

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

Appearing on behalf of the Student: Attorney Meredith Braxton  
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Appearing on behalf of the Board: Attorney Abby Wadler  
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Appearing Before: Attorney Susan Dixon  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Did the 2016-17 IEP provide Student with a free appropriate public education ("FAPE") pursuant to the IDEA?
2. Did the Board provide Student with FAPE pursuant to Section 504 of the Rehabilitation Act ("Section 504") during the 2016-17 school year?
3. If Student did not receive FAPE during 2016-17, is he entitled to compensatory education?
4. Did the 2017-18 IEP offer Student with FAPE pursuant to the IDEA?
5. Did the Board offer Student FAPE pursuant to Section 504 of the Rehabilitation Act? ("Section 504") during the 2017-18 school year?
6. Should Student's parents be reimbursed for his enrollment at Pinnacle School for the 2017-18 school year, including 2017 ESY?
7. Should Student be prospectively placed at Pinnacle School?

**PROCEDURAL BACKGROUND:**

The Student, by the Parents, filed this Request for Due Process Hearing on March 16, 2018. The Hearing Officer was assigned on March 16, 2018, and a Prehearing Conference was held on April 3, 2018. Hearing dates were set by agreement of the parties, and hearings were held on the following dates: May 9, May 10, May 25, June 7, 2018, and a mailing date for final decision was set for July 6, 2018. On June 7, 2018, additional hearing dates were requested and granted for July 9, 10, 12, 31 and August 1, 2018, and the mailing date for final decision was extended to September 4, 2018 by agreement. On July 31, 2018, the parties each rested their case, requested permission to file simultaneous briefs, and requested the mailing date for the final decision be extended. The Hearing Officer granted the parties' request and set the date for filing simultaneous briefs for August 24, 2018. The final date for mailing the decision was set by agreement as September 19, 2018.

On July 18, 2018, the Board moved for an order allowing a previously-undisclosed witness, Mary Forde, to testify regarding a matter that had unexpectedly arisen during the hearing on July 12. The Student filed a written objection on July 26, 2018. On July 27, 2018, the Hearing Officer ruled that the witness could testify for the limited purpose on the subject of the computer program DirectIEP and how data is inputted into it. Additionally, a witness previously disclosed by the Student, Dr. Horn, unexpectedly became physically unable to appear due to a serious illness. The Board did not agree to an indefinite extension of hearing dates based on the uncertainty of his condition. The Hearing Officer ordered that unless he became well enough to appear in person, or a video or phone connection could be arranged, by July 31, 2018, the hearing would not be extended to further dates, as there was unfortunately no assurance he would be recovered by any certain date.

The following witnesses testified at the evidentiary hearings:

The Student called the following witnesses:

Shamain Johnson

Erik Mayville, Ph.D., BCBA-D

Student's Mother

Fabian Agiurgioaei-Boie, Ph.D. ("Dr. Fabian")

Alisa Dror, Ph.D.

Brittney O'Rourke

The Board called the following witnesses:

Judie Baumeister

Kathleen Beinstein

Julie Webster

Daniella Phelan

Hallie Sigman

Mary Forde (limited to data entry question)

Hearing Officer Exhibits HO-1 and HO-2 were entered as full exhibits on May 9, 2018. HO-3 was entered on June 7, 2018. Board Exhibits B-1 through B-4, B-6 through B-18, B-10, B-11, B-11a, B-12, B-14-22, B-23A-E through B-35 were entered as full exhibits. Exhibits 13 and 23 were withdrawn.

On July 10, 2018, the Hearing Officer ordered the Board to produce certain documents, which were produced the next hearing day, labeled B-33 and B-34, and entered as exhibits. Parent Exhibits P-1 through P-32, and P-34-56 were entered as full exhibits. Page 5 of P-43 was substituted.

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

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

## **SUMMARY:**

This case was brought by a Student diagnosed with autism, claiming he was denied a free and appropriate public education (“FAPE”) by the Greenwich Board of Education (“Board”). The Student attended the Board's Central Middle School for sixth and seventh grades, where he received special education services under Individualized Education Plans (“IEP”s). The Student claims the IEPs did not afford him FAPE in both sixth and seventh grade school years because they did not enable him to make appropriate progress in light of his circumstances. For eighth grade, the Student was unilaterally placed at Pinnacle School by his parents who are seeking reimbursement for the 2017-2018 school year tuition, and an order for him to be prospectively placed at Pinnacle for ninth grade (2018-2019) at Board expense. In light of the evidence and testimony, the Hearing Officer orders the Student placed at Pinnacle School for 2018-2019, and orders tuition reimbursement for 2017-2018.

### **STATEMENT OF JURISDICTION:**

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 United States Code (“U.S.C.”) §1400 et seq., according to the specified procedures of 20 U.S.C. §1415, and related regulations, Connecticut General Statutes (“C.G.S.”) §10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

### **FINDINGS OF FACT:**

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

1. Student is currently 14 years of age, entering 9<sup>th</sup> grade in fall of 2018. (HO-1)
2. Student's primary disability is autism, diagnosed by Dr. Emily Cashman in 2007 by means of neuropsychological evaluations. (P-7, p. 2)
3. Student has been receiving special education services for his entire educational career. (P-7, p. 2)
4. Student has average to above-average cognitive functioning in most areas with weaknesses in aspects of working memory and processing speed. (P-9, p. 1)
5. Student's challenges lie in the realm of the social, emotional and behavioral issues of autism that have had a great effect on his educational environment. (P-9, p. 1)
6. Student attended North Street School (“NSS”) and Central Middle School (“CMS”) which are within the jurisdiction of the Greenwich Board of Education (“Board”), with special education support, from the inception of his public school education, until the school year of 2017-18. (HO-1)
7. For sixth and seventh grade, Student attended CMS, a middle school which serves roughly 600 students. (Ms. Johnson, 5/9/18 p. 44)
8. For the school year of 2017-18, by written notice to the Board on May 24, 2017, Parents removed Student from the Board's school and enrolled him in Pinnacle School in Stamford, Connecticut. (P-30)
9. Student has had an Individualized Education Program (“IEP”) developed for him every year going back to at least 2011. (Ms. Johnson, 5/9/18, p. 50)

10. Ms. Johnson, the Assistant Principal at CMS, reviewed all of Student's IEPs. (Ms. Johnson, 5/9/18, p. 50)
11. The majority of Student's goals and objectives in every one of Student's IEPs address social and/or communication issues. (Ms. Johnson, 5/9/18, p. 57-8)
12. A consistent feature of Student's profile is the difficulty with reciprocal social interaction characteristic of autism, significantly affecting his understanding of friendships and resulting in a lack of reciprocity in relationships. (P-9, p. 2)
13. Ms. Johnson agrees that social functioning is important for students. (Ms. Johnson, 5/9/18, p. 60)
14. While Student was attending NSS, he and his Parents were introduced to a curriculum known as "social thinking" that is a research-based program that is of value to students on the autism spectrum. (Mother, 5/25/18, p. 85-7)
15. Student's elementary school teacher, Beth Bloedel, with whom he worked on-on-one with in that time, shared with Student's mother that she used the social thinking strategies and that he responded "very well" to it. (Mother, 5/25/18, p. 87-88)
16. Student's IEP of May 24, 2012, focused on and incorporated goals for Student in social interactions, such as "Student will use self-help strategies to help him manage difficult situations." (Goal #3, P-11, p. 10)
17. The May 17, 2013 IEP also set out goals and objectives largely in the social and communication areas, and proposed 3 team meetings per month, specifying one with a Board Certified Behavior Analyst ("BCBA") and one meeting per month with Parents. (P-12, p. 3)
18. There was no reference to Student exhibiting any significant maladaptive behaviors in the 2013-14 IEP and it refers to his "growth in his ability to participate in school activities with other children." (P-12, p. 5)
19. His IEP for 2014-15 remained largely unchanged with similar goals and strategies keyed to social thinking and again, no significant maladaptive behavior was noted. (P-14)
20. In fourth grade, social thinking and other concepts were included in the April 30, 2015 IEP as a part of Student's annual goals (#4, 6), for example, identifying behavioral triggers (e.g. events, thoughts, emotions, feelings, and understand how these triggers impact his behavior or on the behavior of others). (P-15, p.11, 13)
21. The April 30, 2015 IEP was Student's annual review and anticipated the transition from NSS to CMS. (P-15, p. 2)
22. Also, prior to entering CMS, such other social thinking concepts (such as perspective taking, body language management, and communication with peers) were not only being addressed, they were improving. Student met 93% of his academic and social goals at the end of fifth grade. For example, Goal #5 and Goal #6 were noted "Satisfactory Progress" on the May 7, 2015 IEP and there was no indication his behavior was interfering with his learning or that of others at that point in time. (P-16)

23. Later in May, 2015, a Planning and Placement Team (“PPT”) meeting was held with the new team at CMS, parents, and Beth Bloedel, from NSS, at which the team discussed concerns regarding the Student’s entry into middle school, and an IEP was formulated with many significant social thinking concepts included in the social goals and objectives. (P-16, Mother, 5/25/18, p. 97)

24. At the meeting, Beth Bloedel gave the CMS team a “road map as to what works and what doesn't.” (Mother 5/25/18, p. 99)

25. The notes of the PPT stated:

“In addition to having limited attention in social interactions, which leads to him being unaware of what is going on, Student usually does not focus his attention on people's behaviors, so he often does not notice verbal or even non-verbal cues. This can lead to social frustration and/or isolation when he doesn't know what is going on.”

“Although Student has very much improved his ability to use more flexible thinking and under the perspective of others when adult support and scaffolding is provided, these areas are still a struggle for Student and may make it difficult for him to solve naturally occurring social and problem situations as well as work effectively on group projects in the classroom.” (P-16, p.5)

26. According to Ms. Johnson, as Student was entering 6<sup>th</sup> grade (and transferring out of NSS to CMS), the PPT did not require any changes in Student's goals and objectives. (Johnson, 5/9/18, p. P-16)

27. No social thinking curriculum elements such as had been implemented in fifth grade were included in Student's program for sixth grade. (Johnson, 5/9/18, p. 64-5)

28. An IEP dated October 14, 2015 was generated, removing the original Goal #4 from the prior IEP, and replacing it with: “Student will learn social initiation strategies and utilize them in classroom settings.” (P-17, p. 6)

29. At the October, 2015, PPT meeting, the Parents requested a Functional Behavior Assessment be conducted (which was completed in November, 2015), based on four behaviors of concern: off-task use of personal computer, calling out, raising his voice, and inappropriate touching. CMS did not agree with Parents’ request to allow the FBA to be performed by a BCBA. (P-3, P-17, P-38)

30. Dr. Jisun (“Sunny”) Fisher, the then School Psychologist, who is not a BCBA, performed the FBA, which was followed by her preparing and submitting a Behavior Intervention Plan (“BIP”) in 2015. (P-3)

31. The BIP was limited to addressing the four behaviors of concern in the FBA and included proposed strategies to do so. An example of the “Consequence-based Strategies” proposed to manage the behavioral issues was to “remind of behavior expectations” and “point to visual.” (P-4, p. 1, 4)

32. The BIP did not address the socialization and social functioning problems previously found relevant to Student's education by Student's previous teachers and IEPs. (Ms. Johnson, 5/9/18, p. 77, P-16, P-9)

33. Non-compliance (referenced in the BIP) was an issue which was raised to a level of concern during transition to 6<sup>th</sup> grade, and if the non-compliance did not take the form of off-task use of his computer, calling out, or raising voice, it did not get reported. There were “red flags right away” and “lots of phone calls” about troubling behaviors at the start of and continuing throughout sixth grade. As the sixth grade year went on, Student exhibited other behavioral issues which escalated in frequency and severity; such as hiding in his locker, eloping from class, and on multiple occasions urinating on the floor in the bathroom. (Ms. Johnson, 5/9/18 p. 62, Mother, 5/25/18 p. 106, 108, Dr. Fabian, 5/25/18, p.

61-3, 65)

34. At CMS, Judie Baumeister was Student's case manager and special education teacher, responsible for the academic goals and monitoring his progress. Ms. Baumeister, however, testified she did not produce certain data and records she compiled on Student despite Parents' request. The Hearing Officer ordered this material to be produced at the next hearing the following day and she did so. (Ms. Baumeister, 7/9/18, p. 9, 60-64, 67, B-33)

35. Ms. Baumeister stated that, early in sixth grade, Student crawled into and locked himself in his locker, and over the term otherwise misbehaved in other ways, such as: eloping from class “daily,” wandering the building at will, and in one instance turning on the emergency shower in the chemistry lab. (Ms. Baumeister, 7/9/18 p. 43, Dr. Fabian, 5/10/18 p. 147)

36. Student had begun to exhibit and/or escalate various other behaviors which caused concern: touching teachers and other students inappropriately; making disturbing, threatening/violent statements; one occasion of smearing paint on the walls; and an instance when he had kicked another student in the hallway. (Ms. Johnson, 5/9/18, p. 61-2, Mother, 5/25/18, p. 108, 139-152, 162-3, P-37)

37. The Parents realized there was a need to find the root of this behavior and were concerned about long term implications of his other maladaptive behaviors like tantrumming, so they requested another FBA. (Mother, 5/25/18 p. 110, 162-3, 166-170, P-38, p. 8, P-17)

38. Dr. Fabian Agiurgioaei-Boie worked with Student on a regular basis from Student's years at NSS until sixth grade, when his role in Student's case became more of a consultant. (Dr. Fabian, 5/10/18, p. 142, 145) According to Dr. Fabian; 1) a “team” is responsible for developing an FBA; 2) he was not involved in the design of the FBA Interview which he stated was the basis of the FBA; and 3) no one on the team was a BCBA at that time. (Dr. Fabian, 5/10/18 p. 150-52, P-45) (The 5<sup>th</sup> grade IEP refers to Dr. Fabian being a BCBA but he had not become certified as of then.) (P-14, B-51)

39. Dr. Fabian was a “behavioral coach” for the Board's schools – providing support in consultation to school teams. His duties included developing “FBAs” and Behavior Intervention Programs (“BIP”s) and monitoring implementation of Applied Behavior Analysis (“ABA”) programs. (Dr. Fabian, 5/10/18 p. 140-141)

40. Dr. Fabian has had experience with working with children on the autism spectrum. (Dr. Fabian, 5/10/18, p. 13-14)

41. Dr. Fabian worked with the school team to coordinate supports, provide support strategies and he also participated in the biweekly meetings with the general education teachers, special education teachers, related service team, and parents. (Dr. Fabian, 5/10/18, p. 73)

42. Dr. Fabian's opinion was that Student's main challenge was his ability to understand, engage and maintain social interactions, read social cues which... are just part of the profile of most...children on the autism spectrum and admitted Student had a difficult time transitioning to middle school. (Dr. Fabian, 5/10/18, p. 145, 147)

43. School Psychologist Dr. Jisun Fisher performed a Psychoeducational Evaluation in April, 2016 and data for it was obtained for her by Dr. Fabian from Student's teachers. The testing revealed Student was in the “severe” range for the majority of the areas addressed by the Social Responsiveness Scale (2<sup>nd</sup> Ed.) used in that testing. (P-7)

44. Dr. Fisher, in her attempt to gain a better understanding of Student's self-control and problem-solving skills, administered the Behavior Rating Inventory of Executive Function ("BRIEF") questionnaire to two of Student's teacher and his Parents. (P-7, p. 3, 4)
45. To evaluate the plan in place for Student, Dr. Fabian reviewed entries on the Daily Behavioral Rating Scale ("DBR"), estimates and tally sheets regarding Student's behavior made by the teachers. He used this data in order to determine how "efficient" the plan is. (Dr. Fabian, 5/10/18, p.165, 175, P-4, p.4)
46. The method used to sample data on a DBR form collects data on the times when a student is academically engaged and respectful, as well as occasions of destructive behavior. But a DBR does not provide a means for reporting a behavior happening multiple times in a class period. (Dr. Fabian, 5/10/18, p.184, P-48)
47. Using the DBRs, the teachers had to estimate what they observed while teaching the rest of the class and there is no way to tell how many of the teachers actually responded. The data was not collected in a scientifically reliable manner, and the underlying raw data was not made available. (Ms. Phelan, 7/12/18, p. 49-50, 58-59, Dr. Fabian, 5/10/18, p. 187, Dr. Mayville, 5/10/18 p. 114-19)
48. Dr. Fisher's report included the results of the BRIEF which revealed that, among other data, the Student was in the low range for impulse control. The Student had difficulty exhibiting appropriate amounts of self-control. According to Dr. Fisher's report, Student was in the "severe" range of "almost everything." (P-7, Mother, 5/25/18 p. 123-125)
49. In the social responsiveness scale of the BRIEF, Ms. Baumeister rated his social awareness as moderately impaired, social cognition as moderately impaired, social communication as severely impaired, social motivation as severely impaired and autistic mannerisms as severely impaired. (Ms. Baumeister, 7/9/18 p. 74, B-14, p. 6)
50. Dr. Fisher stated in her report that "it is apparent that Student's difficulties with appropriate social interactions and executive functioning is a great impediment to his ability to access general education and peer interactions without support." (P-7, p. 8)
51. Parents were concerned the focus in the triennial evaluation done in the latter part of 6<sup>th</sup> grade based on Dr. Fisher's psychological evaluation was on Student's "distractibility." (By contrast, Dr. Mayville found that the BRIEF accompanying it showed high levels of impairment in shifting from one task to another, emotional control, rigidity, impulse control, transitioning, and in other behavior that impairs his ability to learn and to function socially.) (P-7, 3-4, Dr. Mayville, 5/10/18, p. 17)
52. The goal of Dr. Fisher's BIP was to decrease behaviors such as calling out, raising his voice, and increase respectful and academically engaged behavior. The behavior plan was not adjusted because the team claimed it was working. As Dr. Fabian testified: "If it works you don't need to change it." (Dr. Fabian, 5/10/18, p. 189, 194)
53. In his recommendations, Dr. Fabian had suggested a "skill building approach" in the form of "social skills training: a matrix was developed and put in place for social skills training where we deconstructed several social skills and tracked those skills." However, Dr. Fabian was "basically a consultant" and his suggestions (such as additional structure for writing assignments) were not viewed as mandates by staff. (Mother, 5/25/18 p. 120, Dr. Fabian, 5/10/18 p. 195)

54. Despite Dr. Fabian stating the BIP was “working” and Dr. Fisher saying Student was making “tremendous gains” in middle school with “positive trends,” the same problems and maladaptive behaviors kept recurring and persisted into 7<sup>th</sup> grade. (Ms. Baumeister, 7/9/18, p. 45, 69-70, 79-82, Dr. Mayville, 5/10/18 p. 12-14, 21-23, Mother 5/25/18 p. 139-43, 164, P-7 p. 2-5, P-9)

55. Many of the goals and objectives set out from year to year in Student's IEPs were developed years before in the elementary school (“whole-body listening,” perspective taking, handling different-sized problems, developing coping skills, improving frustration tolerance), but these same or very similar goals were still not mastered even by the Student's seventh grade Progress Report. (P-12, P-14, P-16, P-22, P-24)

56. School Psychologist Daniella Phelan, who became responsible for the social and emotional goals of Student's IEPs in seventh grade, opined that Student was still having difficulties, i.e. working on substantially the same behaviors set forth as concerns in the Behavior Intervention Plan done in November, 2015, based upon Dr. Fisher's previous FBA. Ms. Phelan stated certain goals and objectives she had helped to create were in the IEP put in place before his seventh grade year. The “majority” of those goals (exhibit appropriate frustration tolerance, use whole-body listening, increase social interactions, increase appropriate behaviors, reduce targeted behaviors), however, were specifically declared “mastered” by Ms. Phelan. (P-26, P-28, Ms. Phelan, 7/10/18 p. 23, 26, 38)

57. Ms. Phelan testified she would not change a BIP, she would have to write a new one. Ms. Baumeister stated the BIP was not revised after November 2015. (Ms. Baumeister, 7/9/18 p. 79, Ms. Phelan, 7/12/18, p. 41)

58. Ms. Phelan, along with several of Student's other PPT members (Judie Baumeister and Hallie Sigmund), testified that records existed from which she stated she used to derive Student's mastery of his goals and objectives, but they admitted those records were not made available to Parents on the grounds that these records were their personal records and not subject to disclosure. (Ms. Phelan, 7/12/18, p. 15, 20, 38, 49-50, Ms. Baumeister, 7/9/18, p. 61-64, Ms. Sigmund, 7/31/18, p. 43)

59. In March, 2016, as part of Student's triennial evaluation, Ms. Baumeister administered a Wechsler Individual Achievement Test – Third Edition (“WIAT-III”) to Student, over several days and never for an entire period. Ms. Baumeister then authored a report (an Educational Evaluation) based on the results of the WIAT-III assessment. The WIAT-III showed strength in math but significant weaknesses in writing. For example, Student's scores in the Reading Comprehension and Essay Composition sections were low (only third grade level). The Student scored poorly in particular areas of writing proficiency such as Sentence Building, Pseudoword Decoding, Word Count, Theme Development and Text Organization. (Ms. Baumeister, 7/9/18, p. 29-30, P-5, B-15)

60. Ms. Baumeister admitted that the lack of structure in Student's writing assignments was a problem that was brought to her attention. The response to that was: “[W]e gave him some structure by providing prompts to answer,” despite being made aware of other additional materials, information and resources given to her by the Parents from organizations such as Autism Speaks, which were not used. (Ms. Baumeister, 7/9/18, p. 104, P-38)

61. Referring to her report based on the WIAT-III, Ms. Baumeister testified she did not put any recommendations at the end of the evaluation. She stated she did not think that she should put in the recommendations section what her recommendations actually were for what his needs were. (Ms. Baumeister, 7/9/18, p. 96, B-15)



62. Ms. Baumeister was not able to explain why the IEP that was dated January 26, 2017, contained a reference ostensibly already showing mastery for certain goals in March, 2017. Ms. Forde testified that was a function of the software of the IEPDirect program. (Ms. Baumeister, 7/9/18, p. 106-7, Ms. Forde, 7/31/18, p. 16-17)

63. The Student continued his maladaptive behaviors such as meltdowns, elopement and tantruming into the 7<sup>th</sup> grade year and again hiding in a locker, but there is no evidence the BIP was ever formally adjusted. Ms. Phelan stated he was still struggling. The team strategies were not achieving identifiable results and the behaviors were not extinguished even though they had been previously deemed mastered. (Ms. Phelan, 7/12/18, p. 39, 63-71, Mother, 5/25/18, p. 146-7, P-9, P-28)

64. On at least one occasion, Student put his hands around the neck of a paraprofessional aide that was “getting too close into his personal space” which was one of the things Beth Bloedell had warned about years before at the initial team meeting. (Ms. Johnson, 5/9/18, p. 109, Ms. Baumeister, 7/9/18 p. 108-9, Mother, 5/25/18, p. 150, P-3, p. 52)

65. Although academics were not the primary focus of Student's difficulties, writing was extremely challenging for Student and brought a lot of anxiety, stress, tantruming and defiance home, as well as at school. Student could not comprehend a curriculum known as “writers' workshop,” but it was never restructured or changed by the school, despite Parents' reporting problems to the school team. (Mother, 5/25/18, p. 158)

66. Student's writing teacher, Ms. Kathleen Beinstein, never spoke to Dr. Fabian about Student or had him observe Student in her class. Although it was specified in a PPT that the writing teacher will attend biweekly team meetings once per month, the teacher was unable to attend. (Ms. Beinstein, 7/10/18 p. 21-22, P-27, p. 3, Dr. Fabian, 5/25/18, p. 56)

67. The Student did have some support in writing class with his special education teacher, Ms. Baumeister; however, she was also responsible for all the other students at the same time. Parents provided autism teaching materials from Autism Speaks to the CMS staff but they were not used. (Mother, 5/25/18, p. 155-161, Ms. Beinstein, 7/10/18 p. 21-22, P-27)

68. Despite Parents requesting it, there was no evidence presented regarding formal training for the team in social thinking concepts, except for an agenda of one half-day of presentations by CMS' own personnel in April, 2016. (Mother, 5/25/18, p. 110, B-23a)

69. In October, 2013, the Parents had enrolled Student in Dramatic Pragmatics (“DP”), which is a speech, language and social development center specializing in Social Thinking in an effort to improve the Student's social skills and peer interactions. The Student stayed enrolled with DP through the end of seventh grade. (Mother, 5/25/18, p. 90-99)

70. In December, 2015, the Parents attempted to establish a connection between DP and the CMS team, and provided materials to CMS. CMS personnel were not made familiar with the Social Thinking curriculum until that one day of training provided in April, 2016. The IEPs for 2016 and 2017 do not show substantial influence or implementation of social thinking concepts in the social goals. (P-38, p. 8, P-23, P-25, B-23a)

71. The Parents requested CMS to share and discuss the social goals of Student's IEP with DP personnel but there is no evidence that was ever done. The Prior Written Notice of the March 28, 2016 PPT does not document the reasons for such refusal. (P-24, P-25, Mother 5/25/18, p. 126)

72. Exhibit P-17, the revision to the IEP dated 10/14/15 states: "Dr. McCarthy will draft goal for using social pragmatics in class" but there is no evidence anything further was done to accomplish that task. (Johnson, 5/9/18 p. 71, Mother, 5/25/18, p. 114)

73. Nor were the instruction, concepts and methodology of Dramatic Pragmatics' work with Student otherwise carried over into his classes in any meaningful way. (P-25, P-38)

74. Julie Webster was the speech and language pathologist at CMS who claimed she spoke to Beth Bloedell "all the time" but there is no evidence to show that she implemented the social thinking concepts with fidelity, in that these concepts remained static throughout the IEPs without development, expansion or alteration, and the evidence shows Student did not make significant progress in improvement in mastering those concepts. (Ms. Webster, 6/7/18, p. 51, P-16, P-26, P-27)

75. The May 11, 2016 PPT meeting notes again mention the Parents' concerns and indicates an intention to utilize social thinking strategies per Parents' input. (P-26)

76. The IEP for 2016-17 (May 11, 2016) sets forth goals and objectives in the social area as follows:  
Goal 6: "Student will learn to exhibit appropriate frustration tolerance and emotional regulation when he becomes frustrated or upset, as observed during structured and unstructured times in school." P-26, p. 17

Goal 7: "Student will use whole-body listening to read and follow social expectations." P-26, p. 19

Goal 8: "Student will increase his ability to sustain social interaction with peers." P-26, p. 21

Goal 9: "Per his behavior plan, Student will provide evidence of increasing appropriate behaviors and reducing targeted behaviors that prohibit appropriate access to education." P-26, p. 24

77. The January 26, 2017 IEP included goals directed at behavioral concerns such as aggression and eloping from classes, yet the above goals are now shown as:

Goal 6: "Mastered" P-27, p. 12

Goal 7: "Mastered" P-27, p. 14

Goal 8: "Mastered" P-27, p. 17

The only goal that is marked "Unsatisfactory" is Goal 9 (see above). (P-27, p. 20)

An additional goal which appears to have been substituted arbitrarily, and described for the first time, as "Student will manage conflicts/concerns over 80% of the school week with teacher support as measured by checking in with the identified staff members (i.e. gen ed teachers, special education, school psychologist, administration) and claimed as "Mastered" is Goal 10. Many of these goals are repeated from year to year with only semantic alterations. (P-27, p. 21)

78. For 2017-18, the IEP of March 27, 2017 included:

Goal 5: "Student will demonstrate understand and accept the perceptions/feelings of others (e.g. 'I understand how you are feeling' 'I am sorry you feel that way.')" (P-28, p. 16)

Goal 6: "Student will improve classroom performance by using 'stop and think' rather than speaking out." (P-28, p. 17)

Goal 7: "Student will independently determine the size of the problem/issue at hand." (P-28, p. 19)

Goal 8: "When frustrated, Student will independently determine and appropriate response to match the size of the problem, (e.g. use a coping strategy, ask for help, or ask to speak to a teacher/staff member)

(P-28, p. 20)

Goal 9: “In a small group, Student will learn how to ask questions about the activities and interests of others, and how to express his own interests.” (P-28, p. 21)

79. During 2016 and 2017, Parents wrote to Ms. Johnson several times regarding the failure of the IEP Prior Written Notices to describe the refusals and reasons for them, stating directly on one occasion: “‘The Prior Written Notice’ was not correct as it didn’t correctly capture what we expressed at the meeting or why it rejected our request and our concerns of the development of Student’s program.” The Parents outlined in writing to Ms. Johnson specific instances of the refusal of the school-based team to implement a social thinking program to address Student’s lack of social skills, the fragmentation of his entire program, the lack of training of the staff, and the lack of oversight. The Parents were also concerned about the lack of progress in Student’s writing and the need to move him to grade level writing. In January, 2017, because Parents were concerned that there was no improvement, i. e. Student had made no progress in social connections, and the maladaptive behaviors were continuing, Parents requested another FBA which was agreed to be performed by a private evaluator (Dr. Erik Mayville) chosen by CMS. (P-25, P-27, Dr. Mayville, 5/10/18, p. 9)

80. Dr. Erik Mayville holds a Ph.D. from Louisiana State University in clinical psychology with an emphasis in developmental disabilities. He is a board-certified BCBA-D with post-doctoral training and numerous published works. He has been a clinical director at several facilities for children with neurodevelopmental needs and is a specialist in autism spectrum disorder. (Dr. Mayville, 5/10/18, p. 7)

81. Over his career, Dr. Mayville has done over 450 Independent Educational Evaluations and numerous FBAs. (Dr. Mayville, 5/10/18, p. 5-9)

82. Dr. Mayville was engaged by CMS to perform an FBA on Student which was completed in April, 2017, which was a detailed report of his testing, observations and findings. (Dr. Mayville, 5/10/18, p. 9, P-9)

83. Dr. Mayville outlined in his testimony the best practices for performing an evaluation include: thoroughly evaluate and understand the issues, summarize what the issues are, and recommend what to do to address the issues, and Dr. Mayville testified that he thought his FBA complied with best practices. (Dr. Mayville, 5/10/18, p. 123)

84. In formulating his FBA, Dr. Mayville spent a day at CMS, observed Student in class and interviewed Student’s 7th grade teachers, including Ms. Baumeister. Dr. Mayville also reviewed the data from teachers regarding Student’s problematic behavior and context of such behaviors, as well as the FBA and BIP done by Dr. Fisher in 2015. (Dr. Mayville, 5/10/18, p.12, 19-21)

85. Dr. Mayville observed that: “in...the latest psychoeducational or psychological evaluation [he] reviewed was [done] in 2016. And, there was an assessment of social functioning that was completed -- social responsiveness scale, which is....a multifaceted look at various aspects of social - social functioning as they specifically relate to the autism spectrum....and...he was rated as having “significant difficulties in – across the board, especially in social motivation and that was something that both his parents and his teachers saw. So it’s a really significant problem for him.” (Dr. Mayville, 5/10/18, p.15)

86. Dr. Mayville examined Student’s behaviors: noncompliance, not following the directives of....staff...which is a multifaceted problematic behavior “which I –broke down in the report” - calling out when it wasn’t his turn in class, which became worse during the transition to the middle school –

and other problem behaviors such as elopement, urinating on the locker room floor, going into a chemical bath area and started the shower, hiding in a locker, and tantrumming. (Dr. Mayville, 5/10/18, p.12-13, P-9)

87. Dr. Mayville's report indicates tantrumming in class and elopement from class were reportedly "common" behaviors and there were instances of "inappropriate touching" that raised concerns. (P-9, p. 2)

88. Dr. Mayville testified that Student's tantrums usually took place following a lack of compliance with tasks that were requested by his teachers, such as revisions to his work. Problem behaviors then escalated: he raised his voice, and would move away from the immediate area. Student especially had "problems with going back and making revisions to his work." (Dr. Mayville, 5/10/18, p. 21)

89. Dr. Mayville reviewed the results of the BRIEF of the previous (Fisher) FBA, which is "a means of looking at the student's competency in various aspects of executive functioning in applied settings." Two of Student's teachers and his parents found overall significant difficulties that were reported on the BRIEF. He had elevated scores in "behavioral regulation, in the areas of inhibition of impulsive behavior, shifting between tasks, using different problem solving strategies if one isn't working, flexibility, being able to control emotional responses and control frustration." (Dr. Mayville, 5/10/18, p. 16-17)

90. Dr. Mayville stated that metacognition, short-term memory, planning and organizing were all difficulties for Student - a student would normally be able to exhibit behavior skills that score (in a) range of 40 to 60. Student's scores were in the 80s. (Dr. Mayville, 5/10/18, p.18)

91. Dr. Mayville personally observed Student throughout the seventh grade school day at CMS in 2017. He saw him in math class, where Student called out loudly on two instances, once with the right answer for which the teacher praised him and wrote it on the board. He saw Student in science class when he observed him to have four instances of calling out or noncompliance. Student did not stay with the group of students he was assigned to or interact with the group. At lunch, staff was trying to get him to interact and socialize with some of his peers but Dr. Mayville observed the interactions weren't meaningful - he was pacing, hopping, making noises, speaking to himself. Student had no friends. Once lunch finished, Student then went back on Youtube for 15 minutes. In writing class, he was non-compliant seven times in that one single class period. (Dr. Mayville, 5/10/18, p. 32-39, P-9, p. 7)

92. Dr. Mayville examined the data compilations of impressions of behavior created by others known as Direct Behavior Rating Forms used by CMS, and opined that he would not use that form of data collection as it is unreliable and inaccurate. (P-46, Dr. Mayville, 5/10/18 p. 41-45, 114-7)

93. Dr. Mayville said he would expect to see all the behaviors and the BIP to be reflected in the goals and objectives of an IEP. (Dr. Mayville, 5/10/18, p.119)

94. Dr. Mayville stated his professional opinion that the school's prior FBA did not comply with best practices. (Dr. Mayville, 5/10/18, p.124)

95. The graphs of the data compilations that Dr. Mayville reviewed did not include the raw data – and now that he has seen it [the raw data] he does not consider them reliable. (Dr. Mayville, 5/10/18, p.125)

96. At the PPT in May, 2017, at which Dr. Mayville was a participant, and was asked to present his findings, he was also asked "to comment on anything else that anyone asked me about." When he was

asked about one of the speech and language goals, and whether he thought the targeted skills were already mastered by Student, he replied: “I suspected that --there was not enough specificity in the [IEP] to indicate that it [one of the speech and language goals] wasn't something he could already do”....There's nothing in those recommendations that really inform the specifics of what to do.” “You could not tell... [there was anything] advancing the process.” (P-29, Dr. Mayville, 5/10/18, p.128-130)

97. In his observations, Dr. Mayville noted that the Student is reasonably bright and he was able to do a lot of the work, but “when it came to do things a little differently, like the learning process when you have to change your behavior – he would become resistant and start to non-comply.” In his written report, Dr. Mayville said that “Student's social/behavioral needs are the priority of his special education program...Noncompliance with teaching staff and input occur regularly.... [t]here is currently no plan in place to help him get better at making additions and revisions to his work, an important skill set for Student to have as academics get more difficult and the requirement for independent work completion rises.” (Dr. Mayville, 5/10/18, p. 22, P-9, p. 12-13)

98. Dr. Mayville testified: “The repetitive and restricted behaviors of autism spectrum disorder [Student] exhibits have social consequences that should be addressed as part of an educational program to increase social comprehension, social connectedness, and social interaction.....Student's program is currently not providing him with the frequency or quality of interactions that will substantively address his coping and social interaction needs. This is in large part a function of lack of specialized resources, including a program coordinator with advanced training in behavior change principles and the needs of high-functioning students with autism.” Dr. Mayville was concerned that “long term you can have high-functioning students who do fine in academics who are bright, who achieve at grade level, above grade level. When it comes time to apply what has come from school in learning to....the main outcomes in life, being able to live on your own, have relationships with others of various types, marriages, friendships, relationship, maintain a job, the majority of kids with this type of profile studies are showing they don't make it. The biggest predictor of failure of that is social functioning. It's a big important thing.” (Dr. Mayville, 5/10/18, p. 29, P-9, p. 13-14)

99. Dr. Mayville's opinion is that improving social connectedness and learning how to create and maintain social interactions is very significant to the success of Student's educational program. “He can definitely get better at...learning how to negotiate and maintain relationships.” (Dr. Mayville, 5/10/18, p. 49-50)

100. The 5/24/17 IEP does not incorporate the numerous recommendations Dr. Mayville presented at the PPT and that the Parents agreed with and requested, such as three hours of BCBA time and oversight. “There wasn't the type of oversight that I was talking about in terms of the behavioral analyst who was overseeing the efforts to change the difficulties that I identified.” (Dr. Mayville, 5/10/18, p. 63, 93, P-29)

101. Dr. Mayville concluded the 5/24/17 IEP would not enable Student to make progress under the circumstances in his expert opinion. (Dr. Mayville, 5/10/18, p. 65, P-29)

102. Dr. Mayville's impression, when he spoke to Student's speech & language pathologist, was that the goals she was working on with Student represented more of going through the motions, and... was “a representation of almost what he could do at the time.” (Dr. Mayville, 5/10/18, p.107)

103. Dr. Mayville recommended that the team investigate placement in an out-of-district school. (Dr. Mayville, 5/10/18, p. 108)

104. Dr. Mayville's stated opinion is that improving Student's ability to complete additional work on a task should be explicitly taught to him by means of an explicit plan and/or program, and there did not

appear to be a plan for that in his current program at CMS and no one with expertise in charge of his program. (Dr. Mayville, 5/10/18 p. 47, 62-65)

105. Dr. Mayville observed that despite being physically near and with other kids during the day, Student had very few interactions with them and in some cases....he was in a different section of the classroom doing his own thing at CMS. (Dr. Mayville, 5/10/18, p. 48)

106. Dr. Mayville's opinion was that: "Improving social connectedness and learning how to negotiate and maintain relationships is a fundamental deficit and it's related to long-term failure....for students coming out of school. It's something kids can get better at. He's going to continue to be autistic, but he's – he can definitely get better at it. He needs a lot of practice in. It needs to be an embedded standard part of his day in various ways. There's a lot of interaction during the day, and that's how kids learn how to relate each other and a lot of (it) is building relationships. Student doesn't get how to do that just by being around kids, He needs explicit instruction and it's something that's a complex process. He needs to be...immersed in it." (Dr. Mayville, 5/10/18, p. 50-51)

107. Dr. Mayville's report stressed the need for a BCBA working closely with the team and especially the special education regular education teacher, speech and language pathologist, and school psychologist to create a revised and expanded behavior intervention plan but CMS did not engage him to draft a new BIP. (P-9, Dr. Mayville, 5/10/18 p. 53, 99)

108. Ms. Johnson claimed it was noted "in the minutes" our psychologist [Daniella Phelan] pointed out that we were already "addressing" the recommendations from Dr. Mayville's report. Dr. Mayville testified that, while they agreed to BCBA "overseeing," the team refused to employ a BCBA trained paraprofessional and also his recommendation of three hours per week a BCBA who would work directly with Student. (P-29, Ms. Johnson, 5/9/18 p. 122, Dr. Mayville, 5/10/18, p. 95)

109. According to Dr. Mayville, the previous Fisher FBA did not comply with best practices, and lacked specificity. (Dr. Mayville, 5/10/18, p. 130-32)

110. Ms. Johnson testified that the CMS team relied on the data that was collected for the 2016 Fisher FBA and BIP to formulate Student's plans. (Ms. Johnson, 5/9/18, p. 76)

111. Dr. Mayville observed that "the behavior intervention plan that I saw in his current program was pretty meager" and "too open-ended." "It had some descriptions of preventative measures but more of what to do after the problem ever happened." Dr. Mayville opined that the strategy most likely to allow the Student to make reasonable progress was to systematically build skills by starting small, using modeling, reinforcement, prompting with prompt fading, then increasing the demand and that he believed scant attention was being paid to this skill building to improve Student's executive functioning and lessen behaviors such as rigidity and lack of self-regulation. There was no plan in place for that at CMS. (Dr. Mayville, 5/10/18, p. 47, 53)

112. Dr. Mayville listed numerous recommendations in his Functional Behavioral Assessment completed in April, 2017, most all of which were rejected by the PPT team, including:

1. Student's program should be overseen by a BCBA, and work directly with him for 3 hours per week.
2. Create a revised and expanded BIP

3. Provide trained paraprofessional support throughout the day
4. Involve Student in his own behavior management and set up a contractual interaction.
5. Intensive social communication and comprehension skill-building.
6. Social communicative programming and teaching interactions to improve Student's understanding of relationships.
7. Improve Student's social skills in natural environments
8. An assessment of adaptive behavior.
9. Communication between school staff and parents, and regular team meetings.
10. Extended school year with all programs continuing in place. (P-9)

113. Dr. Mayville recommended an out-of-district placement that had a program designed for Student already generally in place, with BCBA on staff that would work directly with Student, address skill training, collect data, and provide a paraprofessional for Student throughout the day. Dr. Mayville acknowledged the difficulty of providing these accommodations in a large public school setting. (Dr. Mayville, 5/10/18, p. 56-60)

114. Dr. Mayville stated a need for incorporating social programming in the Student's educational plan. He testified that social functioning is behind the function of the Student's problem behavior and the CMS PPT team was unable to offer a program that he, in his professional opinion, thought would adequately address the Student's issues. "There still aren't objectives that talk about his ....ability to be able to accept redirection and revising his work and getting better at those particular skills." (Dr. Mayville, 5/10/18, p. 64)

115. CMS refused to agree to alternative placement or implement the significant recommendations proposed by Dr. Mayville, and requested by the Parents, as documented in the May 24, 2017 IEP. (P-29, P-30)

116. Dr. Mayville examined the Student's CMS seventh grade annual review and was concerned about his future transition to a high school with even more challenges. Dr Mayville found that goals were listed as mastered that he had seen the Student still struggling with, and concepts that in his opinion needed to be mastered weren't even being brought up as having to be mastered. (Dr. Mayville, 5/10/18, p. 64-5)

117. Pinnacle School is an approved Connecticut Special Education School in Stamford, Connecticut. (Dr. Mayville, 5/10/18, p.19)

118. The Parents unilaterally placed Student at Pinnacle for 2017-2018. Shortly after arrival at Pinnacle, Student's adaptive functioning was assessed by the use of the Vineland Adaptive Behavior Scale. Dr. Mayville reviewed that test and reported that the teacher score in Socialization was 38 (where the average range was 85-115). The Parents scored him at 64. (P-10, p. 2)

119. Dr. Mayville went to Pinnacle School in December of 2017 for a follow-up evaluation, after Student enrolled there in the fall of 2017. (Dr. Mayville, 5/10/18, p. 65)

120. Dr. Mayville testified that he discussed with Pinnacle personnel the systematic effort that was implemented there to teach the Student "skills related to problem behaviors... meaning adaptive skills,

more adaptive responses so that he wasn't engaging in some of the problem behaviors that were identified in the FBA.” (Dr. Mayville, 5/10/18, p. 66, P-10)

121. Dr. Mayville observed that Pinnacle employed strategies for addressing the behaviors with positive reinforcement techniques and stressing “need to” statements. Pinnacle staff graphed the progress of these efforts: by the beginning of December, 2017, the instances of maladaptive behaviors had dropped to zero (0) from an average of 10-12 per day when the school year began. Dr. Mayville correlates the improvement in Student's behavior in class to improvement in his academic performance, and suggests that now that the problem behaviors are coming under control, gradual demands could be placed on him in class to increase the difficulty of his academic challenge. (P-10, p. 3, 10)

122. Dr. Mayville also stated Pinnacle had put a plan in place to increase the time Student interacted directly with his peers with the goal to improve his social interactions. (Dr. Mayville, 5/10/18, p. 71)

123. At Pinnacle in December, 2017, Dr. Mayville saw Student making social interactions on his own volition: having a “pretty significant interest in doing something with a peer.” He had also engaged with another peer mentor who Dr. Mayville believed would be good model and mentor. (Dr. Mayville, 5/10/18, p. 69, 70)

124. Previously, at CMS, Student had been allowed to watch Youtube as a reward for compliance. According to Dr. Mayville, “when he's watching Youtube, he's practicing autistic stuff - essentially re-winding it over and over.” At Pinnacle, he is not allowed to watch Youtube as long as he wanted as a reward. (Dr. Mayville, 5/10/18, p.126-127)

125. In his Language Arts class, Dr. Mayville observed Student was engaged and interested in the topic and class discussion. (P-10, p. 6)

126. There are on average only one or two other students in Student's classes at Pinnacle and he interacts with four or five others. (Dr. Mayville, 5/10/18, p. 102-103, Ms. O'Rourke, 6/7/18, p. 178)

127. Dr. Mayville opined that Student is making good progress at Pinnacle, and “behaviors are not getting in the way of his learning.” Dr. Mayville testified Student was going in a good direction...and he recommends Student continue attending Pinnacle. (Dr. Mayville, 5/10/18, p. 72, 100, 181-182)

128. Brittney O'Rourke is the senior behaviorist at Pinnacle. She has a master's degree (one of two) in Applied Behavioral Analysis, and, having completed all requirements, is eligible to take the examination for a BCBA certification. Ms. O'Rourke created the learning profile for Student. This employs her methodology which is applying positive reinforcement along with providing “expectations” to Student of necessary behaviors. She regularly works on a one-on-one basis with Student. (Ms. O'Rourke, 6/7/18, p. 113, 116, 119, P-40)

129. Since enrolled at Pinnacle, as shown by the data, his grades have improved and Student has made discernible social and behavioral progress, i.e. he can stay on task in a class for 45 minutes, and has made significant improvements in social interactions with peers. (Ms. O'Rourke, 6/7/18 p. 127-44, B-16, P-42, P-43)

130. Ms. O'Rourke stated Student was “absolutely” making progress and recommended he should stay at Pinnacle next year. (Ms. O'Rourke, 6/7/18, p. 128, 152)

131. Ms. O'Rourke corroborated her opinion of progress by taking data regularly and utilizing it to check whether Student was achieving the written measurable goals of the learning profile. (Ms. O'Rourke, 6/7/18, p. 128, P-43)



132. Ms. O'Rourke found that the CMS IEP failed to match Student's skill deficits. To reach that conclusion, she stated that she reviewed two of the social/behavioral goals on that IEP and took baseline data to see if Student already had those skills, and he received 80 percent or higher over three consecutive school days - meaning he already had that skill, but still lacked progress in other areas. (Ms. O'Rourke, 6/7/18, p. 148, P-43)

133. Student's class size has gone from a dozen or more pupils to less than four at Pinnacle. "Student requires a smaller class so that he's able to get that one-on-one instruction time and he's able to get that direct attention from the teacher as well as the one-on-one support." (Ms. O'Rourke, 6/7/18, p. 148, 179, P-29)

134. Student regularly now has a one-on-one session with Ms. O'Rourke or Student's paraprofessionals in his classes as needed. (Ms. O'Rourke, 6/7/18, p. 138, 143-44)

135. Student receives Applied Behavioral Analysis therapy with Ms. O'Rourke at least once per week. (Ms. O'Rourke, 6/7/18, p. 143)

136. Dr. Alisa Dror holds a Ph.D. in special education, BCBA, the head of school, who supervises all Pinnacle students and meets weekly with Ms. O'Rourke to monitor Student's progress. (Dr. Dror, 6/7/18, p. 186-88, 193-6)

137. Dr. Dror stated that Pinnacle follows Connecticut common core standards (Dr. Dror, 6/7/18, p. 197)

138. Dr. Dror testified that Student made "nice progress" assuming he is not disrupted, and received "mostly A's" in his academic classes. "We've seen 'big improvements' in understanding social reciprocity, perspective taking, seamless social interaction." Student's Pinnacle Report Card reflects improvement over the school year and a final grade of all A's. (Dr. Dror, 6/7/18, p. 197-99, P-54)

139. Dr. Dror stated: "Grades are a predictor of success in school. Grades are not necessarily a predictor of success outside of school and the things that really predict success in college, in life, in career are the social/emotional tools. (Dr. Dror, 6/7/18, p. 201, P-42)

140. Dr. Mayville states: "Following an observation of Student in his new school, interviews with staff and review of documentation, it appears the Student's current program offers him many of the features this writer recommended and that his public school lacked....One of the most important features of Student's new program relative to his public school setting is the presence of peers with whom he might develop relationships...a key first step has been taken in getting Student into an environment in which he is motivated to interact with peers and in which he receives systematic instruction to do so. Student appears to have progressed in several social/behavioral respects as his new school....Overall....Student is enrolled in a program that better addresses his most important needs." (P-10, p. 8-9)

## **CONCLUSIONS OF LAW:**

### **SECTION 504 CLAIMS**

1. The Student claims the Board did not offer him FAPE under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (Section 504), in that, under Section 504, the design of a Section 504 plan must meet the educational needs of a disabled student to the same degree that the educational needs of

nondisabled students are met. *Mark H. v. Lemahieu*, 513 F.2d 922, 933 (9<sup>th</sup> Cir. 2008)

2. My jurisdiction, which is limited to hear and decide due process complaints under the authority of R.C.S.A. Sec. 10-76h-1 et seq. and 34 C.F.R. Sec. 104.33(a), does not include the determination of legal claims under Section 504.

3. The Student did not introduce sufficient evidence that would allow a comparative analysis of services provided by the Board to non-disabled students versus disabled students.

#### PROCEDURAL DUE PROCESS

4. Two procedural due process claims have been raised by the Student. The first claim is regarding disclosure and production of the Student's educational records. During the hearing, testimony revealed that the Board may not have been completely forthcoming with documents that the Student claimed should have been provided pursuant to a written request on March 16, 2017. (FF 60, P-55) (See, R.C.S.A. 10-76d-18)

5. However, raw data that teachers retain in their personal possession is not necessarily subject to disclosure. Raw assessment data, including records of progress monitoring, is excluded from the definition of education record under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Section 1232g(b) ("FERPA") See, *Deer Park Cmty. City Schools*, 116 LRP 1361 (SEA OH. 12/11/15) and *Ann Arbor Public Schools*, 115 LRP 6219 (SEA MI 2015) The material Student claims to have been withheld falls under this category.

6. The other claimed procedural violation concerns the Prior Written Notice requirement of the IDEA. It is alleged the March 28, 2016 and May 24, 2017 PPTs failed to properly notify the parents of the reasons for the refusal to implement the Parents' requests. (See, FF 71, 79, 115, P-24, P-25, P-29, P-31, P-55) C.G.S. Section 10-76d(a)(8)(A); 20 U.S.C. Section 1415.

7. These apparent violations were brought to the Board's attention at the time they occurred. (FF 71, 79)

8. The parents of a student receiving special education must have the opportunity to be involved in decisions relating to the provision of a free appropriate public education, including participation in meetings and review of records and documents. 20 U.S.C. Section 1415, R.C.S.A. C.G.S. Section 10-76d(a)(8)(D)

9. A Board's failure to accurately assess and address a student's disability or area of need in the Present Levels of Performance portion of an IEP has been specifically recognized as a procedural violation of IDEA when the failure impedes the child's right to a FAPE, the parents' opportunity to participate in the decision-making process, or educational benefits. 20 U.S.C. Section 1414(d) (1)(A); 34 C.F.R. Sec. 300.320; *RR v. Wallingford Board of Educ.* 101 L. R. P. 196 (D. Conn. 2001); *Newtown Public Schools*, 107 L. R. P. 59412 (CT SEA 2007) Multiple procedural violations may cumulatively result in the denial of FAPE even if the violations considered individually do not. *R. E. v. N.Y.C. Dept. of Educ.* 694 F.3d 167, 190 (2<sup>nd</sup> Cir. 2012)

10. The Hearing Officer finds that, while the withholding of information to the Parents falls under the FERPA exception, the failure to properly document reasons in the IEP for refusing the parents' requests by CMS Staff, did in fact occur. This procedural violation taken together with the substantive violations, results in a finding of denial of FAPE in this case.

#### SUBSTANTIVE DUE PROCESS AND DENIAL OF FAPE

11. There is no disagreement that Student is entitled to special education under the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") §1400 et seq., which estab-

lishes a substantive right to a free and appropriate public education (“FAPE”) for children with disabilities who are covered under the statute.

12. An appropriate public education under IDEA is one that is "likely to produce progress, not regression." *Walczak v. Florida Union Free School District.*, 142 F. 3d. 119, 130 (2d. Cir. 1998), *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245, 248 (5th Cir. 1997) (internal citation omitted), cert. denied, 552 U.S. 1047, 118 S. Ct.. 690, 139 L.Ed.2d 636 (1998).

13. An IEP that does not appropriately address behaviors that impede a child's learning denies the child a FAPE. *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Educ. Hearing Office*, 9th Cir. 1996) 93 F.3d 1458, 1467-68.); *Town of Burlington v. Department of Educ. of Mass.*, 789 n.19 (1st Cir. 1994), *aff'd sub nom. School Comm. v. Department of Educ. of Mass.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2D 385 (1985); *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U. S. 7, 114 S. Ct. 361 (1993)

14. In *Board of Ed. v. Rowley*, 458 U.S. 176, 206-07 (1982), the Supreme Court set forth a two-part inquiry as to whether the Board has provided an IEP that provides the Student with FAPE: 1) whether the Board has complied with the IDEA's procedural requirements, and 2) whether the Board's IEP was reasonably calculated to enable the student to receive meaningful educational benefit. Educational benefit, as contemplated by the IDEA, requires the Student's IEP to provide him with more than trivial educational benefit, that is, meaningful educational benefit, and not produce regression. *Mr. and Mrs. B. v. Milford Bd. of Ed.*, 103 F.2d 1114, 1120-21 (2nd Cir. 1997). There is no requirement that an IEP has to maximize the Student's educational potential, however, it must provide the Student with "meaningful opportunities" and provide more than trivial advancement. "It cannot guarantee totally successful results." *Walczak*, at 130, 133.

15. The Board has the burden of proof on both the *Rowley* issues, procedure and appropriateness. See *Walczak*, at 122; *M.S. v. Board of Educ.*, 231 F.3d 96, 102 (2d Cir. 2000). The burden of proof as to FAPE is by a preponderance of the evidence. R.C.S.A. 10-76h-14(a)

16. Every student is entitled to receive a Free and Appropriate Public Education (“FAPE”) pursuant to 20 U. S. C. §1412(a)(1)(A), that provides “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U. S. \_\_\_\_, 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335 (2017)

17. To meet the standard for substantive FAPE, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances....and is appropriately ambitious in light of his circumstances. *Andrew*, at 999, *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F. 3d 105, 45 IDELR 119 (2<sup>nd</sup> Cir. 2007), *P., by and through his parents/next friends, Mr. and Mrs. P. v. Newington Board of Education*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).

18. A focus on the particular child is at the core of the IDEA. The instruction offered must be ‘specially designed’ to meet a child’s ‘unique needs’ through an “[i]ndividualized education program.” 20 U.S.C. §1414 §1401(29), (14)

19. An IEP is not a form document, but it must conform to Federal requirements and standards. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. 20 U.S.C. §1414(d)(1)(A)(i)(I)–(IV), 20 U. S. C. §1414(d)(3)(A)(i)–(iv)

20. When a child's behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports, to address that behavior. 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)

21. To determine whether an IEP is substantively adequate, the hearing officer must examine the record for any objective evidence indicating whether the child is likely to make progress or regress under the proposed plan, such as test scores and similar objective criteria. The IEP must state “measurable annual goals.” Furthermore, to be legally adequate, the IEP must identify a student's behavioral impediments and implement strategies to address that behavior. *A. M. v. N.Y.C. Dept. of Educ.* 845 F. 3d 523 (2<sup>nd</sup> Cir. 2017); R.C.S.A §10-76d-11, 34 C.F.R. §300.320

22. The party who filed for due process has the burden of going forward with the evidence. In all cases, however, the public agency has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency.

23. An IEP must include a statement of the child's present levels of educational performance; the annual goals for the child, including short-term instructional objectives; the specific educational services to be provided to the child; an explanation of the extent to which the child will not participate with nondisabled children in regular educational programs; any transition services the child needs as he or she begins to leave a school setting; and the projected initiation date and duration of proposed services. 20 U.S.C. § 1414(d)(1)(A).

24. By a preponderance of the evidence, it is found that the 2016-17 IEP was not reasonably calculated to enable Student to make progress appropriate to his circumstances. The Board's claims of reasonable educational progress are not supported by the evidence presented. Multiple witnesses testified there was little improvement in his behavior or socialization from the beginning of sixth grade; indeed there were references to the Student having regressed. Behaviors such as calling out in class, non-compliance and tantrumming escalated into consistently eloping from his classes, regularly urinating on the bathroom floor, hiding in a locker, smearing paint on hallway walls, and similar misdeeds. His behavior not only impacted his social education, interaction and development, it affected his learning ability. 6<sup>th</sup> grade testing showed deficits not only in behavioral issues but in academics, specifically writing. (FF 33, 35, 36, 54, 56, 63, 64, 86)

25. From sixth to seventh grade, the goals and objectives critical to provide the Student with an opportunity to make reasonable progress in his social functioning and communication were simply repeated, carried over, without re-focusing for improvement, and the team's approach to this Student's most important issues did not allow him to make educational progress. The social goals and objectives proposed by school personnel during sixth and seventh grade were neither ambitious nor appropriate, and the Student failed to show meaningful progress. From the beginning of sixth to the end of seventh grade, there was no consistent improvement in social skills, developing friendships, or decrease in maladaptive behaviors. He still remained socially isolated, struggling especially with his writing, opposing his teachers and unable to self-regulate. (FF 32-36, 42, 50-51, 54-56, 63, 101)

26. The Hearing Officer must focus on the potential of *this* child, on his individualized needs and how he learns best. In this case, Dr. Mayville found that the Student was not making progress to conquer the overwhelming social isolation which is interfering with his education. Efforts and methods to bring the Student into the social milieu of his classmates and teachers had not been successful. (FF 79, 85, 91, 97, 105)

27. The evidence has credibly shown that the IEP for Student's 2016-17 year was not appropriate. There is insufficient evidence to conclude that the social goals and objectives were calculated to address Student's profound social deficits and construct a program that will advance his capability to develop social skills, learn and grow into adulthood. Dr. Fabian concurred in the Student's severe need for improvement in social functioning. (FF 42, 85, 93, 100-101, 111, 114, 116)

28. The compelling and highly credible testimony of the Board-Certified Behavior Analyst, Erik

Mayville, Ph.D. was critical to the decision of the Hearing Officer. Dr. Mayville opined that the strategy most likely to allow the Student to make reasonable progress was to systematically build skills “by starting small, using modeling, reinforcement, prompting with prompt fading, then increasing the demand.” Dr. Mayville was concerned that “scant attention was being paid to this skill building to improve Student’s executive functioning and lessen behaviors such as rigidity and lack of self-regulation.” (FF 106, 111)

29. The evidence showed the social thinking methodology, which was used successfully in elementary school, was not continued with fidelity once Student started middle school, and Student’s behavior deteriorated as a result. The claim of “mastery” of goals and objectives rings hollow when the same or very similar goals are carried over from year to year. (cf. FF 23, 62, 68, 70)

30. There was not sufficient credible evidence for the Hearing Officer to conclude that the Board’s decisions and actions regarding the programs implemented for the Student were adequate, sufficient or producing satisfactory results in 2016 or 2017. CMS School Psychologist Daniella Phelan testified that Student was making progress but also said he was “still working” on the same or similar concerns included in the 2015 BIP at the end of seventh grade in 2017. (FF 55, 56, 74, 76-77, 87-88)

31. In order to improve Student’s social connectedness (which is a difficult task, especially in a large school setting) and to address Student’s behavioral and cognitive difficulties, in April of 2017, Dr. Mayville recommended three full hours per week of direct BCBA involvement, and a trained paraprofessional to implement the programming and collect data, along with skill-building and explicit teaching throughout his school day. This recommendation was refused by the CMS team at the meeting in May, 2017. (FF 108, 112, 114-15)

32. Finally, and most importantly, in his report, Dr. Mayville then recommended exploring an out-of-district placement due to the significant number of social skills Student requires to learn, and the lack of meaningful interaction with peers at the present school. (FF 103, 113-15)

33. What methodology might work for other children is irrelevant. The focus has to be what works for this particular child. In this case the evidence shows placement at Pinnacle is having meaningful and significant benefit to Student. Since enrolling at Pinnacle, the data demonstrates tangible and substantial improvement in Student’s behavior and social skills as well as academics. (FF 119-23, 127, 129, 132, 138, 140)

34. While the burden of proof first falls upon the Board to show it provided FAPE, then if it has not met that burden, and the child is unilaterally placed, the burden is shifted to the parents who must demonstrate the placement is appropriate and in the least restrictive environment (“LRE”).

35. The Parents are seeking reimbursement for their unilateral placement to Pinnacle. Under the IDEA, a hearing officer is authorized to order retroactive tuition reimbursement if there is a finding that the District did not make a FAPE available in a timely manner before Student’s enrollment in the private program and if the private program is appropriate. 34 CFR § 300.148(c) Parents assume the financial risk if they place their child in a private program without consent of the District. *Florence Cty. School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15 (1993)

36. A private school placement must be "proper under the Act" *Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370, i.e., the private school offered an educational program which met the student’s special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Walczak*, 142 F.3d at 129).

37. The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement. Parents need not show that the placement provides every special service necessary to maximize the student’s potential. *Frank G. v.*

*Board of Educ.*, 459 F.3d 356, 364-65 (2<sup>nd</sup> Cir. 2006). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" *Frank G.*, 459 F.3d at 364; see *Gagliardo*, 489 F.3d at 115. A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836 [2d Cir. 2014]; *Gagliardo*, 489 F.3d at 114-15; *Frank G.*, 459 F.3d at 365).

38. In *Stephen G. v. Arlington Central School District*, 418 F. Supp. 2D 559 (2006), the court found that a Board of Education may be required to pay for educational services obtained for a student by his or her parent, if (i) the services offered by the board of education were inadequate or inappropriate, (ii) the services selected by the parent were appropriate, and (iii) equitable considerations support the parents' claim. See *M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers*, 231 F.3d 96, 102, 104 (2d Cir. 2000), *cert denied*, 532 U.S. 942 (2001); see also *Walczak*, 142 F.3d at 129 (*citing Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985)). These three factors are known as the "*Burlington factors*."

39. The Board's programs, both the IEP implemented in 2016-17 and the IEP proposed for 2017-18 were shown to be inadequate to provide the Student with FAPE, by a preponderance of the evidence presented at the hearing; therefore the first *Burlington* factor has been satisfied. The second *Burlington* factor was satisfied as Parents introduced sufficient evidence to show that the program at Pinnacle was providing the Student with credible educational benefit. The testimony supported that the Student's social impairments are now being addressed and are showing measurable signs of improvement, satisfying the second factor. Finally, equitable considerations support reimbursement. The parents continually made diligent efforts to work collaboratively with the team at CMS, researched and provided CMS staff with materials in an effort to collaboratively improve Student's situation, and expended funds to provide additional instruction at an outside facility. (e.g. FF 68-79, 100)

40. Pinnacle staff credibly testified at the hearing that Student had improved his behavior significantly from September throughout the school year and was making educational progress, according to their expectations as set forth in their learning profile. Dr. Mayville also found that, in his expert opinion, Student is now enrolled in a program that better addresses his most important needs and that he should remain at Pinnacle School. (FF 119-129, 140)

41. The evidence presented in this particular case cannot support a conclusion that, in a large school with hundreds of students such as CMS (and the high school in the following year and beyond), the critical needs of this particular student could be adequately addressed with the programs proposed by the Board. CMS attempted for three years to craft IEPs that would enable Student to make reasonable educational progress, but the team's efforts were consistently reactive to Student's ever-escalating behaviors, and, as a consequence, he did not make adequate, meaningful progress. The parents consistently and diligently requested a different approach. The Student was socially isolated and was not effectively learning social skills or strategies to enable him to develop necessary life skills to allow him to go about his daily life as he reaches adulthood. At Pinnacle, the evidence has shown that Student is making reasonable and appropriate educational progress now that his socialization and behaviors have been adequately addressed. The placement unilaterally chosen by Parents is appropriate.

#### **FINAL DECISION AND ORDER:**

The Hearing Officer enters the following orders which address all issues and claims made by Student:

1. Placement of Student at Pinnacle School for 2018-2019 at Board expense.
2. Reimbursement to Parents by Board for the tuition expenses of Pinnacle School for 2017-2018 school year.