

DEPARTMENT OF EDUCATION

Student v. Board of Education

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Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUES:

1. Is the program offered by the board for the 2008-2009 school year appropriate and does it provide the Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE)? If not;
2. Is a therapeutic day program appropriate and does it provide the Student with FAPE in the LRE?
3. Should the Student receive homebound schooling until a therapeutic day care program is provided?
4. Is the Student entitled to 2 years of compensatory education for the procedural violations that denied the Student FAPE?

SUMMARY:

The Student is now an eighteen year old young person diagnosed with Emotional Disturbance who was deemed eligible for special education and related services by the Board as defined in the Individuals with Disabilities Educational Improvement Act (IDEIA), 20 U.S.C. 1401 et seq. and Connecticut General Statute §10-76a. The Parents filed a complaint stating that the district was not providing an appropriate program, and that the placements recommended by the Board were not appropriate. The Board denied the Parent's request for a change in placement.

PROCEDURAL HISTORY:

This matter was heard as a contested case pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedures Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

The Parents filed for due process on or about February 27, 2009. A hearing officer was appointed on March 5, 2009 and a pre-hearing conference was held on March 17, 2009 and hearing dates were chosen by the parties. On or about April 3, 2009, the parties attended a mediation session in place of a resolution meeting. The session was not successful and they proceeded to a due process hearing.

The hearing commenced on April 8, 2009 and ended on June 26, 2009, lasting a total of 6 sessions. The parties appeared on 4/8/09, 4/24/09, 5/20/09, 5/27/09, 6/10/09 and 6/26/09.

The Parents presented 6 witnesses, 2 of which were Board personnel and the Board presented 6 witnesses in their case. The Parents presented 53 full exhibits and the Board presented 27 full exhibits to this hearing.

On the first day of hearing the Parents filed an Emergency Motion Seeking Interim Relief. The Parents sought two orders from the Hearing Officer: 1) immediate provision of homebound tutoring during the pendency of this hearing; and 2) immediate referral by the Board to the Grace Webb School. The Board was ordered to respond by the close of business on April 20, 2009 and the matter was to be decided at the April 24, 2009 hearing date. The parties asked the hearing officer to take the matter on the papers and agreed to forego any oral arguments. The Parents' Motion was denied in part and granted in part. The Board was ordered to provide 2 hours per day of homebound tutoring and the request for an immediate referral to Grace Webb School was denied. Homebound instruction was ordered during the pendency of the hearing based on Connecticut State Regulation §10-76d-15(b)(2)

The parents on May 15, 2009 filed a Motion for Telephonic Testimony; on May 20, 2009 the Board filed a timely objection to the parents' Motion. The Motion was argued at the May 27, 2009 hearing date. The Motion was granted with the caveat that the Parent provide an affidavit from the witness' supervisor that the witness is an indispensable employee who at this time cannot leave her place of employment to attend a hearing. The telephonic conference did not happen because her employer allowed the witness to come and testify in person.

During the course of the hearing the Student turned 18 and of age to decide issues about the hearing. The Student through her attorney provided the hearing officer with an affidavit authorizing her parents to continue the matter on her behalf and for the attorney who had been chosen by the parents to continue as the attorney of record in this matter and to represent her.

At the close of the evidentiary hearing on June 26, 2009, the parties were given the opportunity to file briefs postmarked July 27, 2009.

The date of the mailing of the Final Order and Decision was extended to September 1, 2009 at the request of the parties in order to accommodate the Post Trial Brief schedule, the obtaining of transcripts and to review the record.

In order to comply with the confidentiality requirements of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g and related regulations at 34 C.F.R. § 99, the following decision uses "Student", "School", "Parent", and titles of school staff members and other witnesses in place of names and other personally identifiable information.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and Bonnie Ann F.v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

FINDINGS OF FACTS:

1. The Student attended the Board's school in the third grade and was retained that year. She was referred for special education by the Board on 3/28/01 for refusing to answer questions, refusing to participate in discussions, talking at a whisper level and reading at the remedial level. During the Student's 2nd year in the 3rd grade she continued to struggle (Parent's Exhibit¹-3, Testimony of Mother).
2. Parents refused to consent to the evaluations because they feared that their daughter would be labeled. No one explained what special education was nor did they attempt to find out why the Parents did not feel comfortable consenting to the evaluations. (Testimony of Mother)
3. The Student had to attend summer school in the sixth grade and again in the seventh grade in order to be promoted to the next grade. (Testimony of Mother)
4. In January 2006, another student attempted to sexually assault the Student. The Student attempted to use her cell phone to call for help but it was taken away from her by the assailant. The Student escaped from the assailant. The assailant was later caught and arrested. The assailant, as part of his probation was issued a no contact order for 4 years. The assailant attends the Board's high school and is scheduled to graduate in 2010. The no contact order expires in 2010. (P-23)
5. The Student was scheduled to attend the Board's high School for the 2006-2007 school year. In order to avoid the Student coming in contact with the Student's assailant, the parents agreed to enroll the Student in an inter-district magnet high school (IDMHS) located in the district. The School is not a typical comprehensive high school. Three of the five days of each week are devoted to project-based learning activities. The projects require significant independent work from students. Students cannot pass from grade to grade without completion of the project-based learning activities, regardless of their academic performance in traditional classroom subjects (Testimony Principal of Inter-District High School, P-14)
6. The Student's attorney requested a PPT meeting to decide if the Student was eligible for special education and related services as described in IDEIA. A PPT was held September 25, 2006 and the PPT agreed to conduct psychological and educational evaluations. The PPT was concerned with the Student's academic and social/emotional issues. (Testimony of Mother, P-14, Board's Exhibit²-3)

¹ Hereafter Parent's Exhibits will be referred to as "P" followed by a exhibit number as reference to the location of the noted information

² Hereafter Board's Exhibits will be referred to as "B" followed by the Exhibit number as reference to the location of the noted information

7. A psychological evaluation of the Student was conducted by the Board's psychologist. The evaluator found that as the session proceeded, the Student became less and less engaged. The Student obtained a Full Scale IQ of 66. This placed her in the borderline range. Due to the lack of participation of the Student during the assessment process, the evaluator felt that it was unlikely that the results of the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV) or the Wood-Cock Johnson Test of Cognitive Abilities, 3rd Edition (WJ-III) would be valid. The evaluator felt that they may, however, be a reflection of the Student's emotional status and how it may affect her within the academic environment." (B-10)

8. The evaluator reported that during the evaluation, the Student "indicated that she had thoughts of wanting to hurt herself on occasion." The Student currently had been diagnosed with Post Traumatic Stress Disorder (PTSD). The evaluator found from the Behavior Assessment System for Children (BASC), Children's Depression Inventory (CDI), Scale for Assessing Emotional Disturbance (SAED) rating scales, that the Student exhibited symptoms of depression, anxiety and her internalized behaviors were found to be clinically significant. The evaluator found that the Student had significantly greater negative feelings than her peers. (B-10)

9. The Student's self report on the Multidimensional Anxiety Scale for Children (hereinafter MASC), indicated she has "significant fears associated with social situations (i.e. performance and humiliation fears) as well as physical symptoms within the at-risk level." The evaluator concluded that "[b]oth the physical discomfort and the anxiety symptoms appear as a recurrent theme to the Student's emotional status. As they are recurrent, they are also to a marked degree from all raters." The evaluator recommended accommodations for the Student but did not state whether the Student met the criteria for special education and related services. The evaluator left the determination to the PPT. (B-10)

10. On or about October 13, 2006, a educational assessment was done of the Student. Before the 2nd and 3rd session of the assessment, the student had incidents which the assessor felt would have an influence on the validity of the test scores. The evaluator concluded that the Student's behavior, including her non-compliance and task avoidance would likely have a negative impact on the Student's academic performance in the classroom. Time components may be somewhat difficult for the Student. Public speaking would be somewhat difficult for the Student. (B-11)

11. On December 6, 2006, the PPT met to review the evaluations. The PPT found that the Student exhibited some qualities of emotional disturbance but was competent in school. The PPT team did not find the Student eligible to receive special education and related services nor did the team recommend the Student for Section 504 of the Rehabilitation Act. The determination was not contested by the Parent or her attorney who did not attend the PPT. (P-18, B-13)

12. The Student attended the IDMHS for the 2006-2007 and 2007-2008 school years. The Student is required to do quarterly exhibitions before their class and describe what the Student has learned. The Parent was not aware that this was a part of the Student's curriculum. The Student had difficulty presenting before her peers and her 1st exhibition was preceded with 25 minutes of crying. The school accommodated the Student by limiting the number of students who observed the presentation. (Testimony of Mother and IDMHS Principal)

13. At IDMHS each student had personalized learning plans. The Student worked 2 days with a mentor on real world learning and 3 days on project learning. The student's projects were based on their interest and passion. (Testimony of Student's Teacher/Advisor at IDMHS)

14. The students at IDMHS had to take business environment workshops to prepare them for the work environment. The Student learned how to act at an interview, shake hands, take the bus and do anything which would assist them to be successful. (Testimony of Learning Through Internship Coordinator (LTIC))

15. As part of the program at IDMHS the students do job shadow internships. The Student was interested in working with children and her 1st internship was at a daycare center for little children. The School was asked to remove the Student from their internship because of an incident where she went to a corner and was not able to communicate with anyone. During her 2nd year at IDMHS, the Student was not able to find an internship for her 1st two trimesters. During the Student's 2nd year at IDMHS, the Student was able to present her exhibitions to her entire class. In the 3rd trimester, the Student's mother helped the Student obtain a 2nd internship in another daycare center. The Student also had a problem there and IDMHS was asked to remove the Student. The Student was asked if she wanted to do another type of internship but she did not want to do anything else. Student wanted to work with newborns and the hospital would not allow it. (Testimony of LTIC, P-42)

16. The Student while at IDMHS interacted with peers and was a member of the softball team. The Student was defiant about doing the school work, but was an avid reader and able to comprehend books and express it through writing. She had potential but did not put in the effort. The Student was given narratives instead of a report card. (Testimony of Student's Teacher/Advisor at IDMHS)

17. The Student had problems with 2 young men. The boys had the principal advise the Student to leave them alone. The Student had male and female friends and interacted with them while at IDMHS. (Testimony of Student's Teacher/Advisor, Testimony of LTIC)

18. Instead of report cards written narratives at the end of each trimester were written and they reflected that the Student was capable of doing the work. The teacher/advisor felt that her learning gaps and inability to make educational progress were due to the Student's defiance. The narratives reflect that the Student did well in the areas she liked. The Student was asked to leave IDMHS at the end of her sophomore year because the Student could not meet expectations of the school. The Student could not be placed at internships and act appropriately. She had not completed enough of the required projects in a satisfactory manner. The Student did not have sufficient points to be promoted to the next grade and was asked in the 2008-2009 school year to repeat her sophomore year. (P-42, Testimony of Student's Teacher/Advisor and IDMHS Principal, P-12)

19. The staff of IDMHS met with the parents concerning the Student's disenrollment from the school. The Student's parents were informed in June 2008 that the Student would need to attend The Board's High School (BHS). The Student had never attended BHS. The Student and the Parents refused this program. The Student's assailant was still attending BHS and the Student was in fear of coming in contact with her assailant; the parents did not request a PPT at this meeting. During the summer the Student ran into her assailant and became hysterical and had flashbacks of the assault. (Testimony of Mother and IDMHS Principal)

20. On or about September 2, 2008, the Student's treating psychiatrist sent a letter to the Board advising them the Student was currently diagnosed with PTSD and Major Depression Disorder stemming from the assault by a male peer. The Doctor advised the Board that this was impacting the Student's ability to perform to her academic potential: exposure to anything that resembled aspects of her past assault may be detrimental to her health. (B-16)

21. On September 8, 2008, the Student's attorney responded to a Board letter agreeing to a PPT that would constitute a new referral, requesting that a PPT be convened, and indicating that the Parents had determined to home school the Student until the PPT and requested evaluations were completed. The Student did not attend BHS for the fall of 2008 school because of her Parents' decision not to send her to school. (B-18 and Testimony of Director of Pupil Services)

22. On 9/6/08, the Parents through their attorney sent a notice of intent for home schooling thereby withdrawing the Student from the Board's school. The withdrawal was noted to be temporary until a hearing was held. On 9/29/09 the Parents reenrolled the Student into the district and requested homebound instruction. The Board denied homebound instruction and offered to return the Student to BHS where the assailant was still in attendance. A teacher offered to send school work home but the Parents refused because the Student was being home schooled.(B-17, B-18, Testimony of Mother, Testimony of Director of Pupil Services)

23. The Board convened a PPT on October 6, 2008 to address the referral. The PPT determined to conduct a psychological evaluation of the Student. The evaluation was conducted in a timely manner. By the dates of the testing for the psychological evaluation, the Student had not attended school for two months due to the Parents' decision not to send the Student to BHS. The Parents requested that the Board provide home tutoring to the Student. The Board did not agree to provide the home tutoring because the Parents had not provided documentation that the Student was unable to attend school due to a medical reason. (B-20, B-22, P-25, P-26 Testimony of Board's Psychologist Intern and Director of Pupil Services)

24. On or about October 28, 2008, the Board received a letter from the Student's treating psychologist advising them that the Student was being treated for Post Traumatic Stress Disorder (PTSD) and depression since the fall of 2006. The Doctor had treated the Student as a result of a suicide intervention in 10/23/06. The Doctor advised the Board that the attendance of the Student at BHS would contain a high risk of encountering her male attacker and exacerbating her symptoms. (B-21, P-16, P-17)

25. The psychological evaluation of the Student ordered by the Board at the request of the Parents was conducted on 10/28/08 and 11/05/08. The Student demonstrated "low levels of motivation and tendencies to give up easily across both test sessions". The Student was given the CDI to assess her current level of depressive symptoms. The results of this test showed that the Student was suffering from depressive symptoms in the very much above average range for girls of similar age. The Student's ratings demonstrated that she experienced a loss of the capacity to experience pleasure and negative self esteem. The evaluator stated that it would be important to monitor the Student's moods closely when she returned to school. The Student's responses showed suicidal ideations but when questioned stated that, "[she] would not do it". She testified that the Student's scores with regard to social and emotional functioning

were similar to those she received in 2006, but in 2006 there were also teacher ratings that were also consistent with the evaluator's findings in 2008. (B-22, Testimony of Board's Psychologist Intern)

26. The Board Psychologist Intern testified that the Student's fluency-working quickly and accurately-was a weakness for her in all areas, her working memory score was 69 which demonstrated an "extreme weakness" and would "require her to have multiple exposure and a lot of review and rehearsal of material to retain information." This score was similar to the score she received in working memory in 2006. She testified that if a student has a working memory issue, it would make retrieving information you heard and answering questions in class difficult. Problem solving would be difficult and the student would need more exposure to information in order to retain it. The Student would need the information reviewed more than a regular education student both within and outside of the classroom and need cues within the classroom. (Testimony of Board's Psychologist Intern, B-22)

27. The Board's special education teacher gave the Student a Wood-Cock Johnson III Test of Achievement as part of her evaluation. The results showed that the Student was having difficulty in writing and mathematics, written language and written expression. Her math calculation skills were very low. The Student's 10th grade CAPT scores showed that her scores were below basic. (Testimony of Board's Psychologist Intern, P-30)

28. The Evaluator created the goals and objectives with regard to social and emotional functioning and planned to meet with the Student thirty minutes a week. She did not speak to her outside counselor or therapist nor did she screen the Student for ADD, ADHD and did not recommend a psychiatric evaluation of the Student. She found her lack of engagement noteworthy. She testified that the Student at a PPT said to the team that she did not want to attend BHS because the student who assaulted her was there. (Testimony of Board's Psychologist Intern)

29. The Student's psychiatrist conducted a psychopharmacology evaluation on or about January 31, 2008. She diagnosed the Student with PTSD, Major Depressive Disorder, ADHD, inattentive type (rule out) and a learning disorder. The Student reported daily loss of energy and interest in activities, feeling of worthlessness and helplessness, initial insomnia, inability to concentrate and focus at school, and episodes of passive suicidal ideation. The Doctor reported that she was endorsing neurovegetative symptoms of depression and presented as looking psychomotorly retarded in both speech and action. In addition to medical and therapeutic recommendations, she stated that additional neuropsychological testing might be warranted to rule out a learning disorder as a contributing factor to her academic difficulty. (Testimony Of Student's Psychiatrist, B-26)

30. When the student was dismissed from IDMHS, the Student was at risk for suicide. She showed signs of haplessness and the doctor had to put a safety plan in place for her. The Doctor wrote a letter to the Board advising them of her diagnosis and that her attendance at BHS where her assailant was attending "may be detrimental to her mental health and future academic functioning." The doctor was of the opinion that the Student's difficulties went back to the 2nd grade. The Doctor recommended a therapeutic educational environment in order to make appropriate academic and social progress. (Testimony Of Student's Psychiatrist, P-52)

31. On 11/20/08 a PPT was held and the Student was found eligible for special education as a child with an Emotional Disturbance. The IEP called for 7.5 hours in a self contained classroom for math and

vocational instruction and a half an hour a week of counseling. The IEP states under Present Levels of Academic Achievement and Functional Performance that the Student's Emotional Disturbance impacts her ability to focus, complete work and participate in classes without social/emotional/behavioral support services. Despite the fact that she scored low in reading, writing and math, her IEP only addresses math, transition and counseling. She would have been in all mainstream classes with the exception of math. There are 18-22 children in mainstream classes. There are approximately 650 students at BHS. ((B-23 Testimony of Board's Psychologist Intern and Director of Pupil Services)

32. The IEP contained 3 social behavior goals and a transition goal. The Parents expressed no disagreement with the IEP's goals and objectives, services, or any other aspect of the IEP with the exception of the location of the delivery of the program.

33. The Student attended the PPT. The mother took the Student to meet her counselor and social worker. The Student was very distressed walking through the school and began to cry and told her mother that she could not go to school with her assailant. (Testimony of Mother)

34. After the November, 2008 PPT, the Student, the Mother, Board's Psychologist Intern and a guidance counselor discussed how the Student could be hand scheduled so as to have no classes with the Student, a different lunch wave, a permanent pass to see a counselor of her choosing whenever she needed to do so. These items were not part of the PPT's discussion because they were regular education interventions, not specially designed instruction or related services. Such interventions had been provided to regular education students at BHS. The Parents were still opposed to the Student attending BHS. (Testimony of Board's Psychologist Intern , Mother and Assistant Principal at BHS)

35. The Student's attack by another student was not shared with the assistant principal at BHS because the Student was not attending BHS. He was not aware that a restraining order had been issued against the Student's assailant. (Testimony of Assistant Principal at BHS)

36. At a PPT held on February 26, 2009, the Parents, through counsel, for the first time requested an outplacement for the Student at Grace Webb School. The Parents never made such a request in the summer of 2008, nor did they make such a request when they rejected the Board's IEP in November, 2008. The sole reason given by the Parents for the outplacement was their claim that the Student could not attend BHS. At this meeting, as at previous meetings, the Father loudly stated that the Student would not attend BHS. The Parents also requested a psychiatric evaluation at this PPT. After a brief recess, the Board agreed to the evaluation. The Parents refused to allow the Student's psychiatric evaluation by the Board's chosen evaluator. A safety plan was not discussed at this PPT. (B-23, B-27, P-40, Testimony of Director of Pupil Services)

37. The Parents are requesting placement at Grace Webb School (GWS) because it's a small school and they feel it would be better equipped to handle some of the problems the Student is facing. The Student has visited the school and she liked it because of the very small classes, the reward system, the involvement of counselors and the fact that she would feel safe there. GWS is a special education facility which provides special education and related services to adolescent students whose emotional issues affect their educational progress. (Testimony of Mother, p-53)

CONCLUSIONS OF LAW:

1. Student has been properly identified as a student eligible for special education and related services by the Board under the category of Emotional Disturbance, as defined in the Individuals with Disabilities Educational Improvement Act (IDEIA), 20 U.S.C. 1401 et seq. and Connecticut General Statute §10-76a.
2. The Board has the burden of proving the appropriateness of the program and placement that they have offered, and this burden must be met by a preponderance of the evidence. R.S.A. §10-76h-14(a); see also, Walczak v. Florida Free Union Sch. Dist., 142 F.2d 119, 122 (2d Cir. 1998). A party seeking a private placement or program must prove the appropriateness of such placement or program by a preponderance of the evidence. R.S.A. §10-76h-14(c).
3. The two pronged standard for determining whether the Board offered the Student an appropriate IEP for the 2008-2009 school year is: first, whether the procedural requirements of IDEA have been met and second whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-07 (1982). "Only if a court determines that a challenged IEP was inadequate should it proceed to the [] question [of the appropriateness of the parents' proposed outplacement." M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed., 226 F.3d 60, 66 (2d Cir. 2000).
4. "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-- (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit." 34 CFR Section 300.513 (a)(2). According to IDEA, a denial of FAPE can be found if the procedural inadequacies of a district "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child", even without a showing of educational harm. 34 C.F.R. §300.513(a)(2). See also W.A. v. Pascarella, 153 F.Supp 2d 144 (D.Conn 2001).
5. The Parents allege various procedural violations from denial of proper input at PPT, denial of record being timely provided and incomplete provision of records. The procedural inadequacies of the Board do not rise to a level that denied the Student FAPE or caused a deprivation of educational benefit.
6. The Parents allege that the Board committed procedural violations by denying the Student homebound instructions when they had provided documentation from the Student's therapist and psychiatrist about the Student's medical condition. Connecticut State Regulations §10-76d-15(b) clearly define the necessary conditions for homebound instruction. Homebound and hospitalized instruction shall be provided only when the planning and placement team finds that one or more of the following conditions applies.
 - (1) A physician has certified in writing that the child is unable to attend school for medical reasons and has stated the expected date the child will be able to return to the school.
 - (2) The child has a handicap so severe that it prevents the child from learning in a school setting, or the child's presence in school endangers the health, safety or welfare of the child or others.

(3) A special education program recommendation is pending and the child was at home at the time of referral.

(4) The child is pregnant or has given birth and a physician has certified that homebound or hospitalized instruction is in the child's best interest and should continue for a specified period of time.

The Parents letter from the treating psychiatrist (B-16) and her therapist (B-21) clearly stated that the Student cannot attend BHS for medical reasons but there is a second prong to §10-76d-15(b)(1) of the homebound instruction requirement and that is the expected date of the Student's return. Homebound is not intended to be an open ended placement on the LRE continuum; to the contrary on the LRE continuum, homebound is more restrictive than instruction received in detention or in the hospital. (34 C.F.R §300.115(b)(1)). The medical letters from the psychiatrist did not state a possible return date. The medical letter needs to be from a physician; therefore the therapist letter did not meet the requirement. The denial of the Parents' request for homebound instruction based on medical reasons is not a procedural violation.

7. The second prong of Rowley requires a finding that the IEP is "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, *supra*, 206-207. The IDEA requires only that school districts provide an 'appropriate' IEP, gauged by whether the IEP is 'sufficient to confer some educational benefit.'" *Id.*, at 200; see also Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1120 (2nd Cir. 1997). An appropriate public education under IDEA is one that is likely to produce progress, not regression. Walczak v. Florida Union Free School District, 27 IDELR 1135 (2d Cir. 1998).
8. IDEA expresses a "strong preference for children with disabilities to be educated, to the maximum extent appropriate together with their non-disabled peers, 20 U.S.C. §1412(5). Only when the 'nature or the severity' of a child's disability is such 'that education in regular classes with supplementary aids and services cannot be achieved satisfactorily' should the child be segregated."Walczak, *supra*.
9. In order to properly plan a program for the Student the nature or severity of the Student's disability needs to be assessed. The process used by the PPT was the performance of evaluations by the psychological intern and the special education teacher. The Board insisted on this being a new referral. (Findings of Facts # 20) The Board should have conducted a more comprehensive evaluation of the Student and tested her in all areas of the IDEA spectrum. There was no testing for ADD, ADHD nor was there a Functional Behavioral Assessment to see if a behavioral intervention plan was necessary to assess the Student's behavioral issues. (Findings of Facts # 16, 17 & 18) The Student was not recommended for a psychiatric evaluation even though she had suicidal ideations, depression and PTSD. (Findings of Facts # 8, 23, 24 & 28)
10. The PPT created an IEP which they felt provided the Student with FAPE. The IEP developed by the PPT did not provide the Student with FAPE. The evaluation of the Student was not complete and did not clearly show testing of all areas in determining the educational needs of the student. (34 C.F.R. §300.301). The Director of Pupil Services testified that a safety plan was not done for the Student when she would attend BHS, where her assailant is a student. The Director testified that a safety plan was not offered at the PPT because a safety plan is a regular education accommodation. Accommodations whether regular or special education is a part of a special education student's IEP

and need to be incorporated in the student's IEP. Preferential seating as well as counseling are given to regular education students but when offered to a special education student they need to be part of the student's IEP so that all school personnel who come in contact with the student are all aware of all parts of the student's program. (34 C.F.R. §300.320 I) In a school with over 600 students, the Board cannot ensure that the Student will not run into her assailant.

11. The Board in the 2006-2007 and 2007-2008 wisely complied and followed the No Child Left Behind (NCLB) Act of 2001 -- Unsafe School Choice Option, where the Board must offer a school attendance choice to (a) an individual student who is the victim of a violent criminal offense on school grounds, (b) students from schools that are identified by the Connecticut State Board of Education as persistently dangerous within the meaning of the NCLB starting with the 2003/2004 school year. **CT DOE Circular Letter C-34 (Series 2002-03) (June 23, 2003)** provides in pertinent part that:
- “...students who are victims of a violent criminal offense on school grounds must be offered, in a timely manner, the opportunity to transfer to a safe public school within their District. The student may elect to remain at his/her original school. If no opportunity exists within [the District, the District] may, but is not required, to seek alternatives for the student in a neighboring district, charter school or magnet school. An alternative must be provided that takes into account the needs and preferences of the affected students and parents.” The Circular Letter states “the state definition of a violent criminal offense has three components, each of which must be met. First, a student or staff suffers bodily injury as a result of intentional, knowing, or reckless acts committed by another person. Second, the police have been notified and a report taken. Third, the factual underpinnings in the police report are sufficient to constitute a crime described in the penal code, Title 53a of the Connecticut General Statutes.” The Student qualified under this Act. A ruling under NCLB is not made in this case; an unsafe school environment could have a detrimental impact on FAPE. *Shore Regional High School Board of Education v. P.S.*, 41 IDELR 234 (3rd Cir. 2004). The student in that case had perceptual disabilities and had been subject to persistent disability-related physical and verbal harassment and social isolation by classmates over a several year period, with the result that the student became depressed and attempted suicide. The LEA was found to have denied him a FAPE when it proposed to place him in a public school environment where he would continue to be subject to the harassment that the LEA had ignored or been unable to successfully address.
12. In this matter there is an outstanding restraining order against the Student's assailant which the Board has not addressed in the Student's IEP nor how it will ensure the Student's physical safety or her perception of danger. The Parents, treating physician, psychologist and the Student have all stated that attendance at BHS would be detrimental to the Student. One half hour a week of counseling and access to a social worker, guidance counselor or school psychologist on request is not sufficient for the trauma this Student has experienced. This environment would not provide a safe placement where the Student could obtain FAPE.

Decision and Order:

1. The program offered by the Board for the 2008-2009 school year was not appropriate.
2. The Board shall convene a PPT within 10 school days of the issuance of this Final Decision and Order. The PPT shall:
 - a. Order and pay for a psychiatric evaluation of the Student by a psychiatrist recommended by the Student's treating psychiatrist.

- b. Order and pay for a Functional Behavioral Analysis of the Student and shall obtain input from the Student's treating Psychiatrist and Psychotherapist.
 - c. The Student is entitled to one year of compensatory education which shall include a summer program. The Student is seeking placement at Grace Webb School but there was not sufficient testimony that the program at this school would provide the Student with FAPE. Therefore as compensatory education the PPT shall place the Student at a therapeutic day program that provides special education and related services for students with emotional disturbance. The school's teachers should be state certified and besides classes in English, science and mathematics the school should also offer vocational courses.
 - d. If at the PPT, the parties cannot decided where the placement of the Student for the compensatory education program should be, the parties will submit a description of the placement and how it will serve the Student in attaining FAPE to the Student's treating psychiatrist and he shall chose the placement that will best meet her needs for the delivery of her IEP.
3. The Board has 25 school days from the issuance of this order to place the Student in the compensatory education program. For any delay after the 25th day of the issuance of this order, the Student shall receive an additional day of compensatory education for each day of delay. Time is of the essence.

COMMENT: I want to commend the attorneys in their presentation of this matter. Considering the issues and the sensitivity of the matter, the attorneys did an excellent job in presenting their case and avoid any perception of insensitivity.