

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Student<sup>1</sup> v. Colchester Board of Education

Appearing on behalf of Student: Attorney Marisa Mascolo  
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Appearing on behalf of the Board: Attorney Anne Littlefield  
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Appearing before: Attorney Janis C. Jerman, Hearing Officer

**FINAL DECISION AND ORDER**

**Procedural Posture**

A special education hearing in the above-captioned matter was requested by Student's Attorney via Letter dated May 26, 2010.<sup>2</sup> It was received by the Board of Education ("BOE") on June 1. The thirty-day resolution period ran through July 1 and the original deadline for mailing the final decision and order was August 14. A pre-hearing conference was held on June 14. Attorney Mascolo appeared on behalf of Student and Attorney Littlefield appeared on behalf of BOE. At the pre-hearing conference, the following issues were identified for hearing:

1. Did the Board of Education provide Student with a free appropriate public education for the 2009-10 school year?
2. Did the Board of Education propose a program to provide Student with a free appropriate public education for the 2010 extended school year?
3. Did the Board of Education propose a program to provide Student with a free appropriate public education for the 2010-11 school year?
4. If the answer to any of the above questions is in the negative, what shall be the remedy?

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<sup>1</sup> In order to comply with the confidentiality requirements of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA") and related regulations at 34 CFR § 99, this decision uses "Student", "Parents", "School" and titles of school staff members and certain other witnesses in place of names and other personally identifiable information. The school district is identified by name, as are district-wide staff whose identity will not reveal the particular school, program, or student.

<sup>2</sup> All dates are 2010 unless otherwise indicated.

5. Is the Board of Education required to reimburse Student's Parents for privately provided social skills training?

The hearing was scheduled to convene on July 14. Via letter dated June 14, BOE's Attorney filed a sufficiency challenge claiming that "[t]he Parent's due process complaint is ... legally insufficient in that it fails to adequately provide a description of the facts relating to the alleged problems." The Hearing Officer found that the request for hearing was not sufficient in that it did not meet the notice requirements pertaining to "the facts relating to the problem." Student was granted leave until July 1 to amend the request for hearing to include facts relating to the problem. The July 14 hearing was cancelled.

Student's Attorney filed a supplemental pleading on June 30. The thirty-day resolution period ran through July 30 and the deadline for mailing the final decision and order was reset to September 13.

A second pre-hearing conference was held on August 2 to clarify the issues in the amended complaint and to discuss hearing dates. Student's Attorney withdrew Issue Five. The parties had difficulty finding six mutually available dates for hearing. The hearing was scheduled to convene on August 23, 26, and 27.

On August 9, BOE's Attorney filed a request for a 30-day extension of the mailing date to permit the parties to schedule additional hearing dates. Student's Attorney agreed to a fourteen day extension of the mailing date. After fully considering the positions and availability of the parties, the request for a 30-day extension of the mailing date was granted. The deadline for mailing the final decision and order was extended until October 13. Additional hearings were scheduled for August 31, and September 2 and 3.

Hearings were held on August 23, 26, 27, 31, and September 2, and 3, as scheduled.<sup>3</sup> The parties were given until September 21 to file post-hearing briefs and proposed findings of fact. On September 10, BOE's Attorney filed a request for an extension of the mailing date to permit the parties time to receive the hearing transcripts prior to the briefing deadline. After fully considering the positions of the parties, the request for an extension of the mailing date and briefing schedule was granted. The deadline to mail the final decision and order was extended to November 12 and the deadline to file post-hearing briefs was extended to October 13.

The parties filed their post-hearing briefs and proposed findings of fact on October 13. On November 1, the Hearing Officer indicated to the parties that she was working on the final decision; that the final decision needed to be sent to the Due Process Unit by November 5 to be processed in time for the mailing date; and that due to a busy hearing schedule and writing three decisions in October, she was not prepared to issue a thorough and complete decision by the current deadline. Via letter dated November 2, the parties jointly requested a seventeen-day extension of the mailing date to permit the Hearing Officer additional time to complete the

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<sup>3</sup> The order of testimony of witnesses, all of whom testified under oath, is listed in Attachment A.

decision. After fully considering the positions of the parties, the request was granted and the deadline for mailing the final decision and order was extended to November 29.

#### Findings of Relevant Fact<sup>4</sup>

1. Student is currently a fourteen-year old who resides with her Parents in Colchester (Testimony of Mother, Father).
2. At all relevant times, Student was identified by BOE as a child with a nonverbal learning disability in need of special education and related services under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et. seq. (“IDEA”) initially under the disability category of Other Health Impaired and later under the category of Autism Spectrum Disorder (Exh. B-2, B-5, B-10). Student has also been identified as having ADHD and a pervasive developmental disorder (Exh. B-11).
3. Student was diagnosed with a seizure disorder at a young age. She was on medication for that condition for several years. Student was also diagnosed with ADHD and, during middle school, was on daily medication to help her focus (Testimony of Father; Exh. B-9).
4. BOE maintains four schools: a pre-kindergarten through grade two school; an intermediate school for grades three through five; a middle school for grades six through eight; and a high school for grades nine through twelve (Testimony of BOE Director of Pupil Services and Special Education Katherine Shaughnessy (“Shaughnessy”). All BOE Middle School students will go on to BOE High School.
5. BOE is a Positive Behavior Interventions and Support (“PBS”) model district (Exh. B-79, B-80; Testimony of Shaughnessy). PBS is a district-wide general education program which focuses on reinforcing positive behavior and decreasing less desirable behaviors. PBS educates students, teachers, staff, and parents about appropriate school behavior. Since implementing PBS, BOE has seen a reduction in office referrals and suspensions (Testimony of Shaughnessy, Middle School Principal).
6. Student has received speech and language therapy from BOE since preschool. Student began attending BOE’s schools in kindergarten where she received occupational therapy and special education services in reading and math (Testimony of Father, Shaughnessy). Student has attended BOE schools and received special education services from BOE throughout her school career.
7. Student attended BOE’s extended school year (“ESY”) program in summer 2007 at the conclusion of her fifth grade year (Exh. B-1).

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<sup>4</sup> Findings of Fact are cited as “FOF” in the discussion section.

8. During the 2007-08 school year, Student was in sixth grade at BOE's Middle School (Exh. B-2). She received 11.25 hours per week of special education services and .75 hours per week of speech and language therapy (Exh. B-4).
9. A duly noticed PPT meeting was held on October 5, 2007 at Parents' request (Exh. B-2). Parents requested that Student's triennial testing be done as soon as possible. Mother signed consent for reevaluation to determine Student's current level of functioning.
10. Middle School Psychologist evaluated Student in October 2007 (Exh. B-6). He administered the Wechsler Intelligence Scale for Children 4<sup>th</sup> Edition, the Woodcock Johnson III Tests of Cognitive Abilities, the Behavioral Assessment System for Children 2<sup>nd</sup> Edition (including the Parent Rating Scale–Child and the Self Report–Child), and the Conner's Teacher Rating Scale–Revised, reviewed records, and performed observations.
11. As a result of his evaluation, Middle School Psychologist determined that Student's full scale IQ score increased ten points since her last evaluation in May 2005, that her verbal comprehension capabilities (low average range) were identical to the last time she was tested, that she showed ten points improvement in perceptual reasoning skills, that her working memory index (average range) improved significantly, and that she showed some improvement with processing speed capabilities. He further determined that Student demonstrated difficulties in the areas of long-term retrieval, fluid reasoning, and processing speed (Exh. B-6).
12. As a result of his evaluation, Middle School Psychologist recommended that the results be reviewed by the PPT and be integrated with the findings of other evaluations, Parent input, and input from the PPT (Exh. B-6).
13. Sixth Grade Special Education Teacher evaluated Student in October and November 2007 (Exh. B-7). He administered the Wechsler Individual Achievement Test 2<sup>nd</sup> Edition. As a result of his evaluation, Sixth Grade Special Education Teacher determined that Student's academic skills are below average to average and that she demonstrates high average to superior decoding skills. As a result of his evaluation, he recommended that the results be reviewed by the PPT to determine if Student is eligible for special education services.
14. Middle School Speech-Language Pathologist evaluated Student in November 2007 (Exh. B-3). She administered the Peabody Picture Vocabulary Test, the Clinical Evaluation of Language Fundamentals test, the Test of Language Competence–Expanded Edition, and the Test of Word Finding–Second Edition.

15. As a result of her evaluation, Middle School Speech-Language Pathologist determined that Student made “tremendous progress” on most language areas since testing was completed almost three years earlier (Exh. B-3). She found that Student’s vocabulary, basic language skills, word finding, and expressive language for sentence formulation were well within average range. She found that Student experienced difficulty explaining ambiguous sentences and following lengthy multi-step directions. Student demonstrated little tolerance for frustration when she did not know an answer.
16. As a result of her evaluation, Middle School Speech-Language Pathologist made the following recommendations: when using figurative expressions or sentences with multiple meaning, teachers should check with Student to make sure she understands the correct meaning for this situation; whenever possible, directions should be written out for Student so she can refer to them as she completes each step; and Student should be reminded to check her work to ensure that she has complied with all parts of the directions and not missed a step (Exh. B-3).
17. Occupational Therapist evaluated Student in November 2007 (Exh. B-4). She administered the Developmental Test of Visual Perceptual Skills (motor subtests only) and the Test of Visual Perceptual Skills, reviewed a handwriting sample, and performed clinical observations.
18. As a result of her evaluation, Occupational Therapist determined that Student had relative weaknesses in visual spatial relations and strengths in overall visual perceptual skills, visual motor integration, and general legibility of handwriting (Exh. B-4). She determined that Student demonstrated normal muscle tone, had adequate upper body and trunk strength as related to fine motor tasks, and that her fine motor functioning was within average limits (Testimony of Occupational Therapist).
19. Occupational Therapist also observed that Student was cooperative and appeared to attempt all tasks to the best of her ability. Occupational Therapist opined that the test results appear to validly reflect Student’s current abilities. As a result of her evaluation, Occupational Therapist recommended that occupational therapy services be determined by the PPT but noted that it appears that Student does not require such services to ensure her success in the classroom (Exh. B-4).
20. A duly noticed PPT meeting was convened on December 7, 2007 to review Student’s evaluations and to determine eligibility for services (Exh. B-5). Parents attended. The PPT determined Student eligible for services under the category of Other Health Impaired,<sup>5</sup> recommended continuing to implement her IEP dated May 7, 2007, added a goal and four accompanying objectives addressing organization skills,

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<sup>5</sup> The evaluation reports dated December 7, 2007 and attached to the IEP indicate that the PPT determined that Student does not have a learning disability and that Student does not meet the eligibility criteria for speech-language disability (Exh. B-5 at 27-30).

and agreed to fund a neuropsychological evaluation. The IEP provided for 13.5 hours of special education and .75 hours of speech and language therapy per week in addition to consultation by teachers and related service providers.

21. Parents requested a neuropsychological examination (Testimony of Shaughnessy). Via letter dated December 18, 2007, Shaughnessy informed Parents that BOE will fund a neuropsychological evaluation and provided the names of three professionals from which Parents could select the evaluator (Exh. B-8). A copy of “Pediatric Neuropsychology: A Guide for Parents” was enclosed with the letter.
22. On January 16, 2008, BOE referred Student to Dr. Joseph Kulas (“Kulas”)<sup>6</sup> for a neuropsychological evaluation at BOE expense (Exh. P-1).
23. On February 8, 2008, at Kulas’ request, Sixth Grade Special Education Teacher completed a questionnaire regarding Student’s current functioning (Exh. P-2).
24. Kulas evaluated Student in February 2008. He administered the Wechsler Abbreviated Scale of Intelligence, the Wechsler Intelligence Scale for Children 4<sup>th</sup> Edition (digit span, coding, and symbol search subtests), the Woodcock Johnson III Tests of Achievement, Children’s Memory Scale, NEPSY-2 (comprehension of instructions, phonological processing, speed of naming, memory for designs, affect recognition, theory of mind, design copying, arrows, and geometric puzzles), Delis-Kaplan Executive Function System, Trail Making Test, Twenty Questions, Color-Word Test, Children’s Category Test, Grooved Peg Board Test, Finger Tip Tapping, Hand Dynamometer, Children’s Depression Inventory, Revised Children’s Manifest Anxiety Scale, Piers-Harris Self Concept Scale 2<sup>nd</sup> Edition, Achenbach Child Behavior Checklist, Scales of Independent Behavior-Revised, Asperger’s Syndrome Diagnostic Scale, BRIEF, and Social Skills Rating System. He also had discussions with Student, Mother, and BOE staff, observed Student, and reviewed records (Exh. B-9).<sup>7</sup>
25. Kulas determined that Student performed at a level consistent with previous testing suggesting relatively stronger developed verbal skills as compared to nonverbal skills. Kulas’ evaluation of Student was consistent with her 2007 evaluations by BOE staff. Kulas stated that, in the absence of a

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<sup>6</sup> Kulas testified on behalf of Student. Student’s Attorney began direct examination with questions regarding Kulas’ education and background. Kulas testified that he received his master and doctoral degrees in clinical psychology from Purdue University in 1997 and 2000, respectively. At the completion of testimony regarding his education and background, the Hearing Officer took a break in the proceedings and asked Kulas to remain outside the hearing room. Outside of his presence, the Hearing Officer indicated to the parties’ attorneys that she held a bachelors degree in psychology from Purdue University, that she reviewed Kulas’ resume (Exh. P-23) to determine that they did not attend the university at the same time, that she did not know Kulas through the university or prior hearings, and that she felt she could serve as impartial hearing officer in this case. The parties’ attorneys indicated that they had no concerns regarding bias of the Hearing Officer. The hearing resumed with the continuation of Kulas’ testimony.

<sup>7</sup> Kulas mistakenly excluded Student’s Woodcock Johnson data summary sheet from the report issued in 2008. The score report was provided to BOE in August 2010 when Student’s exhibits were submitted for hearing (Exh. P-3; Testimony of Kulas).

formal thought disorder, Student “presents with a pervasive developmental disability with a neurocognitive profile consistent with a nonverbal learning disability” (Exh. B-9).

26. Kulas made the following recommendations: that Student undergo a psychological evaluation to distinguish whether her thought processes are suggestive of a formal thought disorder; that, to the extent possible, she be placed on a schedule with rewards for defecating at a certain time, that she maintain a change of clothes at school and be required to change clothes after an accident to reduce negative peer interactions, and that she be responsible for cleaning herself after an accident; additional assistance with mathematics; consideration of stimulant medication to improve ability to focus; modify academic environment to accommodate attention and concentration difficulties; use of concrete and explicit language rather than figurative language; provide outlines to reduce frustration and confusion in class; utilize computerized assistive technology to reduce writing for assignments not assessing her writing competence; implement self-talk strategy to provide structure and self-organization; extension of time limits or shortened assignments to increase ability to complete assignments in required time frame and emphasize accuracy over speed; organizational skills instruction and consistency in daily schedule to predict transitions; social development and social interaction skills made a priority in educational program; Parents to construct play dates with structured activity; direct training in the meaning of nonverbal language; comprehensive behavioral plan aimed at increasing ability to maintain attention and concentration and tolerate frustration; Parents to initiate calming corner to decrease aggressive behaviors; and time-out strategy at home (Exh. B-9).
27. Kulas believed that Student required opportunities to learn social skills in a safe environment and to practice those skills in naturalistic settings (Testimony of Kulas). Kulas also indicated that Student evidences weaknesses in motor functioning “that may suggest the need for ongoing occupational therapy services.” (Exh. B-9 at 9).
28. Student took the Connecticut Mastery Test (“CMT”) in March 2008 (Exh. B-13). Student scored below basic in math, basic in reading, and proficient in writing.
29. Parents arranged for a psychological evaluation by Dr. Allen Carter (“Carter”) as recommended by Kulas (Exh. B-11). Carter evaluated Student in March and April 2008. He administered the BASC-2, Rorschach, TAT, Sentence Completion, Figure Drawings, Depression Inventory, Psychological interview, and Object-Fantasy Test, and performed a record review. Carter determined that Student demonstrates some of the features of a formal thought disorder and depends heavily on her fantasy life but found no evidence of active psychosis.

30. A duly noticed PPT meeting was convened on April 4, 2008 to review Kulas' evaluation and revise the IEP (Exh. B-10). Parents attended. The PPT determined that Student was a student eligible for special education and related services as a child with Autism Spectrum Disorder.<sup>8</sup> Student's IEP was revised to include social language skills group, scheduled visits to the nurse to address hygiene issues, and observation and consultation by Occupational Therapist regarding hygiene and motor skills. The PPT agreed with and implemented most of Kulas' recommendations (Testimony of Middle School Speech-Language Pathologist). Mother reported to the PPT that Student's psychological evaluation found no formal thought disorder. The PPT did not refuse any requests made by Parents (Testimony of Shaughnessy, Mother).
31. Middle School Speech-Language Pathologist and Middle School Social Worker run the social language skills group at BOE Middle School (Testimony of Middle School Speech-Language Pathologist). The group consists of five to eight students and is made up of boys and girls both with and without disabilities. The group addresses issues such as self-advocacy, hygiene, bullying, friendship-building, communication, and body language. The social language skills group provides opportunities for role-modeling and takes advantage of the fact that students care what peers think about them (Testimony of Middle School Social Worker).
32. A girls-only section of the social language skills group addressed hygiene issues such as taking care of your body, proper showering techniques, and brushing hair and putting it in a pony tail.
33. Student has toileting issues as a result of not wiping herself properly (Testimony of Mother). Student was referred to Middle School Nurse seven times during the 2007-08 school year due to toileting issues (Exh. P-20). After the second incident, in December 2007, Middle School Nurse called Mother to tell her of the incidents and to discuss a plan. A plan was developed where Student would have a change of clothes and wipes to use (Testimony of Mother, Middle School Nurse). If Student was not able to clean up adequately at school, she would be sent home per BOE policy (Testimony of Middle School Nurse). The plan was communicated to Middle School Guidance Counselor and Student's teachers. Middle School Nurse and Student's teachers agreed that the plan should include a specific time of day that Student could use the restroom in the nurse's office.
34. A duly noticed PPT meeting was convened on June 16, 2008 to review or revise Student's IEP and conduct an annual review (Exh. B-12). Parents attended. The PPT noted that Student was passing all of her courses but that homework completion remains inconsistent. The IEP proposed for the 2008-09

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<sup>8</sup> Student's eligibility category was changed from Other Health Impaired.



(seventh grade) school year provided for inclusion English, inclusion math, IEP reading for the first semester, inclusion reading for the second semester, inclusion workshop, social language skills group services,<sup>9</sup> and occupational therapy. Parents requested special transportation due to concerns about Student's welfare. Parents' request was granted. Student was granted an accommodation to time and setting for the math and science portion of the CMT.

35. Parents did not communicate any inaccuracies or express disagreement with the IEP documents (Testimony of Mother).
36. Student passed all of her sixth grade courses, with grades ranging from A+ to C (Exh. B-14).
37. BOE issued Student's sixth grade progress report as of June 19, 2008 (Exh. B-15). Student made limited progress on goals one, six, and eight;<sup>10</sup> and made satisfactory progress on goals two, three, four, five, seven, and nine.<sup>11</sup>
38. Parents did not write, e-mail, call, or meet with Middle School Principal during Student's sixth grade year (Testimony of Middle School Principal). Parents made no complaints of bullying or teasing during Student's sixth grade year.
39. Student attended BOE's ESY program in 2008 (Exh. B-16). Student had a successful program in math and reading but was reluctant to ask for help.
40. During the 2008-09 school year, Student was in seventh grade at BOE's Middle School (Exh. B-12). She received 16.5 hours per week of special education, .75 hours social language skills group, .75 hours speech and language therapy, .75 hours occupational therapy, and 3.75 hours reading instruction for a semester. In 2008-09, the social language skills group worked on friendship skills, verbal and non-verbal skills, frustration tolerance, reciprocity in conversation, and hygiene (Testimony of Middle School Social Worker).
41. A duly noticed PPT meeting was convened on October 15, 2008 at Parents' request (Exh. B-17). Parents attended. Goals two and three (related to writing and reading) were eliminated at the PPT's

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<sup>9</sup> Middle School Social Worker testified that she saw improvements in Student's hygiene as a result of the class in 2007-08. She recommended that Student continue in the group since she just started in April and needs more time addressing certain issues.

<sup>10</sup> Goal one states: Student will demonstrate appropriate classroom behaviors; goal six states: Student will model, explain and develop reasonable proficiency with math skills as specified in grade six math curriculum; and goal eight states: demonstrate improvement in social skills.

<sup>11</sup> Goal two states: Student will apply convention of English language as specified in grade six reading and language arts curriculum; goal three states: Student will describe, interpret, reflect on, analyze and evaluate text on her instructional reading level as specified in grade six reading and language arts curriculum; goal four states: Student will produce written and visual texts to express, develop and substantiate ideas and experiences as specified in grade six reading and language arts curriculum; goal five states: Student will use appropriate strategies before, during, and after reading in order to construct meaning as specified in grade six reading and language arts curriculum; goal seven states: demonstrate an improvement in organization, study skills and learning strategies necessary to progress toward achieving the learning standards.

- recommendation. Goal one (appropriate classroom behaviors) was reclassified from being an academic/cognitive goal to being a social/behavioral goal. The IEP indicates that Parents are supportive of the program. BOE did not refuse any of Parents' requests at the meeting (Testimony of Mother).
42. On December 23, 2008, Parents agreed to change the IEP without convening a PPT meeting in order to provide for an accommodation to time and setting for the reading portion of the CMT under the Modified Assessment System (Exh. B-18).
43. On February 11, 2009, a duly noticed PPT meeting was convened at Parents' request (Exh. B-19). Mother attended. No changes were made to Student's IEP. The IEP indicates that Mother is supportive of the program.
44. Student took the CMT in March 2009 (Exh. B-21). Student scored at basic level in math. A scaled score in writing was not available because Student was absent for one or more of the writing sessions.
45. Student participated in social language skills group in seventh grade (2008-09). The group was again co-taught by Middle School Speech-Language Pathologist and Middle School Social Worker. The group addressed bullying, including the definition of bullying, how to fill out a bullying report, and how to file a report anonymously; friendship skills; non-verbal communication; and frustration tolerance (Testimony of Middle School Speech-Language Pathologist, Middle School Social Worker).
46. On June 8, 2009, a duly noticed PPT meeting was convened to conduct Student's annual review (Exh. B-20). Parents attended. Student's 2009-10 (eighth grade) IEP was planned. Student was granted an accommodation to time and setting for the math, science, and reading portions of the CMT. Direct occupational therapy services were discontinued in exchange for consultative services. Occupational Therapist recommended the change in service because Student mastered her occupational therapy goal and was demonstrating functional skills across multiple settings (Testimony of Occupational Therapist). No other changes were made to Student's IEP. The IEP indicates that Parents are supportive of the program. Parents did not contact the PPT to indicate that they were not supportive of the program (Testimony of Mother, Father). Parents did not make any requests that were refused by the PPT. Occupational Therapist made suggestions for Parents to implement at home to address Student's hygiene issues.
47. BOE issued Student's seventh grade progress report as of June 15, 2009 (Exh. B-22). Student mastered goal seven<sup>12</sup> and made satisfactory progress on all other goals.<sup>13</sup> Father did not contact Student's

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<sup>12</sup> Goal seven states: Student will demonstrate improvement in activities which require fine motor coordination and manipulation of classroom materials and equipment needed to participate in educational activities.

- teachers or related service providers to discuss the progress report (Testimony of Father). Student's hygiene improved significantly (Testimony of Middle School Social Worker).
48. Student's final grades for her seventh grade year ranged from A- to D+ (Exh. B-23). Parents did not contact Student's teachers to ask questions about Student's grades or progress (Testimony of Father).
49. Student was referred to Middle School Nurse one time during the 2008-09 school year due to toileting issues (Exh. P-20). Parents did not contact Middle School Nurse during the school year to discuss or express concerns about Student's hygiene issues (Testimony of Middle School Nurse).
50. Parents did not write, e-mail, call, or meet with Middle School Principal during Student's seventh grade year (Testimony of Middle School Principal). Parents made no complaints of bullying or teasing during Student's seventh grade year.
51. Parents did not contact Shaughnessy during Student's seventh grade year to discuss or report any problems, teasing, or bullying (Testimony of Shaughnessy).
52. Student attended a 2009 summer residential program at Franklin Academy, a private school for students with nonverbal learning differences and Asperger's syndrome accredited by the New England Association of Schools and Colleges (Exh. P-4, P-8; Testimony of Mother, Franklin Academy Educational Director, Seymore Hays ("Hays")).
53. During the 2009-10 school year, Student was in eighth grade at BOE's Middle School (Exh. B-20; Testimony of Shaughnessy, Father). She received 14.25 hours per week of special education, .75 hours speech and language therapy, and .75 hours per week social language skills group. Student also received occupational therapy consultation as needed to ensure continued success in activities of daily living and written communication.
54. On February 24, Parents agreed to change the IEP without convening a PPT meeting in order to reflect that Student will not be taking the CMT Modified Assessment System for math or reading and that Student will have the standard accommodation of time and setting for the math and science portions of the CMT (Exh. B-24).
55. Student took the CMT in March 2010 (Exh. B-37). Student scored at the basic level in math and writing and below basic in science and reading.

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<sup>13</sup> Goal one states: Student will produce written and visual texts to express, develop and substantiate ideas and experiences as specified in grade seven language arts curriculum; goal two states: Student will use appropriate strategies before, during and after reading in order to construct meaning as specified in grade seven reading curriculum; goal three states: demonstrate improvement in math concepts, reasoning and computation necessary to develop problem-solving skills and to utilize math to address everyday problems; goal four states: demonstrate an improvement in organization, study skills, and learning strategies necessary to progress toward achieving the learning standards; goal five states: Student will demonstrate appropriate classroom behaviors; and goal six states: demonstrate improvement in social skills.

56. On March 12, Student's Attorney wrote to Shaughnessy and indicated, *inter alia*, that Student was repeatedly bullied by students in history and science classes (Exh. B-25). Middle School Principal received no previous reports of bullying relating to Student (Testimony of Middle School Principal).
57. Shaughnessy and Middle School Principal initiated an immediate investigation into the allegations (Testimony of Middle School Principal, Shaughnessy). Student's service providers were questioned about the incident and their knowledge of any bullying. None of Student's service providers had any knowledge of any bullying and were shocked by the allegation.
58. Eighth Grade Special Education Teacher spoke with Student to make sure that she felt safe and knew that she could talk to any of her service providers. She also notified the classroom paraprofessional of the situation so that she could watch for any issues or concerns in class (Testimony of Eighth Grade Special Education Teacher).
59. Middle School Social Worker spoke with Student about the allegations of bullying to make sure she felt safe and supported (Testimony of Middle School Social Worker). Student did not seem overly concerned and was "matter-of-fact" about the situation.
60. On April 9, BOE's Attorney sent Student's Attorney an investigation report relative to the complaint of bullying (Exh. B-27). The report indicates that, after much coaxing, Student told Shaughnessy that, since December 2009, two boys were poking her and telling her to be quiet and to stop being annoying; that Shaughnessy spoke with the two boys; that Student's teacher will make a seat change so that Student and the boys are not seated near one another; that Student's teachers were never approached by Student or Parents regarding bullying; and that BOE staff did not observe any inappropriate actions between Student and the boys. Additionally, Middle School Principal spoke with the two boys (Testimony of Middle School Principal).
61. Guidance Counselor spoke with Parents on the phone to discuss the investigation (Testimony of Middle School Principal).
62. In early April, Student reported to a teacher that she was having a problem with a male classmate who called her an inappropriate name in science class. The teacher reported the incident to Middle School Principal who immediately investigated the incident and disciplined the male classmate (Exh. B-29; Testimony of Middle School Principal). Middle School Principal prepared a report which indicated Student's complaint and that she indicated that the classmate always picks on her when she talks in class. The report indicated that Student previously filed a bullying report about the same classmate on March 17. Student wanted the classmate to be spoken to but did not want either him or her to be moved

- to another class. The report indicated that the conversation took place when Student interrupted a conversation to which she was not invited. The report concluded that the conduct was not bullying according to state guidelines. Middle School Principal testified that the conduct was inappropriate.
63. After this incident, the social language skills group discussed bullying issues, in particular, this issue without identifying Student. They discussed whether the behavior constituted bullying, how to respond to it, and who to report it to (Testimony of Middle School Social Worker, Middle School Speech-Language Pathologist).
64. Middle School Social Worker discussed the incident directly with Student (Testimony of Middle School Social Worker).
65. On April 14, Student's Attorney wrote to BOE's Attorney indicating that the bullying behavior of one of the boys escalated and made reference to the above incident. The letter alleged that Middle School Assistant Principal was aware of the incident and asked if an investigation was completed and how BOE plans to remedy the situation (Exh. B-28).
66. Student's Attorney's April 14 letter also relayed to BOE's Attorney a report from Dr. James Loomis ("Loomis"), Student's private social skills provider (Exh. B-28 at 2-3). Loomis' report indicated that Student participated in eleven social skills group training sessions beginning December 17, 2009. He indicated that Student's behavior is consistent with high functioning autism spectrum disorder and nonverbal learning disability. He further indicated that she demonstrates good social motivation but has great difficulty with turn-taking and reciprocal communication. He further indicated that she has trouble making effective social bids to others and makes comments to the group at large or to the facilitator instead. He recommended that an aggressive social skills training program be part of Student's IEP. He commented that Student requires social skills training, "ideally in a group format with other students with social disabilities, although individual instruction would also be effective." He also recommended that her program include opportunities to socially participate and generalize the skills she is learning. The report states "The research literature is very clear that without active generalization of skills, individuals with Autism have great difficulty in maintaining and applying what they learn in social skills training interventions."
67. Prior to receipt of the letter, BOE was not aware that Student was receiving private social skills training (Testimony of Shaughnessy, Middle School Social Worker, Middle School Speech-Language Pathologist). Prior to securing private social skills training for Student, Parents did not request additional social skills training from BOE (Testimony of Mother, Shaughnessy). Parents did not

provide Loomis with Student's school records or authorize Loomis to contact BOE (Testimony of Father).

68. On April 21, BOE's Attorney wrote to Student's Attorney relaying the Report of Suspected Bullying Behaviors regarding the April incident (Exh. B-29).
69. BOE has a policy on bullying and hazing that includes prevention and intervention strategies and a complaint process (Exh. B-30, B-79). Parents can access the bullying prevention policies on-line (Testimony of Middle School Principal).
70. Middle School Principal records allegations or incidents of bullying and makes a notation if necessary to keep students in separate classes (Exh. B-85; Testimony of Middle School Principal).
71. By way of letter from Student's Attorney to BOE's Attorney dated May 5, Parents notified BOE that they intended to place Student at Franklin Academy for 2010 ESY and the 2010-11 school year. Parents requested transportation and full funding for the placement from BOE (Exh. B-31). Parents did not previously raise the issue of private placement at a PPT meeting or directly to BOE (Testimony of Mother).
72. On May 7, Student's Attorney sent BOE's Attorney information about Franklin Academy (Exh. P-8). The information was general information and was not individualized to be specific to Student (Testimony of Hays).
73. On May 13, BOE administered the STAR test to Student. The STAR test is a research-based online assessment that tests reading and math skills (Testimony of Eighth Grade Special Education Teacher). As students take the online assessment, the computer adjusts the questions based on the student's responses. STAR report scores reflect a student's percentile rank against a national group of the student's grade-level peers (Testimony of Shaughnessy). STAR report scores are posted securely online for parents to access (Testimony of Eighth Grade Special Education Teacher).
74. Student's May 13 STAR score in math placed her in the 48<sup>th</sup> percentile nationally and reflects performance comparable to an average eighth grader after the fifth month of school. Student's May 13 STAR score in reading placed her in the 66<sup>th</sup> percentile nationally and reflects performance comparable to an average twelfth grader after the second month of school (Exh. B-57).
75. On May 20, a duly noticed PPT meeting was convened to discuss Parents' request for private placement (Exh. B-32). Father attended. Student's teachers updated the PPT on her progress. The PPT asked Father to share his concerns and the reason Parents seek to place Student at Franklin Academy. Father indicated that Student had been bullied in school over the past eight years, that kids in public

school don't accept Student's differences, that public school is not the best environment for Student, and that Parents worry that high school will be worse than middle school for Student. Father declined Shaughnessy's offer to visit BOE High School, meet the teachers, and sit in on a class.

76. The PPT members were shocked by Father's statement that Student had been bullied for eight years. They had not observed any such bullying (Testimony of Middle School Social Worker, Middle School Speech-Language Pathologist). Father cited only one incident that allegedly occurred on the bus in 2008 and which prompted Parents to request special transportation, which was granted and continued through Student's middle school years.
77. At the PPT meeting, Middle School Social Worker reviewed Loomis' report and recommendations and requested written permission from Father to speak with Loomis. Father indicated that he would discuss the request with Loomis and get back to the PPT (Exh. B-32). The PPT agreed to meet on June 8 for Student's annual review and to address Parents' request for private placement and transportation.
78. Via letter dated May 26, Student's Attorney filed Parents' request for due process hearing, prior to the PPT's final consideration of the request for private placement and prior to the development of Student's 2010-11 IEP (Exh. HO-1).
79. On May 27, Father wrote to Shaughnessy to make clarifications and comments to the May 20 PPT meeting documentation (Exh. P-10). Father indicated that he was first informed of the June 8 PPT meeting at the May 20 meeting and was surprised by it, he disagreed with the prior written notice which indicates that no other options were considered and rejected and stated that he did ask for several things which are reflected on page two of the IEP, asked what "implement IEP" means since no specifics were discussed regarding Student's IEP at BOE High School, and indicated that he spoke with Loomis and signed a consent form permitting transfer of confidential information.
80. BOE staff did not contact Loomis to discuss his report until after the due process hearing was convened in August. At that time, Loomis informed BOE staff that Parents had withdrawn consent for him to talk to BOE (Testimony of High School Social Worker).
81. On June 2, Shaughnessy wrote to Father responding to his May 27 letter (Exh. P-11). Shaughnessy indicated that they will discuss his letter further at the June 8 PPT meeting, that a specific IEP was not discussed because it will be developed at the June 8 PPT meeting, that the PPT will consider Parents' request for private placement at that time, and that "implement IEP" refers to Student's IEP for the remainder of the 2009-10 school year.

82. A duly noticed PPT meeting was convened on June 8 to conduct Student's annual review (Exh. B-33, P-9, P-12). Father attended. The PPT reviewed Student's progress to date, discussed courses that Student requested for the 2010-11 school year and Student's hygiene issue, planned additional transition opportunities and the ESY program, and reviewed Parents' request for private placement. The PPT provided Father with a list of high school activities that Student could participate in (Exh. P-13). The PPT determined that BOE's High School was the least restrictive environment for Student and that the IEP offered was appropriate (Exh. B-33).
83. BOE offered Student a 2010 ESY program in the form of four hours of language arts instruction, four hours of math instruction, one hour of social skills instruction, and three hours of academic support (Exh. B-33 at 21-22). Father rejected the ESY program as inappropriate based on BOE's previous indications that Student would be out of place because the other ESY students were more disabled. Father indicated an intention to place Student at Franklin Academy for the summer. BOE refused Father's request for ESY services at Franklin Academy (Testimony of Father). Parents had already made arrangements for Student to attend Franklin Academy at the time that BOE offered 2010 ESY services.
84. On June 11, as part of her transition plan, Student visited BOE High School. She shadowed a high school student and observed classes (Exh. B-34).
85. Student was referred to Middle School Nurse twice during the 2009-10 school year due to toileting issues (Exh. P-20). This includes a time in the spring when Mother was called to pick up Student at school (Testimony of Mother) and a time in June when Eighth Grade Special Education Teacher smelled fecal matter and referred Student to the School Nurse. Student said "I know, I know" and went to the School Nurse and then returned to class (Testimony of Eighth Grade Special Education Teacher).
86. On June 17, BOE issued Student's eighth grade progress report as of June 14 (Exh. B-36). Student mastered goal three<sup>14</sup> and made satisfactory progress on goals one, two, four, and five.<sup>15</sup> Father did not contact Student's teachers or related service providers to discuss the progress report (Testimony of Father).
87. Student's final grades for her eighth grade year ranged from A+ to C+ (Exh. B-39).

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<sup>14</sup> Goal three states: Student will demonstrate improvement in mathematical concepts, reasoning and computation necessary to develop problem-solving skills.

<sup>15</sup> Goal one states: Student will improve her written language skills as specified in grade eight language arts curriculum; goal two states: Student will increase her comprehension skills as specified in grade eight reading curriculum; goal four states: Student will demonstrate improvement in organization, study skills and learning strategies necessary to progress in grade eight; and goal five states: demonstrate an increase in age appropriate social skills.



88. In 2009-10, BOE introduced PowerSchool to ensure parents are informed regularly of their children's progress. Parents were notified about the program and provided tutorials at the fall 2009 Middle School open house (Testimony of Middle School Principal). Student's grades and school assignments were available online through PowerSchool (Exh. B-77, B-78, B-81, B-82). Parents did not access Student's PowerSchool record during the 2009-10 school year (Exh. B-84; Testimony of Mother). Student accessed her PowerSchool record on February 9.
89. During the 2009-10 school year, BOE provided transition and parent participation opportunities in preparation for middle school students transitioning to high school (Exh. B-35). BOE added two events specifically for Student (Testimony of Shaughnessy).
90. Parents did not contact Shaughnessy directly during the 2009-10 school year to discuss or report any problems, teasing, or bullying (Testimony of Shaughnessy).
91. Student attended Franklin Academy's 2010 summer program (Exh. P-22).
92. On July 2, Father wrote to Shaughnessy to make clarification and comments to the June 8 IEP (Exh. P-17, B-38). Father indicated that he did not agree that all of Student's behaviors are typical 13-year old behaviors and cited her toileting issues and problems interacting with peers; expressed disappointment in lack of transition planning; disagreed that Student made appropriate progress and requested supporting data; acknowledged that a summer program was offered but not explained; and expressed concern that the program is not set up to teach Student practical life skills while simultaneously teaching academic skills. Father enclosed a signed consent for a triennial reevaluation which will be conducted by December 7 (Exh. P-17, B-33).
93. On July 7, Shaughnessy sent Parents a revised IEP that corrected an error in the math section of the present levels of academic achievement and functional performance portion of the IEP (Exh. P-18).
94. On July 8, Shaughnessy wrote to Father to address his July 2 letter (Exh. P-19). Shaughnessy indicated that the statement about typical 13-year old behavior was actually Father's statement and was accurately documented; that Father did not express disappointment about lack of transition planning, that he inquired about it, and the PPT brainstormed specific activities for Student; that Student made progress as described in the present levels of academic achievement and functional performance portion of the IEP, her grades, progress monitoring data, and in work sent home to Parents; that the PPT proposed an ESY program for Student and that Father indicated in response that he had already enrolled Student in Franklin Academy for the summer; that Student's IEP includes practical skill development in social skills instruction; and that the PPT would be happy to reconvene if Father

believes that additional goals and objectives are required. Shaughnessy indicated that she would not amend the IEP because she believed it to be accurate but that she would include Father's letter with the IEP materials. Shaughnessy enclosed a notice of Parents' rights under FERPA.

95. On July 12, Kulas conducted an evaluation of Student at Parents' request (Exh. P-21; Testimony of Father). He administered the Wechsler Intelligence Scale for Children 4<sup>th</sup> Edition, the Woodcock Johnson III Test of Achievement, California Verbal Learning Test—Children's Version, Rey Complex Figure Test, NEPSY-2 (comprehension of instructions, phonological processing, word generation, speed naming, affect recognition, theory of mind, design copying, arrows, geometric puzzles, and inhibition), Children's Category Test, Trail Making Test, TOMM, Grooved Peg Board Test, Finger Oscillation, Hand Dynamometer, Children's Depression Inventory, Revised Children's Manifest Anxiety Scale, Piers-Harris Self Concept Scale 2<sup>nd</sup> Edition, Achenbach Child Behavior Checklist, Scales of Independent Behavior-Revised, Autism Diagnostic Observation Schedule, and Gilliam Autism Rating Scale 2<sup>nd</sup> Edition.
96. On August 13, Kulas sent Student's Attorney a report indicating test results but did not include any summary information (Exh. P-21; Testimony of Kulas). Parents retained Kulas to evaluate Student and provide Parents with a report to confirm Student's progress. The report was not intended for BOE (Testimony of Father).
97. Parents initially told BOE that Student would attend Franklin Academy in 2010-11. In July 2010, Parents made the decision to have Student attend BOE High School instead of Franklin Academy. They did not tell BOE that they changed their mind (Testimony of Mother). As of August 23, Parents had not contacted BOE to discuss Student's 2010-11 program. As of August 26, Hays believed that Student was admitted to Franklin Academy for 2010-11 (Testimony of Hays). BOE High School orientation was scheduled for August 30 (Testimony of Mother).
98. BOE developed a hygiene plan for Student for the 2010-11 school year (Exh. B-87).
99. On September 1, Student began attending ninth grade at BOE's High School (Testimony of High School Social Worker). She is receiving 13.5 hours per week of special education, 1.5 hours of social language skills group, and consultation with teachers and related service providers including High School Social Worker, High School Speech-Language Pathologist, and High School Nurse (Exh. B-33).
100. High School Speech-Language Pathologist and High School Social Worker run the social language skills group at BOE High School (Testimony of High School Social Worker). The group addresses

issues such as organizational skills, self-advocacy, social communication, how to join conversations and stay on topic, how to deal with problems, teasing, bullying, and self-care.

101. Parents received a copy of the procedural safeguards prior to each PPT meeting. (Exh. B-5, B-10, B-12, B-17, B-20, B-32, P-9; Testimony of Mother).
102. BOE has a form to allow Parents to notify BOE of any special needs or requests (Exh. B-85). Parents did not make any requests or indicate any concerns about Student's class assignments in seventh, eighth, or ninth grade (Testimony of Father).
103. Parents did not attend school open houses, feeling that there was no need to go since they go to PPT meetings (Testimony of Mother). Mother testified that she had concerns about Student's program but did not go to the open house to raise them. Parents did not attend parent conferences during Student's eighth grade year (Testimony of Mother, Father). Mother testified that they did not have a reason to go.
104. Parents never filed a written bullying report (Testimony of Father, Mother, Shaughnessy, Middle School Principal).
105. Parents never contacted Middle School Principal during Student's sixth (2007-08) or seventh (2008-09) grade year (Testimony of School Principal).
106. Parents never contacted Middle School Social Worker about bullying or with questions about Student's program (Testimony of Middle School Social Worker, Mother). Middle School Social Worker never saw Student being bullied or teased in school. Student never reported bullying to Middle School Social Worker.
107. Parents never contacted Eighth Grade Special Education Teacher about teasing, bullying, Student's progress, or negative peer interactions (Testimony of Eighth Grade Special Education Teacher, Mother). Eighth Grade Special Education Teacher never saw Student being bullied or teased in school. Student never reported to Eighth Grade Special Education Teacher that she was being bullied or teased.
108. Parents never contacted Eighth Grade Math Teacher about bullying or with questions about Student's program (Testimony of Eighth Grade Math Teacher, Mother). Eighth Grade Math Teacher never saw any negative peer interactions involving Student.
109. Parents never contacted Occupational Therapist about bullying, with concerns about Student's program, or reported suicidal ideations by Student (Testimony of Occupational Therapist, Mother).
110. Parents never contacted Middle School Nurse about any concerns during Student's seventh or eighth grade years (Testimony of Middle School Nurse).

111. Parents never contacted Middle School Speech-Language Pathologist about bullying or teasing (Testimony of Middle School Speech-Language Pathologist, Mother). Middle School Speech-Language Pathologist never saw Student being bullied or teased.
112. No staff members observed or raised any concerns with Middle School Principal about bullying or teasing of Student (Middle School Principal).
113. Mother never contacted Student's teacher to request additional progress reports or to ask questions about the reports received because the reports were "self-explanatory." (Testimony of Mother).
114. Father never contacted Student's teachers or service providers outside of PPT meetings to discuss Student's progress (Testimony of Father).

### Conclusions of Law

1. Parents, as the party who filed for due process, have the burden of going forward with the evidence. Connecticut Agency Regulations § 10-76h-14(a).
2. BOE has the burden of proving the appropriateness of the child's program or placement by a preponderance of the evidence. Connecticut Agency Regulations § 10-76h-14(a).
3. Student qualifies for, and is entitled to receive, a free appropriate public education ("FAPE") with special education and related services under the provisions of state and federal law. 20 U.S.C. § 1401, *et seq.*; Connecticut General Statutes § 10-76a, *et seq.*
4. The standard for determining whether FAPE has been provided is a two-pronged inquiry: 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 (1982).
5. 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 (2d Cir. 1997).
6. An appropriate public education under IDEA is one that is "likely to produce progress, not regression." Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998). The IDEA does not require that the school district provide the best available educational program or one that maximizes a student's educational potential. Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997).
7. Factors to be considered in determining whether an IEP is reasonably calculated to provide a meaningful educational benefit is whether the proposed program is individualized on the basis of the student's

- assessment and performance and whether it is administered in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A); 34 CFR § 300.114(a); A.S. v. Board of Education of West Hartford, 35 IDELR 179 (D. Conn. 2001), *aff'd*, 47 Fed. Appx. 615 (2d Cir. 2002); M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ., 122 F.Supp.2d 289, 292 n.6 (D.Conn. 2000).
8. The proposed program or placement must be reviewed in light of the information available to the PPT at the time the IEPs were developed. B. L. v. New Britain Bd. of Educ., 394 F. Supp. 2d 522, 537 (D. Conn. 2005).
  9. A student may be denied FAPE if bullying or harassment is “severe and prolonged” and if the district is “deliberately indifferent” to the conduct such that the student can derive no benefit from the services offered by the school district. M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 650-51 (9th Cir. 2005).
  10. Where parents allege a procedural violation under the IDEA, a Hearing Officer may find a denial of FAPE if the violation 1) impeded the child's right to FAPE; 2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE; or 3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E); 34 CFR § 300.513(a); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2001 (2007).
  11. If a school district fails in its obligation to provide FAPE, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. School Committee of the Town of Burlington v. Dept. of Educ., 471 U.S. 359, 370 (1985); M.S. ex rel. S.S. v. Bd. of Educ., 231 F.3d 96, 102 (2d Cir. 2000).
  12. Parents are entitled to reimbursement of private school tuition if the public school’s proposed IEP was not reasonably calculated to enable the child to receive educational benefits, the private schooling obtained by the parents is appropriate to the child’s needs, and equitable considerations support the parents’ claim. 20 U.S.C. § 1412(a)(10)(C)(ii); Florence County School District v. Carter, 510 U.S. 7, 15 (1993); T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 417 (2d Cir. 2009). If it is determined that BOE offered Student FAPE, the question as to the appropriateness of the private placement is not reached. 34 CFR § 300.403; Connecticut Agency Regulations § 10-76h-14(b).
  13. A school district must convene a PPT meeting to determine whether ESY services are necessary to the provision of FAPE. 34 CFR § 300.106.
  14. “It is well established that ‘equitable considerations are relevant in fashioning relief’ under the IDEA.” M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Educ., 226 F.3d 60, 68 (2d Cir. 2000) (*quoting Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374 (1985)).

15. The hearing officer has the authority (A) to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, (B) to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education has placed the child or pupil in a program other than that prescribed by the PPT, or (C) to prescribe alternate special educational programs for the child. Connecticut General Statutes § 10-76h(d)(1).

### Discussion

Parents' post-hearing brief identifies numerous reasons why they believe that BOE did not provide FAPE to Student in 2009-10, 2010 ESY, and 2010-11. Similarly, BOE's post-hearing brief makes numerous arguments in support of their case. All of the arguments were thoroughly reviewed and considered by the Hearing Officer although they may not all be specifically or individually addressed here.

### **Issue 1: Did the Board of Education provide Student with a free appropriate public education for the 2009-10 school year?**

Yes, BOE provided Student with a free appropriate public education for the 2009-10 school year.

The PPT prepared an IEP based on Student's triennial evaluation performed in 2007, the 2008 neuropsychological evaluation requested by Parents and funded by BOE, Parents' input, Student's grades, progress, and present levels of functioning (FOF 10-27, 30, 46).

The recommendations of the BOE staff who evaluated Student and most of Kulas' recommendations were incorporated into Student's 2007-08 and 2008-09 IEPs (FOF 30, 34). In June 2009, Student's IEP was updated to reflect her then-current level of performance and to revise her goals and objectives based on her then-current needs. Many of the recommendations from the triennial evaluation were incorporated and updated based on Student's progress and then-current needs.

#### Occupational Therapist's Recommendations

As a result of her triennial evaluation, Occupational Therapist recommended that occupational therapy services be determined by the PPT but noted that it appears that Student does not require such services to ensure her success in the classroom (FOF 19). Kulas indicated that Student evidences weaknesses in motor functioning "that may suggest the need for ongoing occupational therapy services." (FOF 27). In response, in April 2008, BOE revised Student's IEP for the remainder of 2007-08 to provide observation and consultation

by Occupational Therapist (FOF 30). Based on that observation, BOE added occupational therapy to Student's 2008-09 IEP (FOF 34).

As of June 2009, the PPT determined Student's fine and gross motor skills to be age-appropriate and the IEP indicated that Student's strengths in the area of fine and gross motor skills include her overall handwriting, computer skills, and general fine motor abilities (Exh. B-20 at 6). Parents did not dispute or raise concerns over the statement of present level of functioning. Upon the recommendation of Occupational Therapist, the PPT discontinued direct occupational therapy and provided services on a consultative basis (FOF 46). The IEP indicates that Student will receive "consultation occupational therapy as needed to ensure continued success in [activities of daily living] and written communication" (FOF 53). Occupational Therapist's recommendation was based on the facts that Student mastered her occupational therapy goal and was demonstrating functional skills across multiple settings in 2008-09 (FOF 46). The IEP documentation indicates that Parents "are supportive of the program planned for the 2009-10 school year." Parents did not indicate that they disagreed with the proposed program or with that statement in the IEP.

Student's Attorney argues that direct occupational therapy was inappropriately discontinued in 2009-10 without an evaluation. The PPT reviewed Student's performance and progress in deciding whether there was sufficient information available to determine whether Student continued to need direct occupational therapy services. As indicated above, the recommendation is supported by the statement of present level of functional performance, which was not contemporaneously disputed by Parents, and by mastery of her occupational therapy goal. Parents did not request an evaluation of Student's occupational therapy needs.

#### Middle School Speech-Pathologist's Recommendations

As a result of her triennial evaluation, Middle School Speech-Language Pathologist made the following recommendations: when using figurative expressions or sentences with multiple meaning, teachers should check with Student to make sure she understands the correct meaning for this situation; whenever possible, directions should be written out for Student so she can refer to them as she completes each step; Student should be reminded to check her work to ensure that she has complied with all parts of the directions and not missed a step (FOF 16).

The PPT incorporated a communication goal and several accommodations to incorporate these recommendations. The accommodations included: daily assignment list, positive reinforcement, check work in progress, have Student restate information, immediate feedback, monitor assignments, multi-sensory approach, provide models, repeat instructions, review directions, support auditory presentations with visuals, and use manipulatives (Exh. B-5 at 19, 20). The IEP also provided supports in the form of consultation with teachers

and service providers (FOF 20). In response to Kulas' evaluation, the PPT added social language skills group to Student's IEP (FOF 30).

The communication goal, accommodations, supports, and social language skills group were continued in Student's 2008-09 IEP (Exh. B-12, FOF 34). Parents did not express disagreement with the IEP (FOF 35). Student made satisfactory progress on her goals (FOF 47).

As of June 2009, the PPT determined that Student "continues to demonstrate growth in her communication skills. She participates in her classes." (Exh. B-20 at 6). Parents did not dispute or raise concerns over the statement of present level of functioning. Her progress report indicates that Student made satisfactory progress in her social skills goal (FOF 47).

In 2009-10, the PPT continued Student's social skills goal with two objectives remaining the same, one objective eliminated, and one new objective (Exh. B-18 at 26, B-20 at 14). The PPT updated Student's accommodations to provide study outlines, positive reinforcement, check work in progress, cueing/prompts, have Student restate information, and continued consultation with teachers and service providers (Exh. B-20 at 15).

#### Kulas' Recommendations

Kulas recommended that Student undergo a psychological evaluation to distinguish whether her thought processes are suggestive of a formal thought disorder. Parents arranged for such an evaluation (FOF 29).

He also recommended that, to the extent possible, Student be placed on a schedule with rewards for defecating at a certain time, that she maintain a change of clothes at school, that she be required to change clothes after an accident to reduce negative peer interactions, and that she be responsible for cleaning herself after an accident.

Prior to receiving Kulas' recommendations and in conjunction with Mother, BOE prepared a plan to address Student's hygiene issues (FOF 33). A plan was developed where Student would have a change of clothes and wipes to use. If Student was not able to clean up adequately at school, she would be sent home per BOE policy. After Kulas' recommendation, Student's IEP was revised to include scheduled visits to the nurse to address hygiene issues (FOF 33). The hygiene plan was continued in Student's 2009-10 IEP.

Kulas recommended that Student receive additional assistance with mathematics. Student's 2009-10 IEP included a math goal with nine objectives, inclusion math class, an accommodation permitting use of a calculator, organizational and instructional accommodations, and an accommodation to time and setting for the



math portion of the CMT (FOF 46; Exh. B-20). According to her annual CMT scores, Student demonstrated growth in math each year from fifth grade to sixth grade and from sixth to seventh (Exh. B-21).

Kulas recommended that BOE modify the academic environment to accommodate attention and concentration difficulties. Student's 2009-10 IEP included the following accommodations and modifications: alternative tests, rephrase test questions/directions, provide study outlines, preferential seating away from distractions – preferably in end row, check work in progress, cueing/prompts, have Student restate information, and provide notes/outlines to Student. Her IEP also provided for consultation by her teachers and service providers, goals related to organizational and study skills, and an accommodation to time and setting for the reading portion of the CMT which was taken under the Modified Assessment System (Exh. B-20).

Kulas recommended that staff use concrete and explicit language rather than figurative language with Student. Middle School Social Worker and Speech-Language Pathologist testified that during 2009-10, this technique was used in social language skills group and that lessons in abstract concepts were taught.

Kulas recommended that BOE provide outlines to reduce frustration and confusion in class. Such accommodation was included in her 2009-10 IEP (Exh. B-20 at 15). In 2008, Kulas also recommended that BOE utilize computerized assistive technology (“AT”) to reduce writing for assignments not assessing her writing competence. In 2008, Kulas indicated that Student could benefit from AT to reduce the amount of writing that is required of her (Exh. B-9 at 16). As of June 2009, the IEP indicates that Student's strengths in the area of fine and gross motor skills include her overall handwriting, computer skills, and general fine motor abilities (Exh. B-20 at 6). Parents did not dispute or raise concerns over the statement of present level of functioning. The PPT determined that AT was not required for Student. Student's 2009-10 IEP included accommodations to provide her with outlines and notes, which reduce the amount of writing required of her.

Kulas recommended that BOE implement a self-talk strategy to provide structure and self-organization. It is not clear whether this specific technique was implemented. However, Student's 2009-10 IEP included goals related to organizational skills as well as organizational and structural accommodations.

In 2007, Kulas recommended that BOE provide extension of time limits or shortened assignments to increase ability to complete assignments in required time frame and emphasize accuracy over speed. Such accommodation was provided to Student in 2007-08 and 2008-09. It was removed from Student's list of accommodations and modifications by the PPT in 2009-10.

Kulas recommended organizational skills instruction and consistency in daily schedule to predict transitions. The 2009-10 IEP included an organizational goal and objectives (Exh. B-20 at 13). Kulas testified that this goal was helpful for Student. Student's Attorney cites Kulas' testimony in her argument that the IEP

does “not provide measurable indicators of progress in this area.” Student’s goal for organizational skills, study skills, and learning strategies includes three specific objectives identifying desired behaviors. Each of the objectives indicates that it is evaluated by teacher/staff observation of successful completion of the task/activity in 90% of trials. The IEP sufficiently and appropriately identified the goal, objectives, and measure of success.

Kulas recommended that social development and social interaction skills be made a priority in Student’s educational program and that she receive direct training in the meaning of nonverbal language. In response to this recommendation, Student’s IEP was revised to add participation in social language skills group in April 2008. The social language skills group was continued in her IEP in 2008-09 and again in 2009-10. Student’s participation in the group allowed for development and growth of social skills among peers with similar abilities and allowed her to practice those skills in the natural school environment. Middle School Social Worker and Middle School Speech-Language Pathologist testified, with appropriate examples, that Student progressed in her social skills through her active and appropriate participation in the social language skills group.

Student’s Attorney argues that the social skills identified in the 2009-10 IEP are essentially the same skills that she had been working on for three years at Middle School and that a comparison of Student’s 2008-09 and 2009-10 progress reports suggest that she did not make progress but regressed. That argument cites only to the final indicator of progress in a given year and does not take into consideration the changes in objectives under the social skills goal or the staff comments regarding Student’s skills and successes. The evidence supports a finding that Student made progress on her social skills goals and objectives and that she needs to continue to work on expanding her skills.

Kulas also recommended that BOE implement a comprehensive behavioral plan aimed at increasing ability to maintain attention and concentration and tolerate frustration. Student’s 2009-10 IEP included a social and behavioral goal with objectives requiring her to identify and address social stress and struggles, to demonstrate an awareness of the needs of others, and to demonstrate an awareness of social clues and respond accordingly (Exh. B-20 at 14). The IEP also provides for positive reinforcement and cueing/prompting to support Student. The PPT did not believe that a behavioral intervention plan (“BIP”) was necessary for Student since she did not demonstrate negative behaviors.

The IDEA does not require that a BIP be included in every IEP. The IEP must include interventions, supports, and strategies necessary to address Student’s behavior that impedes her education. As indicated above, the IEP included goals and objectives to address Student’s social skills issues and included

accommodations and modifications to support Student. In addition, BOE Middle School's PBS provided behavioral supports and expectations as part of the general education program. There was credible testimony that Student was progressing in her behavioral skills.

Student's Attorney cites Kulas' testimony on several issues to indicate that the 2009-10 IEP did not adequately identify or describe measurable goals, development of desired skills, or implementation guidelines. Kulas did not participate in any PPT meetings to develop Student's IEPs and did not discuss the 2009-10 IEP with BOE staff. BOE staff identified the goals, the desired skills, and the manner in which the goals and objectives have been implemented based on their experience with and knowledge of Student in the school environment.

Student's Attorney also argues that the IEP "failed to address Student's social, behavioral, functional and emotional needs at all or in any sort of meaningful manner" and claims that "Student demonstrated regression and deterioration in these areas of functioning based on recent assessment." As indicated above, Student's 2009-10 IEP addresses social, behavioral, functional, and emotional needs. The record does not support a finding that Student regressed in these areas.

Student's Attorney argues that "Student continues to struggle with anxiety and her overall behavioral and adaptive functioning as well as emotional functioning have significantly deteriorated since being evaluated in 2008 due to increased depression, loss of interest in previously enjoyed activities, heightened negative sense of self and negative peer relations." Student's Attorney cites Kulas' testimony that Student continues to have suicidal ideation. Mother testified that Student discussed suicidal ideations with her in eighth grade and that she (Mother) did not share this information with BOE or Father, who was then attending PPT meetings.

BOE can not be expected to address an issue not raised with them or not known to them. Middle School Social Worker has direct experience conducting suicide assessments, worked directly with Student in sixth, seventh, and eighth grade, and had no evidence to support a concern about Student being suicidal. The claim that Student has experienced increased depression, loss of interest in activities, and deterioration of emotional functioning is not adequately supported by the record.

Student's Attorney argues that BOE did not offer Student counseling despite her low performance at the 2007 triennial evaluation and "despite the numerous indicators" from Kulas and Carter. The evidence in the record does not support a finding that BOE's failure to provide formal counseling in 2009-10 deprived Student of FAPE. Student's Attorney misstates Student's level of functioning as identified by Middle School Speech-Language Pathologist in the triennial evaluation in 2007. Neither Kulas nor Carter recommended that Student receive counseling from BOE. Parents did not request that counseling be added to Student's 2009-10 IEP.

BOE staff testified to their experiences with Student in school based on three years of regular contact with her. Their descriptions of and experiences with Student are markedly different than those cited by Parents. Father testified that he felt that BOE staff reports of Student's behavior and progress in school were not consistent with Parents' experiences at home. Outside of the PPT meetings, Father did not have contact with Student's teachers or observe her program. Father did not talk to Student's teachers about his concerns or about her progress.<sup>16</sup>

Student's CMT scores indicate that she demonstrated growth in achievement across grades four through eight in both reading and math (Exh. B-37). Student's progress reports indicate that she mastered one goal and made satisfactory progress toward her other four goals in 2009-10 (FOF 88). Student experienced a decrease in toileting issues by the completion of her eighth grade year (FOF 85).<sup>17</sup> Student's final grades for her eighth grade year ranged from A+ to C+ (FOF 87).

The goals, objectives, accommodations, and modifications provided in Student's 2009-10 IEP were individualized, based on Student's performance and current level of functioning, prepared with input from Parents, and offered in the least restrictive environment. BOE met its burden of proving by a preponderance of the evidence that the procedural requirements of the IDEA have been met and that Student's 2009-10 IEP was reasonably calculated to enable her to receive meaningful educational benefits.

**Issue 2: Did the Board of Education propose a program to provide Student with a free appropriate public education for the 2010 extended school year?**

Yes, the Board of Education proposed a program to provide Student with a free appropriate public education for the 2010 extended school year.

In May, Father notified BOE of Parents' intention to place Student at Franklin Academy for the summer (FOF 71). Parents made this decision and completed Student's summer enrollment at Franklin Academy prior to a PPT meeting to discuss ESY services.

In June, BOE convened a PPT meeting at which the PPT determined Student eligible for ESY services and offered Student a 2010 ESY program in the form of four hours of language arts instruction, four hours of

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<sup>16</sup> Parents did not attend school open houses, feeling that there was no need to go since they go to PPT meetings (Testimony of Mother). Mother testified that she had concerns about Student's program but did not go to the open house to raise them. Parents did not attend parent conferences during Student's eighth grade year (Testimony of Mother, Father). Mother testified that they did not have a reason to go.

<sup>17</sup> Student's Attorney argues that "Student's toileting issues continued to pose a problem for her during the 2009-10 year... [BOE's] representation that Student's toileting problems had been alleviated by citing a reduction in her visits to the nurse's office is inaccurate, as it does not account for all times that Student had a toileting issue that went unreported." Again, BOE can not be expected to address or resolve a problem that is not brought to its attention.

math instruction, one hour of social skills instruction, and three hours of academic support (FOF 83). The proposed ESY program provided Student with both academic and social skills instruction and could have been provided at BOE's High School to support Student's transition from Middle School to High School (Testimony of Shaughnessy). The PPT did not determine the location of ESY services in light of Parents' previous notice that Student was already enrolled at Franklin Academy for the summer.

Father rejected the ESY program as inappropriate claiming that BOE previously indicated that Student would be out of place because the other ESY students were more disabled.<sup>18</sup>

BOE met its burden of proving by a preponderance of the evidence that the procedural requirements of the IDEA have been met and that Student's proposed 2010 ESY program was reasonably calculated to enable her to receive meaningful educational benefits in both academic and social skills.

**Issue 3: Did the Board of Education propose a program to provide Student with a free appropriate public education for the 2010-11 school year?**

BOE did not meet their burden of proving by a preponderance of the evidence that they complied with the procedural requirements of having the PPT determine, at a PPT meeting to which Parents were invited and given an opportunity to participate, whether Student required continuing occupational therapy services (either direct or consultative) in 2010-11 in order to receive FAPE. BOE met their burden of proving by a preponderance of the evidence that the remaining components of Student's IEP were appropriate and reasonably calculated to enable her to receive meaningful educational benefit.

The PPT prepared an IEP based on Student's grades, progress, and present levels of functioning, and Parent input (FOF 82). The proposed 2010-11 IEP provides 7.5 hours per week co-taught language arts instruction, 3.75 hours per week co-taught math instruction, 2.25 hours per week academic support, 1.5 hours per week small group/individual social skills instruction,<sup>19</sup> speech and language and counseling services provided as part of social skills instruction, and special transportation. The IEP includes six goals: written language skills; comprehension skills; math; organization, study skills, and learning strategies; relating effectively to students in school; and conversational skills in a variety of school settings.

The IEP also provides the following accommodations and modifications: access to computer, calculator and manipulatives; hands-on-projects, pace long-term projects, rephrase test questions/directions, test study

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<sup>18</sup> Father's testimony that he rejected BOE's proposed summer program because Student would be out of place in a program with more disabled students is given limited credibility. Father rejected BOE's summer program, prior to knowing its details, to send Student to a special education school that did not include any typically developing peers (FOF 52, 71, 75, 82, 83).

<sup>19</sup> In 2009-10, Student participated in 45 minutes of social skills training per week. Her social skills training was increased to 1.5 hours in 2010-11 to address issues relating to transition from middle school to high school.

guide; assignment pad, daily assignment list, list sequential steps, post assignments, post routines, provide study outlines; preferential seating, break between tasks, daily feedback to Student, positive reinforcement; check work in progress, concrete examples, cueing/prompts, have Student restate information, provide notes/outlines to Student, review directions; seat away from distractions, check in with Student for long term project and understanding of assignments/concepts, take tests in learning lab as needed, notes/outline provided as needed, home/school communication, incentives for completed work, training/guidance re bathroom hygiene; consultation with special and regular education teachers, social worker, speech-language pathologist, and nurse. In addition, Middle School Principal informed BOE High School staff that the two boys involved in the incidents giving rise to bullying complaints should not be placed in class with Student at BOE High School.

Kulas testified that Student's overall social skills goal is relevant but that the objectives do not reflect her actual ability and are too advanced. Kulas did not observe Student in school or review her progress reports. BOE staff with direct experience instructing, evaluating, and observing Student in the school environment prepared the goals and objectives based on that knowledge.

Student's Attorney cites Kulas' testimony indicating concerns about the mainstream environment at BOE High School and whether it will support Student in development of her social skills. Kulas never visited BOE High School or observed the program. BOE staff with direct experience with Student and knowledge of BOE High School testified that they believe Student will be successful and "blossom" at the school.

Student's Attorney argues that Student's social skills program was determined outside of the PPT process in August without Parent's input. Student's IEP, including her social skills training, was developed at the June PPT meeting. Father attended the meeting and participated in the discussion. At that time, Parents had informed BOE that Student was going to attend Franklin Academy for the 2010-11 school year. BOE did not know until two weeks before the start of the school year that Student was going to attend BOE High School. Parents changed their mind over the summer but did not inform BOE until late August (FOF 97). Upon learning that Student would be attending BOE High School, members of the PPT began making appropriate arrangements. High School Psychologist testified that Student's team met to discuss Student's hygiene plan, seizure plan, and IEP modifications and accommodations page of the IEP. Those discussions preparing for Student's enrollment did not amount to designing an IEP outside of a PPT or without Parent input.

Student's Attorney also argues that the IEP does not appropriately address Student's organizational, behavioral, social, and emotional needs.<sup>20</sup> As indicated above, Student's 2010-11 IEP addresses organizational, social, behavioral, and emotional needs.

Student's Attorney also argues that High School Social Worker, who will implement Student's 2010-11 IEP at the High School, was not involved in the planning process. Middle School Social Worker, High School Guidance Counselor, and High School Special Education Teacher were present at and participated in the PPT meeting. Middle School Social Worker had three years of direct experience working with Student. The PPT meeting included appropriate personnel from BOE High School as well as service providers who knew Student well and were in the best position to know what services and supports she needed.

Student's Attorney argues that Student requires a BIP which is lacking in her IEP. The recommendation for a BIP comes from Kulas' 2008 report. Student's 2010-11 IEP includes a social and behavioral goal and a related communication goal. The IEP also provides for the above-enumerated accommodations and modifications to support Student. The PPT did not believe that a BIP was necessary for Student since she did not demonstrate negative behaviors.

The IDEA does not require that a BIP be included in every IEP. The IEP must include interventions, supports, and strategies necessary to address Student's behavior that impedes her education. As indicated above, the IEP included goals and objectives to address Student's social skills issues and included accommodations and modifications to support Student. In addition, BOE Middle School's PBS provided behavioral supports and expectations as part of the general education program.

Student's Attorney also argues that BOE failed to consult with and incorporate the suggestions of Student's private social skills provider. The PPT reviewed Loomis' report at the May 20 PPT meeting and requested permission to contact him. Father provided consent to communicate with Loomis on May 27.

In this case, failure to contact Loomis prior to the June 8 PPT meeting does not rise to the level of procedural violation resulting in denial of FAPE. There was an intervening holiday and short time frame between receiving consent and the PPT meeting; BOE staff were familiar with Student's social skills needs and level of functioning based on her two-plus years' participation in social language skills group; Loomis had not observed Student in the school setting; Student's IEP incorporated some of the techniques suggested by Loomis (scripts, rule cards and posters); Parents had already given notice that they intended to place Student at Franklin Academy for 2010-11; and by the time that BOE learned that Student would be attending BOE High

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<sup>20</sup> Parent's post-hearing brief cites Kulas' testimony for this proposition but provides no detail as to how the IEP is inappropriate or what deficiencies are claimed in the goals and objectives.

School, Parents had withdrawn consent to speak with Loomis. BOE's actions in not contacting Loomis prior to the PPT meeting did not impede Student's right to FAPE, did not significantly impede Parents' opportunity to participate in the process, or cause a deprivation of educational benefits.

Student's Attorney also argues that BOE's failure to provide Parents with Student's educational records and related data interfered with their IDEA procedural rights. On February 3, Parents, through their attorney, requested Student's educational records (Exh. P-26). On March 12, Student's Attorney indicated that the file received from BOE did not include e-mail correspondence or bullying reports and asked for those documents to be forwarded, if they exist (Exh. B-25). On June 28, Student's Attorney requested additional documentation in preparation for this hearing (Exh. P-16). All of these communications transpired between BOE's Attorney and Student's Attorney. Neither attorney testified as to what documents were or were not provided. Student's Attorney's March 12 letter indicates that Student's file was provided. There is insufficient evidence to determine whether or not BOE failed to provide requested documentation.<sup>21</sup> In the absence of direct testimony as to what documents were or were not provided to Student's Attorney, Student has not met her burden of going forward with regard to this issue.

Student's Attorney argues that BOE did not discuss activities related to Student's transition from Middle School to High School until June. BOE provided numerous transition opportunities for middle school students, including Student, during 2009-10 (Exh. B-35). Student's eighth grade social language skills group discussed, in detail, transitioning to High School and reviewed and discussed the list of course electives available at the High School (Testimony of Middle School Speech-Language Pathologist). BOE provided Student with an individual tour of BOE High School with a shadow – a student already attending High School – in June. During the tour, Student sat in on classes, received a tour of the building, and reviewed her class schedule. BOE provided Student with an opportunity to meet BOE High School service providers at the high school in June. They discussed the social skills group that Student would participate in at BOE High School and discussed students known to her that would be in her class. BOE offered an opportunity for Father to tour the school and meet the special education staff. He declined the opportunity.

BOE's actions in providing transition opportunities to support Student's move from Middle School to High School are found to be appropriate.

Student's Attorney asks the Hearing Officer to find that BOE "failed to meaningfully consider the effects of the bullying and harassment in determining the least restrictive environment." Father claimed that

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<sup>21</sup> In support of this argument, Student's Attorney cites to the three exhibits identified in this paragraph but does not cite to any testimony about whether requested documents were provided.



Student experienced eight years of bullying in BOE's schools yet there is no evidence of any such complaint until spring 2010 when Student's Attorney brought an issue to BOE's attention. Parents did not file bullying reports and did not raise concerns of bullying. There is not sufficient evidence in the record to find that many of the complaints and concerns that Parents articulated at hearing (bullying, suicidal ideation, depression, oppositional behavior) were timely raised with or brought to the attention of BOE staff. BOE immediately investigated and dealt with the two issues that were brought to its attention in spring 2010. BOE also ensured that the two male students involved in those incidents are not in Student's class in High School.

A student may be denied FAPE if bullying or harassment is "severe and prolonged" and if the district is "deliberately indifferent" to the conduct such that the student can derive no benefit from the services offered by the school district. The record does not support a finding that Student was subjected to severe or prolonged bullying or harassment or that BOE was deliberately indifferent to any such conduct.

Student's Attorney argues that consultative occupational therapy was discontinued in 2010-11 without an evaluation. Occupational Therapist did not attend the May or June PPT meetings. Student's present level of functional performance indicates that Student's fine and gross motor skills are age appropriate, that she types sufficiently, and that her strengths are overall handwriting, computer skills, and general fine motor abilities. It is not clear how this functional performance was determined in the absence of Occupational Therapist's attendance at the PPT meeting.

Occupational Therapist testified that she provided consultation to Student as needed in 2009-10, which consisted of monitoring Student's success in activities of daily living and written communication, consulting twice with Eighth Grade Special Education Teacher, and observing Student in social language skills group once.

BOE's only argument regarding occupational therapy states that the Hearing Officer "must disregard any claim that the [2010-11] IEP should have included [occupational therapy] services, when [Father] did not request such services at the annual review PPT and the data available at the time did not demonstrate the need for such services." The May and June PPT meeting documentation makes no reference to Student's occupational therapy needs or the results of her consultative services during 2009-10. There is not adequate evidence in the record to determine the basis for the PPT's decision to eliminate consultative occupational therapy in 2010-11, particularly since Occupational Therapist did not attend the PPT meetings.

BOE did not communicate what, if any, data, assessment, or other information the PPT reviewed in determining that Student no longer needed occupational therapy services. The PPT did not engage in a sufficient conversation at the PPT meeting to permit Parents to make an educated decision about whether to

request occupational therapy services. There was no such determination or communication identified in the PPT meeting summary or minutes.

BOE did not meet their burden of proving by a preponderance of the evidence that they complied with the procedural requirements of having the PPT determine, at a PPT meeting to which Parents were invited and given an opportunity to participate, whether Student required continuing occupational therapy services (either direct or consultative) in 2010-11 in order to receive FAPE. The question of remedy is addressed under Issue Four, below.

**Issue 4: If the answer to any of the above questions is in the negative, what shall be the remedy?**

The answer to Issues One and Two above are in the affirmative. Therefore, the question of remedy is not reached as to those Issues. Under Issue Three, the Hearing Officer found that BOE did not meet their burden of proving by a preponderance of the evidence that they complied with the procedural requirements of having the PPT determine, at a PPT meeting to which Parents were invited and given an opportunity to participate, whether Student required continuing occupational therapy services (either direct or consultative) in 2010-11 in order to receive FAPE.

The notice and consent for Student's triennial reevaluation solicited by the PPT at the June PPT meeting does not include an occupational therapy reevaluation (Exh. B-38 at 2). Parents did not request such reevaluation. Kulas administered the Grooved Pegboard, Finger tapping and Dynamometer tests to Student in July 2010 (Exh. P-21). The reported results appear to indicate improvement since his February 2008 tests of Student (Exh. B-9). However, Kulas' 2010 report provides no summary or narrative report to explain or describe the results and Kulas is not an occupational therapist.<sup>22</sup> Occupational Therapist testified that the PPT should consider Kulas' recent evaluation and gather information from team members about Student's current functional skills in order to provide a context to the score.

BOE is ordered to convene a duly noticed PPT meeting, within fifteen school days of receipt of this Final Decision and Order, to determine and review Student's present level of functioning with regard to fine and gross motor skills and to determine whether Student requires continuing occupational therapy services (either direct or consultative) in 2010-11 in order to receive FAPE. If the PPT determines that Student does require occupational therapy services, it shall immediately revise Student's IEP accordingly. If the PPT determines that Student requires direct occupational therapy services, it shall provide the recommended

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<sup>22</sup> Kulas testified that he was not authorized by Parents to release information to BOE about his recent assessment of Student.

amount of such services and make it retroactive to the first day of the 2010-11 school year by providing additional services for the remainder of the 2010-11 school year to make up for any lost time.

Comments on the Conduct of the Proceedings Pursuant to Connecticut Agency Regulations § 10-76h-16(b)

In preparing this Final Decision and Order, the Hearing Officer thoroughly reviewed and considered the following:

1. testimony of all witnesses (see Attachment A – Order of Testimony of Witnesses);
2. all exhibits admitted into evidence as full exhibits (see Attachment B – Exhibits Offered);
3. arguments and rulings for all exhibits offered but not admitted into evidence as full exhibits;
4. opening statements of the parties' attorneys; and
5. post-hearing briefs and proposed findings of fact filed by the parties.

Testimony of Mother

Mother's testimony was evaluated in light of her apparent inability to answer certain questions, pausing for an extensive period between questions and answers, and seeming to look to her attorney for prompting. Mother indicated that she experienced discomfort due to personal medical condition. It is not clear whether that condition was what was impacting her testimony.

Rebuttal testimony

Student's post-hearing brief discusses the Hearing Officer's ruling denying the request to call Loomis, Student's private social skills provider, as a rebuttal witness. Student's argument focuses on BOE's original objection that his testimony was not noticed five days in advance. The Hearing Officer's ruling was not based on the five-day rule. The Hearing Officer initially ruled that Loomis' testimony would be permitted and would be limited to rebuttal testimony. After discussing scheduling issues, the Hearing Officer informed the parties that rebuttal testimony would not be permitted until BOE completed its case in chief. At that time, Student's Attorney was permitted to make an offer of proof as to whether Loomis should be permitted to testify on rebuttal.

Student's Attorney indicated that Loomis would testify on the following issues: Parents' involvement in Student's education; involvement with other parents and boards of education in special education cases;

Student's ability to interact with peers; the appropriateness of Student's IEP goals and objectives for 2009-10 and 2010-11; and Student's ability to generalize skills related to dealing with bullying and teasing.

BOE's Attorney objected to the proposed testimony on the basis that it was not rebuttal, that the information sought was available during Student's case in chief, that Loomis was not included on Student's witness list, and that there was no evidence that Loomis ever spoke to BOE about Student or knew what was going on relative to her education and program.

Student's Attorney responded that, prior to BOE putting on their case, Parents were not privy to the subjective impressions and input of BOE staff and that the testimony was necessary because BOE attempted to present Parents as uninvolved in Student's education.

The Hearing Officer ruled that Student's Attorney's offer of proof did not demonstrate that Loomis' proposed testimony was rebuttal testimony. The proposed testimony was not specifically responsive to BOE's evidence and could have been offered in Student's case in chief. Student's Attorney did not, in her case in chief, offer Loomis to testify as to his work with Student or his understanding of her capabilities or needs. Failure to call a witness in the case in chief does not convert that witness' testimony to rebuttal testimony. The Hearing Officer also finds that Loomis is not an appropriate witness to testify as to whether Parents were appropriately involved in Student's education and program since he was not a participant in the relationship between Parents and BOE and that Loomis' experience with other parents and boards of education is not relevant to the issues before the Hearing Officer. Therefore, the request to add hearing dates to permit Loomis' testimony was denied.

#### Division of hearing dates

Student's post-hearing brief also comments on her objection to BOE presenting its case over four days. During the first pre-hearing conference, each party indicated that they needed three days to put on their respective case. Student used two days in her case in chief, reserving one day for rebuttal, and BOE used four days.

The parties submitted their witness lists five business days prior to the hearing. There was significant overlap in the lists. To avoid calling witnesses to testify both in Student's case and in BOE's case in chief, the parties agreed to a procedure that would put each witness on the witness stand once and would allow the attorneys to exceed the scope of cross-examination if that witness was on both parties' witness list. Nine of BOE's eleven witnesses were also on Student's witness list. Student's ability to extend cross-examination

during BOE's case to put on her case lengthened the time for BOE's case. Both parties were given ample time to put on their respective cases.

### **FINAL DECISION AND ORDER**

1. The Board of Education provided Student with a free appropriate public education for the 2009-10 school year.
2. The Board of Education proposed a program to provide Student with a free appropriate public education for the 2010 extended school year.
3. The question of remedy is not reached with regard to Issues One and Two. As to Issue Three, BOE is ordered to convene a duly noticed PPT meeting, within fifteen school days of receipt of this Final Decision and Order, to determine and review Student's present level of functioning with regard to fine and gross motor skills and to determine whether Student requires continuing occupational therapy services (either direct or consultative) in 2010-11 in order to receive FAPE. If the PPT determines that Student does require occupational therapy services, it shall revise Student's IEP accordingly.

Attachment A – Order of Testimony of Witnesses

August 23, 2010      Opening statement by Student’s Attorney  
Kulas: direct and cross-examination  
Mother: direct and cross-examination

August 26, 2010      Father: direct and cross-examination  
Hays: direct and cross-examination

August 27, 2010      Opening statement by BOE’s Attorney  
Shaughnessy: direct and cross-examination  
Middle School Speech-Language Pathologist: direct & cross-examination

August 31, 2010      Middle School Social Worker: direct and cross-examination  
Eighth Grade Special Education Teacher: direct and cross-examination  
Eighth Grade Math Teacher: direct and cross-examination

September 2, 2010    High School Psychologist: direct and cross-examination  
High School Social Worker: direct and cross-examination  
High School Speech-Language Pathologist: direct and cross-examination

September 3, 2010    High School Speech-Language Pathologist: cross-examination  
Occupational Therapist: direct and cross-examination  
Middle School Nurse: direct and cross-examination  
Middle School Principal: direct and cross-examination

Attachment B – Exhibits Offered

Parents' exhibits are identified as "P-#"; Board of Education exhibits are identified as "B-#"; and Hearing Officer exhibits are identified as "HO-#". All exhibits were admitted into evidence as full exhibits unless marked otherwise with an asterisk. Those with an asterisk were marked for identification only.

<u>Exh</u>	<u>Date</u>	<u>Description (# of pages)</u>
HO-1	5/26/10	Parents' Request for Due Process Hearing (2 pp)
HO-2	6/29/10	Parents' Supplemental Request for Due Process Hearing (2 pp)
P-1	1/16/08	Letter from Ms. Shaughnessy to Dr. Kulas (1 p)
P-2	2/8/08	Middle & Secondary School Questionnaire completed by Sixth Grade Special Education Teacher (4 pp)
P-3*	2/08	Woodcock Johnson Score Report completed by Dr. Kulas, (2 pp)
P-4		Franklin Academy Summer 2009 Sojourn Path Report for Student (5 pp)
P-5	9/09	Seizure Health Care Plan (1 p)
P-6	3/8/10	Individual Student Report, English 21, Student (1 p)
P-7	3/8/10	Individual Student Report, Reading 11, Student (1 p)
P-8	5/5/10	Letter from Klebanoff & Alfano to Attorney Littlefield with enclosures from Franklin Academy (6 pp)
P-9	5/18/10	6/8/10 PPT Notice (1 p)
P-10	5/27/10	Letter from Father to Ms. Shaughnessy with consent enclosed (2 pp)
P-11	6/2/10	Letter from Ms. Shaughnessy to Father (1 p)
P-12	6/3/10	6/8/10 Amended PPT Notice (1 p)
P-13		Bacon Academy Sports and Activities flyer, distributed at 6/8/10 PPT (2 pp)
P-14	6/8/10	Individual Student Report, Science 22, Student (1 p)
P-15	6/8/10	Individual Student Report, Pre-Algebra 22, Student (2 pp)
P-16	6/28/10	Letter from Klebanoff & Alfano to Attorney Littlefield with attachments (6 pp)

P-17	7/2/10	Correspondence from Father to Ms. Shaughnessy with consent attached (2 pp)
P-18	7/7/10	Correspondence from Ms. Shaughnessy to Father with IEP correction (2 pp)
P-19	7/8/10	Correspondence from Ms. Shaughnessy to Father re: June 8, 2010 PPT Meeting (2 pp)
P-20		Nurse Log, Student, Middle School (2 pp)
P-21	8/13/10	Score Reports of Assessment/Score Reports completed by Dr. Kulas from 7/12/10 (6 pp)
P-22		Franklin Academy Summer 2010 Sojourn Path Report for Student (6 pp)
P-23		Curriculum Vitae, Dr. Joseph Kulas (5 pp)
P-24		Curriculum Vitae, Dr. Seymore T. Hays (3 pp)
P-25*		Franklin Academy Schedule and Calendar (9 pp)
P-26	2/3/2010	Letter from Klebanoff & Alfano to Ms. Shaughnessy (1 p)
P-27*	12/1/09	Letter from (NEASC) to Mr. Weissbach following up on the Visiting Committee (1 p)
P-28*	March 2007	NEASC Report of Visiting Committee, (40 pp)
P-29*		Curriculum Vitae, Private Social Skills Provider (7 pp)
B-1	Summer 2007	Summer Program Progress Report (1 p)
B-2	09/26 and 10/05/07	Notice of Planning and Placement Team (“PPT”) Meeting and PPT Meeting Minutes, including Notice and Consent to Conduct a Reevaluation (5 pp)
B-3	11/20/2007	Language Evaluation prepared by Middle School Speech Language Pathologist (5 pp)
B-4	11/29/07	Occupational Therapy Evaluation prepared by Occupational Therapist (4 pp)
B-5	11/21 and 12/07/07	Notice of PPT Meeting and PPT Meeting Minutes, including Notice and Consent to Conduct a Reevaluation (31 pp)
B-6	12/07/07	Psychological Evaluation prepared by Middle School Psychologist (9 pp)



B-7	12/07/07	Educational Evaluation prepared by Sixth Grade Special Education Teacher (6 pp)
B-8	12/18/07	Correspondence addressed to Parents from Director of Pupil Services & Special Education, Colchester Public Schools, regarding financial support for neuropsychological evaluation (3 pp)
B-9	02/15/2008	Neuropsychological Evaluation prepared by Joseph Kulas, Ph.D., Neuropsychologist (22 pp)
B-10	03/20 and 04/04/08	Notice of PPT Meeting and PPT Meeting Minutes (26 pp)
B-11	04/17/08	Psychological Evaluation prepared by Allen L. Carter, Ph.D., Clinical Psychologist (6 pp)
B-12	05/29 and 06/16/08	Notice of PPT Meeting and PPT Meeting Minutes (29 pp)
B-13	Undated	Connecticut Master Test Grade 6 Scores Report (administered March 2008) (4 pp)
B-14	06/18/08	Fourth Quarter Report Card, Grade 6 (1 p)
B-15	06/19/08	Progress Report (11/2007 - 06/19/2008) (6 pp)
B-16	Summer 2008	Summer Progress Report prepared by Mr. Lucas (1 p)
B-17	09/22 and 10/15/08	Notice of PPT Meeting and PPT Meeting Minutes (26 pp)
B-18	12/23/08	Individualized Education Program (“IEP”) including Agreement to Change Individualized Education Program (“IEP”) of 10/15/08 (7 pp)
B-19	02/04 and 02/11/09	Notice of PPT Meeting and PPT Meeting Minutes (26 pp)
B-20	05/15 and 06/08/09	Notice of PPT Meeting and PPT Meeting Minutes (23 pp)
B-21	Undated	Connecticut Mastery Test Grade 7 Scores Report (administered March 2009) (4 pp)
B-22	06/15/09	Progress Report (11/2008 - 06/15/09) (7 pp)
B-23	06/30/09	Fourth Quarter Report Card, Grade 7 (1 p)
B-24	02/23/2010	IEP dated 2/23/2010 including Agreement to Change IEP of 6/8/09 (5 pp)
B-25	03/12/10	Correspondence addressed to Ms. Shaughnessy from Attorney Marisa Mascolo regarding allegations of bullying (1 p)

B-26	2007 - 03/18/10	Charting the Development of Career Interests (1 p)
B-27	04/09/10	Correspondence addressed to Attorney Mascolo from Attorney Anne Littlefield regarding allegations of bullying including investigation report by Colchester Public Schools (2 pp)
B-28	04/14/10	Correspondence addressed to Attorney Littlefield from Attorney Mascolo regarding bullying allegations, including correspondence from Private Social Skills Provider regarding Student's social skills instruction (3 pp)
B-29	04/21/10	Correspondence addressed to Attorney Mascolo from Attorney Littlefield regarding investigation of bullying (report attached) (6 pp)
B-30	Undated	Colchester Board of Education Bullying Policy (9 pp)
B-31	05/05/10	Correspondence addressed to Attorney Littlefield from Attorney Mascolo regarding Parents' notice of intent to place Student at Franklin Academy (1 p)
B-32	05/11 and 05/20/10	Notice of PPT Meeting and PPT Meeting Minutes (5 pp)
B-33	06/08/10	PPT Meeting Minutes (23 pp)
B-34	06/10/10	Correspondence regarding Student's visit to Bacon Academy on June 11, 2010 (1 p)
B-35	8/2009 - 6//2010	Summary of Student Transition Opportunities and Parent Participation Opportunities (2 pp)
B-36	06/17/10	Correspondence addressed to Parents regarding Progress Report for IEP Goals and Objectives 2009-2010 (report attached) (7 pp)
B-37	June 2010	Connecticut Mastery Test Grade 8 Scores Report (administered March 2010) (6 pp)
B-38	07/02/10	Correspondence addressed to Ms. Shaughnessy from Father regarding June 8, 2010 PPT meeting and Notice and Consent to Conduct Reevaluation (2 pp)
B-39	07/06/10	PowerSchool Records (2009-2010) (25 pp)
B-40*	07/08/10	Response to Amended Due Process Complaint (6 pp)
B-41	07/12/10	Correspondence addressed to Parents from Ms. Shaughnessy regarding reimbursement for Private Social Skills Provider (2 pp)
B-42	2001-2010	Health Records (12 pp)

B-43		Resume of Katherine R. Shaughnessy (13 pp)
B-44		Resume of Middle School Principal (11 pp)
B-45		Resume of Ronald E. Sefchik (14 pp)
B-46		Resume of David L. McLellan (10 pp)
B-47		Resume of Donna M. Bonin (8 pp)
B-48		Resume of High School Social Worker (9 pp)
B-49		Resume of High School Speech-Language Pathologist (17 pp)
B-50		Resume of Wilbur J. Nelson, Jr. (2 pp)
B-51*		Resume of Board Certified Behavior Analyst (5 pp)
B-52		Class Schedule, Grade 9, Bacon Academy (1 p)
B-53		Resume of Eighth Grade Math Teacher (2 pp)
B-54		Resume of Peggy Smigel Harbec (5 pp)
B-55		Resume of Linda Mae Iacobellis (12 pp)
B-56	Undated	Article regarding remembrance project (1 p)
B-57	03/08 - 07/30/10	STAR Diagnostic Reports and Annual Progress Reports (7 pp)
B-58	06/08/10	Least Restrictive Environment (LRE) Procedural Checklist (2 pp)
B-59	03/24/05 - 11/03/09	Colchester Public Schools Professional Development Offerings Related to Autism (1 p)
B-60	Undated	Individual Emergency Care Plan (1 p)
B-61	Undated	Interventions/Practices and Support Systems Log (1 p)
B-62		Resume of High School Psychologist (8 pp)
B-63		Resume of Kelly A. Cook (7 pp)
B-64*	5/26/10	Due Process Complaint (2 pp)
B-65*	6/7/10	Response to Due Process Complaint (2 pp)
B-66*	6/14/10	Sufficiency Challenge to Due Process Complaint (2 pp)

B-67*	6/17/10	Decision of Hearing Officer Regarding Board's Sufficiency Challenge (3 pp)
B-68*	6/29/10	Amended Due Process Complaint (2 pp)
B-69*	7/2/10	Correspondence to Parents from Ms. Shaughnessy regarding Resolution Session
B-70		Resume of Occupational Therapist (3 pp)
B-71		Resume of Cynthia Riordan (7 pp)
B-72		Resume of Middle School Speech-Language Pathologist (11 pp)
B-73		Resume of Middle School Social Worker (6 pp)
B-74		Resume of Middle School Nurse (3 pp)
B-75		Resume of High School Nurse (4 pp)
B-76		Principles, Procedures and Standards for the Approval of Private Special Education Programs (26 pp)
B-77		Website Description of Middle School Program (2 pp)
B-78		PowerSchool Information (9 pp)
B-79		Middle School Student Handbook (2009-2010) (22 pp)
B-80		PBS at Middle School (6 pp)
B-81		Letter to Middle School Parents regarding PowerSchool, 8/21/09 (1 p)
B-82		Invitation to Middle School Open House 9/17/09 (2 pp)
B-83		Invitation to Parent Visitation Week, 10/6/09 (1 p)
B-84		PowerSchool Access Record (1 p)
B-85		Middle School Parent Input Form and Data Sheet, Excerpts for 6, 7 <sup>th</sup> , and 8 <sup>th</sup> Grades (4 pp)
B-86		Resume of Eighth Grade Special Education Teacher (3 pp)
B-87		Draft Hygiene Plan for Student (2 pp)