

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Fairfield Board of Education

Appearing on behalf of the Parents: Atty. Daniel A. Thomas, Law Offices of Daniel A. Thomas, P.C., 888 Seventh Avenue – 45th Floor, New York, N.Y. 10019

Appearing on behalf of the New Fairfield Board of Education: Attys. Linda L. Yoder, Gwen J. Goodman and, on the brief, Rebecca R. Santiago, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

The Parties submitted the following issues for the hearing:

1. Was the action of the planning and placement team (“PPT”) in revising the Student’s June 7, 2007 individual education program (“IEP”) on December 19, 2007 appropriate?
2. What is the Student’s primary disability?
3. Is the myoelectric prosthetic arm, as currently used by the Student, an assistive technology (“AT”) device as that term is defined by the Individuals with Disabilities Education Act (“IDEA”)?
4. If the answer to issue #3 is yes, is the December 19, 2007 IEP inappropriate because it does not provide AT to meet the Student’s needs regarding a myoelectric prosthetic arm?
5. If the answer to issue #3 is yes, should the Board be required to reimburse the Parents for the costs associated with the Student’s myoelectric prosthetic arm?

SUMMARY:

The Student (also referred to as J.) is a four year-old student in the Board’s preschool program. She attended there for the 2007-08 school year, beginning in September 2007. Prior to that, J. was enrolled in the Birth-to-Three program. The Student was born without a left arm below the elbow, referred to as a congenital amputation. At 14 months, J. was fitted with a

myoelectric prosthetic arm. The Parents successfully challenged the Birth-to-Three program's refusal to pay for the arm in a 2005 due process proceeding, which found that the myoelectric arm was AT and that the state, as payer of last resort, was obligated to pay for the arm after the Parents exhausted other avenues, including insurance.

The Parents filed this due process complaint to establish that the myoelectric arm is AT in the preschool program and that the Board is obligated to pay for repairs and replacements of the arm. The Board contends that it has provided the Student with a free appropriate public education ("FAPE"), that the myoelectric arm is not necessary for the Student's IEP and that it cannot be held financially responsible for the Parents' choice of a medical device for their child for a variety of reasons.

PROCEDURAL HISTORY:

The Father requested this hearing by faxing a form to the State Department of Education (SDE) on January 24, 2008. Hearing Officer (HO) Exhibit 1. The Board received a copy on January 25, 2008. This Hearing Officer was assigned to the case on that date. The Parents' attorney filed an appearance on January 29. Attorney Yoder filed an appearance for the Board on February 1. A prehearing conference was held on February 6, 2008. The attorneys reported that a resolution meeting was scheduled for February 7. After discussion, four issues for the hearing were identified, which the Hearing Officer drafted and sent to the attorneys with the hearing notice. The mailing date of the final decision was established as April 9, 2008. Hearing dates were agreed on for March 19, 26 and 31. The parties were directed to file witness lists and exhibits by March 12 and any additional statement of issues by February 15. Exhibit HO-2. On February 13, the Parents' attorney requested an additional issue. Exhibit HO-3. On February 19, the Board's attorney agreed to the new issue if it were addressed as the third issue and if issues #4 and #5 were decided only if issue #3 was answered in the affirmative. Exhibit HO-4. The parties filed written waivers of the resolution meeting. On February 19, Attorney Goodman filed an appearance in addition to Atty. Yoder's. The Parents filed Exhibits P-1 through P-8 and their witness list on March 12. The Board filed Exhibits B-1 through B-34 and its witness list on March 12. On March 17, Atty. Goodman filed additional Board Exhibits B-35 through B-38.

The hearing convened on March 19. The Board objected to Parent Exhibits P-2 and P-8, which were marked for identification. The other Parent exhibits were entered as full exhibits. The Parents objected to Exhibits B-32, B-33 and B-37, which were marked for identification. The other Board exhibits were entered as full exhibits. The attorneys presented opening statements. The Parents then presented testimony from the Father and direct testimony from the Mother. During the Father's testimony, Exhibit P-2 was admitted into evidence over the Board's objection. At the end of the March 19 hearing, the Board withdrew its objection to Exhibit P-8 and the Parents withdrew their objections to Exhibits B-32, B-33 and B-37. The four exhibits were entered as full exhibits. On March 20, the Parents filed Exhibit P-9.

The hearing continued on March 26. Two additional hearing dates were agreed on for April 14 and 16. Exhibit P-9 was admitted as a full exhibit. The Mother completed her testimony. On March 28, the Board's attorneys requested a postponement of the March 31 hearing because the Parents' final witness, Joanne Panicek, Director of Pupil Personnel Services,

was ill. The Parents' attorney objected to the postponement and requested that the Board begin presenting its case on March 31. The postponement was granted following a teleconference with the attorneys. The mailing date for the final decision was extended to May 12, 2008. The hearing continued on April 14 with testimony from Ms. Panicek. On April 15, Atty. Yoder requested a postponement of the April 16 hearing because of personal illness. The Parents' attorney objected because other attorneys from her law firm could be assigned to the case. The postponement was granted over the Parents' objection, the hearing was scheduled to continue on May 5 and 7, and the mailing date for the final decision was extended to June 2, 2008. Another teleconference was held at the Parents' attorney's request on April 21 with Atty. Thomas' legal assistant and Atty. Yoder. No dates prior to May 5 could be scheduled.

The hearing continued on May 5. The Parents offered Exhibit P-10, which was marked for identification because the Board objected to its admission. Ms. Panicek completed her testimony. The Parents rested their case. The Board began its case with deposition testimony from Edwin R. Cruz-Zeno, M.D. His deposition was taken on April 10 by agreement of the parties. The Parents' attorney objected to the testimony of Dr. Cruz-Zeno as a whole, which was overruled. His testimony was read into the record by Ms. Panicek. Questions and objections were read by the attorneys. Objections to specific questions were ruled on during the course of reading the transcript. Dr. Cruz-Zeno was available on May 7, but the Hearing Officer ruled that it would not be necessary for him to appear. On May 7, the Board presented testimony from Diane Twedt, physical therapist. Additional hearing dates were added for June 11 and 19 and the mailing date for the final decision was extended to July 14, 2008.

The hearing continued on June 11 with new Exhibits P-11, P-12 and P-13. Exhibits P-12 and P-13 were entered as full exhibits without objection. Exhibit P-11 was marked for identification based on the Board's objection to the lack of foundation, then entered as a full exhibit after the Board withdrew its objection. Ms. Twedt completed her testimony. This was followed by testimony from Lisa Abrams, special education teacher, and Barbara Cage, occupational therapist. The Parents requested rebuttal testimony from Ms. Abrams, Mary-Jo Terranova, former Elementary Supervisor of Special Education, and the Parents. The Board agreed to call Ms. Terranova as its witness. The parties requested postponing the June 19 hearing to June 24 to accommodate these witnesses. The request was granted. The hearing continued on June 24 with testimony from Ms. Terranova. The Board rested its case. The Parents presented rebuttal testimony from Ms. Abrams and the Father. The Parents' attorney requested that the Board call Marie Moore, special education teacher, as a witness so that he could cross-examine her. The request was denied because the evidence would be cumulative for one side or the other. Both parties agreed that the Hearing Officer should not draw any adverse inferences against either party for not calling Ms. Moore. Both parties rested.

The parties requested time to file briefs. The attorneys were asked to present the briefs in a format of proposed of fact, conclusions of law and order, along with any separate legal argument they wished to make. The Parents' brief was due on July 15. The Board's brief was due on July 31. The Parents' reply brief was due on August 11. The decision deadline was extended to September 4, 2008 by agreement of the parties. The Hearing Officer sent the attorneys a letter on June 26 confirming these dates. The briefs were timely filed.

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 August 14, 2004, is four years old and has been in the Board's preschool program since September 4, 2007. Exhibit B-9; and Testimony of Parents.

2. J. was born with a congenital left below elbow amputation, and, as such, has no left forearm, wrist or hand. Testimony of Father; and Exhibit B-4.

3. The Parents consulted Pediatric Prosthetics and Dr. Peter Waters, a specialist who "works with amputee children" and practices at Children's Hospital in Boston. Testimony of Father. Dr. Waters directed the Parents to the State's Birth-to-Three system. Id.

4. Birth-to-Three evaluated J. soon after the Parents contacted the agency and determined that she was eligible for services when she was two months old. Id.; and Exhibit B-2. J. received services in the Birth to Three program from October 19, 2004 through August 13, 2007. Exhibit B-2.

5. The Parents had J. fitted for a passive prosthetic left arm when she was six months old by Linda Bean, a prosthetist with Pediatric Prosthetics. Testimony of Father. A passive prosthetic arm fits to the end of an individual's missing limb, extends to approximately the same length as a natural limb, and assists the individual in outreaching and picking up items; this prosthetic does not move from its manufactured form. Id.

6. The Parents again consulted Dr. Waters to find out if J. had any medical conditions resulting from the missing limb and to ask about the options for prosthetic limbs. Id. When the Parents asked Dr. Waters which prosthetic was "best suited" for J., he explained that there were several "good options" including a passive prosthetic or "even a myoelectric arm." Id. Dr. Waters did not testify at the hearing or provide any documentary evidence in the record.

7. "A myoelectric prosthetic arm is an arm that extends . . . from the socket with a hand that has a moving claw inside . . . that looks like fingers that opens and closes based upon [J.'s] muscle movement in her forearm" Id.

8. After conducting additional internet research, J.'s Parents had her fitted, at Pediatric Prosthetics, for a myoelectric prosthetic arm when she was 14 months old. Id.

9. J.'s Parents chose to have J. fitted for a myoelectric prosthetic arm because they wanted to "try and make her a two-handed child and [allow her] to do all the things that a normal child can do." Id.

10. When making their decision regarding the myoelectric arm, the Parents did not take J. to a physician for a consultation, but Ms. Bean (the prosthetist) obtained a prescription from J.'s pediatrician for her myoelectric prosthetic arm. Id. This prescription was obtained so that the Parents could seek reimbursement from their insurance company. Id.

11. The Parents requested that the Birth to Three System provide J. with a myoelectric arm. The request was denied. On September 4, 2005, the Parents filed a hearing request to challenge the refusal of Birth to Three and its provider, Family Junction, to provide the arm. Exhibit P-2.

12. The three-day hearing was conducted by an impartial hearing officer in October 2005. A decision was rendered in favor of the Parents. The Birth-to-Three Hearing Officer found that the Student's Individualized Family Service Plan ("IFSP") was inappropriate because it did not include J.'s myoelectric prosthetic arm as AT and ordered Birth-to-Three to pay for the arm. The Hearing Officer also ordered the IFSP team to convene to revise the IFSP to conform to the decision. Id.

13. Dr. Cruz-Zeno is a Board-certified specialist in physical medicine and rehabilitation, as well as in the subspecialty of pediatric rehabilitation medicine with many years of experience, including prosthetics. Testimony of Dr. Cruz-Zeno; and Exhibit B-34. His office is located in Brookfield, Connecticut. Exhibit B-34. Although prosthetists do not always require a prescription in order to fit a patient with a prosthetic limb, a prescription is required by most insurance companies. Testimony of Dr. Cruz-Zeno.

14. It is necessary for a doctor with experience in dealing with prosthetics to write a prescription for a prosthetic limb and oversee the treatment of the patient. Id. A medical doctor should be overseeing a patient's use of a prosthetic arm for reasons including the fact that there could be problems with the fitting or the residual limb or stump. Further, "[t]here can be medical problems like pain, skin problems, edema, volume changes, allergic reactions, dermatitis, skin ulcers, skeletal misalignments, psycho social aspects that will require periodic evaluations by the physician and the team in order to prevent and/or treat these problems." Id.; and Exhibit B-36. Moreover, a doctor should be reviewing the patient and any "changes in the function of ability of the child" to ensure that there are no medical problems and to ensure the best medical outcome for the child. Testimony of Dr. Cruz-Zeno.

15. Most physicians are not properly trained or qualified to write an adequate prescription for these purposes. Before prescribing a prosthetic limb to a child, Dr. Cruz-Zeno will typically conduct a medical examination of the child and conduct other medical tests such as X-rays or blood work. Id.

16. There are many options available to children with amputations, including various different types of prosthetic devices and the option of waiting to achieve function without a prosthetic device. Id.

17. “For medical purposes a prosthesis falls into the durable medical equipment, prosthetics and orthotics or daily living and mobility aids categories for insurance purposes.” Exhibit B-36.

18. As part of Dr. Cruz-Zeno’s specialty, he prescribes frequently this type of device, prosthesis, the orthotics or braces, wheelchairs, equipment to help patients perform better on activities of daily living, self-care. He prescribes this type of equipment almost on a daily basis. Testimony of Dr. Cruz-Zeno.

19. “A prosthesis is then considered to be medical equipment necessary for the treatment of a specific illness, injury, condition or disease with the goal of improving or restoring that patient’s life and level of function.” Exhibit B-36.

20. In October 2006, Marjorie Kacir, an occupational therapist at Family Junction, J.’s Birth-to-Three provider, conducted a development evaluation of J. as part of her continued services. Exhibit B-2. At that time J. had a new larger myoelectric arm because she had outgrown the first one. Id. The procedures used during the evaluation to assess J.’s skills included parent reports, clinical observation, and the Hawaii Early Learning Profile (“HELP”) Strands. The HELP Strands evaluate a child’s skills in “the six major traditional domains of development” and are used by the Birth-to-Three system to plan for programming and to monitor a child’s progress. Id. Ms. Kacir concluded that J.’s cognitive, language and social-emotional skills were developmentally appropriate. However, because she was still adapting and learning to use her myoelectric prosthetic arm, she had limitations relative to, among other things, balance and bilateral coordination and required continued development of her motor and self-help skills, including dressing. Id.

21. On January 29, 2007, the Birth-to-Three service provider referred J. and her Parents to the New Fairfield Public Schools. A copy of the evaluation by Ms. Kacir and J.’s current IFSP dated November 20, 2006 were provided with the referral. Exhibit B-1. The IFSP for October 11, 2006 through August 13, 2007, had two outcomes, first “for J[.] to use prosthesis to function and interact in her daily activities,” and second, “for J[.] to continue to develop skills appropriate for her age.” Id. at 6.

22. On April 4, 2007, the Board convened a PPT meeting to discuss J.’s transition to the public school system and the referral by Birth-to-Three. Present at this meeting were Mary-Jo Terranova, Director of Pupil Personnel Services at that time; the Parents; Marie Moore, preschool special education teacher; Barbara Cage, occupational therapist; Diane Twedt, physical therapist; Ms. Kacir, Birth-to-Three provider; and Attorney Daniel A. Thomas. Testimony of Parents; and Exhibits P-13 and B-5.

23. The Parents made the District aware of their due process case against the Birth-to-Three service provider to obtain reimbursement for the myoelectric arm. Testimony of Ms. Terranova and Ms. Cage. Mr. Thomas simply stated that he was a friend of the family. Testimony of Ms. Twedt. He did not identify himself as an attorney or an advocate at the April 4, 2007 meeting, nor did he share that he had represented the Parents in their due process case against Birth-to-Three. Id.; and Testimony of Ms. Cage. If the Board had known that the Parents would be accompanied by their attorney, it would have had its legal representative at the PPT. Id.; and Testimony of Ms. Panicek.

24. During the April 4, 2007 meeting, Ms. Kacir shared her opinions regarding J.'s limitations and difficulties relative to the services provided through the Birth-to-Three program. Exhibit B-5 at 2; and Testimony of Ms. Terranova.

25. The Parents reported that J. had difficulties with activities of daily living and with advocating for herself. Id. The Parents also raised various concerns at the April 4 transition meeting regarding J.'s abilities as they relate to her myoelectric arm. Specifically, the Mother expressed concerns about J.'s continued use of the prosthetic arm, safety on playground equipment and walking up and down stairs, and toileting. Testimony of Mother.

26. The PPT considered a written report provided by the Parents from Donna Lasco, a teacher at Terrific Twos, a program in which J. was enrolled at the time. This class met weekly for 90 minutes and was a structured educational program for parent and child. Id.; and Exhibit B-4. In this report, Ms. Lasco explained that J.'s myoelectric prosthetic arm presents additional challenges for J. because it was physically and mentally demanding to use and it could not get wet. Exhibit B-4. J. had difficulty with self-help skills, including dressing and toileting, needed assistance with craft projects, and required monitoring relative to safety and manipulation of her prosthetic. Id.

27. Mr. Thomas requested that J. be identified as eligible for special education and related services and suggested that orthopedic impairment would be an appropriate eligibility classification. Testimony of Ms. Twedt and Ms. Cage. No eligibility determination was made at the April 4 PPT. Id.

28. The prior written notice clearly shows that the only proposed action at the April 4 PPT meeting was to conduct physical and occupational therapy evaluations and an AT consultation. Exhibit B-5 at 3; Testimony of Ms. Terranova. The evaluations and AT consultation were to be completed by April 25. Exhibit B-3 at 3.

29. The Parents signed a consent form on April 4 for the physical therapy evaluation to be conducted by Board's physical therapist, an occupational therapy evaluation by a Birth to Three occupational therapist and an AT consultation by a consultant determined by Birth to Three. Id. at 5.

30. The PPT meeting document, including the prior written notice page, was sent to the Parents. Id. There is no dispute that the Parents received timely prior written notice of the Board's intent to conduct the indicated evaluations and consultation. On March 26, the Parents were mailed their procedural safeguards prior to the PPT meeting. Id. at 3.

31. The Father wrote to Ms. Terranova on April 16, 2007 and requested that corrections be made on the PPT document regarding J.'s age (2.8 years not 4.8) and ethnicity (Hispanic not White). Exhibit P-12. He also asked for the meeting summary to include comments that made clear that while J.'s prosthetic arm is helpful as an AT device, she continues to require assistance with activities of daily living. Id.

32. The school members of the PPT had no independent knowledge of J. and therefore could not reach any conclusions about these issues before the recommended evaluations were completed. Ms. Terranova made the corrections on the first page of the April 4 document. Ms. Terranova also added to the meeting summary: "[.]'s prosthetic arm works well as an assistive technology device but she continues to require assistance with activities of daily living." Exhibit P-13 at 2. She was documenting what the Parents and Ms. Kacir had reported during the PPT meeting. Testimony of Ms. Terranova. The corrections on page 1 were, but the additional comments in the PPT meeting summary were not, placed in the Student's file. Id. The Parents had received and kept a copy of both pages of the revised PPT document, which they offered into evidence at the hearing. Exhibit P-13; and Testimony of the Father. Ms. Terranova verified the accuracy of Exhibit P-13 in her testimony.

33. Ms. Kacir conducted the AT consultation on April 25, 2007 by telephone conversation with Amy Norton, a staff member at the New England Assistive Technology Program ("NEAT"). Exhibit B-6. Ms. Terranova had spoken to a staff member NEAT who recommended that Birth to Three get a consultation, not an assessment. Id. The consent form signed by the Parents provided that an AT consultant would be selected by Birth to Three. Ms. Kacir contacted Birth to Three and was advised that they "do not pay for any adaptive equipment or assistive technology to be used in the school and should not incur expenses for a consultation or evaluation." Id. Ms. Kacir did not provide client or family identifying data to Ms. Norton, but gave J.'s school district, age, orthopedic condition and functional ability. Ms. Kacir also relayed to Ms. Norton the Parents' concerns about hand-washing, toileting, dressing, ascending and descending stairs, participating in group activities without hitting another child with her prosthesis, using her prosthesis to grasp classroom items and holding onto playground equipment or carrying fragile items without a back-up for safety. Id. Ms. Norton said that "adult intervention would be necessary to address many of these concerns and that assessment of the facility itself would be necessary to determine the need for specialized equipment." This "would be determined by the barriers to full function in the school setting." Id. She thought that school personnel would be able to make many "suitable accommodations." Id. Ms. Norton recommended against computer usage, including the use of adapted keyboards or software for one-handed typists, as it was not age-appropriate for J. Id.

34. Ms. Kacir also completed a developmental evaluation on May 23, 2007, which was comprised of the Peabody Developmental Motor Scales—Second Edition, Fine Motor Scales, a clinical observation, and a review of the Parents’ report of J.’s skills. Exhibit B-7. She found that J.’s ability to perform fine motor skills fell within the average range. Id. Ms. Kacir noted that the grasping skills required performance of one hand. On the visual-motor integration test, J. performed some of the required skills in an adaptive manner, which allowed her to attain full credit for two of the skills—snipping with scissors and stringing beads. J. cut the edge of a piece of paper by holding the scissors in her right hand and placing the paper flat on the table with her prosthesis. She received partial credit for cutting across a piece of paper with scissors, and no credit for lacing up and down in a strip with holes or for cutting along a line. Id. Ms. Kacir stated that J. will have difficulty progressing to that level of skill unless she is able to hold more securely with her prosthetic hand. “Some of the next skills that are appropriate for [J.] to develop will also have to be achieved in an adapted manner.” Id.

35. A Physical Therapy evaluation was completed by Diane Twedt on June 1, 2007. Exhibit B-8. This evaluation consisted of administering the Peabody Developmental Motor Scales-2, gross motor subtests, and clinical observations. Ms. Twedt observed that adult facilitation is necessary for J. to safely use her myoelectric prosthesis. Id. Results of the three gross motor subtests of stationary, locomotion and object manipulation were in the average range on the stationary (her ability to control her body and maintain balance) and the locomotion (her ability to move by walking, running, hopping and jumping) subtests, and in the below average on the object manipulation subtest (her ability to use manipulates for catching, throwing and kicking). Id. J. had greatest difficulty in using her arms together to catch a large ball and needed adult prompting to use her prosthetic arm to reach for puzzle pieces with her prosthetic hand then transfer to her right hand across midline to place in the puzzle. J. required adult assistance to guide her myoelectric prosthetic to hold onto the safety rail on the trampoline, stair rails and the left handlebar of a tricycle. Id. Ms. Twedt further noted that J. was at risk for asymmetries, due to the weight of her prosthesis. Id. Ms. Twedt recommended physical therapy services once per week to allow J. to increase the strength of her left shoulder girdle and increase the active assistive use of her left upper extremity in motor activities. Id.

36. On May 9, Ms. Panicek sent the Parents a notice of a PPT meeting on June 6, 2007 for the purposes of reviewing the evaluations that had been conducted and determining J.’s eligibility for special education, to develop an IEP for J., and to determine her placement in the preschool program within the New Fairfield Public Schools. Exhibit B-9 at 1. There is no dispute that the Parents received sufficient notice of this PPT and participated in the meeting. Id. at 2.

37. Present at this PPT meeting were Ms. Terranova; the Parents; Ms. Moore; Ms. Cage; Ms. Twedt; Ms. Kacir; and Lisa Abrams, preschool special education teacher. Id.; and Testimony of Father.

38. After reviewing the evaluations, the PPT discussed and determined J.'s present levels of academic achievement and functional performance and the impact, if any, of J.'s disability on her ability to participate in the preschool classroom. Exhibit B-9 at 5-6. J.'s current performance in June 2007 was age appropriate in all cognitive, academic and communication areas. Id.

39. While her social-emotional performance was also age-appropriate, the Parents expressed concern regarding future self-image problems relative to J.'s physical condition. Id. at 6. Ms. Abrams noted that social interaction skills and play are a major component of the preschool curriculum. Id.; and Testimony of Ms. Abrams.

40. J.'s current performance relative to gross and fine motor skills was documented as indicated in the reports from Ms. Kacir and Ms. Twedt. Exhibit B-9 at 6. The PPT found that J.'s weakness with bilateral tasks effects J.'s involvement in preschool activities because many are bilateral in nature. Id.

41. With regard to gross motor, the PPT found that J.'s risk of asymmetry because of the weight of the myoelectric prosthetic and her difficulty with object manipulation may cause J. to experience difficulty with "typical pre-K motor activities as a result of her amputation." The team also indicated that J. had some delays with respect to her activities of daily living due to her amputation. Id.

42. Using these present levels of performance, and the preschool guidelines, the team developed an IEP with four goals, with accompanying objectives, to support J.'s program. Id. at 7-12. The first three goals relate to fine and gross motor ability, with the first specifically providing that J. "will improve strength and active assistive use of left arm/myoelectric prosthesis." Goal one has six objectives. Id. at 7-8. The second goal provided that J. "will be able to perform bilateral tasks in the classroom with adaptations." Goal two has two objectives. Id. at 9. The third goal provided that J. "will be able to perform appropriate self-help skills in the classroom with adaptations." Goal three has five objectives. Id. at 10-11. The fourth goal provides that J. "will demonstrate a clear understanding of her physical disability and will begin to self-advocate at an age appropriate level." There are three objectives for goal four. Id. at 12. The Parents advocated for the inclusion of the phrase "myoelectric prosthetic arm" in J.'s goals. Testimony of Ms. Cage.

43. The school-based members of the PPT understood that the Student would be coming into the school with the myoelectric prosthetic arm that the Parents had chosen for her. Testimony of Ms. Terranova. When the school system is informed by a parent that a parent or a physician has provided a student with a particular device or appliance, the school will work to accommodate that device. Id.; and Testimony of Ms. Twedt. There was no discussion at this meeting regarding whether the school district should purchase another myoelectric arm or

whether a myoelectric arm was required for J. to receive educational benefit from the preschool curriculum. Testimony of Ms. Terranova.

44. The Team discussed whether to provide AT such as voice activated technology to assist with learning. Id. The Team determined that no such technology was required for J. to master the preschool curriculum but indicated that this topic could be revisited in future years when different curriculum goals would be at issue. Id.; and Exhibit B-9 at 3. Accordingly, the school staff member who filled out the PPT documentation checked the box referring to AT as “not required” to reflect the PPT discussion on this issue. Exhibit B-9 at 17. A note appears near the AT box on the IEP which stated, “already fitted and using a myoelectric prosthetic arm.” Id. There was no explanation at the hearing about who added this comment and why. Testimony of Ms. Cage and Ms. Terranova.

45. The PPT document acknowledged, however, that J. had a myoelectric arm and provided accommodations and modifications that would allow for its use. Exhibit B-9 at 14. Under the heading “environment” it is specified that J. required adult guidance/supervision in the use of her left myoelectric prosthesis in classroom activities, on the playground and in the bathroom and that the prosthetic “cannot get wet.” Id. Under “instructional strategies,” the document states “modifications and adaptations for bilateral tasks” and that J. “should be encouraged to use her myoelectric arm functionally.” Id. The document also provides for adult guidance to assist J. in advocating for herself and for one hour per month of consultation to classroom personnel from the physical therapist and occupational therapist. Id.

46. The June IEP provided 10.5 hours per week of special education services, specifically developmental learning to address goals two, three and four. J. would also receive 1.5 hours per week of related services consisting of physical therapy and occupational therapy to address goal one. Id. at 17. The PPT decided to place J. in the District’s preschool at Consolidated School. Id. at 2.

47. On June 6, 2007, the Parents signed a written consent to J.’s placement in this special education program. Exhibit B-10. The Parents received the prior written notice and reviewed the completed IEP document and made no objections to its implementation. The Father, upon his initial review of the IEP, noticed that J.’s age was incorrect. He returned the IEP with the corrected age, but made no additional corrections to the document. Testimony of Father. He was “satisfied” with the services J. would receive through the June 2007 IEP. Id.

48. Ms. Terranova left employment with the Board in mid June 2007. She had a conversation with the Father on or about the last day of school. He told her that Birth to Three had paid for J.’s myoelectric arm. They did not discuss whether the Board would pay for another arm when it wore out. J. was not attending school in the district in June 2007. Testimony of Ms. Terranova.

49. In September 2007, J. entered the preschool program at Consolidated School in accordance with her June 2007 IEP. J. wore her myoelectric prosthetic arm to school every day, except on the occasions that the prosthetic required maintenance. Testimony of Mother.

50. Although J. wore her prosthetic arm to school on most days, she did take it off on occasion. Testimony of Ms. Twedt. J. has taken it off in physical therapy when she was perspiring. Id. There are also many activities in which she does not use the myoelectric arm, even though she has it. Id. J. is able to work on her goals and objectives and participate in the preschool curriculum on those occasions when she does not have use of the myoelectric arm. Id.; and Testimony of Ms. Cage.

51. There was no discussion between the Parents and the District about the Board's responsibility for paying for repairs or replacement of the myoelectric arm until November 2007. J. had outgrown her myoelectric prosthetic arm and needed to be refit for a new prosthesis. Testimony of Father. He contacted Ms. Terranova's replacement, Aimee Turner, Elementary Special Education Supervisor for the New Fairfield Schools, and requested that the District pay the expenses incurred with the refitting and replacement of the arm. Testimony of Father. Ms. Turner referred him to Ms. Panicek to discuss this request. Id.

52. On November 7, 2007, the Father went to Ms. Panicek's office and requested payment for the new costs associated with J.'s myoelectric prosthetic arm. Id.; and Exhibit B-11. The Father told Ms. Panicek that he believed the myoelectric arm was an AT device and that an amendment should be made to the IEP to provide for payment by the District. Testimony of Father and Ms. Panicek.

53. Ms. Panicek told the Father that she would have to research the law on AT. Id.

54. The Father followed-up his visit with a letter dated November 9 to Ms. Panicek outlining his understanding of the law as it relates to the provision of AT devices by a public school. Testimony of Father; and Exhibit B-11. The Father included in his letter portions of the Connecticut Guidelines for Assistive Technology ("AT Guidelines") and emphasized that, because the June PPT stated that "many preschool activities are bilateral in nature," in the section on Present Levels of Academic Achievement and Performance, that J.'s prosthetic arm "would be most appropriate in achieving both the purpose and the spirit of FAPE and LRE." Exhibit B-11 at 2. Because J.'s myoelectric arm was mentioned throughout the PPT document, he concluded that the school was required to pay for the prosthetic arm as an AT device. Id. at 2-3.

55. During November 2007, the Father and Ms. Panicek had additional conversations concerning payment for the prosthetic. Testimony of Father. He encouraged Ms. Panicek to speak with Linda Bean at Pediatric Prosthetics regarding the fitting and configuration of the myoelectric arm. Id. He also provided Ms. Panicek with an estimate for the projected costs of J.'s myoelectric arm and projected repair costs for the years 2007 through 2009. Id.; and Exhibit B-12.

56. On November 27, 2007, Ms. Panicek wrote to the Father and advised him that the District was continuing its research regarding its obligation to pay for the prosthetic arm. Exhibit B-13. As part of her research, she reviewed the law, spoke with other special education directors and her attorney and contacted Linda Bean at Pediatric Prosthetics. Testimony of Ms. Panicek.

57. The Father wrote a second letter dated December 4, 2007 to Ms. Panicek, which was received on December 11, 2007. The letter again quoted portions of the AT Guidelines and insisted that the District was responsible for payment because the myoelectric arm is an AT device. Exhibit B-14; and Testimony of Father. At the conclusion of the letter, the Father asked when he could expect a decision regarding payment for the prosthesis, whether a PPT meeting was necessary and, if so, requested a PPT meeting as soon as possible. Id.

58. In an e-mail dated December 6, 2007, the Father advised Ms. Panicek that J. would be fitted for a new prosthetic arm on December 11, 2007, irrespective of the District's decision regarding payment. Exhibit B-15; and Testimony of Father.

59. J. was fitted for a new arm and the Parents submitted the bill to their insurance company which totaled \$11,700.00. The Parents will be responsible for any portion of the bill not covered by insurance. Testimony of Father.

60. On December 11, 2007, Ms. Turner provided the Parents notice that a PPT meeting would be held on December 19, 2007. The purpose of the meeting was to conduct a "program review" for J. Exhibit B-17 at 1. The intent of the PPT was both to address the Parents' request to have the myoelectric arm considered AT within the IEP and to allow the District's staff to discuss J.'s progress and to revise the goals as necessary based on her progress and the staff's greater understanding of her skills. Testimony of Ms. Panicek.

61. The meeting convened on December 19, 2007, with the following people present: Ms. Turner, the Parents, Ms. Abrams, Ms. Cage, Ms. Twedt, Ms. Panicek, Attorney Thomas and Attorney Rebecca Santiago, the Board's attorney. Exhibit B-17 at 2.

62. Ms. Panicek attended the PPT meeting to be part of the team and share the information she obtained from her research and discussions with the Father. Testimony of Ms. Panicek.

63. This was the first PPT meeting held since J. enrolled in the preschool program on September 4, 2007. Ms. Cage, Ms. Twedt and Ms. Abrams had been working directly with J. for several months. They were familiar with her skills and progress on her June IEP goals and objectives. Testimony of Ms. Panicek. They wanted to discuss her progress with the PPT and revise the IEP accordingly. Id.

64. It is typical practice for the school district staff to track students' progress and to come to a PPT meeting prepared to adjust goals and objectives in accordance with progress. Testimony of Ms. Twedt.

65. This PPT discussed J.'s present levels of performance and revised them based on current data. Exhibit B-17 at 3. The team determined that J.'s social/emotional abilities were no longer age appropriate because she demonstrated weak self-esteem and had difficulty engaging with unfamiliar peers and adults. These concerns impacted her progress in the preschool classroom. Id. at 8. The Mother did not disagree with addressing self-esteem concerns. Testimony of Mother. She had raised self-esteem concerns in the past. Testimony of Ms. Abrams. J.'s fine and gross motor skills, as well as her activities of daily living continued to be concerns, which impacted her progress in preschool activities. J. had difficulties with washing hands, toileting and managing personal belongings. Her object manipulation skills, as well as the requirement for minimal assistance to complete bilateral tasks affected her ability to perform some preschool activities independently. Id.; and Exhibit B-17 at 8.

66. Based on J.'s revised present levels of performance, and considering the Connecticut Preschool Curriculum, the PPT proposed adding some language to the goal with three objectives in the area of social/behavioral and revising some of the language in the three goals and 13 objectives in the area of gross/fine motor skills. Exhibit B-17 at 4, 9-14; Testimony of Father and Ms. Twedt. Some of the reworded goals require the same substantive achievement to reach the goals in the June IEP. Compare Exhibits B-9 at 7-12 and B-17 at 9-14; and Testimony of Mother and Ms. Cage.

67. The December IEP goals and objectives continued to focus on active movement of limbs through various preschool activities, safe maneuvering throughout the classroom and playground, object manipulation, catching and throwing a ball, as well as fine motor activities of cutting paper, coloring while stabilizing the paper and playing with blocks. Exhibit B-17 at 10-12. J.'s self-help goal continued to focus on independence in the classroom, including washing her right hand and cleaning her left, dressing and undressing, and managing her belongings. Id. at 13-14.

68. At this December PPT, the accommodations and modifications J. required in school were also updated. Id. at 16. Under "instructional strategies," the language that J. should receive "modifications and adaptations for bilateral tasks" was kept, but the second sentence "Encouragement to use her myoelectric arm functionally" was deleted. Id. Under "other" the PPT provided, as had been written under "environment" in the June 2007 IEP, that J. should receive adult guidance in assisting J. in advocating for herself. The PPT added that: "When necessary, adult supervision/guidance should be provided with use of myoelectric arm." Id.

69. J.'s special education services hours were reduced from 10.5 to 10.0 hours per week, specifically 1.25 hours per day of instruction in each of the self-advocacy (goal one) and

self-help (goal four) goals. Id. at 17. Only related services were provided for the other two goals. She continued to receive 1.0 hours per week of related services by the physical (0.5 hours) and occupational (0.5 hours) therapists within the preschool classroom and 0.5 hours per week of physical therapy in a resource/related service room. Id. The physical therapy services were provided only for goal two (gross motor skills in motor group, on the playground and in the classroom). The occupational therapy services were provided for goal three (age appropriate bilateral tasks in the classroom with adaptations) and goal four (self-help). Id. The PPT checked the box “not required” regarding J.’s need for AT. Id.

70. Based on a review of J.’s abilities relative to the preschool curriculum and discussion of J.’s primary disability category, the school-based team recommended that J. continue her program within the preschool, but that her primary disability category be changed to developmental delay. Id. at 2-3 and 5; Testimony of Ms. Twedt.

71. The Parents disagreed with the change in J.’s primary disability category and the amendment of her goals and objectives to remove references to the myoelectric arm. They requested payment for the myoelectric prosthetic arm, claiming that it is an AT device. Exhibit B-17 at 3; and Testimony of Father. The school-based team rejected the Parents’ request for payment because the myoelectric prosthetic arm is a medical device not AT and is not necessary to provide FAPE. Id.; Testimony of Ms. Cage; and Exhibit B-17 at 6.

72. The Parents fully participated in the discussion relative to the change of J.’s primary disability category. Testimony of Father. The PPT considered the Parents’ input. Testimony of Ms. Panicek. Although the Parents were surprised that the PPT concerned “a whole program review and [was] not just about the arm,” the Father admitted that the notice of the PPT meeting did not limit the “program review” in any manner. Testimony of Father. At no time during this PPT, did the Parents or Attorney Thomas indicate that they were not prepared to discuss J.’s goals and objectives or her primary disability category, or request postponement of the meeting. Id. They understood that, if J. mastered one or more of her goals and objectives, the team could call a PPT to update her program. Id. The Mother agreed that some of J.’s goals “have been mastered and could be taken away. Testimony of Mother. The Parents received prior written notice of all of the actions proposed by the school-based team and received a copy of the revised IEP and their due process rights. Testimony of Father; and Exhibit B-17 at 4-6.

73. The District staff had recently received training on how to word goals and objectives. Testimony of Ms. Panicek. Goals should be written to address skills within the curriculum. The manner in which the skills are accomplished need not be stated. Testimony of Ms. Twedt and Ms. Cage.

74. After the December PPT, J. continued attending the preschool at Consolidated School. J.’s teachers and service providers continued assisting J. in manipulating her myoelectric arm and encouraging her to use it to progress on her goals and objectives.

Testimony of Ms. Twedt; and Exhibit B-32. J. reported to her Mother that she was using her myoelectric arm during school. Testimony of Mother.

75. On January 25, 2008, the Parents requested a due process hearing to dispute the December 19 PPT decisions to change J.'s eligibility category to developmental delay, amend J.'s IEP and deny payment for J.'s myoelectric prosthetic arm. Exhibit HO-1. The Parents contend that J. should be classified as orthopedically impaired and that J.'s myoelectric arm should be included in her IEP because it is AT device. Id.

76. On February 27, 2008, Ms. Turner conducted a classroom observation of J. to identify J.'s level of functioning within the preschool setting. Exhibit B-21. Ms. Turner's observation took place during the class snack time. She observed Ms. Cage, J.'s occupational therapist, encourage J. to open her water bottle, on her own, and to have a drink. Id. J. "placed the water bottle under her armpit and twisted the cap open with her right hand." Id. To close the bottle top, J. stabilized the bottle with her left arm against her body and tightened the cap with her right hand. Id. During class, Ms. Turner observed Ms. Cage review with J. strategies to dress and undress for toileting and observed J. play with blocks. Id. While J. engaged with her peers nonverbally through play, she did not initiate conversation with them. Id.

77. In early March 2008, the Parents filmed J. engaging in various activities with her family members in their home. Exhibit P-8. Throughout the video, the Mother guides J. to engage in activities such as stringing large beads, stamping construction paper, cutting construction paper, playing musical instruments, and playing with a large parachute. Id. The Mother first instructs J. to engage in the activity while using her myoelectric arm, then instructs J. to remove her prosthetic arm and engage in the identical activity. Id. J. can accomplish each task with and without using her myoelectric arm. Id. The Parents prefer that she use the myoelectric arm and believe that her performance is better with it. Testimony of Mother.

78. Ms. Twedt prepared a physical therapy report of J.'s progress on March 6, 2008. Exhibit B-32. J. had mastered the physical therapy goal in her June 2007 IEP, which provided that J. would improve the strength and active assistive use of her left arm, by the time of the January progress report. Mastery of the goal was based on achievement of mastery on four of the six objectives. Id.; and Exhibits B-9 at 7 and B-38 at 1-2. Ms. Twedt reported that J. consistently uses both arms during motor group to reach above her head and make other various movements. Exhibit B-32. J. also uses the parachute with both hands and independently moves throughout the obstacle course. Id. She uses her myoelectric prosthetic arm in a variety of activities in the classroom, has symmetrical posture, and has normal muscle tone. Id. J. is easily able to catch a large beach ball, but has difficulty with smaller manipulatives. Id.

79. In March 2008, Ms. Abrams reported on J.'s progress in the classroom. Exhibit B-33. J. "demonstrates many readiness skills that are typical of a child her age and some skills that are typical of a four or five year old child." Id. at 3. J. continues to have difficulty with

some self-help skills, including managing her backpack and toileting, but she is learning various adaptive techniques to assist her. Id. J. enjoys craft projects and has learned the adaptive strategy of stabilizing a marker or glue stick under her armpit and using her right hand to put on the top. Id. With regard to social-emotional skills, while J. has age-appropriate social skills, J. does not always use these skills when interacting with new peers or adults and occasionally holds her myoelectric arm behind her back. Id. J. avoids being the center of attention or asking for assistance, which is likely a result of her “continued issues with self-consciousness and self-esteem,” but J. continues to grow in this respect. Id.

80. Ms. Cage prepared an Occupational Therapy Report on March 7, 2008. Exhibit B-37. J. has made “steady progress.” Id. J. usually wears her myoelectric prosthetic, but at times she chooses not to use it because it may pinch the skin, bunch the paper or take more time to open and close the terminal device. Id. When she chooses not to use the myoelectric, she finds other ways of accomplishing the task. Id. “[J.] has made ongoing progress towards independence in her bilateral and self help skills in the preschool environment. She continues to be able to adapt and utilize modifications within the classroom on her own or with minimal direction.” Id. She has mastered one of three objectives on goal three (bilateral skills). On goal four (self-help skills) she has mastered two of the five objectives. Id.

81. Ms. Abrams did not attend the April 2007 PPT meeting. She attended the June 2007 PPT meeting, but came in late. Although the District did not normally write social goals for preschool, Ms. Abrams was asked to write a goal because the Parents wanted it documented. It was agreed on by the PPT that the goal would be self advocacy regarding her disability. Testimony of Ms. Abrams; and Exhibit B-9 at 12. Ms. Abrams’ understanding was that J. would come into the preschool program with the myoelectric arm and that the school team would work with it. She did not agree that the arm was AT or that the school would be responsible for payment of repairs and replacement. Id.

82. Ms. Twedt and Ms. Cage were at the April and June 2007 PPT meetings. There was not agreement by either PPT that the myoelectric arm would be AT in the preschool program. Testimony of Ms. Cage and Ms. Twedt. If the school had intended to accept the myoelectric arm as AT and to accept responsibility and payment for it, it would have been noted on the modifications page of the IEP under “books and equipment.” Id.; and Testimony of Ms. Terranova and Ms. Panicek. The myoelectric arm does not appear on that page, as the Board never accepted responsibility for it. Id.

83. When a student comes in to the preschool with a device from Birth to Three, the school will accept it and reassess the need for it after working with the child. Testimony of Ms. Cage. In December 2007, the PPT reassessed the Student’s need for the myoelectric arm and found it wasn’t necessary for J. to achieve her goals. Since the Parents insisted on J. using the myoelectric arm, Ms. Cage, Ms. Twedt and Ms. Abrams continued to assist J. in using it at school. Id.; and Testimony of Ms. Panicek. The Parents believed that J.’s myoelectric prosthetic

arm was AT because “Birth-to-Three said it was an assistive technology device.” Testimony of the Father. This was finally communicated to the District in November 2007 by the Father. Id.; and Exhibits B-11 through B-15. The District promptly convened a PPT meeting in December 2007 so that the PPT could decide the issue. Exhibit B-17; and Testimony of Ms. Panicek.

84. The District commonly uses the disability category of developmental delay for young students because it “encompasses all areas of development, including the motor piece.” Testimony of Ms. Twedt and Ms. Panicek. J. did not receive less special education and related services because of the change in the disability category from orthopedic impairment to developmental delay. Id.

CONCLUSIONS OF LAW:

1. The Student was enrolled in the Birth to Three system until her third birthday on August 14, 2007. During the time she was in Birth to Three, the Student had an IFSP, which required the system to treat the Student’s myoelectric arm as AT. This was the result of a decision and order by a Part C due process hearing officer in October 2005. For children previously served under Part C, parents may request that the Part C coordinator or other Part C representatives be invited to the initial IEP meeting “to assist with the smooth transition of services.” 20 U.S.C. Section 1414(d); 34 C.F.R. Section 300.321(f). In this case, the Part C coordinator was invited to and did attend the April 2007 PPT meeting. The Parents’ contention that the document from the April 2007 PPT meeting was an IEP is erroneous. The contention that the April 2007 “IEP” was amended pursuant to the Parents’ request that the “Planning and Placement Team Meeting Summary” be amended to more fully and accurately reflect the summary of the discussions and consensus during the PPT on April 4, 2007 is also erroneous. 34 C.F.R. Section 300.320 contains the definition of “Individualized education program” and what must be contained in an IEP. There is no requirement in the regulation that the summary of the discussions of participants at a PPT meeting must be included. To the contrary, Section 300.320(d) provides in relevant part: “Construction. Nothing in this section shall be construed to require—(1) That additional information be included in child’s IEP beyond what is explicitly required in section 614 of the Act.” The form provided by the SDE for districts to use at PPT meetings provides: “Planning and Placement Team Meeting Summary (Optional).” The Parents’ request to add language to the April 2007 meeting summary (Exhibit B-5 at 2) and Ms. Terranova’s addition of “J[.]’s prosthetic arm works well as an assistive technology device but she continues to require assistance with activities of daily living” (Exhibit P-13 at 2) does not constitute an amendment of an IEP by agreement. Parents point to 34 C.F.R. Section 300.324(4) as authority for their argument. This regulation provides:

- (i) In making changes to a child’s IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead

may develop a written document to amend or modify the child's current IEP.

(Emphasis added.) This addition to the meeting summary, which Ms. Terranova apparently neglected to place in the Student's education file, did not create an amendment of an IEP because there was no IEP at that time. This added language did not indicate that a decision was made by the PPT that the Student's myoelectric arm would be an AT device in her preschool program. The only decision made by the PPT, as set forth in the prior written notice, was to conduct physical and occupational therapy evaluations and an AT assessment. The Parents received a copy of their procedural safeguards, a notice of the PPT meeting and prior written notice of the proposed action of the PPT. The Parents were represented by counsel at the April 2007 PPT meeting, although he did not identify himself to the PPT as an attorney. The Parents have not shown that the IDEA was violated or that they were prejudiced in any way by the inadvertent failure of the Board's staff to place the Father's April 16 letter and Ms. Terranova's amended PPT meeting summary in the Student's education file.

2. The Parties agree that since August 14, 2007, the Student qualifies for and is entitled to receive a FAPE with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and IDEA, 20 U.S.C. Section 1401, et seq. The Parents argue that J. is a child with an orthopedic impairment. 34 C.F.R. Section 300.8(c)(8). The definition is as follows:

(8) Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

At the June 2007 PPT meeting, the Student was found eligible for special education under this category and an IEP was written for the 2007-2008 school, beginning on September 4, 2007. The Parents received notice of the PPT meeting, prior written notice of the proposed action of the PPT and signed a written consent for the Student to be placed in the preschool program with this IEP. They were admittedly satisfied with the services she was receiving.

3. The PPT met on December 19, 2007 to review the Student's program. The PPT proposed revising the Student's IEP, changing the Student's disability category to developmental delay and refusing the Parents' request to fund and repair the Student's myoelectric arm. The Parents claim that the actions of the PPT denied the Student a FAPE.

4. 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 (2nd Cir. 1997). The Court of Appeals has also cautioned that meaningful education benefits are “not everything that might be thought desirable by loving parents.” Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563, 567 (2d Cir. 1989). The Board has the burden of proof on the appropriateness of the December 19, 2007 IEP. Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998). In Connecticut, the party who requested a due process hearing has the “burden of going forward” with the evidence. Conn. Agencies Regs. Section 10-76h-14. The Parents, as the party who requested this due process hearing, have the burden of producing evidence in support of their claims. On page 24 of their brief, the Parents list 14 alleged procedural and substantive violations of IDEA in the December IEP.

5. Pursuant to the IDEA, a hearing officer presented with a complaint regarding a child’s special education program must make a decision “on substantive grounds based on a determination of whether the child received a free appropriate public education.” 20 U.S.C. Section 1415(f)(3)(E). Where parents allege a procedural violation under the IDEA, a hearing officer may find a denial of FAPE “only if the violation ‘(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.’” Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2001 (2007) (quoting Sections 1415(f)(3)(E)(i)-(ii)). See also 34 C.F.R Section 300.513(a).

6. The Parents allege failure to provide notice to Parents as to the actual “purpose” of PPT, failure to obtain parental consent for “Reevaluation,” and unilateral amendments by the Board that denied parental participation. Parents’ Brief at 24. Regarding the purpose of the PPT meeting, the Parents argue that the Board has to specifically detail in the notice everything that will be discussed at the PPT meeting. None of the cases cited in the Parents’ Brief support this argument. The Parents requested that the PPT be convened to address their request for payment for repairs and modifications made to J.’s myoelectric arm. The notice of the PPT meeting stated that its purpose was “program review.” Program review was necessary to determine if J. currently required her myoelectric prosthetic limb as an AT device. In making this determination, it was appropriate for school staff to report on current levels of functioning and to update goals and objectives to reflect J.’s current needs. All of the IDEA notice requirements were met. The Parents received the notice early enough to ensure that they would have the opportunity to attend, the notice specified the date, time and place of the meeting, who was invited to the PPT meeting, informed them that they could bring other individuals to the meeting

and that they could call the school with questions or to request that the meeting be rescheduled. 34 C.F.R. Section 300.322(a) and (b). The Parents attended the meeting accompanied by their attorney. Further, they were advised at the beginning of the meeting what the agenda would be. “We came into the meeting. We sat down. And Joanne Panicek very professionally addressed everyone there and said that we’re here today because we got to know J[.] better now and so we’re going to just review all of the goals and the -- all of the goals written, and so we’re just going to review her because we know her better now. And I said that’s not why we’re here. I said we’re here because [the Father] asked for her myoelectric to be covered by the school.” Testimony of Mother. This quotation from the Mother’s testimony is supportive of the Board’s claim that the Parents were made aware of the purpose of the PPT meeting at the outset. Their request for reimbursement for J.’s arm could not be viewed in a vacuum, especially since J. had been in the preschool program for approximately three months and the June IEP was written before the staff had met or worked with her. The Parents did not object to the meeting proceeding as a program review, nor did they request that the meeting be rescheduled to allow them time to better prepare.

7. The IDEA requires that:

The local educational agency shall ensure that, subject to subparagraph (B), the IEP team—

- (i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and
- (ii) revises the IEP as appropriate to address—
 - (I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
 - (II) the results of any reevaluation conducted under this section;
 - (III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) [concerning additional evaluation data];
 - (IV) the child's anticipated needs; or
 - (V) other matters.

20 U.S.C. Section 1414 (d)(4)(A)-(B). While the Parents requested a PPT meeting only for the purpose of reimbursement, the Board was not restricted to limiting the PPT meeting agenda to their request. Since J. was a new student in September, reviewing and revising her IEP in December was appropriate.

8. The claim that the Board reevaluated the Student without the Parents’ consent is unsupported by the record. Reviewing the Student’s progress on her IEP and her current levels of performance at a PPT meeting is not an evaluation. “Evaluation means procedures used in accordance with [Sections] 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. Section 300.15. The June IEP provided that the first progress report would

occur in January 2008. The December 19, 2007 PPT meeting, which was a short time before her January progress report was due, was an appropriate time for the school staff to discuss J.'s progress. The Parents' consent was not required to review the Student's progress.

9. The claim that the PPT made unilateral amendments without parent participation is also unsupported by the record. The Parents were present at the PPT meeting with their attorney and their views were considered. Nothing in the IDEA or any case cited in the Parents' Brief requires that the Parents' opinions be adopted by the PPT. The changes to the IEP removed a goal and objectives that were mastered and made changes in the wording of other goals and objectives that require the same substantive achievement to reach mastery of them. The main objection the Parents had to the changes was the removal of the myoelectric arm from the wording of several goals and objectives. The Parents rely on Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004), to support their argument that the results of the December PPT were predetermined pursuant to a policy of refusing to purchase prosthetics. In Deal, the parents proved that the district had a policy of not providing autistic students with one-to-one applied behavior (ABA) programs. In this case the Parents have not shown predetermination. The evidence shows that this was the first time the Board was asked to purchase a prosthetic device for a student. There was no policy regarding prosthetics in November 2007 when the Father made his request for reimbursement. Ms. Panicek's efforts to research the question of whether the Board was responsible for payment for the arm and to bring the information to the PPT for discussion and decision was appropriate. The Parents wanted to preclude the PPT from discussing the issue by claiming that the issue was decided in April and that the "amended April 2007 IEP is binding on the Board." Parents' Brief at 32. There was no procedural violation regarding Parent participation at the December 2007 PPT meeting. The Board never intended to accept responsibility for payment for the prosthetic arm in April 2007. The Parents admitted that the issue was to be decided for the first time at the December PPT meeting.

10. The first substantive violation of IDEA claimed by the Parents is the change in J.'s primary disability from orthopedic impairment to developmental delay. The Board argues that either category could apply to J. and it has discretion to use developmental delay as a disability category for children age three to five. This is supported by IDEA and state law. 34 C.F.R. 300.8(b) provides that:

Children aged three through nine experiencing developmental delays. Child with a disability for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in Sec. 300.111(b), include a child-- (1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive

development; and (2) Who, by reason thereof, needs special education and related services.

Connecticut defines a “child requiring special education” as a child “(i) who meets the criteria for eligibility for special education pursuant to the individuals with disabilities education act, 20 USC 1400, et.seq., as amended from time to time; . . . or (B) is age three, four or five and is experiencing developmental delay. . . that causes such child to require special education.” Regs. Conn. State Agencies Section 10-76a-1(4) (Emphasis added). The regulations refer to two categories of eligibility, one from the listing of IDEA labels and the other, a more temporary label of developmental delay. The Parents argue that J. cannot be labeled as developmental delay without a full evaluation of her delays. They have cited no legal authority for this assertion. Under Part C of IDEA, the Birth to Three system, J. was considered as a child with developmental delays. 34 C.F.R. Section 300.25(a) defines infant or toddler with a disability as “an individual under three years of age who needs early intervention services because the individual—(1) [i]s experiencing developmental delays. . . .” The definition of infant or toddler does not include the Part B requirement that the individual with a disability “needs special education and related services.” 34 C.F.R. Section 300.8(b)(1). J. was evaluated by Birth to Three, as well the District’s physical therapist prior to entering school in September. The District was not required to undertake another evaluation in December, especially where IDEA and state law allow the District the option of using this category. There was no violation of IDEA in changing J.’s disability category to developmental delay. Her services remained the same under both categories.

11. The Parents claim that the Board had a sinister motive in changing the disability category: “From the outset, the reason, purpose, and focus of convening the December 2007 PPT meeting was to perpetrate the fraud of ‘writing out’ the myoelectric from the established IEPs.” Parents’ Brief at 37. The Parents’ premise is that the myoelectric arm must be part of the IEP in order for J. to obtain a FAPE. The Parents further claim that because the myoelectric arm was deemed to be AT by Birth to Three, the Board cannot change that designation without a formal AT evaluation. Pursuant to 34 C.F.R. Section 300.5, an AT device is:

any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified or customized, that is used to increase, maintain or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

The second sentence was added to the definition in 2006. The Parents argue that since the myoelectric arm is not surgically implanted, it qualifies as an AT device. The Board argues that Congress did not add the language to broaden the definition of AT, but rather to clarify that school districts are not required to pay for any device that is surgically implanted regardless of whether it is required in order for a student to receive FAPE.

12. The determination of whether a device is “considered an assistive technology device for a child depends on whether the device is used to improve the functional capabilities of a child with a disability and whether the child’s individualized education program (IEP) Team determines that the child needs the device in order to receive a free appropriate public education (FAPE).” Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46547 (August 14, 2006). The Board does not dispute the contention that the myoelectric arm improves the functional capabilities of J.’s left arm. The Board claims that that the myoelectric arm is not necessary for J. to receive FAPE.

13. “It is well established the District’s obligation to provide assistive technology is limited to assistive technology which is necessary to provide a FAPE.” Grant v. Ind. School District No. 11, 43 IDELR 219 (D.Minn. 2005). The Department of Education, Office of Special Education Programs has summarized a school district’s responsibilities under the IDEA and its implementing regulations as follows:

[T]he Department’s position is that, as a general matter, a school district is not required to provide an assistive technology device or assistive technology service to a disabled student if the student requires that device or service regardless of whether he or she attended school. However, this exclusion does not apply to a situation where a school district determines that a disabled student requires an assistive technology device or service in order to receive a free appropriate public education and specifies that the device or service is part of the student’s program of special education, a related service, or a supplementary aid or service.

Letter to Anonymous, 24 IDELR 388 (Jan. 23, 1996). In other words, “participants at the meeting held to develop a child’s IEP must determine whether, in light of a particular child’s education needs, the public agency must make an assistive technology device and/or assistive technology service available in order for the child to receive a FAPE.” Letter to Seiler, 20 IDELR 1216 (Nov. 19, 1993); see also Letter to Anonymous, 24 IDELR 584 (Apr. 11, 1996)(same). “The need for a specific assistive technology device/service must be determined according to the individual needs of the child.” Letter to Hutcheson, 30 IDELR 708 (June 22, 1998).

14. In this case, the Parents do not dispute that J.’s myoelectric arm is needed regardless of whether she attends school. The Parents want the District to pay for the arm, but it admittedly would not be used only at school. 34 C.F.R. Section 105(b) provides:

On a case-by-case basis, the use of school-purchased assistive technology devices in a child’s home or in other settings is

required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

The District agrees that when developing an IEP, the PPT must consider whether the student requires AT in order to receive educational benefit. The decision whether a student requires AT cannot be made until the school has first identified the student's educational needs as they affect the student's ability to benefit from the applicable educational curriculum.

15. The Preschool Curriculum Framework contains the program goals and content standards for, among other things, physical development. Exhibit B-22 at 17-22. The preschool curriculum does not require that the District teach J. to be a "two-handed child," which is the Parents' goal for her. The Parents have interpreted "bilateral tasks" as meaning "two-handed." Ms. Twedt carefully explained the differences. The former is in the curriculum, while the latter is not. J. is not entitled to special education under the IDEA simply because she is missing the lower portion of her left arm. She is entitled to special education only if she requires specialized instruction to receive benefit from the school curriculum. Hence, the educational focus must always be on the skills that are necessary to learn the curriculum. The Parents assert that J. always will be missing part of her left arm and her left hand and that she always will have an orthopedic impairment. IDEA eligibility requires a finding that she needs specialized instruction to benefit from the school curriculum. Related services alone do not qualify a student for services under the IDEA. 34 C.F.R. Section 300.8(a)(2)(i). After working directly with J. for several months, the school-based PPT members concluded in December that J. did not need the myoelectric arm to benefit from the preschool curriculum. The Parents have not shown any educational need that requires the myoelectric arm as AT. The Parents argue that the Board is required to conduct a formal AT evaluation by someone knowledgeable in prosthetic arms in order to determine whether the Student needs AT. They have cited no legal authority for this claim.

16. The Board also claims that the myoelectric arm is not AT because it is a medical device. School districts are not required to pay for medical devices if they are "prescribed" or purely medical. Gaylord Community Schools, 40 IDELR 224 (Mich. SEA, Oct. 4, 2003). See also Cedar Rapids Comm. School Dist. v. Garret F., 526 U.S. 66 (1999) (holding that "medical services" are not "related services" and setting a bright line test for what constitutes "medical services." The Parents agree that the Board is not required to pay for medical devices prescribed by a physician, but they argue that they obtained the arm from a prosthetist without a prescription and, therefore, it is not a medical device. The evidence is clear that the myoelectric arm is a medical device. The Parents admitted that they had consulted a physician in Boston who specializes in children with orthopedic impairments, not only for recommendations regarding an appropriate prosthetic for J., but also regarding whether she had any bone or other problems that could affect a prosthetic. They also admitted that the prosthetist obtained a prescription from J.'s pediatrician for the arm on their behalf because their health insurance company required it. Dr. Cruz-Zeno's expert testimony that the myoelectric arm is classified as

durable medical equipment, and as such, is a medical device was uncontradicted and persuasive. The Board is not required to pay for this device. In a case where the school district's and the parents' expert witnesses disagreed, the federal court in this district stated that: "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent." A.S. and W.S. v. Trumbull Board of Education, 414 F. Supp. 2d 152 (D.Conn. 2006), citing A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 328 (4th Cir. 2004).

17. The removal of the references to the myoelectric arm from the goals and objectives in December did not mean, as Parents suggested at the hearing, that J. could no longer use her prosthetic in school. While not necessary to accomplish a task in the curriculum, school staff worked with J. to improve her facility with the myoelectric arm because her Parents had chosen this device and wanted her to use it at school. The District is encouraged to continue to accommodate J.'s use of the myoelectric arm at school.

FINAL DECISION AND ORDER:

1. The action of the PPT in revising the Student's June 7, 2007 IEP on December 19, 2007 was appropriate.
2. The Student's primary disability is orthopedic impairment, however, the PPT has the discretion to use the category of developmental delay while the Student is age three to five.
3. At the time of the December 19, 2007 PPT meeting, the Student's myoelectric prosthetic arm was not an AT device as that term is defined by Part B of IDEA because it was not required for the Student to receive a FAPE.
4. The Board is not required to reimburse the Parents for the costs associated with the Student's myoelectric prosthetic arm.