

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. East Haddam Board of Education

Appearing on behalf of the Student: Attorney Andrew Feinstein
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Appearing on behalf of the Board: Attorney Frederick Dorsey
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Appearing before: Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board of Education offer the Student a Free Appropriate Public Education for the 2015/2016 and/or 2016/2017 School Years?
2. If the Board of Education did not offer the Student a Free Appropriate Public Education for the 2015/2016 and/or 2016/2017 School Years, is the Parents' home and community based program appropriate for the Student?
3. If the Board of Education did not offer the Student a Free Appropriate Public Education for the 2015/2016 and/or 2016/2017 School Years and the Parents' home and community based program is appropriate for the Student should the Student be reimbursed for the expense of the Parents' program and/or should that program become the Student's placement?
4. If the Board of Education did not offer the Student a Free Appropriate Public Education for the 2015/2016 and/or 2016/2017 School Years but the Parents' home and community based program is not appropriate for the Student, should the Student receive compensatory education services?

PROCEDURAL HISTORY:

The Student requested a special education due process hearing in the above-captioned matter on August 2, 2016. The Impartial Hearing Officer was appointed to hear the case on August 4, 2016. A telephonic pre-hearing conference was convened on August 29, 2016. Attorneys

Andrew Feinstein and Jillian Griswold appeared on behalf of the Student and Attorney Frederick Dorsey appeared on behalf of the Board of Education.

The deadline to conduct the hearing and issue the final decision was initially October 13, 2016. An evidentiary hearing was scheduled for September 26, 2016. On September 21, 2016, the parties jointly requested that the hearing be cancelled because they had scheduled a mediation for October 5, 2016 and sought to postpone the hearing until after the mediation. The request was granted and the hearing was cancelled.

On October 3, 2016, the Student submitted a written request for a thirty-day postponement and extension of the timelines to conduct the hearing and to file the final decision to November 10, 2016. The requested postponement was granted.

On October 14, 2016, the parties participated in a second Prehearing Conference to identify dates for the hearing. Hearings were scheduled for November 9, 2016, November 14, 2016, December 15, 2016, December 19, 2016 and January 6, 2017. The first day of hearing, November 9, 2016, was subsequently cancelled due to counsel's family emergency.

On November 8, 2016 the Student requested and was granted a second thirty-day extension of the deadline to issue the final decision. On November 14, 2016, the first evidentiary hearing matter was conducted. The parties agreed that further evidentiary hearings would be necessary and added scheduled hearings for December 16, 2016, January 3, 2017 and January 30, 2017. In addition, the Student requested a third thirty-day extension of the deadline to issue the final decision. The request was granted.

On December 19, 2016 at the third evidentiary hearing, the Student requested a fourth thirty-day extension of the deadline to issue the final decision. The Board consented to the request and it was granted. On January 20, 2017 at an evidentiary hearing in this case, the Student requested a fifth thirty-day extension of the deadline to issue the final. The Board consented to the request and it was granted.

Evidentiary hearings were conducted on November 14, 2016, December 15, 2016, December 16, 2016, December 19, 2016, January 3, 2017, January 20, 2017 and January 30, 2017. The following witnesses testified:

Student's Mother
Student's Paraprofessional/Aunt
Erik Mayville, PhD
Louis Alperowitz
David Scata
Danielle Bellows
Martha Dexter
Laura Hall
Jennifer Dupre
Liana Lilburn
Katherine Bristol

Hearing Officer Exhibits HO 1 through HO 4 were entered as full exhibits. Student Exhibits P 1 through P 21, P 23 through P 26, P 28 through 48, and P 50 through P 70 were entered as full exhibits. Finally, Board Exhibits B 1 through B 88 were entered as full exhibits.

All motions and objections not previously ruled upon, if any, are hereby overruled.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985).

SUMMARY:

The Student claimed that the Board failed to provide a safe and educationally appropriate program for the 2015-2016 and 2016-2017 School Years for their profoundly and multiply disabled son. In particular, they claimed that school staff was not competent to meet the Student's complicated feeding and medical needs, failed to provide appropriate related services and proposed unrealistic goals and objectives. The Student submits that a home and community based program designed with the help of Futures, Inc. is appropriate and should be adopted as his permanent placement.

The Board of Education argues that the program it provided and offered is safe and appropriate for the Student.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.*, and related regulations, and in accordance with the Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student was born on May 17, 2008, and is now eight years of age. (Exhibit P 60; Testimony of Mother [Hereafter "T Mother"])
2. The Student was born with severe brain damage and a profound intellectual deficit. He has a seizure disorder, cortical visual impairment, optic atrophy, and cerebral palsy with extremely high tone spastic quadriplegia. He hears, but cannot speak. He relies on a gastrostomy feeding tube for nutritional sustenance and administration of medication, and requires occasional suctioning of his airways. (Exhibit P 60; Exhibit B 83 pp. 4, 12 and 19; T Mother; T Bellows)

3. The Student was identified as eligible for early intervention from the age of two months, when he began to receive services through the Birth to Three Program. (T Mother; Exhibit B 1)
4. At the age of two months, although the Student was able to cry, he had no variation in his cry. He was able to take food by mouth and sometimes gazed in the direction of his parents. (Exhibit B 1)
5. By the age of two years, the Student had developed various different cries to communicate his different needs. He could react to his environment by smiling, laughing and even cooing in the presence of his parents' and aunt's voice. He allowed hand over hand contact during therapy, could take food orally and also had a feeding tube. Unfortunately, he also experienced increased tone and sensitivity to touch as he grew. (Exhibit B 8)
6. The Student began a Pre-Kindergarten ("Pre-K") program with the East Haddam Board of Education ("Board") at three years of age. (T Mother) The Pre-K program was initially provided in the home, with occupational and physical therapists employed by the Board and a Teacher of the Visually Impaired ("TVI") provided by the Board of Education and Services for the Blind ("BESB") visiting the home each week. (T Scata; Exhibits B 14, B 17 and B 19)
7. The Pre-K program was moved to East Haddam Elementary School for the 2013-2014 School Year for two afternoons each week when the Student was five years of age. At that point, the Student's maternal aunt, who had cared for him at home from an early age, was hired as his one to one paraprofessional for support in school and during transportation to school. (Exhibit B 22; T Mother; T Paraprofessional/Aunt)
8. The Student's Paraprofessional/Aunt learned to care for his many needs with instruction from his parents and through experience. She had no formal training in the Student's care. (T of Paraprofessional/Aunt)
9. The Student's services for his 2013-2014 Pre-K Year at East Haddam Elementary School consisted of physical therapy for three quarters of an hour each week; occupational therapy for one hour each week; special education instruction for 5.5 hours each week, consultation and direct services with a TVI five times per year; and daily one to one paraprofessional support provided by his Paraprofessional/Aunt. (Exhibit B 22)
10. Shortly before his sixth birthday in May 2014, the Student was assessed as developmentally well below the level of one year of age in the areas of Communication, Auditory, Cognition and Social Emotional on The INSITE Developmental Checklist for young multihandicapped sensory impaired children. (Exhibit B 25)
11. The Student's Pre-K program was continued at the East Haddam Elementary School for the 2014-2015 School Year, but was now increased to three afternoons each week. His time with the special education teacher was increased to 16.5 hours per week and his physical therapy was increased to one hour per week. By the end of that school year, his attendance three days each week was increased to nearly a full day, from 10:00 am to 3:20 pm. (Exhibit B 27)

12. During this time, the Student's Paraprofessional/Aunt provided all of his care at school, from diapering and occasional suctioning of his airways, to transitioning him from home to school, within the school building and between various positions in the classroom. The Student was not, however, fed at school until the next school year. (T Paraprofessional/Aunt)

13. The 2014-2015 School Year was a difficult one for the Student, as he was in clear discomfort¹ on many days. His medical providers were not always able to identify or resolve all causes of his distress. (Exhibit B 43).

14. Toward the end of that year, the Student was fitted for his first wheelchair. (Exhibit B 43) The Student's school physical therapist, Katherine Bristol, was heavily involved in the process of assessing the Student's functional mobility, designing the wheelchair and preparing paperwork to secure insurance coverage for the wheelchair in coordination with the wheelchair vendor. (T Mother; T Bristol; Exhibits B 36, B 37, B 38, B 48, B 49 and B 50)

15. The custom wheelchair has a full tilt function so that the Student's entire body can be tilted while he is seated. In addition, the seatback reclines to adjust the Student's hip angle while seated. (T Mother; T Bristol) The wheelchair was also fitted with a subasis bar to hold the Student's pelvis in a stable and therapeutic position while in the wheelchair. The subasis bar made it easier for the Student to relax his body while in the wheelchair. (T Bristol)

16. As part of her functional mobility assessment, Bristol determined that the Student is able to bend one of his hips to only 80 degrees. Accordingly, she made sure that the wheelchair was adjusted for an 80 degree hip angle at the time of delivery. (T Bristol; Exhibit B 38)

17. An evaluation at the Connecticut Children's Medical Center's ("CCMC") Tone Clinic in March 2016 revealed that the seatback was set for a 90 degree hip angle rather than an 80 degree hip angle. In addition, the Tone Clinic staff found that the subasis bar had been positioned incorrectly. The seatback was adjusted and the subasis bar was repositioned. (T Bellows; T Mother; T Bristol; T Lilburn) With these changes, the Student grew visibly more comfortable. (T Bellows; T Mother) The evidence does not reflect when, why or by whom the seatback angle was changed to an 80 degree angle. (T Bristol; Exhibit B 83 p. 50 and 53)

18. For his Kindergarten year at East Haddam Elementary School during the 2015-2016 School Year, the Student's week was increased from three days per week from 10:00 am to 3:20 pm to four days per week in November 2015 and then to five days per week in January 2016.² (T Lilburn; Exhibit B 42)

19. Several important new developments occurred at the outset of the Student's Kindergarten year in the fall of 2015. First, the Board hired a new Director of Special Education, Joshua Martin, to replace the retiring David Scata. Martin came from a different school district and was

¹ The Student exhibited discomfort by crying, grimacing, squirming and vocalizing. (T Mother; T Bellows; T Bristol; T Paraprofessional/Aunt; B 69)

² The Student was also offered extended school year services each year. (Exhibits B 42, B 53, B 57 and B 72)

not familiar with the Student or his needs until he began work in East Haddam. As Martin became familiar with the Student's expanding program, he identified and implemented several needed changes. (T Martin; T Scata)

20. One of the changes Martin introduced early on in the 2015-2016 School Year was a plan to add a second paraprofessional to work with the Student on a regular basis. As Martin explained to the parents, a second paraprofessional would be necessary in the event of the Paraprofessional/Aunt's absence. Moreover, because the Student's needs are so significant and complex, the second paraprofessional should work with the Student on a regular basis to maintain skills and knowledge of the Student's changing needs³. (T Martin; T Bristol) Martin discussed his plan to hire a second paraprofessional to work with the Student with the Student's parents in October and/or December of 2015. (T Martin)

21. Martin's plan upset the Student's parents. They objected to the very concept of having two paraprofessionals share the job and demanded that the Paraprofessional/Aunt be assigned to support the Student every school day, and that the second paraprofessional serve only as a substitute when needed⁴. (T Mother; Exhibit B 55).

22. Over the parents' objection, Martin brought a second paraprofessional, Cummings, on board in December 2015. (T Bristol; T Martin) Cummings shadowed the Paraprofessional/Aunt and trained for the Student's care for the next several weeks before beginning to work independently as the Student's paraprofessional in January 2016. The Paraprofessional/Aunt continued to work with the Student for three days per week. (T Paraprofessional/Aunt; T Bristol)

23. Another significant change that Martin made involved feeding. The Student's Paraprofessional/Aunt began to feed him through his gastronomy tube and orally at school in the 2015-2016 School Year. (T Paraprofessional/Aunt) As far as the evidence reflects, the Student's family did not formally notify the Board of this new development.

24. In about December 2015, Martin learned that the Student was being fed through the gastronomy tube at school. At that point, he consulted with School Nurse Dexter and the Department of Education and learned that legal guidelines require that a nurse must initiate gastronomy feeding. The Department of Education also highly recommended that the nurse disconnect the gastronomy tube at conclusion of feeding. (T Dexter; T Martin)

³ The Student's witness, Mr. Alperowitz, agreed that such a model is the best practice. (T Alperowitz)

⁴ The Student's parents also asked to participate in selecting all new staff to work with the Student and to be involved with all staff training. Although Martin agreed to notify the parents of the schedule for training the new paraprofessional and other staff, he did not carry this through. (T Mother)

25. Unfortunately, Nurse Dexter did not have the Student on her caseload and was not aware of his medical needs until December 2015 due to a misunderstanding⁵. (T Dexter) Martin took steps to have Dexter take over the process of initiating and disconnecting the Student's gastronomy tube for feeding each day. (T Martin)

26. Martin also secured a physician's order from the Student's medical provider to specify feeding amounts and related details. (Exhibit B 83 p. 33) He enlisted the manufacturer of the gastronomy pump to train the nurse and others involved in the Student's care on proper feeding technique. (T Martin; Exhibit B 59)

27. Despite this care, some issues arose. On May 3, 2016, the Student's father visited the school and observed elements of the gastronomy feed that day. He watched as the nurse administering the feed, a substitute⁶ for Nurse Dexter, made several mistakes in the process. Although the incident was disruptive and likely uncomfortable for the Student, it did not have lasting effects or require medical attention. (T Mother)

28. In February 2016, Occupational Therapist Dupre told Martin that she saw the Paraprofessional/Aunt feeding the Student orally. Dupre told Martin that she was concerned for the Student's safety because he seemed to be resisting the food, pushing away and turning his head. (T Dupre) The Student was being fed through his mouth to support development of oral motor control, assist digestion and provide pleasure. (T Mother)

29. Martin learned that the Paraprofessional/Aunt had no formal training in oral feeding. He contacted the Student's physician's office and was advised to discontinue oral feeding until the medical team could conduct a swallow study. Accordingly, on March 2, 2016 Martin directed that oral feeding stop. (T Martin; (Exhibit B 83 p. 66) With suspension of the oral feeding, however, the Student experienced constipation and was very uncomfortable. (T Mother; Exhibit 83 p. 67) By April 6, 2016, having received new instructions from the Student's physician, Martin resumed the oral feeding at school. (T Martin; Exhibit B 83 p. 67) Paraprofessional Cummings and other staff were then trained in the proper procedure for oral feeding. (T Dupre; Exhibit B 83, p. 66; Exhibit B 83 p. 80)

30. There were several incidents involving oral feeding in April and May 2016 that concerned the Student's parents. On May 26, 2016, Paraprofessional Cummings was orally feeding the Student when he spit up, coughed and vomited a small amount of liquid. Cummings summoned Nurse Dexter who used a bulb suction to clear the Student's airway and found his vital signs to be within normal limits. No further medical attention was required, although a decision was made to forego the Student's afternoon medication that day. (T Dexter; Exhibit B 83 p. 87)

⁵ Dexter was under the incorrect assumption that another agency was still responsible for operation of the Student's classroom, including the nursing function. As a result, she did not prepare a Health Plan for the Student or involve herself in his care until well into the 2015-2016 School Year. (T Dexter; Exhibit B 60)

⁶ The other nurses employed by the Board were all trained in use of the gastronomy tube and suctioning so that they could substitute in the event of Dexter's absence. (T Dexter)

31. On a few other occasions in April and May, the student coughed or spit up small amounts of food while feeding orally. This took place even while being fed by the Paraprofessional/Aunt and was not unusual. (T Paraprofessional/Aunt) On only one of these occasions was the nurse summoned. None of the incidents required any medical care beyond suctioning or resulted in any lasting effects. (T Dexter; Exhibit B-83 pp 87, 70, 71)

32. The Student occasionally requires suctioning of his airways during mouth feeding and otherwise. The frequency of the need for suctioning tends to increase during the winter months and when the Student has a respiratory infection, but the need may arise at any time. (T Mother; T Paraprofessional/Aunt) The Student's Health Plan as developed by Nurse Dexter and approved by the Student's physician, provides for suctioning by either machine or by bulb. (Exhibit 60)

33. The Student's parents own a portable suctioning machine that they initially sent to school with the Student. (T Paraprofessional/Aunt) Later, during the 2015-2016 School Year, the Board purchased a suction machine that required connection to an electrical outlet. This suction machine was kept on a cart so that it could be wheeled from room to room within the school building as needed, but was not nearly as convenient as the portable machine. (T Dexter; T Paraprofessional/Aunt)

34. In addition to the machine, the school nurse provided a large suctioning bulb to remain with the Student at all times, including during transportation. (T Dexter) Both the machine and the bulb were used from time to time without incident. (T Paraprofessional/Aunt; T Dexter) There were no emergencies involving the need for suctioning or the unavailability of an appropriate suctioning device at school or during transportation to or from school.

35. The Student also requires a change of diaper several times each day. (T Mother; T Paraprofessional/Aunt; T Hall) This task was performed by his paraprofessionals in a room designated for this purpose near the school's gym. (T Mother) Although the room did not have access to an intercom or telephone line, the school did provide the paraprofessionals with walkie-talkies to communicate in the event of an emergency in the changing room. (T Paraprofessional/Aunt) There were no emergencies in the changing room reflected in the evidence.

36. The Student arguably wasted time during the school day traveling to and from the diaper changing area and his classroom, waiting for connection and disconnection of his gastrostomy tube and administration of medications, and transitioning between the special education classroom and mainstream classroom and specials during the 2015-2016 School Year. (T Hall; T Mother) While the Student may have wasted somewhat more time with such things than some of his peers, the experience of wasting time itself was certainly not unique to the Student. The amount of time wasted at school was not unreasonably significant under the circumstances and did not render his program inappropriate.

37. Although the Board introduced a new protocol for parental visits to school during the 2015-2016 School Year, which was not well publicized among staff, the Student's parents were

able to visit him in school on several occasions. (T Lilburn; T Hall; T Mother) There was no occasion that their request to visit the Student in school was denied or unreasonably delayed.

38. The Student's Individualized Education Program ("IEP") for his Kindergarten year during the 2015-2016 School Year was initially developed in the spring of 2015. It provided for 16.5 hours per week with his special education teacher, as well as 60 minutes of occupational therapy per week, 60 minutes of physical therapy per week, 60 minutes of physical therapy consultation per week and four hours per year of consultation and direct services with a TVI provided by BESB. (Exhibit B 42) Time with his special education teacher was increased to 27.5 hours per week during a meeting on October 27, 2015 in light of his increasing school attendance. (Exhibit B 53)

39. The Student was placed in a self-contained classroom with three other students with multiple disabilities. He was mainstreamed each afternoon in a typical Kindergarten classroom⁷ and for special subjects. (T Lilburn; T Hall; T Paraprofessional/Aunt). The Student enjoyed and benefited from interactions with his nondisabled peers. He sometimes turned his head toward peers and/or opened his eyes widely. (T Bristol; T Lilburn; T Dupre; T Hall; T Bellows)

40. The Student's IEP goals and objectives for the 2015-2016 School Year were as follows:

Academic/Cognitive

Goal # 1

[Student] will recognize items through active exploration, including trial and error and interacting with peers and adults.

Objective # 1 Engage in an activity with a peer/adult or with a small group.

Conduct observations or experiments with one peer or with a small group using sharing and turn taking skills.

Goal # 2

[Student] will exhibit interest in reading.

Objective # 1 Attend to a story. Listen with interest to a story read or told by an adult or another child.

Goal # 3

[Student] will engage in musical and creative movement activities.

Objective # 1 Participate in group musical experiences with adult, which may include listening to music, doing finger plays and using musical instruments.

Willingly participate in modified finger plays, musical games and other musical activities.

⁷ The typical Kindergarten classroom was not wholly wheelchair accessible, but the Student was able to access three of the five classroom learning stations.

Gross/Fine Motor

Goal # 4

Demonstrate an improvement in activities which require fine motor coordination and manipulation of classroom materials and equipment needed to participate in educational activities.

Objective # 1 Demonstrate the ability to tolerate hand over hand assistance to right/left hand to engage in simple table top activities without adverse reaction.

Objective # 2 Demonstrate the ability to release an item placed in his left or right hand with minimal assistance after holding an item for 1 minute.

Objective # 3 Demonstrate the ability to consistently maintain a gross grasp in right and left hand to hold an item for one minute.

Goal # 5

[Student] will increase active participation/engagement in functional activities within the classroom setting.

Objective # 1 Demonstrate improved force grading in order to activate a switch with hand over hand assistance with an open hand.

Objective # 2 Demonstrate the ability to sit with support on the floor with peers to engage in a 5 minute play or circle time activity.

Objective # 3 Demonstrate the ability to maintain prone position on elbows for 3 minutes.

Objective # 4 Demonstrate the ability to maintain prone position weight bearing on elbows with good head control for 1 minute.

Goal # 6

Demonstrate an improvement in sensory processing skills to successfully participate in educational and classroom activities. (PT & OT)

Objective # 1 Demonstrate the ability to tolerate range of motion to his left upper extremity without adverse reaction prior to a functional fine motor activity.

Objective # 2 Demonstrate the ability to tolerate various textures (e.g., glue, sandpaper, etc.) during a 1-minute tactile play without adverse reactions following sensory input to bilateral hands.

Objective # 3 Demonstrate the ability to participate in movement associated with playground equipment (e.g. swings) with maximal assistance. (PT)

Objective # 4 Demonstrate the ability to tolerate participation in imposed movement on a rocker board, bolster, swing, or scooter with maximal assistance. (PT)

Goal # 7

Demonstrate an improvement in balance for increased safety while participating in educational activities in the school environment. (PT)

Objective # 1 Demonstrate the ability to sit on the floor with support and maintain head in midline, while engaged in classroom activities, for increasing periods of up to 1 minute. (PT)

Objective # 2 Demonstrate the ability to sit erect and maintain proper body alignment, while seated in a Rifton, Tumbleforms, or corner sit chair with or

without tray, for increasing periods up to 30 minutes.

Goal # 8

Demonstrate ability to maintain flexibility and present range of motion in trunk and extremities to perform educational and daily living activities. (PT & OT)

Objective # 1 Demonstrate an increase in range of motion and flexibility of lower extremities to allow for properly aligned weight bearing. (PT)

Objective # 2 Move head fully from side to side in sitting, in stander and in supported prone. (PT)

Objective # 3 Demonstrate the ability to maintain relaxation for 15 minutes. (PT)

Goal # 9

Demonstrate an improvement in adaptive positioning during the school day. (PT)

Objective # 1 Demonstrate good tolerance of sitting position in custom wheelchair with adjustments as needed to maintain good posture for increasing periods up to 1.5 hours. (PT)

Objective # 2 Demonstrate the ability to utilize lower extremity orthotics for one hour with good tolerance. (PT)

Objective # 3 Demonstrate the ability to stand in proper position in a supine stander for increasing periods for up to 60 minutes while at school. (PT)

(Exhibits B 42 and B 53)

41. These goals and objectives were reasonably related to his levels of cognitive and functional development at the time. By the conclusion of the 2015-2016 School Year, the Student mastered Academic/Cognitive Goal Nos. 1, 2 and 3 and mastered or made satisfactory progress in each of his Gross/Fine Motor Goals, except Goal 5, Objective 2 and Goal 7, Objective 2, which were not introduced. (Exhibit B 82 pp. 1 – 16; T Lilburn; T Bristol; T Dupre)

42. Special Education Teacher Lilburn noted, for example, that with the support of his teacher or paraprofessional the Student would at times attend to stories read to him, participate in musical experiences and engage in group activities. (T Lilburn; Exhibit B 71)

43. Occupational Therapist Dupre observed that the Student progressed in grasping objects and maintaining his grasp as well as in tolerating hand over hand support in activating switches to select different sounds and songs. In particular, Dupre testified that the Student developed a “purposeful reach” and is able – with support - to select the switch that plays his preferred song - The Muffin Man - by lingering his hand over the applicable button⁸ on the device. (T of Dupre; Exhibit B 70)

44. Physical Therapist Bristol testified that although the Student clearly experienced physical discomfort and increased tone and dystonia during the year, he made good progress on his goals

⁸ Dupre’s observation is supported by the testimony of Physical Therapist Bellows from the CCMC Tone Clinic, that the Student is able to move his arm purposefully to communicate. (T Bellows)

and objectives⁹. Bristol agreed with Dupre that the Student is able to move his arms volitionally, at least while he is in the wheelchair. (T of Bristol; Exhibit B 69)

45. Each of these providers based their conclusions about the Student's progress on data taken while the services were being provided. It was not their practice to maintain that data after using it to develop progress reports for their students. (T Lilburn; T Bristol; T Dupre)

46. For the 2016-2017 School Year, the Board proposed increasing the Student's special education time to 30.42 hours per week. (Exhibit B 72) The Student's Special Education Teacher, Occupational Therapist and Physical Therapist all felt that the proposed service hours were sufficient to meet the Student's needs. As the occupational and physical therapists pointed out, the Student's paraprofessionals also work with the Student during the school day on various stretching and positioning activities that support their direct therapeutic services. (T Bristol; T Dupre; Exhibit B 69; Exhibit B 83 p. 51)

47. No one proposed or requested that the Student receive services with a Speech and Language Pathologist ("SLP") for either the 2015-2016 or 2016-2017 School Years. One of the Student's witnesses recommended adding SLP services to assist with teaching the Student to use switches for communication. The Board's team, however, had consulted with an SLP for this purpose (Exhibit B 24) and was making progress in teaching the Student to activate switches. (T Bristol; T Dupre; T Lilburn)

48. At a meeting on March 30, 2016, the Board proposed the following goals and objectives for the Student's IEP for the 2016-2017 School Year:

Academic/Cognitive

Goal # 1

Upon listening to a story, [Student] will answer questions about key details in the text.

Objective # 1 After listening to a text, with support [Student] will answer "wh" questions to demonstrate understanding of key details in a text by utilizing a 40 second grasp of 3D objects/manipulatives.

Goal # 8

[Student] will organize, represent and interpret data.

Objective # 1 [Student] will demonstrate sorting using a grasp and release pattern of up to four categories of sensory data (ex. Soft, rough, cold, warm) with supports.

Gross/Fine Motor

Goal # 2

⁹ Bristol did, however, recommend that most of his goals and objectives be continued into the next school year. (Exhibit B 72)

Demonstrate an improvement in activities which require fine motor coordination and manipulation of classroom materials and equipment needed to participate in educational activities. (OT)

Objective # 1 Demonstrate the ability to release an item placed in his left or right hand with minimal assistance after holding an item for 1 minute.

Objective # 2 Will tolerate sitting in his wheelchair with the tray on the wheelchair to activate a variety of single switch activated toys in three of four attempts during a weekly session.

Objective # 3 Demonstrate the ability to consistently maintain a gross grasp in right and left hand to hold an item for one minute.

Goal # 3

[Student] will increase active participation/engagement in functional activities within the classroom setting. (PT & OT)

Objective # 1 Demonstrate the ability to maintain prone position on elbows for 3 minutes.

Objective # 2 Demonstrate the ability to maintain prone position weight bearing on elbows with good head control for 1 minute.

Objective # 3 When given two choices, [Student] will activate toy of preference using a switch with no more than 3 verbal cues to activate toy upon command consistently 4 or 5 attempts for 3 sessions. (OT)

Goal # 4

Demonstrate an improvement in sensory processing skills to successfully participate in educational and classroom activities. (PT & OT)

Objective # 1 Demonstrate the ability to tolerate range of motion to his left upper extremity without adverse reaction prior to a functional fine motor activity.

Objective # 2 Demonstrate the ability to tolerate various textures (e.g. glue, sandpaper, etc.) during a 1-minute tactile play without adverse reactions following sensory input to bilateral hands.

Objective # 3 Demonstrate the ability to participate in movement associated with playground equipment (e.g. swings) with maximal assistance and good vestibular tolerance as evidenced by nystagmus and tonal changes lasting less than 15 seconds. (PT)

Goal # 3

Demonstrate an improvement in sensory processing skills to successfully participate in educational and classroom activities. (PT & OT)

Objective # 1 Demonstrate the ability to tolerate participation in imposed movement on a rocker board, bolster, swing or scooter with maximal assistance and good tolerances as evidenced by tonal changes that last less than 15 seconds. (PT)

Goal # 5

Demonstrate an improvement in balance for increased safety while participating in educational activities in the school environment.

Objective # 1 Demonstrate the ability to sit erect and maintain proper body alignment, while seated in a Rifton or other table height chair with seatbelt, harness or tray as deemed necessary for proper positioning, for increasing periods up to 30 minutes. (PT)

Goal # 6

Demonstrate ability to maintain flexibility and present range of motion in trunk and extremities to perform educational and daily living activities. (PT)

Objective # 1 Demonstrate maintenance of range of motion and flexibility of lower extremities to allow for properly aligned weight bearing. (PT)

Objective # 2 Demonstrate full active and passive range of motion in head and neck in sitting, in stander, and in supported prone. (PT)

Objective # 3 Demonstrate the ability to maintain relaxation of trunk and extremities for 15 minutes when positioned comfortably.

Goal # 7

Demonstrate an improvement in adaptive positioning during the school day. (PT)

Objective # 1 Demonstrate good tolerance of sitting position to custom wheelchair with adjustments as needed to maintain good posture for increasing periods up to 1.5 hours. (PT)

Objective # 2 Demonstrate the ability to utilize lower extremity orthotics in weightbearing and non-weightbearing for a minimum of one hour at a time with good tolerance. (PT)

Objective #3 Demonstrate the ability to stand in proper position in a supine stander for increasing periods for up to 60 minutes while at school. (PT)

Goal # 9

[Student] will safely use playground and gym equipment for up to 30 consecutive minutes with assistance as required to maximize his ability to participate in a recreational experience. (PT)

Objective # 1 [Student] will demonstrate tolerance and enjoyment during the use of a minimum of 3 activities during his scheduled recess and/or PE period. (PT)

Independent Living

Goal # 10

[Student] will produce a functional 'signature'.

Objective # 1 With support, [Student] will sign into school locations twice a day by demonstrating a grasp/pull down of magnetic name piece to signify his attendance.

(Exhibit B 72)

49. The Student's parents formally rejected these goals and objectives and, in early June 2016 stopped sending the Student to the Board's school. In July 2016, they notified the Board of the Student's unilateral placement. (T Mother; T Lilburn; Exhibits P 41 and P 56)

50. The Student's Mother, Paraprofessional/Aunt and the Student's witness, Dr. Erik Mayville all testified that many¹⁰ of the Board's proposed goals and objectives for the 2016-2017 School Year were unrealistically advanced for him. Perhaps most significant is the expectation of Goals 1, 8 and 10 that the Student grasp and/or release an object in order to respond to questions about a story, sort categories of sensory data or sign in to his classroom.

51. The Student's Mother and Paraprofessional/Aunt claim that the Student cannot grasp or release an object. They say that he can only grasp an object if someone first pries his clenched fingers open (both hands are usually held in tight fists around the thumb), and places an object in his fist. (T Mother; T Paraprofessional Aunt) The Student's private physical therapist, Bellows, also reported that the Student cannot grasp or release an object. (T Bellows)

52. Special Education Teacher Lilburn, on the other hand, testified convincingly that she saw the Student progress in his ability to use his arms and hands volitionally over the course of the year and that by the end of the year, he did, on occasion and with support, grasp an object and use it to make marks on paper. In addition, she saw the Student hold and shake a maraca and hold a book. She did not claim that the Student exhibited these skills consistently or without support, but only that they are coming into his repertoire (T Lilburn; Exhibit B 82).

53. Similarly, Occupational Therapist Dupre confirmed that the Student made progress over the course of the 2015-2016 School year in maintaining a grasp of objects. (T Dupre; Exhibit B 70)

54. Dr. Erik Mayville evaluated the Student on behalf of his parents on October 31, 2016.¹¹ During an approximately two hour office visit, Dr. Mayville administered the Mullens Scale of Early Learning¹², interviewed the Student's Mother and Paraprofessional/Aunt, and arranged for the family to complete Vineland Adaptive Behavior Scales. On the Mullens Scale of Early Learning, the Student scored at the very bottom, in the three to four months of age range in all areas examined. According to Dr. Mayville, the Student has no communicative behavior at all, does not respond in a learning way to sounds, and cannot grasp objects. (T Mayville) Significantly, however, Dr. Mayville reported that the Student "grabbed onto [his mother's] scarf" while sitting in her lap during their office visit. (Exhibit P 60)

55. In addition to the controversy over whether the Student can grasp, the Student's parents claim that the Student lacks the cognitive capacity to sort objects or respond to questions about a story. (T Mother; T Paraprofessional/Aunt) Indeed, the Paraprofessional/Aunt submits that the Student is virtually oblivious to his environment and has learned nothing during the many years

¹⁰ The Student's Mother did allow that several of the proposed goals and objectives for physical and occupational therapy are appropriate. (T Mother)

¹¹ This evaluation took place after the Student was unilaterally placed and was never considered by the Student's Planning and Placement Team ("PPT").

¹² Administration of the Mullens consumed about fifteen minutes of the session. The only test Dr. Mayville described was blowing a whistle near the Student's head, which produced a startle response from the Student. (T Mayville)

she has worked with him. (T Paraprofessional/Aunt). Dr. Mayville says that he has no communicative behavior. (T Mayville)

56. The Student's Mother, on the other hand, agrees with school staff that the Student experiences pleasure from a variety of sources, including listening to music, hearing his family's voices, sitting in her lap, eating sweets and being outdoors. She also acknowledges that he has several expressive behaviors - including crying, vocalizing, squirming, straightening his body and turning his head away – that may or may not be volitional. (T Mother) School staff notice that his eyes widen or become more alert when he enjoys the sound of a peer's voice or having a story read to him. Additionally, the Mother reports that the Student has learned to open his mouth when prompted for food and to turn his head away when she prompts him to brush his teeth. (T Mother)

57. Although the conflict in these reports presents ambiguity as to the precise level of the Student's functionality at this time, there is no dispute that his developmental level is very low and that this leaves the possibilities for future performance unclear. (T Mayville; T Alperowitz)

58. Dr. Mayville suggests that it may be possible to teach the Student to connect cause and effect, and learn to use switches to communicate his preferences and recruit interaction. This approach would involve highly structured, empirically and behaviorally based instruction designed and implemented by a board certified behavior analyst, an SLP and other service providers. (T Mayville)

59. The Board's approach to educating the Student has not been fundamentally different than that suggested by Dr. Mayville. The Board has used switches, specialized instruction and therapies with the overall goal of allowing the Student an avenue to communicate and impact his environment. The Board has had some success with its approach. (T Lilburn; T Dupre; Exhibits B 24, B 27, B 42, B 53 and B 72)

60. The goals and objectives proposed by the Board for the 2015-2016 and 2016-2017 School Years were designed, and are likely, to enable the Student to receive educational benefit and improve his motor function and communication. Although they were not all mastered, some progress was made, even on the 2016-2017 IEP which was in effect for only a few weeks. (Exhibit B 82 pp 8 – 16)

CONCLUSIONS OF LAW AND DISCUSSION:

Background

1. The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq* ("IDEA") is to open the door of public education to students with disabilities by requiring school systems to offer a free appropriate public education ("FAPE"). *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982) ("Rowley"). In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA.

2. The first part of the test is whether there has been compliance with the procedural requirements of IDEA, and the second part is whether the student's IEP is reasonably calculated to enable the student to receive educational benefit. *Id.* at 206-207. *See also, Fry v. Napoleon Community Schools*, 580 U.S. ___ (2017). An IEP is reasonably calculated to enable the student to receive educational benefit if it is likely to produce progress rather than regression. *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000).
3. The Board here had the burden to prove by a preponderance of the evidence that the IEPs it offered were both substantively appropriate and in compliance with IDEA's procedural requirements. Regulations of Connecticut State Agencies ("R.S.C.A.") Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).
4. The first prong of the *Rowley* inquiry, whether the Board complied with IDEA's procedural mandates, is critical. As the Supreme Court said in *Rowley*, Congress based IDEA on the "conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet the student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).
5. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied FAPE. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). In matters alleging a procedural violation a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).
6. Each IEP must include: (a) a statement of the student's present level of performance in each area of disability as determined through periodic assessments; (b) a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the child's educational needs resulting from the disability; and (c) a statement of the special education and related services to be provided in order to enable the child to attain the goals and progress in the general education curriculum. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320.
7. Significantly, IDEA also demands that each student's program be implemented in the least restrictive environment, so that children with disabilities are educated in integrated settings with non-disabled peers "[t]o the maximum extent appropriate." 34 C.F.R. Section 300.550(b); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).

8. The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). "An IEP is a snapshot, not a retrospective." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id.*

The Board's 2015-2016 and 2016-2017 IEPs offer FAPE

9. The evidence presented established that the Board's 2015-2016 and 2016-2017 IEPs adequately fulfilled IDEA's procedural as well as substantive requirements. First, the IEPs were developed by the Student's PPT based on reasonably appropriate assessments of the Student's strengths, weaknesses and levels of performance. The opportunities for assessment were limited by the Student's very low functional level. The Board assessed the Student with the INSITE checklist in 2014 and produced results very similar to those of the parents' witness, Erik Mayville. The PPT team also had progress reports from his teachers and physical and occupational therapists each year. It secured a speech and language screening and consultation early in the process. It was not necessary to attempt further or more intensive assessment.

10. The Student claims that the Board staff overestimated his level of functional performance. The Board's staff was credible in its reports and testimony of the Student's developing capacity to use his hands and arms purposefully, to communicate and to participate in school activities. These assessments and reports, as well as information from the parents, were used in development of the Student's goals and objectives. The disagreements that did exist between the Student's parents and the school staff concerning his functional levels were not so great as to impede the Student's right to FAPE, significantly impede the parents' right to participate in the process or deny the Student educational benefit. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).

11. The Student's parents were active members of a PPT that met periodically to review progress, design the program and develop measurable goals and objectives. 34 C.F.R. Section 300.321 and Section 300.324. They were not excluded from observing the Student at school or from participating in the decision making process. While the parents were not invited to control the process of hiring or training staff, these functions are not within the purview of the PPT under the IDEA. 34 C.F.R. Section 300.324.

12. Overall, the goals and objectives proposed for the Student are both measurable and reasonably calculated to enable him to receive educational benefit and to progress rather than regress in his academic and motor development. *Rowley*, at 206-207; *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000).

13. The Board's use of the term "tolerate" in several goals and objectives related to motor skills does not render them meaningless or inappropriate. The term "toleration" generally signifies the absence of behavior. For this Student, however, the absence of behavior expressing discomfort or pain is significant. This Student's caregivers know he is in pain when he grimaces, squirms or cries, and they know he is tolerating a therapeutic position or movement when he is

not grimacing, squirming or crying. Progress in the goals and objectives involving toleration is susceptible of measurement by the absence of behavior expressing pain.

14. The Student's academic and cognitive goals and objectives are also both measurable and reasonably likely to produce progress rather than regression. Indeed, these goals and objectives for the 2015-2016 were mastered and some progress was made in the first few weeks of work on those for 2016-2017. The staff was able, for example, to ascertain and measure the Student's preference for the Muffin Man song because he lingered his hand over that switch for a longer period of time. The fact that the Board's approach for these goals, the use of switches to facilitate development of communication, is similar to that suggested by Dr. Mayville also supports their legitimacy.

15. In addition, the Board's program was offered in the least restrictive environment. The Student was mainstreamed for significant portions of his school day with non-disabled peers, and he both enjoyed and benefited from these interactions. (Findings of Fact #39)

16. Finally, the Board put into place the related services that were necessary for the Student's care and safety at school and provided qualified staff to implement those services. *See Department of Education, State of Hawaii v. Katherine D*, 727 F.2d 809 (9th Cir. 1983) *cert den*, 471 U.S. 1117 (1985). Although the Student suffered a few moments of discomfort and disruption when staff made mistakes in his care, these incidents did not require medical care beyond suctioning, and did not threaten serious injury.

17. In light of the foregoing conclusions that the Board's programs were appropriate during the relevant time, it is not necessary to reach the question whether the parents' unilateral placement is appropriate. *School Committee of Burlington v. Department of Education of Massachusetts*; 471 U.S. 359, 370 (1985).

Request for Independent Educational Evaluation

18. In his brief, the Student requests that he be reimbursed for the expense of an evaluation performed by Dr. Erik Mayville as an independent educational evaluation. This issue was not raised in the Student's request for due process. (HO Exhibit 1) It cannot, therefore, be addressed as part of this hearing. 34 C.F.R Section 300.511(d).

FINAL DECISION AND ORDER:

The Board offered the Student a Free Appropriate Public Education for the 2015-2016 and 2016-2017 School Years.

The Student's claims are denied.