

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Clinton Board of Education

Appearing on behalf of the Grandparents: Atty. Andrew A. Feinstein, Law Offices of David C. Shaw, LLC, 34 Jerome Avenue, Suite 210, Bloomfield, CT 06002

Appearing on behalf of the Clinton Board of Education: Attys. Anne H. Littlefield and Erin O. Duques, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919

Appearing before: Attorney Patricia M. Strong, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES**

The Grandparents submitted the following issues for the hearing:

1. Should the Board have identified the Student as eligible for special education services at any time during the period from February 22, 2005 through November 15, 2006?
3. After November 15, 2006 did the Board offer the Student a free appropriate public education ("FAPE") for the 2006-2007 school year?
4. If not, did the Grandparents' unilateral placement at Accendo Academy in Gautier, Mississippi provide the Student with a FAPE for the period from December 6 through the end of the 2006-2007 school year?
5. Is the Board financially responsible for the Student's placement at Accendo Academy for the period from December 6 through the end of the 2006-07 school year?
6. Should the Board be required to reimburse the Grandparents for a speech and language evaluation of the Student completed in June 2006?
7. Are the Grandparents entitled to compensatory education to remedy any past denial of FAPE to the Student by extending his eligibility for services?
8. Is the two-year Statute of Limitations tolled by a "continuing violation" from June 19, 2002?

## SUMMARY

The Student is a 16 year-old student at Accendo Academy (“Accendo”) in Gautier, Mississippi. He attended there for the 2006-07 school year, beginning on December 6, 2006. He was educated in the New Haven Public Schools from 1996 to 2002 for grades kindergarten through fifth grade. His Grandparents (paternal grandmother and step-grandfather) became his foster Grandparents in 1996 and his legal guardians in 2000. In June 2002, the Grandparents moved from New Haven to Clinton. The Student was enrolled in the Clinton Public Schools on June 19 and began school in September 2002 in sixth grade at Jared Eliot Middle School (“Eliot”). Various regular education strategies were implemented in the 2002-03 school year. In April 2003, the Student was considered for special education. After several evaluations by the Eliot staff, the Planning and Placement Team (“PPT”) met on June 13, 2003 and found the Student not eligible. The Student was placed in a mandatory summer school and did well until he was expelled toward the end of the session. As a result, he repeated sixth grade in 2003-04. On October 29, 2003, the PPT met and again found that the Student was not eligible for special education. The Student was continued in regular education interventions. The District conducted no further evaluations for special education eligibility in the 2003-04, 2004-05 or 2005-06 school years. Although the Grandparents requested special education and obtained a neuropsychological evaluation in February 2006, the Student was found ineligible again in May 2006.

The Grandparents placed the Student at Redcliff Ascent Wilderness Treatment Program in Utah for the summer 2006 and advised the District that he would not be returning to school until September 25, 2006. They asked for a PPT meeting upon his return. The PPT placed the Student in the alternative education program on September 25 at Morgan High School for a diagnostic placement for three academic classes. On October 16, 2006 the Student was expelled for possession of weapons at school. The District and the Grandparents agreed to an alternative educational placement at High Roads. He was found eligible for special education on November 15, 2006 under the category of Other Health Impaired (“OHI”), Attention Deficit Hyperactivity Disorder (“ADHD”). On December 6, 2006, the Student went to Juvenile Court to receive a disposition on the criminal charges resulting from his arrest in October. The Grandparents hired two men to escort the Student directly from court to Gautier, Mississippi, where he was enrolled at Accendo Academy. The Board contends that it has discharged its child find obligations and provided the Student with a FAPE during the period of his eligibility and that it cannot be held responsible for the residential placement at Accendo for a variety of reasons. The Grandparents are seeking reimbursement for the placement, as well as compensatory education for the period from February 2005 through November 2006. They are also seeking to avoid the two-year statute of limitations under a theory of “continuing violation” since 2002.

## PROCEDURAL HISTORY

The Grandparents’ attorney requested this hearing by faxing a letter to the State Department of Education (SDE) and a copy to the Board’s attorney and Director of Special Services on February 22, 2007. Hearing Officer (HO) Exhibit 1. This Hearing Officer was assigned to the case on that date. A prehearing conference was held on March 6, 2007. The

parties reported that a resolution meeting was scheduled for March 8 and that they hoped to narrow the issues after that meeting. The mailing date of the final decision was established as May 8, 2007. Hearing dates were agreed on for April 5, 24 and 26 and May 1 and 3. The parties were directed to file witness lists and exhibits by March 29. On March 8, the Grandparents' attorney requested a postponement of the April 26 and May 1 hearing dates until May 10 and 14 and an extension of the mailing date of the final decision to June 7 in order to accommodate the scheduling of these hearing dates. The request was granted. On March 16 the Board filed a Motion to Strike the Grandparents' request for reimbursement of Sylvan Learning Center tutoring costs incurred from April through September 2003. The Grandparents' attorney did not respond to the motion. In the absence of objection and since the dates fell well beyond the two-year statute of limitations, the Motion to Strike was granted on March 22.

The hearing convened on April 5. The parties prior to the hearing resolved the issues regarding the claims for reimbursement of the evaluations by Dr. Westerveld and the Learning House. The Grandparents filed Exhibits P-1 through P-85 and their witness list on March 28. The Board reserved the right to object to Parent Exhibit P-80, which was marked for identification. The other Parent exhibits were entered as full exhibits. The Board filed Exhibits B-1 through B-57 and its witness list on March 29. The Grandparents' attorney objected to Exhibits B-51 and B-52, which were marked for identification. The other Board exhibits were entered as full exhibits. The attorneys presented opening statements. The Grandparents then presented direct testimony from the Grandfather. The hearing continued on April 24. Exhibits P-80 and B-51 and B-52 were admitted as full exhibits, along with new Board Exhibits B-58 and B-59. Miriam Cherkas-Julkowski, Ph.D., and Cheryl Hill, guidance counselor at Eliot, testified on direct examination. Exhibits P-86 through P-88 were entered as full exhibits.

The hearing continued on May 3 with testimony from Albert Engel, who was the Student's tutor in November 2006. The Grandfather completed his direct testimony. This was followed by Carol LaBruno, Ph.D., independent parent advocate, who testified over objection by the Board. Additional hearing dates were agreed on for June 5, 15, 19 and 21. The mailing date for the final decision was extended to July 16. The hearing continued on May 10 with telephonic testimony from Tommy Fortenberry, founder of Accendo Academy. The Grandfather testified on cross-examination and completed his testimony. On May 14 the Grandparents offered Exhibit P-89, and the Board offered Exhibit B-60. Both were admitted into evidence as full exhibits. Ms. Hill completed her testimony. Kathleen Casparino, parent advocate, testified over objection by the Board. On June 5, the Board offered Exhibit B-61 and B-62, which were admitted without objection. The Grandparents called their final witness, Beverly Bowen, speech language pathologist for Clinton public schools and rested their case. Hearing Officer Exhibit HO-2 was entered into evidence.

The Board began its case on June 5 with Eileen Bechtel, special education teacher at Eliot. The hearing continued on June 15 with new exhibits P-90 and P-92 (there is no Exhibit P-91). The Board then called Claudine Kelly, school psychologist at Eliot, and Karen DelGiudice, special education teacher at High Roads, to testify. On June 19 additional hearing dates were agreed on for July 11 and 23. The mailing date for the final decision was extended to August 16 because of the need for more hearing dates. The Board called Pamela Brucker, Ed.D., Chair of Special Education and Reading Department at Southern Connecticut State University, and Carol

Cocores, special education teacher, Clinton public schools. On June 21, the Board called Laraine Scherban, eighth grade teacher at Eliot, and Dawn Paradis, family consumer science teacher at Eliot. A new exhibit, P-93, was entered into evidence. Linda Tucker, Principal at Eliot, testified on June 21 and July 10. At the beginning of the July 10 hearing, new exhibits were entered into evidence—Exhibits P-94 through P-128 and B-63 through B-66. The Board also called Lynn Butkus, special education teacher at Morgan, and Jaime Buley, speech pathologist for Eliot and Morgan. On July 23, the Board offered new Exhibits B-67 through B-70. Janet Brisson, Director of Special Services since 1988 for the Clinton public schools, testified. The Board rested its case. The Grandparents declined to present rebuttal testimony.

The parties requested time to file briefs. Simultaneous briefs were due on August 31. Simultaneous reply briefs were due on September 10. The decision deadline was extended to October 10, 2007 by agreement of the parties. The Hearing Officer sent the attorneys a letter on July 27 confirming these dates. The Grandparents' attorney sent a letter on August 22 requesting a 30-day extension to the briefing schedule until September 30 and October 10 respectively and to extend the mailing date for the final decision for 30 days. The request, which was not objected to by the Board's attorney, was granted and the mailing date for the final decision was extended to November 9, 2007. On November 7, the Hearing Officer notified the parties that an additional week was needed to complete the decision. The Board's attorney sent a letter agreeing to the postponement of the mailing date to November 16.

The Findings of Fact incorporate various portions of the Parties Proposed Findings of Fact. To the extent that the findings of fact are conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels. Bonnie Ann F. v. Callahan Independent School Board, 835 F.Supp. 340 (S.D. Tex. 1993). The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record. Id.

## FINDINGS OF FACT

1. The Student has a birth date of November 29, 1990, is 16 years old and has been at Accendo since December 6, 2006. Testimony of Grandfather and Tommy Fortenberry; various Board and Parent Exhibits.

2. The Student (also referred to as "J.") attended Clinton public schools in sixth (twice), seventh and eighth grades at Eliot from September 2002 through June 2006. Testimony of Grandfather and Ms. Tucker. From September 25 through October 16, 2006, he attended the alternative education program at Morgan High School (Morgan). In November 2006 he received home tutoring and on November 28 was placed at High Roads for approximately one week. Testimony of Grandfather and Ms. Brisson.

3. The District found the Student eligible for special education on November 15, 2006, during his ninth grade year. Exhibit B-36.

4. Prior to June 2002, the Student attended the New Haven Public Schools as a regular education student. Testimony of Grandfather and Ms. Kelly.

5. The Student lives with his maternal grandmother and her husband, both of whom are his legal guardians. Exhibits B-14 at 1; and P-6 at 1. They obtained custody of the student when he was five years of age. Exhibit B-14 at 1-2; Testimony of Grandfather.

6. The Student lived with his biological parents until age two and one-half. Exhibit B-14 at 2. After his parents divorced, he remained in the custody of his mother. Id.

7. At age two, he was found to have serious lead toxicity that was not brought down to a safe level until he moved in with his Grandparents at age six. Exhibit P-61 at 4. At age four, he was physically abusing himself by banging his head and saying he hated himself. At five years and four months, he was an inpatient at the Children's Psychiatric Ward of Yale New Haven Hospital (YNHH) for almost three weeks for frequent tantrums and violent outbursts. The Student's home environment was "reportedly unstable" with "minimal supervision." Exhibit B-14 at 2. When the Student was five, his mother was arrested for selling drugs from their home and the Student was removed from his mother's care by the Department of Children and Families and placed at Kids in Crisis, a children's shelter. Id.; and Exhibit P-1 at 1 and Testimony of Grandfather. The Grandparents became his foster parents in April 1996 after the Student's discharge from YNHH. Testimony of Grandfather. They were granted legal guardianship in March 2000. Id.

8. The Student had difficulty coping with the inconsistency in his home life after separating from his mother. Exhibit P-3. Attempts to reunite him with his mother were unsuccessful, which led to "feelings of neglect, anxiety and confusion about where he was to live on a permanent basis." Id.

9. In March 2000, the Juvenile Court gave full custody of J. to his Grandparents. In October 2000, Gina Wells, the principal of Welch Annex and the Prince School, wrote: "J[.] began his years at Welsh Annex in a constant state of turmoil, having been removed from his mother's care and placed with his grandparents. With the wisdom and guidance of both of these grandparents, J[.] has shown a marked improvement in both the academic and social areas of the curriculum as well as in his home." Exhibit P-4.

10. In June 2002, the Grandparents moved with J. to Clinton and on June 19, registered J. for his sixth grade year in the Clinton Public Schools. Exhibit P-6. Just prior to the move, the Grandfather met with the guidance counselor at Eliot, and informed her fully of J.'s background. The Grandparents immediately hired a tutor privately to attempt to bring J. up to the level of his classmates. Testimony of Grandfather and Ms. Hill.

11. From the day he started school in Clinton, the Student stopped wetting his bed. He had been doing this for six years pretty much every night. Testimony of Grandfather. He came home from school happy for the first time, but after two weeks he was unable to keep up with the class, especially in reading. Id.

12. In November 2002, Ms. Hill recommended a tutor, Melissa Mitko, who often worked as a substitute teacher at Eliot. Id.; and Testimony of Ms. Hill; and Exhibit P-7. Ms.

Hill noted in her letter that J. especially needed help in English and Social Studies, as well as organizing his papers, folders and notebooks. Exhibit P-7.

13. In September 2002, J. took the sixth grade Connecticut Mastery Test. Exhibits B-49 at 1-2; and P-8. His overall results were Basic (Level 2) in mathematics, Below Basic (Level 1) in reading and Proficient (Level 3) in writing. He scored 48 on the Degrees of Reading Power (“DRP”). Id. His scores were well below the school and district averages. Id.

14. The Student was referred by his teacher, Ms. Finucane, to the Eliot Student Assistance Team (“ESAT”) on February 27, 2003 due to concerns about his academics, behavioral and social and emotional functioning, poor test scores, coping ability, and a lack of work completion and inattentiveness. Exhibit P-9. At that time, the Student was in co-taught math, remedial reading classes, had services from social work/guidance and was in the tutoring center, but he refused to work there and dropped out. He also had preferential seating, teachers signing planner and parent conferences. His Grandparents also privately paid a tutor. Id.

15. On March 19, 2003, J.’s four regular education teachers filled out a list of intervention strategies that had been tried with the Student. Exhibit P-10. On March 27, 2003, the ESAT reviewed these interventions and developed an action plan, which 1) identified the Student’s strengths, behaviors of concern, and needs, 2) reviewed the interventions that had been used with the Student and 3) developed an action plan that included additional strategies to be used with the Student. Exhibit P-11. Among the behaviors of concern were poor test scores, lacks organization, easily stressed, needs one on one, cries easily, poor coping skills, homework rarely done, lacks social skills and inattentive. Id. One of the strategies suggested was to meet with Ms. Hill and other students to participate in a “games group,” which facilitated the development of his social skills and also worked on homework completion. Id. The Student participated in this group for about three months, until the end of the year. Testimony of Ms. Hill.

16. ESAT operates as the first level of the pre-referral process. ESAT is composed of general education teachers, special educators, administrators, and other individuals who receive referrals from teams of teachers on students for whom they have behavioral or learning concerns. Testimony of Ms. Brisson and Ms. Hill. After the ESAT receives a referral, one member of the ESAT conducts a record review, another member gathers information from the child’s teachers, and another interviews the student. Testimony of Ms. Hill. Based on the data that is collected, the ESAT then discusses the concerns that have been identified and the strategies used with a student and develops a SAT plan, which includes strategies aimed at helping the student be more successful in the school. Id.; and Testimony of Ms. Brisson; Exhibits P-10 and P-11. The ESAT monitors the success of these strategies and makes a referral to a Child Study Team (“CST”) if unsuccessful.

17. Except for direct contact with his teachers, the ESAT found that few of the intervention strategies tried had been helpful to J. Exhibit P-10. The ESAT decided to refer him to the Child Study Team (CST) on March 31, 2003. Id.; and Exhibits P-11 and P-12. The statement of concern on the referral was that the Student had an inability to focus, low test scores, easily stressed, working at frustration level, difficulty with peer relations and low grades. Exhibit P-12.

18. The CST is the second and final step in the pre-referral process. Testimony of Ms. Brisson. The CST reviews the effectiveness of regular education strategies that have been implemented with a student and input from a student's teachers and discusses whether a referral to a PPT and evaluations are necessary. Id.; and Testimony of Ms. Bechtel. The CST meets regularly and monitors special education students and other students who have been referred to the CST. Testimony of Ms. Hill.

19. After reviewing the ESAT referral, the records, and the concerns raised by teachers, the CST referred the Student to a PPT on April 3, 2003. Id.; and Exhibit P-14. The Grandparents were notified of the referral on that date. They were also sent a copy of procedural safeguards in special education and a PPT meeting notice. Exhibit P-13.

20. The PPT convened on April 11, 2003. Exhibit P-15. The PPT recommendations were to complete an initial evaluation and meet to review the evaluations. In deciding what evaluations were necessary, the team considered the concerns raised through the pre-referral process, input from teachers, the Student's academic records, standardized test results, and input from the Grandparents regarding his past medical and family history and educational experience at the New Haven Public Schools. Testimony of Ms. Bechtel. The PPT recommended psychological, educational, and speech and language evaluations in addition to a social work assessment. Testimony of Ms. Hill; and Exhibit P-15. The Grandparents signed the consent form at the PPT meeting. Exhibit P-16. Ms. Bechtel described the written portion of the testing to the Grandparents at the PPT meeting. Testimony of Ms. Bechtel. The PPT chose to administer the Test Of Written Language (TOWL-3) because they felt that it would provide a more comprehensive assessment of the Student's ability in this area. J.'s teachers requested a baseline for his ability to write long assignments and information regarding his strengths and weaknesses. Id.

21. Ms. Kelly, the school psychologist, completed the psychological evaluation in May 2003. Exhibit B-3. Ms. Kelly has a Master's and Sixth Year degrees in School Psychology and is certified as a school psychologist by the State of Connecticut. She has worked as a school psychologist for 15 years and has received extensive training on the administration of the Wechsler Intelligence Scale for Children ("WISC"). Testimony of Ms. Kelly.

22. The psychological evaluation included a review of the Student's academic records, behavioral observations, and a full battery of tests, including the WISC, which evaluated the Student's cognitive ability, the Kaufman Test of Educational Achievement (KTEA), Bender Gestalt test of visual/motor integration, Attention Deficit Disorders Evaluation or ADDES, and the Behavior Assessment System for Children (BASC), which included scales completed by his teachers, Grandparents and the Student. Exhibit B-3 at 3.

23. The Student's test results on the WISC revealed a full scale IQ of 83, indicating that his overall intellectual functioning was within the low average range. Id. at 9. His verbal score was 74, within the borderline range, and his performance score was 95, within the average range of intellectual functioning. Id. Ms. Kelly noted the large gap between verbal and performance intelligence, but did not consider that such a gap might be an indicator of a learning

disability. Testimony of Ms. Kelly. On the KTEA, which looks at academic abilities in areas including math, reading and spelling, the Student's scores were in the low-average range. Id. She found a substantial discrepancy between the school staff's behavior rating scales and the Grandparent's scales. The staff at school found marked areas of concern in the domains of depression, hyperactivity, attention problems and learning problems. The Grandparents found him overall in the average range at home. J.'s own ratings on the BASC showed him in the clinical range for atypicality, locus of control, social stress, sense of inadequacy and depression. The results on the ADDES for school staff were in a range for concern and need for adult monitoring on the inattentive scales and hyperactivity scales. At home, these scales were in the average range. Exhibit B-3 at 11-12. Social judgment and reasoning skills were below average. Id. at 12. "The projective and behavior and attentional rating scales indicated significant behaviors of concern within the school setting which may preclude academic achievement. ... Emotionally, numerous depressive indicators were evidence within the emotional profile as well." Id. at 13.

24. Ms. Bechtel, special education teacher with 28 years experience, conducted the educational evaluation, which consisted of the TOWL-3, the Wechsler Intelligence Test (WIAT), and the Detroit Test of Learning Aptitude, Third Edition (DTLA-3). Exhibit B-54. These evaluations assessed the Student's performance in the areas of written expression, reading, math, and processing. Testimony of Ms. Bechtel. In preparation for her evaluation, Ms. Bechtel reviewed the Student's educational records. Id.

25. Ms. Bechtel has a Master's Degree in Special Education and a Sixth Year Certificate in Remedial Reading and Language Arts. She has received special training in order to administer the DTLA-3. Id.

26. On the TOWL-3, the Student's overall written language score revealed his written expression ability to be within the below average range. Exhibit P-19 at 5. On the WIAT, the Student scored within the average range in mathematics and language and below average in reading. Id. at 7-9.

27. The DTLA is used to determine whether the Student has a processing issue. Testimony of Dr. Brucker. It is unique in that it examines and allows the evaluator to compare various processing factors such as attention-enhanced as opposed to attention-reduced items. Id. Special training is required in order to administer the test. Testimony of Ms. Bechtel. The Student's General Aptitude Score on the DTLA, which is compiled using his Linguistic, Attentional, and Motoric Scores, fell within the below average range of ability and showed no significant processing differences. Id.; and Exhibit P-19 at 10-11.

28. During the 2003 administration of the education evaluation Ms. Bechtel observed: "Throughout the testing sessions, it was obvious to this examiner that J[.]'s inattention, uncooperativeness and reluctant attitude to the testing tasks may be a contributing factor to the scores he achieved." Exhibit P-17 at 4. On testimony, Ms. Bechtel retreated from that, saying that, while the Student was resistant at the beginning of the testing period, he responded well to the boundaries she set, and she believed the testing results were valid and not affected by his behavior. Testimony of Ms. Bechtel.

29. A speech and language evaluation was completed in May 2003 by Beverly Bowen, a licensed speech and language pathologist with a Master's degree, sixth year equivalent in communication disorders, and 22 years of public school teaching experience. Testimony of Ms. Bowen; Exhibit B-1. She has received additional training beyond her Master's degree on a variety of topics including language impairments, the use of evaluations within the context of the State eligibility guidelines for speech and language impairments, and the use of augmentative devices. Testimony of Ms. Bowen. The speech and language evaluation included the Clinical Evaluation of Language Fundamentals test (CELF-3) and the Test of Adolescent Language (TOAL-3). Exhibit B-1 at 2. The CELF-3 assessed the Student's understanding of language in the areas of word content and form. The TOAL-3 assessed the Student's listening, speaking, reading and writing. Id.

30. When considering a student for eligibility as speech and language impaired, in addition to test scores, the PPT must also consider academic impact and rule out exclusionary factors including "attitude, motivation, attention, health factors, and communication building experiences." Testimony of Ms. Bowen.

31. During the speech and language evaluation, the Student was able to engage in conversation, respond appropriately to questions and demonstrated grossly age appropriate pragmatic skills. Id.; and Exhibit B-1.

32. On April 28, 2003, Ms. Mitko resigned as the Student's tutor. The stated reason was that the Grandparents had enrolled the Student with the Sylvan Learning Center. Exhibit P-18. The Eliot Reading Assistance Program reported that J. was reading at the third grade level on the Stanford Diagnostic Reading Test. Exhibit P-20.

33. The PPT reconvened on June 13, 2003 to review the evaluation results and consider the Student's eligibility for special education. Exhibit P-21. The team discussed the Student's performance on achievement tests and his classroom functioning. Guided by the "PPT Report of Eligibility for Speech Language Services," the PPT considered the results of the speech and language evaluation and exclusionary factors. Exhibit B-56; and Testimony of Ms. Bowen. Prior to the PPT, Ms. Kelly and Ms. Bechtel met with the Grandparents and reviewed the results of the evaluations they had conducted with the Student. Testimony of Ms. Bechtel.

34. Based on the team's review of exclusionary factors, as well as the Student's variable academic performance, the team determined that the Student did not meet the eligibility criteria for speech-language disability. Testimony of Ms. Bowen. The Student demonstrated the ability to function quite well academically, even if inconsistently, which called into question the impact of any language weaknesses. Id. The form for eligibility for speech-language services does not support this conclusion. Exhibit B-56 (also Exhibit P-24) is checked "yes" for impairments found in written language comprehension and written language production. On oral language comprehension, the form has half a check mark in the "yes" and half in the "no" boxes. The boxes in the adverse impact on education columns are not checked as required. On the second page of the form, a note appears next to Part B, item one: "Health, attention, and other factors must be ruled out." In Part C, "yes" is checked on the last item stating that the team needs more information to make an eligibility determination.

35. The PPT on June 13, 2003 determined that additional information regarding the Student's processing ability and achievement was needed and recommended that the Woodcock-Johnson Test of Cognitive Ability and Test of Achievement ("WJ-III") be administered by a special education teacher. The PPT would reconvene after the testing was completed by the end of October 2003. Exhibit P-21. Testimony of Ms. Bowen and Ms. Bechtel. The Grandfather signed the consent for the evaluation at the June 13 PPT meeting. Exhibit P-25.

36. In 2003, the criteria for a "learning disability" under state regulations includes a severe discrepancy between achievement and intellectual ability. Exhibit B-59. At the PPT meeting on June 13, 2003, the PPT used the criteria contained in the State Department of Education Guidelines for Identifying Children with Learning Disabilities ("LD Guidelines"), to assist them in determining if a severe discrepancy existed between the Student's achievement and ability. Testimony of Ms. Bechtel. This criteria is based on the definition of learning disabilities set forth in federal (1999 Rev.) and state regulations. The criteria appears on the state issued multidisciplinary evaluation report, which the PPT adhered to and completed, although it does not appear to be correctly completed. Exhibit P-23. Page two answers the first question (is there a severe discrepancy) in the negative, but question three (severe discrepancy is primarily due to) is answered. Emotional disturbance and environmental, cultural or economic disadvantage are marked with question marks. Id. Reference is made to Paragraph I.C., which states that the Student has relevant medical findings of developmental delay and lead toxicity, as well as hospitalization at YNHH. The box is checked no on page two indicating that the PPT has determined that no learning disability requires special education. Id.

37. Dr. Pamela Brucker, the Board's expert witness, testified regarding the proper manner in which to apply the severe discrepancy model, as well as confirming the Board's appropriate use of this model with respect to J. She is currently the Chair of the Special Education and Reading Department at Southern Connecticut State University where she supervises professors, teaches graduate level courses on learning disabilities and supervises students and the instruction of graduate students with learning disabilities. Testimony Dr. Brucker. She holds a Bachelor's Degree and a Master's Degree in Special Education with a concentration in learning disabilities and is also certified in special education and as an intermediate administrator. Id.

38. "The computations of discrepancies is often complicated and, some believe, may be invalid, largely due to the statistical phenomenon of regression to the mean and differences in the construction of tests." Exhibit B-59 at 7. In this case, the district relied exclusively on composite scores. Testimony of Ms. Kelly. This approach creates the very problem of regression to the mean, which the LD Guidelines warn against. Testimony of Dr. Cherkes-Julkowski. "Strict adherence to discrepancy formulas leaves no room for clinical judgment, thereby eliminating some students from service who may, in fact, have a learning disability (e.g., a learning disability may significantly affect performance on both aptitude and achievement tests, resulting in no discrepancy for a student who, in fact, has a learning disability)." Exhibit B-59 at 7.

39. Despite the findings that the Student had significant issues with hyperactivity, attention problems, depression, social skills and sense of inadequacy, the PPT did not find the Student eligible under the OHI category. Exhibit P-21 at 3. There is no discussion in the PPT document relative to this or other categories, other than speech-language impairment and learning disability, which the team rejected. The Grandparents disagreed with the decision, but did not file for due process at that time. They knew that J. had been tested and that he was not eligible for special education. Testimony of Grandfather.

40. J. was failing Reading and Social Studies and had D's in English and Science. Id.; and Exhibit P-22.

41. The Student was required to attend the Summer Institute, a mandatory summer school program for students who are in jeopardy of repeating a grade. Exhibit P-26. The Student attended, but during a field trip activity, he was disruptive and the principal expelled him. Testimony of Grandfather. He repeated sixth grade in 2003-04. Id.

42. The Student took the sixth grade Connecticut Mastery Test again in September 2003. This time he scored in the below basic level (Level 1) in both reading and writing and in the proficient level (Level 3) in mathematics. Exhibit P-27.

43. As recommended at the June 13, 2003 PPT, the WJ-III was administered by Carol Cocores in October 2003. Ms Corcores completed the L.D./Educational Evaluation on October 29, 2003. Exhibit P-28.

44. Ms. Cocores is a certified special education teacher with 26 years of teaching experience and is a mentor to first and second year teachers. She has received training specific to the administration of the WJ-III and has remained current in that training. Testimony of Ms. Cocores.

45. The WJ-III provides information regarding processing ability and achievement. Id. This information is used to determine whether a student has a processing disorder that adversely impacts educational performance. Id. Evidence of a processing disorder is an essential criterion for the identification of a learning disability. Exhibit B-59 at 24-25. The WJ-III is useful in determining a student's strengths and weaknesses and interventions that will be helpful to that student. Testimony of Dr. Brucker.

46. There is an "acceptable correlation coefficient" between the WIAT, the WISC, and the WJ-III, meaning that that the cognitive and achievement scores can be compared accurately. Id. When considered together, the results of these assessments provide a comprehensive picture of the Student's ability, achievement, and strengths and weaknesses. Id.

47. The WJ-III utilizes a computerized system, Compuscore, that weights the scores on the individual subtests of achievement and ability, calculates the standard deviations, and provides a determination as to whether a significant discrepancy exists. Id.; Exhibit P-28 at 3; and Testimony of Ms. Cocores.

48. The Student's scores on the WJ-III revealed that his overall processing ability and achievement were in the average range. Testimony of Ms. Cocores. There were no significant disparities in his ability to process information and the Student did not appear to have a processing disorder. Id. Based on the Student's scores, there was no reason to conclude that a severe discrepancy between ability and achievement existed. Testimony of Dr. Brucker and Ms. Kelly.

49. During the testing sessions for the WJ-III, the Student was cooperative and completed tasks with little hesitation. He maintained eye contact and "freely engaged in conversation with the examiner." Exhibit P-28 at 1. Overall, his behavior and distractibility were within the average range. Testimony of Ms. Cocores. She reviewed the evaluation results with Ms. Bechtel and Ms. Kelly. Id.

50. The PPT met again on October 29, 2003 to review the results of the WJ-III and reconsider the Student's eligibility for special education. Exhibit P-30. The team reviewed the psychological and educational evaluations again. Testimony of Ms. Cocores. They reviewed the Student's eligibility under the Specific Learning Disability, Other Health Impaired, and Speech and Language Impairment exceptionalities. Testimony of Ms. Bechtel. The Student's records revealed that his academic performance was in the average range. Id.; and Exhibit P-30 at 3. His grades had improved since the previous year. Testimony of Ms. Hill; and Exhibit B-4.

51. At the October 29, 2003 PPT meeting, the team completed the multidisciplinary evaluation report for students suspected of having a learning disability. Testimony of Ms. Cocores; and Exhibit P-29. They discussed the classroom observation of remedial reading completed by Ms. Bechtel on October 16, 2003. Exhibit P-29. The team considered the Student's previous exposure to lead toxicity and his familial history and the potential impact these factors may have had on his academic performance. Testimony of Ms. Cocores. The team also discussed his attention issues and ruled out eligibility under Other Health Impaired because the Student's academic performance had improved. Ms. Kelly asked the Grandparents to follow up with J.'s pediatrician on the medical issues. Testimony of Ms. Bechtel.

52. There was much testimony and documentary references to the Student's poor motivation as an explanation for his poor grades and behavior. The LD Guidelines provide that a student should *not* be classified as learning disabled if their poor performance is due to poor motivation. Exhibit B-59 at 27. An assessment that a student is motivated to learn should be made by several competent professionals who have worked with the child who can assess "whether the student has been and is still willing to try, is serious about school, and seeks help in doing assignments, etc." Id. "Poorly motivated students, otherwise capable of learning and performing up to potential, frequently do not so because of extraneous factors which diminish motivation." Id. If any of these situations are occurring, school personnel should respond through regular education, using intervention/teacher assistance team strategies, and pupil services involvement as needed." Id. "There also are those students whose motivation is impaired by repeated failure. The presence of a low level of motivation must be given serious consideration before a diagnosis of learning disabilities is reached." Id.

53. The LD Guidelines recommend that the “full scale IQ score be used for purposes of determining a severe discrepancy for *most* students” and further state that “as a rule...the full scale IQ score will be best representative of cognitive ability.” Exhibit B-59 at 23, 30. Use of the full scale IQ is “widely accepted.” Testimony of Dr. Brucker. The Guidelines also require that the testing instruments from which the ability and achievement scores are compared must be compatible. Id.; and Exhibit B-59 at 23. In accordance with the Guidelines, the team compared the Student’s WISC III Full Scale IQ score of 83 with his achievement scores on the WIAT. The WIAT and the WISC are compatible and may be appropriately compared as indicated by the acceptable correlation coefficient between these tests. Testimony of Ms. Kelly and Dr. Brucker.

54. The LD Guidelines do not mandate that a composite, full-scale IQ score be used. Rather, the LD Guidelines state: “There may be occasions, however, when the PPT determines that one particular scale, such as a Verbal or Performance Scale, more accurately reflects the student’s academic potential. If this occurs, the PPT may substitute the particular scale for the full-scale score in determining a severe discrepancy.” Exhibit 59 at 23. At the June 12 and October 29, 2003 PPT meetings, the district used the full-scale IQ score even though the Student had a significant disparity (21 points) between the Verbal and Performance scales. Board witnesses did not think this was an adequate reason to deviate from using the full-scale IQ. In J.’s case, the full-scale IQ score was not an accurate measure of his cognitive ability. The discrepancy that Ms. Kelly found between J.’s verbal and performance IQs would occur in less than .01 percent of the population. Testimony of Dr. Miriam Cherkes-Julkowski.

55. “The state guidelines reminds us that there are times when we don’t want to combine those into a composite score. And the standard in neuropsych assessment is that you must never, ever calculate, report or use a full scale score under that condition.” Id. The testing, taken as a whole, demonstrated that J. had a substantial deficit in language functioning, which impaired his ability to demonstrate his cognitive ability on the WISC given by Ms. Kelly. Id. Due to this language impairment, J.’s score on the performance subtests on the WISC are a more valid indication of his cognitive ability than those on the verbal sections. Id. “The determination of a severe discrepancy cannot always be made on a strictly statistical basis. Professional judgment must be applied to an analysis of all available information.” Exhibit B-59 at 24.

56. If a more realistic measure of the Student’s cognitive ability were used, a 1.6 standard deviation discrepancy would be found in numerous areas. Using a cognitive ability score of 95 would result in significant discrepancies being found in reading, writing, written language, vocabulary and grammar, based on the district’s testing. Exhibit P-80. Further, the district failed to conduct testing in written expression, an area of great weakness and never administered a test of pure reading skill, by using pseudo-words, as is the standard in the profession. Id. at 3. J.’s ADHD has been documented throughout his record. This diagnosis is consistent with identified lead toxicity in his early development. Id. at 5. J. should have been found eligible under LD and OHI categories. Testimony of Dr. Cherkes-Julkowski and Dr. LaBruno.

57. J. was placed in the reading assistance program at Eliot during the 2003-2004 school year. Exhibit P-33. J. ended his second sixth grade school year with B’s in art and math, C’s in science and social studies, and D’s in reading and English. Exhibit B-4.

58. J. was promoted into the seventh grade for the 2004-2005 school year, during which year he received academic support. During the summer of 2005 the Student attended the Board's one-week Learning Assistance Program ("LAP"), an intensive voluntary program that addresses the weakness areas of students identified based on CMT scores. Exhibit P-37; Testimony of Ms. Tucker. The program includes small groups of seven to eight students and involves "highly energetic, motivational tasks" such as using motorized cars to calculate distance and speed, in order to demonstrate and reinforce skills and curriculum goals. Testimony of Ms. Tucker. The Student did well in the program academically and demonstrated good effort and attitude. Exhibit P-37.

59. The Student's grades were inconsistent in seventh grade. Exhibit B-5; and Testimony of Ms. Tucker. His teachers noted concerns with inconsistent performance and effort, incomplete assignments, and excessive socializing. Exhibit B-5.

60. Because he was failing math, the Grandparents consented, on March 31, 2005, to move J. to a co-taught math class. Beginning in April 2005, the Student was in a co-taught math class, a small class with a teacher and consultant, which offered differentiated and individualized instruction. Testimony of Ms. Tucker. The math consultant in the Student's co-taught class was K-12 certified in math and held a special education certification. *Id.* Despite this change, on May 16, 2005, the Grandparents received a letter from Eliot principal Linda Tucker stating that J. was in danger of failing two courses and being retained in seventh grade. Exhibit P-35. On his final report card for the school year, J. was given a D- in math (as well as D's in English, reading and social studies and an F in science). Exhibit B-5.

61. The Grandparents continued to provide, at their own expense, tutoring for J. at the Sylvan Learning Center. Exhibit P-36.

62. During his seventh grade year (2004-2005), the Student received various regular education interventions implemented. He participated in the homework club and the volleyball club, both part of the after hours program, which took place in three six-week sessions throughout the school year. Testimony of Ms. Tucker. These programs motivated the Student to complete his homework. Testimony of Grandfather. The Student also received additional support in reading as part of a remedial reading program that took place three times per week during a silent sustained reading period. Exhibit B-6; and Testimony of Ms. Tucker. As part of the program, the Student was assisted by a reading consultant who is certified in English and holds a K-12 reading certification. Testimony of Ms. Tucker. The consultant provided direct instruction on a variety of skills including silent reading, vocabulary acquisition, comprehension, and writing. *Id.* She also conducted ongoing testing and collected data regarding the Student's reading progress. *Id.*

63. The Grandfather wrote to Ms. Tucker on July 27, 2005, stating that the co-taught math class was merely a less demanding curriculum and a means of giving J. a D- to promote him to the eighth grade. The Grandfather requested a meeting with Ms. Tucker and a neurological evaluation for J. Exhibit P-38. He received a telephone call from Ms. Tucker and a

meeting was set up. She advised him that a PPT meeting would be scheduled and suggested that he talk to Dr. Hurlburt, J.'s pediatrician. Testimony of Grandfather.

64. At that time, J. was already two years older than his classmates, having repeated first grade in New Haven and sixth grade in Clinton. Testimony of Grandfather.

65. On September 1, 2005, the Grandfather wrote to Ms. Tucker and reported that he and J. had seen Dr. Hurlburt on August 12 and that she said that the school was responsible for conducting a neurological examination. Exhibit P-39.

66. On September 16, 2005, Dr. Hurlburt wrote a letter that suggested that J.'s elevated lead levels in the past may have played a role in his ability to learn. She requested a full school evaluation of his learning abilities and style so that he may receive any support services needed to maximize his education. Exhibit B-10.

67. On September 14, 2005, Ms. Hill made a referral to the CST so that the Grandparents' request for a PPT meeting could be scheduled. Exhibit P-40. On that date, the CST made a referral to special education at the Grandparents' request. Exhibit B-6. It was noted that the Student was receiving remedial reading and math classes, which had helped him. The Peer Tutor Program was not successful. Preferential seating sometimes helped. J. was continually offered support from classroom teachers, to which he was not always receptive. He had difficulty with consistently turning in homework and long-term assignments. Id.

68. A PPT meeting was scheduled for September 28, 2005. Exhibit B-8. The Board sent the Grandparents, along with the PPT notice, a copy of procedural safeguards. Exhibit B-7.

69. A PPT meeting was held on September 28, 2005. Exhibit B-12. At the PPT meeting, the Student's teachers reported on his progress and the strategies used with the Student. Id.; and Testimony of Ms. Tucker. The team reviewed the Student's 2003 evaluations and the Grandparents' concerns regarding the Student's academic performance. Testimony of Ms. Tucker and Ms. Brisson. The Grandparents did not express concerns regarding the Student's social emotional functioning or notify the PPT that the Student had received private counseling. Testimony of Ms. Brisson. The PPT did not believe that additional evaluations were necessary.

70. The PPT also discussed Dr. Hurlburt's September 16, 2005 letter in which she requests that the District complete "a full school evaluation." Exhibit B-10. Upon receipt of that letter, it became clear to the District that as of the date her letter was written, Dr. Hurlburt was not aware of the evaluations that the District had administered in 2003 and that the Grandparents had not shared the evaluation data with Dr. Hurlburt, despite the PPT's previous recommendation that they do so. Testimony of Ms. Kelly and Grandfather. There was no articulated reason why the District wanted Dr. Hurlburt to review the 2003 evaluations. However, the District was confident that any misperception in this regard would be remedied by the District's transmittal of the Student's records, including the comprehensive evaluation reports, to her on September 21, 2005. The District anticipated further contact from Dr. Hurlburt after her review of the Student's records. Testimony of Ms. Kelly and Ms. Brisson. As of the date of that meeting, Dr. Hurlburt had not contacted the District after her receipt of the Student's

records and evaluations or sent any medical information to the District concerning the Student. Testimony of Ms. Hill. Apparently the District staff thought a medical diagnosis of ADHD was needed to qualify the Student for OHI. No one ever explained that to the Grandparents or to Dr. Hurlburt. Testimony of Grandfather.

71. At the PPT meeting on September 28, 2005, J.'s teachers reported that he did not consistently complete his homework or assignments but when he did, he was able to succeed in his classes. Testimony of Ms. Brisson. To assist the Student with his issues with work completion, the PPT discussed and made numerous recommendations for continuing regular education interventions, including that 1) the Student's teachers would contact the Grandparents when the Student was missing assignments, 2) the Student's teachers would sign the Student's planner to verify proper recording of assignments and projects, 3) the Student's pediatrician, Dr. Hurlburt, should review the Student's evaluations, 4) the Student would attend the homework club and would forgo volleyball club if homework was not completed, 5) the Grandparents would check the Student's work and verify its completion, and 6) the District and the Grandparents would explain the PPT's recommendations to the Student. *Id.*; Exhibit B-12; and Testimony of Ms. Hill.

72. The PPT determined that the Student was not eligible for special education and related services. Exhibit B-12 at 2. A copy of the procedural safeguards was made available to the Grandparents at the PPT meeting. *Id.* There were no new evaluations made. The PPT decision was based on the 2003 evaluations and reports from teachers. *Id.* The District believed that the Grandparents were in agreement with the PPT's recommendations. Testimony of Ms. Hill.

73. After the PPT meeting on September 28, 2005, the ESAT and the CST, consisting of an administrator, a special education teacher, guidance counselor and resource personnel continued to closely monitor the Student and the effectiveness of the regular education interventions. *Id.*; Exhibit B-11; Testimony of Ms. Brisson and Ms. Tucker. A member of the ESAT met with the Student's teachers daily in cooperative planning sessions, to discuss any concerns with students, including J. Testimony of Ms. Brisson. In November 2005, the CST reported that the Student was "making progress both academically and socially." Exhibit B-11 at 2.

74. From January 10 through February 14, 2006, the Student participated in a six-week LAP program, a voluntary program through which certified personnel provided support to the Student in skill development and reinforced areas of mathematics instruction. Testimony of Ms. Tucker. The Student did well in the program and demonstrated good attitude and excellent effort. Exhibit P-42.

75. In February 2006, the Student was identified as needing additional support by the ESAT because of poor grades. Testimony of Ms. Paradis. The ESAT recommended that the Student be assigned a contract coach, a regular education intervention that was used with students at risk academically. Testimony of Ms. Tucker and Ms. Hill. The Student and the members of the ESAT met and developed goals, which became part of a contract for the Student that his Grandparents signed. Testimony of Ms. Paradis. Dawn Paradis, who was the Student's

teacher for four years and at that time was his consumer science teacher, worked with the Student as his contract coach. Id. She provided additional support, assisted him in meeting his contract goals, and served as a liaison between the Student and his teachers. Id.

76. As his contract coach, Ms. Paradis met with the Student on a weekly basis beginning in March 2006 to review weekly academic progress reports provided by his teachers and to discuss strategies and goals for improving upon weak areas identified by the Student and his teachers, such as improving a quiz grade or homework completion. Id.; and Exhibit P-44. During their weekly meetings, the Student talked openly and accepted responsibility if he hadn't completed his work or studied for a quiz or test during the week prior. Testimony of Ms. Paradis. The Student never expressed to Ms. Paradis that he wasn't able to complete his assignments or class work. When he completed and turned in his work, his grades improved. Id.

77. The arrangement with the contract coach was successful for the Student. Id.; Testimony of Ms. Tucker; and Exhibit P-48. As his grades improved, the Student expressed pride in his academic accomplishments and demonstrated increased motivation. Id.; and Testimony of Ms. Scherban. He recognized his ability to control and bring about his own academic success. Testimony of Ms. Paradis and Ms. Scherban. In the weekly reports from his teachers, they reported the Student's improved attitude, effort, work completion, and class participation. Exhibits P-44 through P-47 and P-49 through P-51. The Grandparents received a copy of the teachers' reports. Testimony of Grandfather. The Student met his contract goals around the end of April/early May 2006 (the end of the third quarter). Testimony of Ms. Paradis; and Exhibit P-48. The Student's third quarter grades were C- in Science, Mathematics and Social Studies and F in English. He also had F's in physical education and health. Exhibit P-48.

78. The Grandfather provided the District with information regarding a neurological evaluation performed by Dr. Susan Levy in order to ascertain the impact, if any, of the Student's previous exposure to lead and bout with Lyme disease. Testimony of Grandfather. Dr. Levy indicated that the Student was functioning normally. Id.

79. In March 2006, J. took the 8<sup>th</sup> grade CMT, showing mastery of three of twenty-one math strands tested, one of four reading strands, and none of the writing strands. He scored 63 on the Degrees of Reading Power (DRP). Exhibit B-49.

80. Dr. Hurlburt made a referral of the Student to Michael Westerveld, Ph.D., ABPP, of the Yale University School of Medicine, Clinical Neuropsychology, who performed a neuropsychological evaluation of the Student in March 2006. The purpose of the evaluation was to better understand J.'s cognitive function in the context of his medical history. Exhibit B-14. Based on his review of prior testing and further testing he performed, he concluded that the Student "has significant learning disabilities and his difficulties stem from the learning disability." Id. at 10. Dr. Westerveld administered the WISC-IV, finding that J. has a full scale IQ of 77. On the California Verbal Learning Test, J. scored within normal limits but showed significant difficulty with recall and retention of verbal information. "Although behavioral issues may play a role as well, these are reactive in nature, rather than being the primary issue. That is, it is common for children with chronic underachievement to develop low self-esteem and lose motivation due to their learning disabilities. In adolescence, this is often misinterpreted as attitude rather than related to a learning disability." Id. Dr. Westerveld also found that J. had

symptoms characteristic of ADHD-Combined Type. Dr. Westerveld recommended special education designation, chunking assignments, reinforcement for accomplished tasks, additional time for assignments, minimizing distraction, organizational accommodations, tutoring, and therapy. Id. at 12-16. “It may be helpful to consider placement in another school environment,” if J. continued to fail despite the interventions. Id. at 15.

82. Although the District complains that the Grandparents, without prior notification to the District, obtained the neuropsychological evaluation from Dr. Michael Westerveld, the Grandfather and Dr. Hurlburt had previously made written requests that the District provide such an evaluation. Exhibits P-38, P-39 and B-10. Even after the September 28, 2005 PPT meeting, the District declined to conduct that or any other evaluation. Exhibit B-13. Dr. Westerveld obtained the background information for the evaluation through an interview with the Grandparents and a review of the Student’s medical and educational records, including the Board’s 2003 evaluations, which were sent to him by Dr. Hurlburt. Exhibit B-14 at 1-5.

83. The Student’s full-scale IQ score was 77 and his overall level of cognitive functioning was in the borderline range on the WISC-IV. Id. at 6.

84. As part of Dr. Westerveld’s assessment of the Student’s attention and executive function, the Grandparents completed the Behavior Rating Inventory of Executive Function (BRIEF), a questionnaire assessing executive behaviors in the home and classroom and the Behavior Assessment of Children (BASC), a structured behavioral rating scale. Id. at 9-10.

85. He found that J. had significant difficulty with abstract reasoning, remembering verbal information, problem solving and planning abilities. He also acknowledged the significance and impact of the Student’s “longstanding history of emotional problems” and issues related to his early home environment” on his development and learning. Id. at 10-11. He further noted the difficulty in making a “causal attribution for any single factor” given the “complex interaction of developmental, medical (e.g. lead poisoning) and psychosocial issues that have contributed to [the Student’s] development.” Id. at 12.

86. On May 9, 2006, the Grandparents provided the District with a copy of Dr. Westerveld’s report of the neuropsychological evaluation, requested a PPT meeting for the purpose of reviewing the report and for the Board to conduct further evaluations. Exhibit P-52; Testimony of Grandfather. The Board sent a notice of a PPT meeting on May 8 at Grandparents’ request. Exhibit B-15; and Testimony of Ms. Brisson. The report was provided to the PPT members. Testimony of Ms. Brisson. The PPT convened on May 10, 2006. Id.; and Exhibit B-16.

87. The Grandparents attended the May 10, 2006 PPT meeting accompanied by an advocate, Kathleen Casparino. The District had 11 staff members in attendance, including Ms. Brisson, Ms. Tucker, Ms. Scherban, Ms. Paradis, Ms. Kelly, Ms. Buley, Ms. Hill, Ms. McMinn (a special education teacher), Mr. Quinn (school social worker), Ms. Canestrari (school nurse) and Mr. Robinson (PE teacher). Exhibit B-16. The team reviewed the psychological, educational, and speech and language evaluations conducted in 2003 by the District. Id. at 2. They also discussed Dr. Westerveld’s findings and recommendations. Id. His teachers reported

that he was carrying B averages in English and math, and C averages in science and social studies. This was an improvement from his third quarter report card, which showed him with F's in English, health and physical education and C's in science, math, and social studies. Exhibit B-13.

88. The Board's witnesses gave a litany of reasons why they disagreed with Dr. Westerveld's report. While the District staff believed that much of the report was accurate, they not agree with his conclusion that the student had "significant learning disabilities" and felt that his poor academic performance was due to lack of motivation. Testimony of Ms. Brisson. They felt his evaluation was invalid because he did not contact any member of the District or observe the Student in the school setting. Id. Dr. Westerveld did not gather any information from the Student's teachers regarding his attention, executive function, or behavior in the classroom. Id. He did not meet with the Grandparents to review the results with them, discuss the results with any staff member of the District, or attend any PPT meeting for the Student. Id.; and Testimony of Grandfather.

89. The District also thought that the Student's scores on the WISC-IV were consistent with those on the WISC-III, administered by Claudine Kelly in 2003. Testimony of Ms. Brisson and Dr. Brucker. They also claimed that many of his recommendations could and were being implemented by the Student's various teachers within the regular education environment. Testimony of Ms. Scherban; Dr. Brucker; and Ms. Kelly. These included: 1) breaking down assignments, 2) providing reinforcement and praise, 3) providing additional time for writing assignments, 4) providing access to word processing, and 5) providing verbal and written directions. Testimony of Ms. Scherban; and Ms. Tucker. The Student was also given preferential seating, a homework planner and support in using the planner. Id. He received support in the areas of socials skills and problem solving from John Quinn, the school social worker in the after hours program. Testimony of Ms. Tucker. Dr. Westerveld's recommendation for "multi-level intervention" and "meta cognitive strategies" was being provided within the co-taught math and reading classes. Testimony of Dr. Brucker. Ms. Scherban provided assistance in writing organization. Testimony of Ms. Scherban.

90. Prior to the May 10, 2006 PPT meeting, Ms. Buley reviewed Dr. Westerveld's report, the speech and language evaluation conducted by the District in 2003 and spoke with Ms. Bowen, the speech and language pathologist who had previously evaluated the Student. Testimony of Ms. Buley; and Exhibit B-1.

91. According to State Guidelines for Speech and Language Programs, a child can qualify as primarily speech and language impaired if he scores at least 1.5 standard deviations below the norm on any core index or language score, not subtest scores. Testimony of Ms. Buley. In addition to these scores, the impairment must have an adverse impact on the Student's learning. Id. The PPT should also consider information such as input from parents and teachers, teacher observations, grades, and any difficulties expressed by the student. Id.

92. The Student's teachers had not expressed concerns to Ms. Buley regarding the Student's functioning in the area of speech and language. Id. Likewise, the ESAT had not made a referral based on concerns in this area. Id.

93. At the May 10, 2006 PPT, the Student's teachers reported that the regular education accommodations, including the contract coach and homework club, were effective and the Student's performance, effort and attitude had improved. Testimony of Ms. Brisson; Ms. Tucker; Ms. Kelly; and Ms. Scherban. Ms. Paradis reported on her work with the Student as his contract coach and the considerable progress he had made. Testimony of Ms. Paradis. Both Ms. Paradis and Ms. Scherban consistently reported that when the Student completed his work, he was able to demonstrate mastery of the material and his grades improved. Id.; Testimony of Ms. Hill; and Ms. Buley. This was consistent with feedback that Ms. Hill received from the Student's teachers over the four years she worked with him. Testimony of Ms. Hill.

94. In considering whether the Student qualified under speech and language impaired, the PPT discussed the Student's demonstrated ability to attend and to complete work independently as reported by his teachers. Testimony of Ms. Buley. Such demonstrated ability is uncharacteristic of students with a speech and language impairment; typically such students are not able to complete work without support. Id.

95. The PPT considered eligibility under various IDEA classifications, including learning disabilities and speech and language impairment, using the information provided in Dr. Westerveld's report, the District evaluations, and teacher reports of progress. Id.; Testimony of Ms. Brisson; Ms. Tucker; and Ms. Kelly. The PPT determined that the Student was not eligible for special education. Exhibit B-16 at 2; and Testimony of Ms. Brisson.

96. The team also discussed Dr. Westerveld's suggestion that the Student may have ADHD and the supporting information concerning this issue he provided in his report. Testimony of Ms. Kelly. The team determined that the Student did not qualify as OHI on the basis of ADHD because of the Student's academic progress, his demonstrated ability to access the academic environment with support, and the effectiveness of the regular education interventions as reported by the Student's teachers. Id.; and Testimony of Ms. Brisson. The team considered Dr. Westerveld's report only a "potential" diagnosis of ADHD. The PPT recommended that the Student be referred to a 504 team meeting to determine whether 504 accommodations were appropriate for the Student. Id.; Testimony of Ms. Kelly; and Ms. Tucker.

97. The Grandparents disagreed with the PPT's conclusion of ineligibility. Exhibit B-16 at 2. The District provided due process request forms at the request of Ms. Casparino and proposed dates on which to hold a mediation concerning these issues. Testimony of Ms. Brisson and the Grandfather. The Grandparents did not file for due process or contact Ms. Brisson to discuss her offer to mediate. Testimony of Grandfather.

98. No one, including Ms. Casparino, raised the issue of the Student's emotional state and/or depression at the May 10 PPT meeting even though it was discussed in Dr. Westerveld's report. Testimony of Ms. Casparino.

99. The Student resumed seeing a therapist, Dr. Stableford, in March 2006. Testimony of Grandfather. Neither the Grandparents nor Ms. Casparino mentioned that the

Student was receiving counseling or provided any information from his therapist at the May 10, 2006 PPT. Testimony of Ms. Brisson; and Ms. Tucker. No member of the PPT requested consideration for eligibility under the classification of emotional disturbance. Testimony of Ms. Brisson; and Ms. Casparino. The team did not consider eligibility under the category of emotional disturbance. Exhibit B-16.

100. Towards the end of May 2006, the Student appeared “distracted” and his grades began to decline due to lack of work completion and poor test grades. Testimony of Ms. Paradis, Ms. Scherban and Ms. Tucker. The Student notified Ms. Paradis, his contract coach, that he did not want to continue meeting with her on weekly basis. Testimony of Ms. Paradis. The Student’s failure to complete work significantly impacted his fourth quarter grades. Testimony of Ms. Scherban.

101. The District scheduled a 504 meeting on June 2, 2006 but the meeting was rescheduled at the Grandfather’s request. Exhibit B-17; and Testimony of Grandfather.

102. In an email sent on June 5, 2006, the Grandfather notified the District that the Student’s Grandmother had thyroid surgery on May 31, 2006 and that they learned on June 5 that it was cancerous. (B-17 at 2). Due to her further pending surgery, the Grandfather indicated that he was not able to reschedule the 504 meeting. Id.

103. His Grandmother’s illness was (understandably) upsetting to the Student. Testimony of Grandfather. It is not uncommon that the illness of a family member and, in particular a caregiver, has a significant impact on a student’s academic performance and ability to engage in the educational environment. Testimony of Ms. Tucker; Ms. Scherban; and Ms. Hill. It may also “cause escalations in a student’s behavior.” Testimony of Ms. Brucker. The Board attributed the Student’s decline in grades to this.

104. On his final report card for 8<sup>th</sup> grade, J. had a C in music and math, D in science, D- social studies and English, and F’s in health and physical education. Exhibit P-56. The Student earned passing grades and was promoted to ninth grade. Id.; and Testimony of Ms. Tucker. His fourth quarter grades were F’s in Science, Social Studies, D- in English and C+ in mathematics. Exhibit P-56.

105. On or about June 19, 2006, the Grandparents were considering sending the Student to a “boot camp” type program. Testimony of Grandfather. On June 23, 2006, they enrolled the Student at RedCliff Ascent, an outdoor therapeutic program in Enterprise, Utah that caters to adolescents with familial, behavioral, and substance abuse difficulties. Exhibits B-18, B-19 and P-57; and Testimony of Ms. Brisson. The focus of the treatment the Student received at RedCliff was on the “grandparent/child relationship.” Exhibit B-18. The Student’s therapist at RedCliff, Justin Stum, LMFT, reported on July 31 that J. had to learn to engage others in a socially appropriate way, because he struggled with reading and understanding social cues. He recommended a “structured academic setting” and reported that the Student required “a high level of structure and support from a setting that offers both academic guidance and therapeutic support.” Id.

106. The Grandparents did not request the District's support of the Student's program there. Testimony of Grandfather. On August 15, 2006, the Grandfather informed the district that J. would not be attending the district's S.T.E.P. program, recommended by the district, during late August because he was at RedCliff Ascent. Exhibit B-19. On or around September 1, 2006, the Grandfather notified Ms. Eriksen, of the Student's anticipated return from RedCliff Ascent the week of September 25, and requested a PPT meeting. Exhibit B-22; and Testimony of Grandfather.

107. J. was released from RedCliff Ascent on September 12, 2006. The discharge summary noted that J. was quite distractible, that therapy was arduous as he struggled to read social cues, and that he continued to relapse into his old behaviors, including defiance of authority and disrespect for others. Exhibit B-23. He failed to pass his final test in the independent study course of Character Education: Exploring Values I, and, consequently, did not earn credit there. Exhibit P-62; and Testimony of Grandfather.

108. Upon his return to Clinton, J. was tested on September 19 and 21, 2006 by Susan Santora, M.S., Educational Therapist, of the Learning House, at the Grandparent's expense. Exhibit B-26. Ms. Santora found that J. exhibited an apparent lack of confidence in his academic abilities as his demeanor was dejected when he did not know an item on a test. Id. at 2. J. tested in the average range on the Peabody Picture Vocabulary Test (PPVT-III), a commonly used measure of intelligence. Id.

109. On the KTEA-II, however, he was below average on decoding, associational fluency, and written expression. Ms. Santora concluded that written expression was the area most affected by his learning disabilities. Id. at 2-5. On the GORT-4, J. scored in the 16<sup>th</sup> percentile for his age. Id. at 6. Ms. Santora recommended that J. receive direct instruction in the areas of decoding, vocabulary, spelling, reading comprehension and writing. Id. at 7-8.

110. The PPT met on September 20, 2006 and reviewed the July 31 RedCliff Ascent report. Exhibit B-27. They discussed the report's recommendations for structure, a behavior modification program, and positive reinforcement. Exhibits B-18 and B-27 at 2; Testimony of Ms. Butkus and Ms. Casparino. The Grandparents also notified the PPT that they had obtained an educational evaluation the week of September 16, 2006 from the Learning House. Exhibits B-26 and B-27. The Grandparents funded a private speech and language evaluation of J. with Ms. Kalosieh of Pediatric and Adolescent Speech Therapy Associates in early June 2006. Id. They also presented an incomplete report from her, but the PPT deferred discussion so that the school staff members could have an opportunity to review the complete report. Testimony of Ms. Buley and Ms. Casparino.

111. Based on the report from RedCliff and the concerns of the Grandparents, and in order to assess the Student's needs for further consideration of his eligibility for special education, the PPT recommended that the Student be placed diagnostically in the District's Alternative Education Program at Morgan High School for three academic classes. Exhibit B-27 at 2; Testimony of Ms. Butkus; Grandfather; and Ms. Casparino. The Grandparents agreed with this recommendation and were "optimistic." Testimony of Grandfather. The PPT agreed to reconvene on October 11, 2006. Exhibit B-27 at 2.

112. The PPT met again on October 11, 2006 to review the Student's performance in the diagnostic placement. Exhibits B-28 and B-29. The team decided to continue J. in his diagnostic placement in the alternative program at Morgan. The teachers would gather data on target behaviors, such as work completion and class participation to be reviewed at the next meeting, scheduled for October 26, 2006. The Grandparents would continue to explore psychiatric evaluation at Yale as advised by Dr. Hurlburt. Exhibit B-29; Testimony of Ms. Butkus, Grandfather and Ms. Casparino. Neither the Grandparents nor their advocate requested that the District conduct a psychiatric or any other evaluation. Id.

113. The Alternative Education Program at Morgan High School is a self contained, special education program offering structured, small group instruction. Testimony of Ms. Brisson and Ms. Butkus. The team of two special education teachers and a paraprofessional provides academic instruction and a behavioral modification program to groups of two to seven students. Id.

114. During his diagnostic placement, Ms. Butkus and Ms. Nadeau, the special education instructors in the Alternative Education Program, observed and collected data regarding the Student's behaviors including on-task perseverance, following directions, and use of appropriate language. Testimony of Ms. Butkus; and P-67 at 3-6. They used specific strategies to engage him when he demonstrated work avoidant behavior, including one-on-one instruction and verbal cues. He responded well to positive reinforcement and rewards. When the Student was productive and completed his work, his grades ranged from 87-100. Overall, the Student interacted appropriately with his peers. Testimony of Ms. Butkus.

115. The Student's oppositional behaviors at home had worsened after he returned from RedCliff. He often sought out confrontation at home. Throughout the period of the diagnostic placement at Morgan High School, the Student was resentful because he felt that "he was being labeled as mentally retarded" and that the Grandfather was forcing him to attend the program. Testimony of Grandfather.

116. On October 23, 2006, the Board received a complete copy of the speech and language evaluation conducted by Ashley Kalosieh, M.A., CCC-SLP, of Pediatric and Adolescent Speech Therapy Associates. Testimony of Ms. Buley; and Exhibit B-25. Ms. Kalosieh administered the CELF-4, the Test of Auditory Perceptual Skills Revised (TAPS) and the Oral and Written Language Scales (OWLS). Exhibit B-25 at 2-6.

117. On the CELF-4, Ms. Kalosieh found that J. was below the 10<sup>th</sup> percentile in sentence assembly, semantic relationships, and understanding spoken paragraphs. On the TAPS, he scored in the 5<sup>th</sup> percentile on his ability to perceive and process auditory stimuli. Ms. Kalosieh found that the Student "presents with primary difficulties associated with auditory processing, working memory, and receptive language skills." He also presents with select expressive language weaknesses that are inconsistently affecting his ability to use the appropriate sentence structure in discourse. Id. at 6. She concluded that his weaknesses "are likely significantly affecting the Student's ability to process and comprehend information in the educational setting." Id. at 7.

118. The Board did not consider this evaluation to be valid for a variety of reasons. First, the Student's core language score on the CELF was 88, within the average range. Id. at 3; and Testimony of Ms. Buley. The CELF manual recommends that the core language be used because it is the best representation of a student's overall abilities. Testimony of Ms. Buley. There are four subtests of the CELF that make up the core language score. These subtests are designed to be grouped together in order to compile "one big picture" of a student's abilities and are not intended to be used individually in the determination of whether a child has a speech and language impairment. Id. Second, she pointed to the state eligibility guidelines for speech and language impairment, which state that a student's core language score must be at least 1.5 standard deviations below the mean, in order to qualify as having an impairment. Id. Using the stated mean of 100 and a standard deviation of 15, the Student's score of 88 was not at least 1.5 deviations below the mean. Exhibit B-25 at 3. The Student's composite score on the OWLS was 82, which also did not fall 1.5 deviations below the mean. Id.; and Exhibit B-25 at 5. Third, Ms. Buley questioned the validity of the results of the TAPS because this assessment is intended for students up to age 13 years, 11 months and at the time of the evaluation, the Student was 15 years, 6 months. Id.

119. Ms. Buley also complained that Ms. Kalosieh did not gather data from the Student's teachers, but the Student was not in school at the time she tested him. Id.

120. On October 16, 2006, the Student was arrested and placed on out-of-school suspension for ten days for possession of dangerous instruments including a butterfly knife, Chinese star and laser pointer on school grounds. Exhibit B-30; and Testimony of Ms. Brisson. That morning, in the Alternative Education Program, the Student was compliant and cooperative. Testimony of Ms. Butkus. The Morgan School also referred the matter to the police who arrested him. Exhibit P-64. On November 6, 2006, J. pled responsibility for one count of breach of peace in the second degree. He was instructed to perform community service and write an essay and return to court on December 6. Testimony of Grandfather and Mr. Engel.

121. A PPT meeting was held on October 26, 2006 for the purpose of reviewing the diagnostic placement and conducting a manifestation determination. Testimony of Ms. Brisson; and Exhibit B-32 at 1. At the meeting, the PPT considered whether the Student's conduct was a manifestation of his ADHD and determined, over the objection of the Grandparents, that the conduct was not a manifestation of the Student's disability. Exhibit P-68. The team again refused to identify J. as eligible for special education services as OHI or emotional disturbance (ED). Exhibit B-32 at 2-3; and Testimony of Ms. Butkus. The PPT reviewed the full report of Ms. Kalosieh's speech and language evaluation obtained by the Grandparents. Testimony of Ms. Buley. The Grandparents' advocate presented an education evaluation completed by Ms. Santora at the Learning House, which the team agreed to review and discuss at the next scheduled PPT meeting. Id.; and Testimony of Ms. Brisson. The PPT agreed that the District would provide the Student with two hours a day of tutoring program and counseling on a weekly basis by the school social worker as an interim alternative educational placement. Testimony of Ms. Brisson; and Exhibit B-32 at 4.

122. The principal recommended expulsion for 180 school days on October 31, 2006. Exhibit P-71. An expulsion hearing was scheduled for November 16, 2006. Exhibit B-33.

123. In October, J. began treatment with social worker Morgan Fine from the Yale Child Study Center. Ms. Fine wrote to Ms. Brisson on November 14, 2006, informing her that J. was diagnosed with Pervasive Developmental Disorder NOS, Adjustment Disorder with Depressed Mood, Mixed Receptive-Expressive Language Disorder and Attention Deficit Hyperactivity Disorder, Combined Type. Exhibit P-75. She noted that the Student's only extra-curricular activity of Tae Kwon Do was not developmentally appropriate for an adolescent. She concluded that his social, cognitive and academic difficulties appear to be pervasive, causing him great difficulty in his general functioning. She specifically recommended that J. be placed in a school that is designed and structured for these types of students. Id.

124. Ms. Butkus oversaw the tutoring program provided to the Student. She met with the Student's tutor, Albert Engel, provided assignments, and altered some assignments at the request of the Grandmother. Testimony of Ms. Butkus. Mr. John Quinn, the school social worker, counseled the Student once per week, at the Student's house. Testimony of Grandfather. The Student responded well to Mr. Quinn. Id.

125. On November 15, 2006, the day before the expulsion hearing, the Board and the Grandparents entered into a voluntary agreement whereby the Board would place the Student in an alternative education facility by agreement of the PPT for one year outside the Clinton Public Schools. Exhibit B-34; and Testimony of Ms. Brisson.

126. The PPT met on November 15, 2006, to consider the Student's eligibility for special education. Exhibit B-48 at 1. The Board and the Grandparents were represented by counsel at the PPT meeting. The team reviewed the independent educational evaluation from Ms. Santora and reviewed again Dr. Westerveld's neuropsychological evaluation and Ms. Kalosieh's speech and language evaluation. Exhibit P-48; Testimony of Ms. Brisson and Ms. Buley.

127. Based on the evaluations and reports and observations from Ms. Butkus and Ms. Nadeau, the PPT determined that the Student did not meet the eligibility criteria for a speech and language impairment. Id. The PPT also reviewed a report by Morgan Fine at Yale University, which diagnosed the Student with Pervasive Developmental Disorder NOS. Id.; and Exhibit P-75. After completing the checklist from the state eligibility guidelines for autism, the PPT determined that the Student was not eligible under this exceptionality. Testimony of Ms. Brisson; and Exhibit B-48 at 2.

128. The PPT did, however, decide that the Student was eligible for special education under OHI on the basis of ADD Inattentive Type, not ADHD. Id.; and Testimony of Ms. Buley. In arriving at this decision, the PPT considered the evaluative data, behavioral data his teachers collected during his diagnostic placement and observations from Board staff. Id. The only new information was staff observation at the Morgan program, where the Student spent approximately 2-3 weeks. The PPT developed an Individualized Education Program (IEP) with

goals related to 1) written expression, 2) improving work habits, organization, impulse control and work completion and 3) development of work skills. Exhibit B-48.

129. The Board and the Grandparents were in agreement that the Student's out of district placement should contain specially designed academic instruction in reading and written expression and a therapeutic component with individual and group counseling, with a focus on social skills. Testimony of Ms. Brisson; and Exhibit B-14 at 4. The Grandparents were also interested in vocational skills training. Testimony of Ms. Brisson. Ms. Brisson contacted various facilities and arranged for the Grandparents and Student to visit these facilities. Id. The Grandparents provided written permission for the Board to communicate with and release the Student's records to Pathways High School, Woodhouse Academy, and High Roads Student Learning Center. Exhibits B-68, B-69 and B-70.

130. Ms. Brisson has been the Director of Special Education for the Clinton Public Schools since 1988. She holds a Master's Degree and certification in Special Education and a Sixth Year degree in School Administration and Supervision. She has worked in the education field for thirty-six years. Testimony of Ms. Brisson.

131. On behalf of the Grandparents, Kathleen Casparino contacted the various facilities recommended by the PPT. Testimony of Ms. Casparino. In early November 2006, Ms. Casparino also began to assist the Grandparents in researching residential placements for the Student. Id. Neither Ms. Casparino nor the Grandparents informed the District of the Grandparents' interest in a residential placement. Id.

132. After visiting various facilities, the Grandparents articulated their preference for the program at the High Roads Student Learning Center ("High Roads") because of its vocational component, AC certification, and the structure it provided to its students. Id.; and Testimony of Grandfather and Ms. Brisson. Ms. Brisson was very familiar with the program at High Roads and agreed that it would appropriately and successfully implement the IEP that the PPT developed for the Student. Testimony of Ms. Brisson.

133. High Roads is a state approved private special education facility. Id.; and Exhibit B-61 at 3. This means that the facility must satisfy state guidelines regarding curriculum and teacher certification. Id. It is reviewed by state monitoring teams, which thoroughly interview teachers and administrators in order to ensure adherence to state guidelines. Id. The curriculum is based on that provided at public schools, thereby providing students in attendance the opportunity to earn credits at their district high schools. Testimony of Ms. Delgiudice. There are an occupational therapist, physical therapist, speech and language therapist, and two social workers on staff, all of whom are certified by the State of Connecticut. Id.; and Exhibit B-61 at 15.

134. High Roads works with students with various disabilities including learning disabilities, ADD/ADHD, autism, emotional disturbance and behavior disorders, and other health impairments and with at-risk youth. Id.; and Exhibit B-61 at 6. High Roads uses one-on-one and small group instruction. (B-61 at 3). The approximate class size is ten students. Testimony of Ms. Delgiudice.

135. High Roads uses a behavior management system aimed at teaching students to control their “impulsivity, accept responsibility, and self monitor their behavior.” Exhibit B-61. An individualized behavior plan is created for each student and motivators specific to the student’s interests are used to target and reinforce positive behaviors. Testimony of Ms. Delgiudice.

136. Students at High Roads receive comprehensive social skills training daily within the classroom and through a social worker in individual and small groups. Id.; and Exhibit B-61 at 3. The school social workers conduct group activities one day per week in the classrooms and the speech and language clinician also conducts group activities in the classroom. Testimony of Ms. Delgiudice.

137. Karen Delgiudice was the Student’s teacher at High Roads. She is certified in special education. Prior to the Student’s attendance at High Roads, she reviewed his evaluations and participated in the November 28, 2006 PPT meeting which placed the Student, by agreement, at High Roads. Id.

138. The Student visited the High Roads in November 2006 and connected with another student. Id.; and Testimony of Ms. Brisson. He expressed his preference to begin at High Roads on November 29, his birthday. Testimony of Ms. Brisson.

139. The PPT convened on November 28, 2006 for the purpose of placing the Student at High Roads. Id.; and Exhibit B-36. Three representatives from High Roads attended the meeting, as well as Ms. Brisson and the Grandparents. Id.; and Testimony of Ms. Delgiudice. The High Roads staff assured the PPT that they could provide a program that would appropriately implement the Student’s IEP. Testimony of Ms. Brisson. The Grandparents were in agreement with this placement and wanted him to start “as soon as possible.” Id.; and Testimony of Grandfather. The Grandfather agreed to transport the Student to and from school until school transportation could be arranged. Exhibit B-36 at 2.

140. The Board had scheduled a PPT meeting for January 2007 to follow up on the Student’s progress in the program at High Roads. Id.; and Testimony of Ms. Brisson.

141. The Student began at High Roads on November 29, 2006. Testimony of Ms. Brisson. He attended a total of five days. Testimony of Ms. Delgiudice. The Student was reluctant on his first day, very withdrawn and would not give verbal responses. The next day he was more comfortable and gave brief answers or nods to staff questions. He still seemed reluctant to follow his schedule and lesson plans. He participated in a couple of small group lessons, but seemed impatient with the other students. Exhibit B-52. Ms. Delgiudice felt that J. was on his way to making the adjustment to a new school. He interacted with some of the students with similar interests. Id.; and Testimony of Ms. Delgiudice. Although the Student demonstrated resistant behaviors, Ms. Delgiudice believed that he could be successful in the program, as had other students with similar issues. He told her he would not be back to school after he went to court on December 6. Testimony of Ms. Delgiudice.

142. Academically, the Student was completing work that was on grade level and was earning between “90 to 100 percent” on completed work. He put in good effort on an essay he was writing for the court. Id.; and Exhibit B-52. Although the Student’s work production was somewhat limited at first, the quality of his work was “excellent.” Id.

143. At High Roads, the Student received one-to-one instruction and accommodations and modifications in math, language arts and reading, in accordance with his IEP. Testimony of Ms. Delgiudice. There were about ten other students in his class. Id. A teacher assistant was present in the class to reinforce concepts and skills and to provide support when needed. Id. The teacher assistant was familiar with the Student’s IEP; and Ms. Delgiudice and the teacher assistant collaborated about instructional strategies, modifications and accommodations for the Student. Id.

144. While the Student was attending High Roads, the Grandfather notified Ms. Delgiudice that the Student’s mother had passed away, after having been critically ill. Id. The Grandfather asked that no one at High Roads mention her passing to the Student. Id.

145. Although the Grandfather was impressed with High Roads and believed that it was meeting the Student’s educational needs, he was concerned about the Student’s behavior after school and that he would “get himself into trouble.” It would have been a good placement for J. in 2003 before he developed anger issues. Testimony of Grandfather. The Student was becoming increasingly defiant at home. Id. During the Student’s five days at High Roads, they did not report any problems with the Student. Id.

146. Between the November 15 PPT meeting and the first week of December, J.’s behavior deteriorated at home. The Student had threatened the Grandfather with a large kitchen knife in front of Mr. Engel. The Student said he would not return to school after his court case was resolved and no one could force him to. Testimony of Mr. Engel. The Grandfather began researching residential placements, including Accendo Academy. Testimony of Grandfather. He did not inform the District that he was doing so. Id. During that time, he also contacted Teen Solutions in Utah, whom he hired to escort the Student to Mississippi. Id.

147. On Saturday, December 2, 2006, three days after the Student began at High Roads, the Grandfather decided to withdraw the Student from High Roads and place him at Accendo Academy. The final paperwork was signed on December 5. Id.; and Exhibit B-40.

148. The Grandparents determined to place him at Accendo directly from his court appearance on December 6. The Grandfather hired two men from Teen Solutions, an organization he found on the Internet, to transport the Student to Accendo because he did not believe that the Student would go willingly. Id. Teen Solutions holds itself out as specializing in escorting difficult teens to schools chosen by their parents. Id. The Grandfather arranged to have the men meet the Student outside of the courthouse and escort him to Bradley International Airport and, subsequently, to Mississippi. Id. The Grandparents did not communicate these arrangements to the Student or tell him they were sending him to Accendo. When the Student was greeted by the two men, he “cried and appeared scared.” Id. They did not want the Student to know because they were afraid he would do something, which would result in his being

arrested or harming himself. Through their attorney, the Grandparents provided notice to the district in a letter dated December 8. Exhibit B-37. The Board's attorney answered on December 13, 2006, seeking additional information, which was promptly supplied. Exhibit B-39.

149. On December 7, 2006, Ms. Brisson was notified by the intake coordinator that the Student's Grandparents had removed him from High Roads and he was no longer attending there. Testimony of Ms. Brisson. Ms. Brisson contacted the Grandfather who confirmed that the Student was attending Accendo Academy in Mississippi. Id. At no time between November 29 and December 7 did the Grandparents contact the Board to request a PPT, report any dissatisfaction with the Student's placement, or notify them of their intention to remove the Student. Id.; and Exhibit B-37. Ms. Brisson contacted Accendo Academy on March 7, 2007 seeking information about their program. Id.; and Exhibit B-46.

150. Accendo Academy is a Christian boarding school for "troubled teens" located in Gautier, Mississippi. Exhibits B-58 and B-40 at 8; Testimony of Mr. Fortenberry. Currently there are about sixteen male students at Accendo, most of whom can be characterized as having behavioral issues such as a "defiance to authority." Testimony of Mr. Fortenberry.

151. The school was founded by Mr. Fortenberry and his wife. Testimony of Grandfather. Mr. Fortenberry does not hold a college degree or any credentials from the State of Mississippi Department of Education. He is a former boxer and policeman. Testimony of Mr. Fortenberry. He does, however, evaluate the two teachers at Accendo on their teaching techniques. Id.

152. The Grandfather's decision to place the Student at Accendo was based primarily on phone conversations with Mr. Fortenberry, the police department in Mississippi, and another parent whose child had attended Accendo, and on information contained in enrollment contract and Accendo's website. Testimony of Grandfather; and Exhibit B-44. He did not have specific information about the curriculum at Accendo and is aware only that the Student receives instruction in math and social studies. Testimony of Grandfather. The Grandparents did not have any information regarding the teacher's credentials, academic background, or qualifications or those of Mr. Fortenberry, the school's director. Id. The Grandfather's decision was influenced by the fact that Accendo is a religious institution. Id.

153. Prior the Grandparents' placement of the Student at Accendo, Ms. Casparino contacted Accendo on behalf of the Grandparents. Testimony of Ms. Casparino. She questioned Mr. Fortenberry regarding the type of counseling the Student would receive and the educational qualifications, training, certifications, and licensure held by the staff. Id. She considered this information to be "important to the determination of whether or not Accendo was an appropriate program." Id.

154. The Grandparents provided their permission for the Student to receive "psychological" therapy from Mr. Fortenberry and others. Testimony of Grandfather. Although he is the "head counselor" of the students at Accendo, Mr. Fortenberry is not licensed by the State of Mississippi to provide any type of counseling, nor does he have any college degree related to any counseling field. Testimony of Mr. Fortenberry and Ms. Casparino. Mr.

Fortenberry's wife also provides counseling, but is not certified as a counselor by the State and does not have a college degree either. Testimony of Mr. Fortenberry.

155. Mr. Fortenberry attributes the Student's success with "a change of heart" brought about by his "personally spending time with him and loving him." Id.

156. A home school program called Accelerated Christian Education, created by Lighthouse Christian Academy, is used with the students at Accendo. Id. It is "almost a self taught program." Id. When a student enrolls at Accendo, there are diagnostic tests given to determine grade levels. Then the student works in that level until he successfully completes it. The students complete the schoolwork with support from the teachers. Id. The completed work is sent off-site to Lighthouse Christian Academy for grading. Id.; and Exhibit B-47.

157. The Student received academic instruction from Amy Cooksey and beginning on or around the end of April 2007, Steve Daniels. If a student requires remedial courses or one-to-one tutoring, they provide it. J. does require both. Id. Neither Ms. Cooksey nor Mr. Daniels has a college degree, a certification or license from the State of Mississippi. Testimony of Mr. Fortenberry.

158. Mr. Fortenberry hired Mr. Daniels sometime in April 2007. He hired Mr. Daniels because "he liked him," despite his not having any experience teaching or working in school systems. Mr. Daniels is also a member of the Church on the Rock. Id.

159. Bible study is part of the academic program at Accendo. Id.; and Testimony of Grandfather; and Exhibit B-47. Before advancing in subjects, students are required to memorize verses from the Bible. Testimony of Mr. Fortenberry. The students also are required to participate in devotions at the beginning and at various other times in the day, and attend services at Church of the Rock on Sundays and Wednesdays, and youth group on Sunday evenings. Id.; Testimony of Grandfather; and B-47 at 2. The Student has been baptized at the Church of the Rock. Testimony of Mr. Fortenberry.

160. Accendo staff are not familiar with the term "disabilities" as defined by the IDEA. Id.

161. Accendo has a progressive discipline policy, consisting of 1) a verbal meeting with the student, 2) a verbal meeting with the student and parents usually via telephone and the suspension of privileges, and 3) corporal punishment. Id.; and Exhibit B-44 at 10. There is also a system of demerits whereby by students progress to the next level of discipline after earning a certain number of demerits for various offenses such as failing to keep their room clean or leaving their desks without permission. Id. Students have to "earn" the privilege to call home based on their behavior and interactions with other students. Testimony of Grandfather.

162. Mr. Fortenberry used corporal punishment twice on the Student, once when he was injuring himself to get attention and the second time, after he was found sleeping in class. Testimony of Mr. Fortenberry; and Exhibit 47 at 2. When asked why he was sleeping in class, the Student responded that he had had adequate sleep the night before but was tired and did not

want to do his schoolwork. Testimony of Mr. Fortenberry. After Mr. Fortenberry gave the Student one “swat” on his backside with a wooden paddle approximately a foot long and a quarter of an inch thick, he prayed with him. Id. The paddling took place in the living room located about sixty feet from the classroom from which the Student was removed. Id. While Mr. Fortenberry indicated it was the practice of Accendo to have another adult observe the administration of corporal punishment, he did not recall whether another adult was present at the time of the paddling. Id. He also did not contact the Grandparents prior to using corporal punishment. Id. Corporal punishment of students is permitted under Mississippi law. It is not permitted in Connecticut.

163. The Church of the Rock oversees Accendo Academy. The pastor of the Church of the Rock interviews students on a monthly basis and “counsels them.” Id. Also, members of the Church of the Rock observe classes and inspect the school facility. Id.

164. The determination of whether a student is “ready” to leave Accendo is made by Mr. Fortenberry and a student’s parents and is based on whether the student has adequately “dealt with” the behavior issues that he had when he arrived at Accendo. Id.

165. Accendo Academy is not accredited by the Mississippi Department of Education as a private school or a home school. Testimony of Ms. Brisson. The school does not provide instruction by certified teachers or counseling from certified counselors. Id.; and Exhibit B-47 at 2. Lighthouse Christian Academy is accredited by the Commission on International and Trans-Regional Accreditation. Exhibit B-47 at 5-6. There was no evidence introduced as to whether the Student can receive any academic credits through Lighthouse toward his high school diploma.

166. On January 9, 2007, the Board’s attorney wrote to the Grandparents’ attorney denying any financial support from Clinton for J.’s education at Accendo Academy because 1) the Board provided J. a free and appropriate education, 2) the Grandparents failed to notify the District of their intent to unilaterally place the Student, and 3) due to concerns with the location and the program at Accendo Academy. Exhibit B-41. There was no discussion of the request for Accendo at any PPT meeting.

167. The Student should have been identified as OHI-ADHD in June 2003. There was nothing that changed between June 2003 and February 2005 regarding his need for special education designation. Testimony of Dr. LaBruno.

168. By the time he was identified as OHI on November 15, 2006, the Student required a residential placement. Placement of the Student on November 29, 2006 at High Roads was not an appropriate placement. Id.

## CONCLUSIONS OF LAW

1. There are two versions of IDEA that are applicable in this case. In the issues pertaining to identification of the Student for special education during the period from 2002 through September 30, 2005, the 1997 amendments to IDEA apply. After October 1, 2005, the 2004 amendments apply. The amendments to the IDEA regulations were effective on October 13, 2006. The citations to the IDEA statute and regulations will be referenced by the amendment dates relevant to the issue being addressed.

2. The Parties agree that since November 15, 2006, the Student qualifies for and is entitled to receive a free and appropriate public education (“FAPE”) with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq. The Parties also agree that J. is a child with other health impairment (OHI) by reason of Attention Deficit Hyperactivity Disorder (ADHD)- Inattentive type. 34 C.F.R. Section 300.8(c)(9) (2006 Rev.). The only difference between the new definition and the former definition in Section 300.7(c)(9) (1999 Rev.) is that the new definition adds Tourette syndrome. The definition is as follows:

(9) Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that-

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

34 CFR §300.7(c)(9) (1999 Rev.). Although the Board argues that the regulation requires that the health impairment “severely” adversely affects educational performance, that is not set forth in the language quoted above or in the 2006 regulations. See Board’s Proposed Conclusions of Law, paragraph 11. Ms. Kelly’s psychological evaluation in 2003 stated that the Student had attention problems and concluded that he should be referred to his pediatrician. This was a source of confusion and miscommunication between the parties for the next three years. The school was waiting for a letter from the Student’s doctor and the Grandparents did not know what information was needed from the doctor. If Ms. Kelly and the other team members needed medical information or diagnosis of ADHD from a doctor, it was incumbent on them to obtain it at no cost to the Grandparents.

3. The parties dispute the applicable statute of limitations in this case. The 2004 amendments to IDEA specifically provide for a two-year statute of limitations. 20 U.S.C. Section 1415(b)(6). Similarly state law provides for a two-year statute of limitations. Conn. Gen. Stats. Section 10-76h(a)(4). In M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 (2d Cir.2003) the Second Circuit held that in the case of the IDEA statute prior to the 2004 revision, courts must apply the “most appropriate or analogous state statute of limitations.” In Mr. and

Mrs. D v. Southington Board of Education, 119 F.Supp.2d 105, 111 (2000), Judge Squatrito explained:

Since the IDEA does not contain its own statute of limitations, the courts are obliged to “apply the most closely analogous statute of limitations under state law.” *Wilson v. Garcia*, 471 U.S. 261, 267-268 (1985). However, Connecticut has passed legislation, codified at sections 10-76a et seq. of the Connecticut General Statutes, to ensure compliance with the terms of the IDEA. See *Mrs. M. v. Bridgeport Bd. Of Ed.*, 96 F.Supp.2d 124, 128 (D.Conn.2000). Section 10-76h(a)(3) explicitly sets forth the time frame in which the appropriateness of an educational placement may be challenged: ‘A party shall have two years to request a hearing from the time the board of education proposed or refused to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education placement to such child or pupil provided, if such parent, guardian, pupil or surrogate parent is not given notice of the procedural safeguards, in accordance with regulations adopted by the State Board of Education, including notice of the limitations contained in this section, such two-year limitation shall be calculated from the time notice of the safeguards is properly given,’ Conn. Gen. Stat. § 10-76h(a)(3). The statute is in keeping with the goals of the IDEA, and is similar to myriad statutes found in other states.

The Grandparents’ attorney argues that the two-year time limit should not apply because of a “continuing violation” of IDEA since 2002. He relies on Conn. Gen. Stats. Section 52-577, which provides a three-year limitation on tort actions. He cites no case law or persuasive reason why a due process hearing resembles a tort action, nor does he have any legal support for the “continuing violation” claim. Further, the Grandparents participated in the April, June and October 2003 PPT meetings and admittedly received their procedural safeguards. Therefore, claims made more than two years prior to the filing of the due process request, which is February 22, 2007, are time barred.

4. The Grandparents claim that J. should have been eligible for special education from the time he was enrolled in Clinton in June 2002. IDEA’s child find obligations require that schools identify, locate and evaluate all children with disabilities including those children who are suspected of being a child with a disability and in need of special education. 20 U.S.C. Section 1412(A)(3)(A); 34 C.F.R. Section 300.125 (1999 Rev.); See also Regs. of Conn. State Agencies, Section 10-76d-6. Specifically, districts must have pre-placement procedures in place to ensure that “all children with disabilities . . . including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. Section 1412(A)(3)(A). In this case, J. was not a special education student in New Haven at the time of his transfer to Clinton.

5. Connecticut requires that alternative procedures and programs in regular education shall be explored and, where appropriate, implemented before a child is referred to a planning and placement team. Regs of Conn. State Agencies, Section 10-76d-7. The Board had and used with the Student, two distinct pre-referral procedures, the Eliot Student Assistance

Team (ESAT) and the Child Study Team (CST). The Board argues that it did not violate IDEA because it provided four years of regular education interventions with the Student including academic support through a co-taught math class, remedial reading program, homework and volleyball club, social skills support through a games group with Cheryl Hill, the school guidance counselor, and a contract coach. Throughout the years at issue for alleged child find violations, the Board claims that the use of these interventions complied with the District's obligations with respect to pre-placement procedures. The interventions used from September 2002 to April 2003 met the Board's obligation under Section 10-76d-7. The evidence is clear that the regular education interventions used in the 2002-03 school year were not effective, which is why his teachers referred him to a PPT in April 2003. The Board should not have postponed the eligibility determination, which should have been made in June 2003, while it tried various regular education interventions for three more years. It is not known what effect a timely determination of eligibility and provision of a FAPE would have had in avoiding the Student's downward spiral in the summer and fall 2006. It is clear, however, that the Student was denied a FAPE from February 22, 2005 until November 15, 2006, a period of one year and nine months.

6. The Board claims that it met its obligations under IDEA and state law to evaluate the Student and that its conclusion that the Student was not eligible for special education prior to November 15, 2006 is correct. The Board must conduct an appropriate and comprehensive evaluation study of the Student. 20 U.S.C. Section 1414(a)(1) and 34 C.F.R. Section 300.531 (1999 Rev.). The evaluation study shall include reports concerning the child's educational progress, structured observations, and such psychological, medical, developmental and social evaluations as may be appropriate to determine the nature and scope of the child's exceptionality. Regs. of Conn. State Agencies Section 10-76d-9(a). The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent. 34 C.F.R. Section 300.534(2) (1999 Rev.).

7. A district must evaluate a student who has been referred and who may require special education and related services, for all suspected areas of disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 C.F.R. Sections 300.320 and 300.532(g) (1999 Rev.); Regs. of Conn. State Agencies Section 10-76d-9. The Board must use a variety of assessment tools and strategies to gather relevant functional and developmental information about the child. 34 C.F.R. Section 300.532(b). The evaluations administered must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. Section 300.532(h). The Student's PPT, inclusive of his Grandparents, convened on April 11, 2003 and, after considering the areas of concerns expressed by the team members and through the pre-referral process, decided upon a variety of evaluations and assessments. Based on these recommendations by the PPT, the Board completed a series of initial comprehensive evaluations including: a psychological evaluation, educational evaluation, speech and language evaluation, social work assessment, and behavior rating scales. The District did not evaluate the Student's health issues, which were significant for severe lead poisoning, head injury and psychiatric hospitalization at a young age.

8. In interpreting evaluation data and determining whether a child is a child with a disability, the team should carefully consider “information from a variety of sources including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social, or cultural background, and adaptive behavior.” 34 C.F.R. Section 300.535(a)(1) (1999 Rev.).

9. If, after a child is evaluated, he or she is found to be a child with a disability, then the student is eligible for special education. A child with a disability means a child with mental retardation, a hearing impairment, including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. Section 1401(3)(A); 34 C.F.R. Section 300.7(a)(1) (1999 Rev.).

10. The Grandparents claim that the Student was eligible under several categories: speech or language impairment, serious emotional disturbance, autism, other health impairment and specific learning disability. Connecticut special education regulations define a child with an “identifiable learning disability” as “a child who demonstrates a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes as indicated by a diminished ability to listen, speak, read, write, spell, or do mathematical reasoning.” Regs. of Conn. State Agencies Section 10-76a-2. Under federal regulations, 34 C.F.R. Section 300.541 (1999 Rev.):

(a) A team may determine that a child has a specific learning disability if--

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child’s age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading comprehension.
- (vi) Mathematics calculation.
- (vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy is primarily the result of--

- (1) A visual, hearing, or motor disability;
- (2) Mental retardation;
- (3) Emotional disturbance; or
- (4) Environmental, cultural, or economic disadvantage.

11. The discrepancy between J.'s verbal and performance IQ of 21 points was statistically significant and, as Dr. Cherkes-Julkowski testified will occur in only 0.1% of the population. This is a persuasive reason not to use the full scale IQ. Dr. LaBruno, a retired public educator with 35 years experience, including 20 years as a special education administrator in Stamford and Greenwich, concurred with Dr. Cherkes-Julkowski that J. did qualify as having a specific learning disability. The LD Guidelines give flexibility in whether to use the full scale IQ. If the full scale IQ was not used, there appears to be no dispute that J. would qualify under the severe discrepancy analysis. The District could have conducted further testing in the areas of extremely low scores to determine if behavioral issues affected the scores. The LD form was not correctly filled out. It should have indicated that there was a severe discrepancy in the areas of written expression, reading and math. There was also evidence of a processing disorder as outlined by Drs. Cherkes-Julkowski and LaBruno and in the reports of Ms. Kalosieh and Ms. Santora.

12. "Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's education performance." 34 C.F.R. Section 300.7(c)(11) (1999 Rev.). According to the state eligibility guidelines for speech and language impairment, a student's core language score must be at least 1.5 standard deviations below the mean of 100, in order to qualify as having an impairment. Dr. Cherkes-Julkowski, Dr. LaBruno and Ms. Kalosieh's report provided support for finding J. eligible under this category, even if it was not the primary disability. Further, Ms. Bowen's results in 2003 noted behavioral and attention concerns, which may have affected the results. She did find he had difficulties with language.

13. "Emotional disturbance . . . means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:"

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR Section 300.7(c)(4)(i) (1999 Rev.), Regs. of Conn. State Agencies Section 10-76a-2(m). In June 2002 the Board was advised that the Student had a history of psychiatric hospitalization and self-injurious behavior in New Haven. Although the Grandparents did not specifically ask for eligibility to be decided under the emotional disturbance criteria, the Board was obligated to evaluate in all suspected areas of disability. In 2003 the referral to the student assistance team noted concerns about J.'s difficulty interacting with peers, following social cues and inappropriate responses when spoken to. It was recommended that he have a psychological and social/emotional evaluation. The Board did not obtain any psychiatric evaluation of J. in 2003 or

at any time thereafter. In February 2006 Dr. Westerveld noted J.'s history of psychiatric and psychosocial problems, including longstanding problems relating to same age peers and depressive symptoms. In August 2006, the Grandparents advised the Board that the Student had been placed in a residential therapeutic program in Utah for the summer. The July report from that program indicated that the Student had difficulty in engaging in socially appropriate ways and understanding social cues from others. He also displayed developmental delays regarding managing emotions and appropriately expressing them. J. should have been evaluated under this category.

14. Children who have been suspended repeatedly or whose behavior, attendance or progress in school is considered unsatisfactory or at a marginal level of acceptance should be promptly referred to a planning and placement team. Conn. Agencies Regs. Section 10-76d-7. The Board did not consider the Student in this category of unacceptable behavior until he was expelled for bringing two martial arts weapons and a laser pointer to school. There were earlier signs of behavior problems, including his expulsion from summer school in 2003, which resulted in his repeating sixth grade. Even when the Student was referred to a PPT following his expulsion in October 2006, the team found his conduct was not a manifestation of any disability.

15. The Grandparents claim that the Student was eligible under the category of autism based on the evaluation by Morgan Fine of the Yale Child Study Center in October 2006. She made a diagnosis of Pervasive Developmental Disorder (PDD) NOS by history. PDD is on the autism spectrum. The PPT found that J. did not meet eligibility for special education under this category at the November 15, 2006 meeting. The Grandparents' brief did not argue this point; therefore, it is not examined further here.

16. Pursuant to 34 CFR Section 300.502(c) (2006 Rev.), if a parent shares with the public agency an evaluation obtained at private expense, the public agency must consider the results of the evaluation in any decision made with respect to the provision of FAPE. At the May 10, 2006, September 20, 2006, October 11, 2006, October 26, 2006, and November 15, 2006 PPTs, the District considered the neuropsychological, speech and language, and education evaluations privately obtained by the Grandparents, but disagreed with them all.

17. Connecticut special education regulations permit districts to use a trial placement for diagnostic purposes. The trial placement must include a structured program, of not more than eight weeks' duration, the purpose of which is to assess the needs of a child for whom an individualized education program may be needed. Conn. Agencies Regs. Section 10-76d-14. A diagnostic placement was provided by the District in the Alternative Education at Morgan High School for approximately three weeks, from September 25 to October 16, 2006. The program provided individualized instruction and a behavioral modification program. The Student's teachers collected data to measure his responses to the various strategies used with the Student.

18. The diagnostic placement effectively ended with the Student's expulsion on October 16, 2006. The PPT developed the Student's IEP on November 15, 2006 and began implementing it at High Roads on November 29, 2006. Between October 16 and November 28, the Student had some home-based tutoring and weekly counseling by the social worker.

19. The PPT finally identified the Student as eligible for special education under the Other Health Impaired at the November 15, 2006 PPT meeting. In arriving at this decision, the Board claims that PPT considered the evaluative data, behavioral data his teachers collected during his diagnostic placement and observations from Board staff. There were no evaluations done by the Board except the 2003 evaluations. The behavior data was collected during the three weeks in the alternative education program. The basis for the decision seems to be the evaluations and reports provided by the Grandparents in 2006. The Grandparents were grateful that J. was identified after several years of requests.

20. Even the Board's own expert witness, Dr. Brucker, conceded that the Student should have been classified as eligible under the OHI category as of February 2005. As Dr. LaBruno said, the eligibility determination in November 2006 and day placement at High Roads on November 28, 2006, was "too little, too late." The Student was only at High Roads for five days. The Board makes much of the Grandparents' failure to advise it of their plan to place J. residentially after the December 6 court appearance. Notably, however, the Student told his teacher at High Roads, Ms. Butkus, that he would not be back there after he went to court. The Student had also threatened his grandfather with a knife and said he would not be forced back to school. The Grandfather had a reasonable belief that he could not force the six-foot, 190 pound Student to do anything. The Grandparents' choice of hiring two men from Teen Solutions to transport the Student from court to Accendo was reasonable under the circumstances. The Board was informed the day after the placement was made.

21. In placing the Student at the Accendo Academy in Mississippi the Grandparent made a unilateral placement. "Parents who unilaterally change their child's educational placement without...the consent of school officials, do so at their own financial risk." Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 373-74 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). "[W]hether the parents of a disabled child are entitled to reimbursement for the costs of a private school turns on two distinct questions: first, whether the challenged IEP was adequate to provide the child with a free appropriate public education; and second, whether the private educational services obtained by the parents were appropriate to the child's needs. ...Only if a court determines that a challenged IEP was inadequate should it proceed to the second question." M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed., 226 F.3d 60, 66 (2d Cir. 2000).

22. The standard for determining whether FAPE has been provided is set forth in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have been met and second is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-207. "IDEA requires only that school districts provide an 'appropriate' IEP, gauged by whether the IEP is 'sufficient to confer some educational benefit.'" Id. In this Circuit, the Court of Appeals has said that the proper gauge for determining educational progress is "whether the educational program provided for a child is reasonably calculated to allow the child to receive 'meaningful' educational benefits." Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1120 (2<sup>nd</sup> Cir. 1997). Where the Board has not offered any program, there is no FAPE provided. From the date the Board developed an IEP on November 15 until November 28, when the PPT made the placement at High Roads, the Student was not offered any services except tutoring at home and weekly counseling. From November 29 until

December 5, 2006, the Student spent five days at High Roads, the Board's out-of-district day placement. At that time he required a residential placement.

23. Since the IEP in November 2006 was inadequate, the question is whether the services obtained at Accendo were appropriate for the Student's needs. See Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985); Florence Cty. Sch. Dist. v. Carter, 114 S.Ct. 361 (1993). In selecting a unilateral placement, parents are not held to the same standards as are school systems. Since Florence County Sch. Dist. v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993), it is well settled that the unilateral placement does not have to meet the standards of a least restrictive environment (LRE), nor even does the unilateral placement have to include certified instructors in special education, 34 CFR Section 300.148(c); M.S. ex rel S.S. v. Board of Education of the City of Yonkers, 33 IDELR 183 (2nd Cir. 2000), citing Warren G. v. Cumberland County School District, 190 F.3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect). Generally speaking, FAPE must be provided to disabled children "in the least restrictive appropriate environment." Polera v. Bd. of Educ., 288 F.3d 478, 481 (2d Cir. 2002). However, the least restrictive environment guarantee ... cannot be applied to cure an otherwise inappropriate placement. A separate setting may be the most appropriate and least restrictive environment for a student. DeVries v. Fairfax County School Board, 882 F.2d 876 (Cir. 1989). In this case the parties agreed in November 2006 that the Student required an out-of-district placement. The question here is whether it should have been a day or residential placement.

24. "[I]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. Section 300.104 (2006 Rev.). 20 U.S.C. Sections 1412(a)(1) and 1412(a)(10)(B). "[A]s long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement." Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1122 (2d Cir. 1997).

25. The IDEA requires that school districts must make available a continuum of alternative placements for students who require special education and related services. 34 CFR Section 300.115 (2006 Rev.). This continuum includes "regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR Section 300.115(b)(1). In addition, the IDEA expresses a clear preference for disabled children to be educated "as close as possible to the child's home." 34 CFR Section 300.116 (2006 Rev.). Accendo Academy is a residential facility located in Mississippi, a significant distance from the Student's home in Connecticut. The Board argues that placement at Accendo does not provide a meaningful education in the least restrictive environment as required by the IDEA. 20 U.S.C. Section 1412(a)(5); 34 C.F.R. Section 300.114 (2006 Rev.). However, the Board's placement at High Roads was an out-of-district private, state approved special education program in Connecticut in a day placement. The Board did not offer evidence that that placement could have provided the Student with a residential placement or that there were residential placements available in Connecticut. There is substantial evidence in the record that the Student does require an out-of-district residential placement in order to be educated.

26. The cost of reimbursement for private school placement may be reduced or denied if the Grandparents failed to notify the PPT or the District that they rejected the Board's proposed placement and of their intention to place their child unilaterally either 1) at the PPT meeting attended prior to the Student's removal or 2) by providing the Board written notice at least ten business days prior to the child's removal. 34 C.F.R. Section 300.148(d) (2006 Rev.). The Grandparents appeared to be in agreement with the Board's proposed program and the placement at the High Roads Learning Center. They did not notify the Board prior to removing the Student from the Board's placement. One exception to the reimbursement limitations is where notifying the Board would have likely resulted in physical harm to the Student. There was credible evidence from the Grandparents that the Student would harm himself or others if he knew in advance of the plan to place him at Accendo. The Board's attorney was notified one day after the placement.

27. The program at Accendo is not accredited by the Mississippi State Department of Education as a secondary or elementary school. The education program at Accendo is a home schooling program administered through Lighthouse Christian Academy. The students basically teach themselves. The teachers at Accendo, Ms. Cooksey and Mr. Daniels, do not have special education training or even have college degrees. There are no certified or trained counselors on staff to provide counseling and social skills training. Mr. Fortenberry, who provides counseling to the students, does not any college degree. These concerns are sufficient to render the Grandparent's unilateral placement inappropriate. As such, the program cannot meet the Student's unique academic, behavioral and emotional needs. Even if the Student made academic progress, the Grandparents are not entitled to reimbursement. Gagliardo v. Arlington Central School District, 489 F.3d 105 (2d Cir. 2007). The Grandparents have not met the burden of proving that the educational services provided by Accendo are appropriate under the IDEA. Sch. Comm. of Town of Burlington v. Dept. of Educ. Mass., 471 U.S. 359, 370 (1985); M.S. ex rel S.S. v. Board of Education of the City of Yonkers, *supra*; Tatro v. State of Texas, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd*. 468 U.S. 883 (1984). The staff uses, and has used on the Student, corporal punishment, which is not permitted in the state of Connecticut. While the use of corporal punishment is legal in the State of Mississippi, there is no evidence that it is appropriate for the Student.

28. The Grandparents have requested reimbursement for a speech and language evaluation done in September 2006. Every parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by an agency. 34 C.F.R. 300.502(b) (1999 Rev.). The evaluation from Pediatric and Adolescent Speech Therapy Associates qualifies as an independent evaluation, as the Grandparents asked the Board to conduct comprehensive evaluations in May 2006, but the Board declined. It is implicit that the Grandparents disagreed with the 2003 speech and language evaluation conducted by the Board because it was used to deny eligibility to the Student. 34 C.F.R. Section 300.536(b) (1999 Rev.) provides: "That a reevaluation of each child . . . is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years." Since the Board did not agree to do a reevaluation, the Grandparents were justified in obtaining one. The Board should reimburse them under these circumstances.

29. The Grandparents are requesting an award of compensatory education for the Board's alleged "repeated refusal to consider the Grandparents' input for the enhancement of the Student's education." Compensatory education has been recognized as an available remedy under the IDEA for the failure to provide a free appropriate public education. *See, K.P. v. Juzwic*, 23 IDELR 5, 891 F.Supp. 703 (D.Conn. 1995); *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated*, 492 U.S. 902 (1989), *reaffirmed*, 888 F.2d 258 (2d Cir. 1989); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990). Moreover, most courts have characterized an award of compensatory education as an "equitable remedy" (*see, Burlington v. Dept. of Educ.*, 736 F.2d 773, 801 (1<sup>st</sup> Cir. 1984), *affirmed*, 471 U.S. 359 (1985)), and have awarded compensatory education such as tuition reimbursement only where a school district "flagrantly" fails to comply with the requirements of IDEA, or commits what may be characterized as an "egregious" violation. *Carlisle Area Sch. Dist. v. Scott P.*, 23 IDELR 293, 62 F.3d 520 (3d Cir. 1995); *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990), *cert. denied*, 499, U.S. 923 (1991) (compensatory education awarded where district took more than 30 months to provide an appropriate placement while admitting that the in-district program was not appropriate). The Second Circuit has explicitly required a "gross" violation of IDEA as a prerequisite to an award of compensatory education, at least as it pertains to claimants over the age of 21 at the time of the institution of the claim. *Garro v. State of Connecticut*, 23 F.3d 734 (2d Cir. 1994) (student was denied all access to educational services until the age of 21); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (gross violation examples include undue delay in holding hearings, taking advantage of mental infirmity to deny a placement). The failure to provide the Student with FAPE from June 2003 until November 2006 was an egregious violation of IDEA in this case, which warrants an award of compensatory education for the time period within the two-year statute of limitations. In their due process request, the Grandparents asked for an extension of eligibility to compensate for the time the Student was not provided with a FAPE. In their brief, they changed this request to hours of tutoring for each day FAPE was denied. The Board in its reply brief objected to this change of relief requested. The objection is sustained. The compensatory education allowed is for 21 months extension of eligibility to remedy the period when FAPE was denied.

## FINAL DECISION AND ORDER

1. The Board did not provide the Student a free appropriate public education for the relevant period from February 22, 2005 to the end of the 2004-05 school year.
2. The Board did not provide the Student a free appropriate public education in the 2005-06 school year.
3. The program proposed by the Board on November 15, 2006 for the 2006-2007 school year at High Roads did not offer the Student a free appropriate public education.
4. Accendo Academy is not an appropriate placement for the Student.
5. The Board is not financially responsible for a private placement of the Student at Accendo Academy in Gautier, Mississippi for the 2006-2007 school year.
6. The Board shall convene a PPT meeting within 15 days to determine an appropriate program and placement for the Student. The Board shall provide a psychiatric evaluation of the Student at no cost to the Grandparents with a mutually agreed upon psychiatrist to determine whether the Student continues to require a residential placement.
7. The Student is entitled to an extended eligibility period of 21 months to compensate him for the period from February 22, 2005 through November 15, 2006 when he was not offered a free appropriate public education.
8. The Board shall reimburse the Grandparents for the speech and language evaluation by Ashley Kalosieh of Pediatric and Adolescent Speech Therapy Associates.