

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

Appearing on behalf of the Student:

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Appearing on behalf of the Board:

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Appearing before:

Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board of Education violate its Child Find obligation before January 27¹, 2014?
 - (a) If so, is the Student entitled to compensatory education, including reimbursement for evaluations secured at her own expense, except relating to the period of time that the Student was in the jurisdiction of the Easton Board of Education?
2. Did the Board of Education provide the Student a free appropriate public education after January 27, 2014?
 - (a) If not, were the Student's unilateral placements at Greenbrier Academy and Trails Carolina appropriate?
 - (b) If they were appropriate, is the Student entitled to reimbursement for the expense of those placements, including transportation?
 - (c) If they were not appropriate, is the Student entitled to compensatory education?
3. Did the Board of Education violate the Student's rights under Section 504 of the Rehabilitation Act?
 - (a) If so, is the Student entitled to compensatory education?

PROCEDURAL HISTORY:

The Student requested a special education due process hearing in the above-captioned matter on October 28, 2015. The Impartial Hearing Officer was appointed to hear the case on October 29,

¹ The Memorandum And Orders in this case included a typographical error that identified this date as January 29, 2014. The correct date is January 27, 2014.

2015. A telephonic pre-hearing conference was conducted on November 10, 2015. Attorney Abby Wadler appeared on behalf of the Board of Education ("Board") and Attorney Meredith Braxton appeared on behalf of the Student. It was determined that the initial deadline for filing the Final Decision and Order was January 11, 2016.

On November 10, 2015, 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 in this case to February 10, 2016. The Board consented to the requested postponement and it was granted. Subsequently, the Student and/or the Board requested further postponements and extensions of the timelines to conduct the hearing and to file the final decision, which were also granted. A final deadline for filing the final decision was established to be July 29, 2016. On January 11, 2016, the Student submitted a motion to allow telephonic testimony in this matter. The Board of Education timely objected to the motion and it was denied on January 17, 2016.

Evidentiary hearings were conducted on January 4, 2016, January 17, 2016, February 2, 2016, April 1, 2016, April 11, 2016, May 9, 2016 and May 25, 2016. The following witnesses testified:

Student's Father
Student's Mother
Brigid Barry, School Administrator
Helen Blackburn, School Psychologist
Lorraine Termini, School Administrator
Luis Rivera, Guidance Counselor
Lindsey Pontieri, Teacher
Kathy Mulaire, Evaluator
Krystina Dawson, Evaluator
Kristen Mulhearn, Social Worker
Kevin Frick, Therapist
John Samanich, Psychiatrist
Joseph Braccio, Psychotherapist
Claude Schleuderer, Evaluator
Sharon Turshon, Retired School Administrator

Hearing Officer Exhibits HO 1 through HO 4 were entered as full exhibits. Student Exhibits P 1 through P 12, P 14 through P 18, P 20 through P 22, P 24 through P 28, P 30 through P 51, P 53 through 62, P 64 through P 79, and P 81 through P 97 were entered as full exhibits. Finally, Board Exhibits B 1 through B 69 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, with significant attention, learning and emotional disabilities entered the Board's high school as a mainstream student but quickly displayed attendance, behavior and academic difficulties. Her parents placed her in a private school for a time, but returned her to the Board's high school in the fall of the next school year. A referral for special education and related services was made, evaluations were completed and an individualized education program was provided in the Board's alternative high school. The Student's parents unilaterally placed her in a therapeutic boarding school and a wilderness program.

The Student claimed that the Board failed to timely fulfill its Child Find obligation and then failed to provide a free appropriate public education. The Student's request for reimbursement of the expense of the unilateral placements is granted.

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 July 10, 1998, and is now 18 years of age. She attended public elementary and middle schools in Easton, Connecticut where she lived with her mother after her parents' divorce. (Testimony of Father ("Father"))
2. The Student has been diagnosed with Attention Deficit Hyperactive Disorder inattentive type, Major Depressive Disorder, Oppositional Defiant Disorder, Mathematics Learning Disability, Learning Disorder (executive function difficulties, slow processing speed, impaired memory retrieval), Nonverbal Learning Disability, Bipolar Disorder, Parent-Child Relational Problems, and Adjustment Disorder, among others. (Exhibits P 2, P 88 and Exhibits B 12A, B 15, B 16, B 17, B 33)
3. The Student was first identified as eligible to receive special education and related services during her fourth grade year in Easton under the identification category of Specific Learning Disability due to weak reading comprehension and slow processing speed. She received special education services in mainstream schools, with goals in reading and mathematics, until the seventh grade when she began refusing services. (Exhibit B 14; Mother) At that point, the Easton Public Schools and her parents decided to substitute a significantly less intensive educational program under Section 504 of the Rehabilitation Act (29 U.S.C. Section 794) ("504 Plan") for her special education program. (Exhibits P 20 and 24; Mother)

4. The Student and her older sister moved to Greenwich to live with their father after the Student's seventh grade year. She then attended Greenwich Public Schools' Central Middle School for the eighth grade with only the support of her 504 Plan. She did relatively well that school year. (Father, Mother)
5. The Student entered Greenwich High School ("GHS") in the fall of 2012 for her ninth grade year. She did not meet with success at GHS. She frequently skipped classes, misbehaved and did very poorly academically. (Father; Mother; Exhibit B 38; Exhibits P 27, P 28, P 30, P 31 and P 32) The GHS team added supports, including the "Stars" program and security escorts to her classes and recommended that her father file a Family with Service Needs petition with the juvenile court system. These interventions were not effective. (Father; Mother; Barry)
6. The Student's parents moved her from GHS to the private Hyde School in Woodstock CT in early January 2013. The Student similarly did not find success at the Hyde School. (Father, Mother)
7. In the meantime, GHS staff convened a Planning and Placement Team ("PPT") meeting on January 9, 2013 to address a referral for possible special education eligibility. The PPT decided to secure a psycho-educational evaluation comprised of a basic academic battery, psychological testing, a social history and a diagnostic reading test. The Student's parents did not attend this meeting because they had already removed the Student to the Hyde School. The proposed evaluation was not conducted. (Exhibit B 9; Father; Mother)
8. The Hyde School recommended that the Student attend a wilderness program for the summer of 2013. As a result, the Student was enrolled in the Adirondack Leadership Expedition ("ALE"). (Father; Mother)
9. While at ALE, the Student was evaluated by Dr. Claude Schleuderer², a highly qualified psychologist and former educator who has performed hundreds of evaluations. Dr. Schleuderer produced a comprehensive report of his June 2013 evaluation of the Student's cognitive, academic and emotional profile. (Exhibits P 96 and B 16)
10. Dr. Schleuderer administered tests of the Student's cognitive, achievement and emotional functioning. He reported a full scale IQ for the Student of 94, within the average range. The Student's processing speed was notably at the bottom of the Borderline range due to her great difficulty in visual attention, visual scanning and visual focus. (Exhibit B 16; Schleuderer)
11. Dr. Schleuderer also found that the Student exhibits a very significant attention problem, warranting a diagnosis of Attention Deficit Disorder ("ADD" or "ADHD"). (Exhibit B 16; Schleuderer)
12. On academic achievement tests, the Student's math fluency placed her in the lowest .5% of her peers. The Student's weakness in math fluency and lack of automaticity for math facts, Dr. Schleuderer concluded, is due to a previously unrecognized mathematics learning disability. Like many students with ADD and learning disabilities, Dr. Schleuderer observed, the Student frequently misbehaves in school. Her oppositional behavior and noncompliance with behavior

² Dr. Schleuderer also provided credible testimony at the hearing of this case.

demands are closely related to her ADD and learning disabilities: "Because the academic difficulties make them feel 'dumb' they develop a strategy of acting provocatively in order to attribute their school difficulties to behavior, preferring that to labeling of themselves as being incapable." (Exhibit B 16; Schleuderer)

13. Dr. Schleuderer observed that although the Student is at risk for substance abuse problems in the future, she was not a substance abuser at the time of his evaluation. (Exhibit B 16; Schleuderer)

14. In summary, Dr. Schleuderer found that the Student suffers from Oppositional Defiant Disorder, ADD predominately inattentive type, Parent-Child Relational Problems and a Mathematics Disorder. He indicated that the Student did not need support for language-based writing tasks, but did require a considerable amount of help in basic mathematical operations. The Student's complex profile means that instruction must be nuanced. Due to the Student's ADD for instance, the window for instruction in basic mathematics is very narrow. Because she cannot maintain attention in the low interest subjects of addition, subtraction and multiplication, instruction will require great care. Instruction in higher interest topics such as language arts, will require different techniques. Accordingly, use of the same strategies for all subject areas, he concluded, would be useless for this complex Student. (Exhibit B 16; Schleuderer)

15. Dr. Schleuderer strongly recommended that the Student be placed in a therapeutic boarding school. As he explained,

She needs a considerable amount of external behavioral controls in an environment that will take into account her emotional needs and integrate her academic production, emotional growth and psychotherapeutic interventions. Such integrated treatment is only possible in an environment where the treatment team consists of and integrates her academic growth, social interactions and the residential elements of her daily life. Her emotional difficulties are, at this point, so significant that such a combined approach is necessary.

(Exhibit B 16 p. 18)

16. ALE provided a Discharge Summary at the end of the Student's stay. The Discharge Summary noted that the Student suffers from poor self esteem, poor insight into her own behavior and poor accountability for her behavior. Her "underlying emotional difficulties are inhibiting [the Student's] ability to achieve her academic potential. Addressing these emotional difficulties will be a necessary precursor to [the Student] achieving her potential in the classroom." ALE noted the following diagnoses: Oppositional Defiant Disorder, ADHD, Parent-Child Relational Problems and Mathematics Disorder. (Exhibit B 33)

17. The Student's parents also secured an evaluation of her cognitive and academic status from North Star Educational Services ("North Star") in August 2013. (Exhibits B 14 and B 15)

18. North Star's cognitive assessment revealed that the Student suffers from a nonverbal learning disability that impacts not only her learning, but also her executive functioning, behavior regulation and social interactions. She has significant challenges in the areas of visual perception and visual discrimination. Her visual memory is somewhat less impaired, falling into the low average range. Her low visual-motor processing speed score reflects deficits in her

ability to visually organize and visually scan information. (Exhibit B 15)

19. North Star's academic evaluation echoed Dr. Schleuderer's finding of very low achievement in the area of math fluency, as well as extremely poor multiplication and division skills. The Student's written composition score was well below grade level. (Exhibit B 14)

20. North Star's Pam Flynn wrote that the Student's "longstanding learning disability" has been misunderstood throughout her schooling, resulting in inappropriate instruction and significantly undermining her academic confidence. The Student's emotional issues, Flynn concluded, stem largely from the failure to identify and address her nonverbal learning disability. (Exhibit B 14, p. 7).

21. The Student was enrolled at a private boarding school for students with learning disabilities, the Marvelwood School, at the start of the 2013/2014 School year. She was soon dismissed from Marvelwood School for incidents involving alcohol and a physical fight with a classmate. (Father; Mother)

22. After Marvelwood, the Student's parents re-enrolled her at GHS in October 2013. Before placing the Student in a classroom, GHS convened a PPT meeting on November 1, 2013 to address a referral for special education and related services. (Exhibit B 8)

23. At the November 1, 2013 PPT meeting, the team reviewed the North Star reports and the ALE Discharge Summary, which were provided earlier by the Student's parents.³ Pam Flynn from North Star also attended the meeting by telephone. The PPT did not yet have the Schleuderer report⁴, but a copy was provided at the meeting. Although it did not express disagreement with the ALE Discharge Summary, the North Star evaluations or the Schleuderer report, the PPT declined to make a decision about the Student's eligibility for special education and related services at the meeting. Nor did the PPT request any additional testing or assessments at that time. Instead, the PPT decided to adjourn to review the Schleuderer report. (Exhibit B 8)

24. At the same time and although it did not make an eligibility decision, the PPT placed the Student at the Board's alternate high school known then as the ARCH Program. ARCH was a small program housed apart from the much larger GHS. It was the Board's most restrictive setting and was populated primarily with students identified as requiring special education services. (Father; Mother; Rivera; Exhibit B 8; Parties' Stipulation of Fact)

25. The ARCH program was not a therapeutic program but did have a dedicated social worker and guidance counselor on site to support the students. All academic subjects were taught by special education teachers and the curriculum was modified. Class sizes were small

³ Throughout the process, the Student's parents provided the Board with copies of all the reports and documents they had about the Student and signed all consents for evaluation and all releases for confidential records that were requested of them. (Father; Mother)

⁴ The Schleuderer report had not been provided to the PPT before the meeting as the result of a miscommunication between the Student's mother and father. It was not withheld in an effort to mislead the PPT. (Mother)

and the school offered a relatively high level of structure. (Rivera)

26. Although the Student did not have an individualized education plan (“IEP”) at ARCH, she did receive counseling with the school social worker for 30 minutes each week and group therapy for 45 minutes each week. She also had a period of daily resource room support with a special education teacher each day. The resource room support typically consisted of reviewing lessons and breaking down assignments from the academic classes. (Rivera; Mulhearn; Pontieri)

27. The PPT did not meet again to review the Schleuderer report until five weeks later, on December 9, 2013. Again, Pam Flynn from North Star attended the meeting by telephone. A letter from the Student’s psychiatrist, Dr. Samanich, was also provided. (Exhibit B 9) In the letter, Dr. Samanich identified the Student’s diagnoses as Major Depressive Disorder, Oppositional Defiant Disorder, ADHD inattentive subtype and Nonverbal Learning Disability. Dr. Samanich credibly testified that the Student was anxious all of the time at school and could barely function in or out of school. He believed that when she used alcohol, it was to soothe her anxiety so that she could get through the day. Dr. Samanich also strongly recommended placement in a therapeutic boarding school as necessary to meet the Student’s academic needs. (Samanich; Exhibit B 12A)

28. Again, and despite the Student’s parents’ request that it do so, the PPT declined to identify the Student as eligible for special education and related services at the December 9, 2013 PPT meeting. Instead, the PPT requested another evaluation of the Student, to include: a) classroom observation by the school psychologist; b) social and behavioral rating scales; c) academic battery; d) clinical interview; e) teacher feedback; and f) cognitive testing by the school psychologist, including the NEPSY II⁵. (Exhibit B 9)

29. The evaluation requested by the PPT was performed by Board staff between December 10, 2013 and December 19, 2013. The Board’s psychologist administered the NEPSY II, which produced scores in the expected range for Comprehension of Instruction, Memory for Faces and Affect Recognition. The Student’s NEPSY II scores for Theory of Mind, by contrast, were in the Borderline range. Theory of Mind looks at how emotion relates to social context and a person’s ability to interpret the affect of others in a social context. (Exhibit B 12)

30. The Student’s parents’ responses on social and behavior rating scales put the Student in the Clinically Significant range for Externalizing Problems, the At Risk range for Depression and the Clinically Significant range on the Behavior Symptoms Index for Atypicality, Withdrawal and Attention Problems. (Exhibit B 12)

31. The Student’s social skills were almost all Below Average on the Social Skills Improvement System, including weaknesses in Communication, Cooperation, Responsibility, Empathy, Engagement and Self Control. (Exhibit B 12)

32. The Board of Education’s testing of the Student’s academic achievement produced below average scores for Essay Composition and Numerical Operations. The evaluator wrote: “[Her] math facts are not automatic and she could not remember routines or procedures for multi-digit

⁵ The NEPSY II is a test of neuropsychological development and cognitive function. (Exhibit B 12)

multiplication and division.” (Exhibit B 12 p. 19)

33. The PPT did not meet again until January 27, 2014, six weeks later. At that point, the PPT decided that the Student was eligible for special education and related services under the category of Emotional Disturbance (“ED”). (Exhibit B 6)

34. The PPT placed the Student in the ARCH program with the same services and supports that had been provided before she was identified as eligible for special education and related services. (Exhibit B 6; Rivera; Mulaire)

35. The Student’s January 27, 2014 IEP identified her then present levels of performance as follows:

Language Arts: Reading Comprehension SS 98, Oral Reading Accuracy SS 100, Word Reading SS 106, Basic Reading Composite SS 105, Essay Composition SS 92.

Mathematics: Age Appropriate

Behavior/Social: Passing all classes, seeks out mental health supports, participates in group

Other: Working Memory 102, Comprehension 99, Perceptual Reasoning 108, Processing Speed 70

(Exhibit B 6)

36. Notably, because the Student’s level of performance in Mathematics was identified as “Age Appropriate” the IEP did not include any services or other provision to address her lack of automaticity in math facts or her failure to understand and perform basic math functions like multiplication and division. (Exhibit B 6) Yet, the Board’s staff admitted that these are skills possessed by most elementary level students, and that it is not “Age Appropriate” for a high school student to lack them. (Mulaire)

37. The January 27, 2014 IEP included one Academic goal in Writing, three Social/Behavior goals for Counseling, one goal in Employment, one goal in Post High School Education and one goal in School Skills. There was no provision to address the Student’s nonverbal learning disorder, mathematics disorder or significant ADD. (Exhibit B 6)

38. Although the Student’s academic work at ARCH was reported to be acceptable in the IEP, she was actually failing several classes and continuing to leave school without permission. She earned only one high school credit for the semester and got into a fight and used alcohol at school despite ARCH’s high level of structure and supervision. (Exhibit B 7; Exhibit P 64; Mother)

39. The Student’s parents disagreed with the ARCH placement and notified the Board of their decision to unilaterally place the student in a private school. (Exhibit B 7; Mother)

40. The Student’s parents enrolled her at Greenbrier Academy (“Greenbrier”) in West Virginia on February 3, 2014. (Exhibit P 90; Mother)

41. Greenbrier is a therapeutic boarding school for girls aged 13 to 18. It is licensed and accredited by the North Central Association of College and Schools and the West Virginia Department of Health and Human Resources. Greenbrier has eight certified teachers, one

certified special education teacher, eight licensed therapists and approximately thirty resident advisors who are trained in the school's therapeutic model. Class size is an average of nine students. (Exhibit P 84; Frick)

42. Greenbrier caters to students who exhibit a variety of emotional problems, including anxiety, depression, and substance abuse. It offers a therapeutic milieu that meets its students' therapeutic needs in all phases of the program, from academic to therapeutic to residential. This therapeutic milieu provides the framework by which the program enforces consistent support and evaluation of students' behavioral, emotional and academic needs in all phases of their lives. (Exhibit P 84; Frick)

43. Greenbrier calls its academic approach Quantum Learning, which attempts to connect the learning experience to real life. In so doing, it uses a multimodal, experiential approach with many hands on activities, kinesthetic and visual aids. The Student participated in academic subjects ranging from Biology, Chemistry and Geometry to English, American Studies, Drumming and Physical Education and earned passing grades in most of her classes. (Exhibit B 84; Frick).

44. The Student also participated in intensive therapy, with 60 to 90 minutes of individual therapy *each day* and an additional four group therapy sessions each week. Family therapy was conducted each week over the telephone. The Student's therapist worked on addressing her focus and attention to school work, regulating emotions, tolerating stress, developing and maintaining relationships and improving self esteem. (Exhibit B 84; Frick)

45. After several months at Greenbrier, the Student was involved in two behavior incidents that prompted Greenbrier to recommend that she participate in another wilderness program. In July 2014, the Student and a few other girls eloped from the Greenbrier campus and caught a ride into a nearby town. They were returned to the school after about five or six hours. In another incident, the Student was involved in a physical altercation with a classmate. (Exhibit B 84; Frick; Mother)

46. Accordingly, the Student was enrolled in the Trails North Carolina boarding wilderness program ("Trails") from July 11, 2014 to October 8, 2014. Trails imbeds an academic component to its therapeutic wilderness program. Students spend one week a month in base camp, where they attend academic classes. Another week is spent at a second base camp where they take day hikes but also participate in science laboratory. The final two weeks per month are spent on expedition, where students are still required to journal and read assigned texts. During the Student's time at Trails, she not only received intensive therapeutic interventions, but also earned three high school credits for her academic work. (Exhibit P 89; Mother)

47. The Student also progressed in social competence, communication and gained an increased sense of agency at Trails. The Trails' Discharge Summary recommended that the Student return to Greenbrier due to her continuing and significant emotional and learning needs. (Exhibit P 89)

48. The Student returned to Greenbrier on about October 10, 2014, where she resumed her prior program. (Frick; Mother)

49. The Student made slow progress in her therapeutic treatment and in academics over the course of her matriculation at Greenbrier. She became more engaged in class, more determined to complete schoolwork and better able to make and maintain friendships. She also made academic progress at Greenbrier, earning three high school credits with good grades. (Exhibit P 84; Mother)

50. On January 15, 2015 against Greenbrier's advice⁶ the Student returned to her mother's home in Easton. There, she was enrolled in the Easton Public Schools. At about this time, the Student's new psychiatrist diagnosed her with bipolar disorder and implemented a pharmaceutical intervention that has had a significant impact in improving her emotional and academic function. (Mother; Braccio) The Easton Public Schools placed her at Wellspring residential treatment center in Bethlehem, Connecticut where she remains today. (Mother; Exhibit P 95)

51. Wellspring residential treatment center is even more highly structured and supervised than Greenbrier. As her Wellspring therapist testified, the Student's emotional and learning needs continue to be so pervasive that she requires the highly structured and integrated setting of a therapeutic treatment center to receive an education. It is likely that she has required such a setting in order to be educated since she was thirteen years of age. (Braccio)

52. The evidence as a whole demonstrated that due to the Student's complex and closely intertwined learning and emotional disabilities, it has been necessary that she be educated in a therapeutic boarding school or residential treatment center in order to access her education during the time relevant to this case. (Samanich; Frick; Schleuderer; Braccio; Exhibits B 12A, B 16, B 33 and P 69 and P 85)

53. Greenbrier was an appropriate placement for the Student because it offered an intensive therapeutic milieu that crossed the school, residential and therapeutic phases of the Student's day as well as an integrated academic program that was reasonably expected to afford the Student educational benefit, including an opportunity to earn high school credits. Although Greenbrier was a very restrictive setting, its restrictiveness was appropriate to the Student's needs. (Frick; Mother; Exhibit P 84)

54. The Trails program, although less focused on academics than Greenbrier, was also an appropriate placement for the Student at the time. At Trails, the Student spent five days out of every month in a classroom setting and was required to journal and read assigned books even while out on expedition. She had the opportunity to, and did, earn three high school credits during her time there. Trails' intensive therapeutic program was also reasonably expected to benefit the Student from a behavior regulation and emotional point of view, which in turn, improved her readiness to focus on academics. (Frick; Mother; Exhibit P 89)

CONCLUSIONS OF LAW AND DISCUSSION:

1. In *Board of Education v. Rowley*, 458 U.S. 176 (1982) ("Rowley"), the United States Supreme Court set out a two-part test for determining whether a local board of education has

⁶ Greenbrier recommended that the Student continue her education in a residential boarding school like Greenbrier or a residential treatment center. (Exhibit P 85)

offered a student a free appropriate public education ("FAPE") in compliance with the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq* ("IDEA"). The first part 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 benefits. *Id.* at 206-207.

2. The Board had the burden in this case to prove by a preponderance of the evidence that its IEP was appropriate and in compliance with IDEA's requirements. Regulations of Connecticut State Agencies ("R.S.C.A.") Section 10-76h-14(a).

3. 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.

4. 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). Significantly, compliance with IDEA's procedural requirements is the responsibility of the board of education, and not the parents. *Unified School District No. 1 v. Department of Education*, 64 Conn. App. 273, 285 (2001).

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. One of the most fundamental procedural requirements of IDEA is Child Find. Child Find describes a public school district's affirmative and ongoing duty to locate, identify and evaluate students within its jurisdiction who have a disability. 20 U.S.C. Sections 1401(3) and 1412(a)(3); 34 C.F.R. Section 300.111; R.C.S.A. Sections 10-76d-6 through 10-76d-9). The school district must accept and process referrals from school staff, parents, physicians, social workers and clinics for the initial evaluation of a child suspected of having a disability. R.C.S.A. Section 10-76d-7.

7. The school district must then promptly conduct an initial evaluation of the student and convene a PPT meeting to determine whether the student has a qualifying disability. R.C.S.A. Sections 10-76d-9 and 10-76d-10. A cornerstone of Child Find is that students must be assessed "in all areas of suspected disability" so as to garner the information necessary to identify the student's educational needs and to develop his or her educational program. 20 U.S.C. Section 1414(b)(3); 34 C.F.R. Section 300.304(c)(4). In this regard, school districts must "use a variety

of assessment tools and strategies to gather relevant functional, developmental, and academic information" about the student. 34 C.F.R. Section 300.304.

8. If a student is determined to have a disability and is eligible for special education and related services, the PPT must develop an IEP for the student. IDEA sets forth a process by which each student's IEP is to be developed and what it must contain. The IEP is the "key operative feature of the Federal Act." *David D. v. Dartmouth School Committee*, 775 F.2d 411, 415 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

9. Each IEP must include a statement of the student's present level of performance in each area of disability, 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 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.

10. If a student is identified as eligible for special education and related services, the board must implement an IEP for the student within forty-five school days of the referral for possible eligibility, exclusive of the time required to obtain parental consent. R.C.S.A. Section 10-76d-13(a). *See also* 34 C.F.R. Section 300.301(c) (absent state imposed timeline evaluation must be implemented within sixty days of parental consent)

11. 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.*

12. The Student here claims that the PPT had sufficient information to identify her as eligible for special education and related services at the meeting on November 1, 2013 and should have made her eligible at that time. While it is true that the PPT had ample evidence to conclude that the Student suffered from one or more qualifying disabilities (ADHD, significant emotional and behavioral deficits and specific learning disabilities) on November 1, 2013, the PPT's desire to defer the eligibility decision until it could study the Schleuderer was reasonable and appropriate. The PPT, after all, was required to not only identify the Student as eligible for special education and related services, but also to develop an appropriate IEP for her. An understanding of the Schleuderer report was crucial to this latter task.

13. It was not appropriate or reasonable, however, that the PPT took five weeks to review the Schleuderer report before it reconvened. Similarly, while it was also appropriate and reasonable for the PPT to want an evaluation performed by Board staff, it was not appropriate or reasonable that the PPT waited until December 9, 2013 to request that evaluation. The Board evaluation could and should have been planned at the November 1, 2013 meeting.

14. Furthermore, even though the Board's evaluation was performed promptly after it was requested in December 2013, the PPT did not meet again to review that evaluation and make the eligibility decision until January 27, 2014. The entire process could and should have been completed weeks earlier, certainly by the week of January 6, 2014. This would have placed the

Board within the forty-five day timeline established by R.C.S.A. Section 10-76d-13(a).

15. The Board's procedural violation in failing to timely complete the Child Find process impeded the Student's right to a free appropriate public education and deprived her of educational benefit for approximately three weeks. Even though the program implemented after January 27, 2016 did not constitute a free appropriate public education, the Board's delay caused the Student's parents to delay placing her at Greenbrier, where she ultimately did receive an appropriate program, for approximately three weeks.

16. The IEP offered by the Board on January 27, 2014 also significantly misstated the Student's educational needs. When an IEP is premised on a misunderstanding of important aspects of the Student's disability, it can hardly provide FAPE. Indeed, a school district's inaccurate description of a student's actual levels of performance in the IEP has been specifically recognized as a material procedural violation of IDEA. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320; *RR v. Wallingford Board of Education*, 101 L.R.P. 196 (D. Conn 2001); *Newtown Public Schools*, 107 L.R.P. 59412 (Ct SEA 2007).

17. The IEP offered to the Student on January 27, 2014 inaccurately represented her then present level of performance in the area of Mathematics as "Age Appropriate." It neglected to identify the Student's lack of automaticity in math facts and her failure to understand multiplication and division. These, the Board's staff admitted, are skills possessed by most elementary level students, and it is not age appropriate for a high school student to lack them.

18. The misstatement of the Student's present level of performance in Mathematics resulted in the absence of any goals or objectives or services related to mathematics in her IEP. Consequently, this procedural violation also impeded the Student's right to a free appropriate public education and deprived her of educational benefit.

19. Similarly, although the IEP acknowledges and addresses the Student's emotional disability, it ignored her significant attention deficits and nonverbal learning disabilities. The IEP neither mentions these problems as impacting her learning nor includes any services or goals in these important areas.

20. Finally, the Board's IEP is deficient because it does not offer the Student a residential placement. As each of the Student's mental health providers testified and the evidence as a whole demonstrated, the Student requires a residential placement with a therapeutic milieu spanning all waking hours in order to benefit from her education. Only in a residential context can a program integrate the level of consistency, structure and therapeutic support that Student needs to learn in light of her complex and intertwined disability profile. (Findings of Fact Nos. 15, 27, 51 and 52)

21. The Board also failed to prove that the January 27, 2014 IEP satisfied IDEA's substantive requirement that it be reasonably calculated to enable the student to receive educational benefit. *Rowley* at 206-07 (1982). The Student was not entitled to a "potential-maximizing education" (*id.* at p. 197, fn. 21) but was entitled to one that "confers some educational benefit" (*id.* at p. 200) and "is likely to produce progress, not regression." *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005).

22. The absence of a residential program as well as any services or accommodations targeting her nonverbal learning disability, mathematics disability and ADHD rendered the IEP unlikely to produce progress for the Student. Indeed, the Student was already failing several of her classes and had earned only one high school credit at ARCH when the January 27, 2015 IEP formalized her preexisting program there. (Findings of Fact No. 38)

23. While the unilateral placement at Greenbrier was not perfect, it did provide an opportunity for the Student to access her education. The program was designed to create a sufficient opening, through the efforts of the Student's therapist and other staff to integrate behavioral, emotional and academic interventions across all waking hours, for the Student to learn. The school's quantum learning approach, small class size and structured program were also reasonably calculated to benefit the Student. Greenbrier also offered the opportunity for the Student to earn high school credits. Accordingly, Greenbrier was an appropriate program for the Student.

24. Trails was also reasonably calculated to provide educational benefit. The Trails program embedded academics into the expedition portion of its program and additionally offered classroom experience in its base camp and science laboratory. The concurrent therapeutic services and activities supported the Student in the academic portion. The Student was able to earn three high school credits at Trails.

25. A parent's unilateral placement need not meet the standards that are generally applicable to public school placements, but need only be reasonably calculated to provide educational benefit. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1286 (11th Cir. 2008); *Frank G. v. Board of Education*, 459 F.3d 356, 367 (2d Cir. 2006); *Warren G. by and Through Tom G v. Cumberland City School District*, 190 F.3d 80, 84 (3d Cir. 1999).

26. The Board claims that the Student's parents attempted to conceal from the Board that the Student abuses alcohol and/or marijuana. In this regard, I do not find the evidence convincing that the Student has an alcohol or marijuana addiction that interferes with her learning. Without a doubt, she has used alcohol and marijuana on several occasions throughout her high school career. But none of her mental health professionals identified this as a significant concern for her learning. More importantly, however, there was no evidence that the parents ever attempted to conceal any facts about the Student's alcohol or marijuana use.

27. The Student also argues that the Board violated Section 504 of the Rehabilitation Act and that a remedy should be imposed accordingly. Section 504 prohibits discrimination based on disability in programs and activities that are funded by the federal government. 29 U.S.C. Section 794(a). Under Section 504, a public school system must provide a "free appropriate public education" to qualified disabled students. 34 C.F.R. Section 104.33(a); *Mark H. V. Lemahieu*, 513 F.2d 922, 936-37 (9th Cir. 2008).

28. I was appointed under the authority of R.C.S.A. Sections 10-76h-1 *et seq* and 34 C.F.R. Sections 300.500 *et seq* to hear and decide due process complaints relating to the identification, evaluation or educational placement of children with disabilities or the provision of a free appropriate public education for children with disabilities under IDEA and Connecticut special

education law. My jurisdiction does not include the determination of legal claims under Section 504.

29. Nonetheless, even if I did have jurisdiction under Section 504, the claim would require dismissal. The Student's case under Section 504 required a showing that the Student's educational needs were not met as adequately as are the needs of non-disabled students. *Mark H. V. Lemahieu*, 513 F.2d 922, 936-37 (9th Cir. 2008). To find a violation of this obligation would thus require a comparative analysis of how well the Board provides for disabled versus nondisabled students. There was insufficient evidence presented in this hearing upon which to form any conclusions in this regard. Accordingly, the Section 504 claim must be dismissed.

30. Whereas here, a special education student is not offered a free appropriate public education and is parentally placed in a private school that is reasonably calculated to enable the child to receive educational benefits, the student is generally entitled to reimbursement for the expense of the unilateral placement. *Florence City School District Four v. Carter by and through Carter*, 510 U.S. 7, 15 (1993); 34 C.F.R. Section 300.148.

31. Furthermore, when a student's emotional and behavioral problems are closely intertwined with his or her learning problems such that a residential program is necessary for the student to receive educational benefit, the residential program, including non-medical care and room and board, must be provided by the school district at no cost to the student. 34 C.F.R. Section 300.104; *Mrs. B v. Milford Public Schools*, 103 F.3d 1114, 1122 (2d Cir. 1977).

32. Accordingly, the Student here is entitled to reimbursement for the expenses incurred in matriculating at Greenbrier and at Trails based on the Board's failure to offer FAPE.

33. The Student also seeks a compensatory education award in this case. Impartial Hearing Officers have broad discretion to fashion appropriate remedies in due process cases, including to award compensatory education as an equitable remedy for denial of FAPE. *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285 (11th Cir. 2008); *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 523 (D.C. Cir. 2005).

34. Compensatory education should be designed as a "replacement of educational services the child should have received in the first place" and should "elevate [the Student] to the position he would have occupied absent the school board's failures." *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 518, 524-27 (D.C. Cir. 2005). An award of compensatory services is not based on an established logarithm, but instead on equitable considerations. *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005).

35. In this case, the Student seeks an order of reimbursement for the expense of the Schleuderer and North Star evaluations as a compensatory education remedy. Typically, a Student is entitled to secure evaluations from providers of the Student's choice at public expense when the Student disagrees with a school district's evaluation. 34 C.F.R. Section 300.502. That is not the case here. The Schleuderer and North Star evaluations were performed before the Board conducted its evaluations and were not secured because the Student's parents disagreed with the Board's evaluations.

36. In addition, these evaluations were not secured for any reason related in any way to the Board's delay in completing its Child Find obligation. Indeed, the Schleuderer and North Star evaluations were secured before the Board's Child Find obligation was triggered. Accordingly, it is not appropriate to award the expense of these evaluations as a compensatory education remedy for violation of Child Find.

37. No other remedy for the Board's approximately three-week delay in completing the Child Find process appears appropriate either. The Student was being educated, albeit in the same inappropriate manner, even before the IEP was put in place. Since a remedy is awarded for the deficits of that program, a separate remedy for a delay in its implementation is unnecessary.

38. The Board argues that equitable factors arising from an alleged lack of transparency about the Student's alcohol and/or marijuana use argue for a reduction of any remedy ordered in this case. Equitable factors are generally relevant to the calculation of remedies in special education cases. *C.L. v. Scarsdale Union Free School District*, 744 F.3d 826 (2d Cir. 2014).

39. The evidence here did not, however, establish that the parents tried to hide information about the Student's use of alcohol and marijuana from the Board. Throughout the process, the Student's parents provided the Board with copies of all the reports and documents they had and signed all consents and releases for confidential records that were requested of them.

FINAL DECISION AND ORDER:

1. The Board of Education did not satisfy its Child Find duty when it failed to timely identify the Student as eligible for special education and related services and provide an individualized education program. No separate remedy, however, is appropriate for this violation.
2. The Board of Education did not offer the Student FAPE after January 27, 2014. The Student's unilateral placements at Greenbrier and Trails were appropriate for the Student. The Board shall reimburse the Student for the expense of those placements, including transportation.
3. The Student's claim under Section 504 of the Rehabilitation Act is dismissed.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

ANN F BIRD

Hearing Officer

Name in Print