

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Connecticut Technical High School System

Appearing on behalf of the Parent: Attorney David C. Shaw  
The Law Office of David C. Shaw, LLC  
34 Jerome Ave., Suite 210  
Bloomfield, CT 06002

Appearing on behalf of the Board: Attorney Christine Chinni  
Chinni & Meuser, LLC  
30 Avon Meadow Lane  
Avon, CT 06001

Appearing before: Robert L. Skelley, Esq.  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Is the Board's comprehensive educational evaluation completed over November 29, 2012 through January 13, 2013, appropriate for this Student?
2. If the answer to the above (No.1) is No, is the Board responsible to provide either a publicly funded Independent Education Evaluation ("IEE") or reimburse the Parents for a privately acquired IEE?
3. Did the Board provide the Student a free and appropriate public education ("FAPE") for the academic years of 2011-2012 and 2012-2013?
4. Are the Individualized Education Programs ("IEPs"), dated 5/5/11, modified on 10/6/11 and then offered on 12/14/13 appropriate for this Student and do they offer the Student a FAPE?
5. Did the Board fail to appropriately identify the Student in all areas of suspected disability?
6. Did the Board fail to appropriately implement the accepted IEPs for the time periods in question?
7. Did the Board commit a procedural violation by holding the February 14, 2013 Planning and Placement Team ("PPT") meeting on short notice, preventing one Parent and the South Windsor Board of Education from attending?
8. Did the Board commit a procedural violation and deny the Parents meaningful participation by holding a PPT on 5/17/2013 despite neither of the Parents, nor the Student, being present?
9. Does the Hearing Officer have jurisdiction to address an alleged discriminatory action by the Board by failing to provide supplementary aids, services, and modifications to the curriculum to allow the Student to fully participate in the placement programs, in violation of 29 U.S.C. §794?

10. Did the Board improperly apply Connecticut General Statute ("C.G.S.") §10-76q(c) by expelling/discharging the Student from Howell Cheney Technical High School without first considering the supplementary aid, services, and modifications that would be needed to allow the Student to proceed?
11. If the answer to No. 9 above is Yes, does the Hearing Officer have the authority and/or jurisdiction to determine if C.G.S. § 10-76q(c) discriminates against the Student in violation of the Individuals with Disabilities Education Improvement Act ("IDEA")?
12. Does the Board offered IEP for the 2013-2014 school years provide the Student with a FAPE?
13. Was the Board justified in recommending the Student be placed in a therapeutic day placement setting during the pendency of the due process complaint?

### **PROCEDURAL HISTORY:**

The hearing was requested on February 20, 2013 by the Connecticut Technical High School System ("CTHSS") Board of Education, regarding Howell Cheney Technical High School ("Cheney Tech") (Case No. 13-0321). The Board's complaint involved the sole issue of the appropriateness of the Board evaluation and a decision to not pay for a parental request for an IEE. The Parents filed a separate complaint on February 20 and then an amended complaint on February 22, 2013, (Case No. 13-0329). The Board filed a brief answer to the Parent complaint on February 22, 2013.

This matter was consolidated, at the request of the Parties and agreement of the assigned Hearing Officers on 2/28/2013, under Case No. 13-0321. On 3/5/2013 a prehearing conference was held, where the issues were identified for hearing.

On 4/19/2013 the Parties requested an additional prehearing conference to address a dispute regarding the necessity of the Parents IEE being completed before the Board's raised issue of the appropriateness of the Board's evaluation would be heard and decided. The Parties agreed to address the issue of the completion of the Parents' IEE at the start of the due process hearings. The hearing addressing that issue began 5/9/2013, and further convened on 5/30, 5/31, 6/3, 6/6, and 6/7/2013 to address the remaining issues. The Parties agreed that if the Parents' IEE was completed prior to the testimony of the Board's expert, there would be no objection to the evaluation being completed after the start of the hearing. In order to accommodate professional witnesses, additional hearing dates were set for 7/26 and 7/27/2013. Concluding hearing dates were held on 8/5; 8/6; 8/7; and 8/8/2013. The Parties rested their cases on 8/8/2013.

The final decision and order date was extended from 8/14/2013 until 9/13/2013 to allow the parties to obtain transcripts of the hearings and to prepare final briefs. Consequently the parties developed the following briefing schedule, presuming that transcripts would be available to the parties by the end of August, 2013:

1. Initial briefs would be due by 9/16/2013;
2. Reply briefs would be due by 9/23/2013;
3. The final decision and order would be due by 10/13/2013.

4. The Parties reached a temporary agreement between themselves to provide educational services to the Student in such a fashion as to make the necessity of an extension not detrimental to the Student.

On 9/13/2013, the Parties requested a short extension of the briefing schedule, adding three days to the initial briefs (9/19) and to the reply brief (9/26). The final decision and order date remains at 10/13/2013.

### **SUMMARY:**

This matter concerns a Student diagnosed with Pervasive Developmental Disorder, Not otherwise Specified ("PDD NOS"), with Attention Deficit Hyperactivity Disorder ("ADHD"). These diagnoses have been sustained over a fairly lengthy period of time (2008 through 2013) by a number of evaluators. When transitioning from the Timothy Edwards Middle School to Cheney Tech, the Middle School psychologist noted that the Student would seek her out when he needed to problem solve, but that he was not always receptive to the suggested solutions that were offered. He was seen as a concrete thinker which diminished his reading comprehension significantly. He was also seen as having a good vocabulary but slow retrieval and often tried to avoid independent reading. He benefited from extra time and small test settings when taking standardized testing in math. The Board attended the meeting in which these attributes of the Student were discussed and from which the initial Cheney Tech IEP was written 5/5/2011. On 10/7/2011, the Board held a PPT meeting to develop a behavior intervention plan ("BIP"), from which a functional behavioral assessment was conducted and a BIP was created. Both Mother and Student participated in the PPT meeting.

At the annual PPT conducted 5/3/2012, the Student's teachers reported a shared concern that he was at risk of failing three core subjects (English I, Algebra I and Global Studies (as identified by the Board)). The teachers shared concern was of the Student complying and completing his work. Although modifications to the IEP and the behavior intervention plan ("BIP") were made which included targeted tutoring twice weekly, co-taught core subjects at least two periods each class per academic week, continued counseling and utilization of his BIP, the 5/3/2012 IEP is essentially the same as the 5/5/2011 IEP. The BIP was slightly modified.

The Parents requested, and the Board convened two additional PPT meetings prior to the start of the Student's sophomore year, in June and August to help staff become acquainted with the Student and the IEP. By early October, 2012, the Parents were notifying the Board that they had concerns about the Student's functioning at Cheney Tech. The Parents believed that the teachers did not understand the impact of the Student's diagnoses on his ability to handle the work load and structure of Cheney Tech. The Board attempted to convene a PPT meeting in October but was unable to coordinate all of the schedules to do so until 11/1/2012. At the 11/1/2012 PPT, the Team came to the conclusion that a comprehensive evaluation of the Student was warranted. The PPT was concerned about the Student's lack of ability to stay in class, sleeping in class and lack of work completion. The PPT developed a series of five questions for the evaluator to respond to in completing the evaluation. The Parents dispute that there was consensus on the five questions and state that they were denied the ability to ask different questions. The Board and Parents completed the evaluation permission form, the Team reviewed the

BIP and it was determined that it was still appropriate. The Parents dispute that the BIP was effective and felt that it did not address the Student's behaviors in a proper manner, being focused too strongly on punitive measures, rather than rewarding positive behaviors.

The Board completed a comprehensive educational evaluation of the Student. The evaluation was completed in January, 2013. On 2/14/2013, the PPT met to review the comprehensive evaluation and subsequently recommended that the Student be returned to his sending LEA. Mother attended the 2/14/2013 PPT, Father was not able to attend due to work considerations and had requested that the meeting be postponed, which the Board declined to do. The Parents disagreed with the PPT, and the comprehensive evaluation, which the Parents challenged as not being appropriate and requested an IEE at Board expense, which the Board denied. The Parents subsequently invoked stay-put to challenge the IEP. The Board filed the initial complaint in defense of their evaluation and their denial to fund the IEE at public expense. Subsequent to the filing of the Board's complaint, the Parents filed their own complaint charging amongst other things, the Board's failure to provide a free and appropriate public education ("FAPE") to the Student, for the 2011-2012; 2012-2013 academic years, and for improperly holding a planning and placement team ("PPT") meeting in which a decision was made that the Student would be removed from Cheney Tech. and sent back to his sending local educational agency ("LEA") for the 2013-2014 academic year. The Board subsequently held two additional PPTs in which the decision to remove the Student from Cheney Tech was reiterated and suggesting a change in services during the pendency of the due process complaint.

The Parties subsequently requested the two complaints be consolidated into one, which occurred upon agreement of the Hearing Officers. The Parties then agreed at the 6/3/2013 hearing, to allow the Parents to amend the Parents complaint to include the 2013-2014 IEP in this matter, adding additional issues to be decided. The Board stood by its decision to remove the Student from Cheney Tech, citing C.G.S. §10-76q<sup>1</sup> as the authority allowing the removal and the school's inability to provide the program and services necessary to meet the Student's needs. From the Board's perspective, the Student posed a safety threat to himself, and possibly others due to several statements

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<sup>1</sup> C.G.S. §10-76q. **Special education at technical high schools.** (a) The State Board of Education, in accordance with regulations adopted by said board, shall: (1) Provide the professional services necessary to identify, in accordance with section 10-76a, children requiring special education who are enrolled at state technical high schools, in accordance with section 10-95; (2) identify each such child; (3) determine the appropriateness of the state technical high school for the educational needs of each such child; (4) provide an appropriate educational program for each such child; (5) maintain a record thereof; and (6) annually evaluate the progress and accomplishments of special education programs at the state technical high schools.

(b) Where it is deemed appropriate that a child enrolled in a state technical high school receive special education, the parents or guardian of such child shall have a right to the hearing and appeal process as provided for in section 10-76h.

(c) If a planning and placement team determines that a student requires special education services which preclude such student's participation in the vocational education program offered by a technical high school, the student shall be referred to the board of education in the town in which the student resides for the development of an individualized educational program and such board of education shall be responsible for the implementation and financing of such program.

that the Student had made, both in school and out of school, that he was contemplating suicide. The Student was becoming increasingly defiant and refusing to do homework, listen to the teachers, or work with the observer assigned to him. The Parents challenge that statute, stating that Cheney Tech has a legal requirement to provide a FAPE to the Student and that the Board may invoke §10-76q only after attempting a full complement of services designed to enable the student to achieve a meaningful educational benefit, which the Parents feel the Board did not do; and further that the May, 2013 PPT was held without Parent or Student participation denying them meaningful participation in the process and thereby a denial of a FAPE.

#### **STATEMENT OF JURISDICTION:**

This matter was heard as a contested matter pursuant to C.G.S. §10-76h and related regulations, which authorize an impartial hearing officer to conduct a special education hearing and to render a final decision in accordance with the Uniform Administrative Procedures Act ("UAPA"), C.G.S. §§ 4-176e to 4-178, inclusive, §§ 4-181a and 4-186; 20 United States Code §1415(f) and related regulations at 34 C.F.R. §§300.511 through 300.520

#### **FINDINGS OF FACT:**

1. The Student is a 16 year old, 10<sup>th</sup> grade student (at the time of the hearings), attending Cheney Tech, in the Machine Tool tract for the 2011-2012 and 2012-2013 school years. (B6,7,9,10,11,12,13,14,15)<sup>2</sup>
2. The following witnesses (in no particular order) appeared and gave testimony during this hearing:
  - a. Board Psychologist – Ph.D. in Educational Psychology. Certified by the Connecticut State Department of Education as a school psychologist. Board Witness.
  - b. Mother of Student. Parent Witness.
  - c. Father of Student. Parent Witness.
  - d. Educational Consultant for CTHSS - M.S. in Special Education, Sixth Year Degree in Educational Leadership. Board Witness.
  - e. Special Education Department Chair, Cheney Tech. - M.S. in Special Education. Board Witness.
  - f. School Psychologist, Cheney Tech, - M.S. in School Psychology. Certified in Connecticut as a School Psychologist. Board Witness.
  - g. Assistant Principal for Cheney Tech. M.S. in Special Education; Advanced Certificate in educational leadership. Board Witness.
  - h. Parent Psychologist. –Ph.D. in Special Education and Rehabilitation Psychology. Certified in Connecticut as a Psychologist. Parent Witness.
  - i. Therapist for Student - Ph.D. in Psychology. Licensed as a Psychologist in Connecticut. Parent Witness.

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<sup>2</sup> Exhibits will be marked "B-No." indicating a Board exhibit; "P-No.." indicating a Parent exhibit.

3. There is no dispute between the Parties that the Student is a student with a disability, with a primary disability of autism, and eligible for special education services pursuant to 20 U.S.C. § 1415 et seq. § 1400 et seq. ("IDEA") under the disability category of Autism. (B9, p.1 of 16)
4. Prior to attending Cheney Tech, the Student attended the South Windsor Public Schools, specifically Timothy Edwards Middle School. (B2,3,5)
5. While attending Timothy Edwards Middle School the Student attended primarily regular classes, attending the STEP program for Math and Resource, and receiving the support of a paraprofessional in Social Studies and Science. (B5, pp. 2, 15 of 29; Testimony, Tr. 6/7/13 Father, pp. 149-150)
6. Cheney Tech is a member school of the Connecticut Technical High School System ("CTHSS"). (Educational Consultant, 5/31/2013, Testimony, Tr. p.26)
7. CTHSS serves as the Board of Education ("Board") in this matter.
8. Cheney Tech held a PPT meeting, including the Parents and the South Windsor Public Schools, on 5/5/2011 to plan an individualized education program ("IEP") for the 2012-2013 school year. (B5)
9. The Student's special education teacher in the South Windsor Public Schools noted at the 5/5/2011 PPT that the Student made progress behaviorally and socially since the sixth grade and that he would be attending Cheney Tech during the 2012-2013 school year. (B5, p.2 of 29).
10. The Cheney Tech Special Education Chair, who was in attendance at the PPT meeting, described for the participants that the Cheney Tech schedule rotated between shop and academic cycles and the importance of homework for students. (Testimony, Tr. Special Education Department Chair., 8/7/13, p. 125).
11. Neither the sending LEA, nor the Student, nor the Parents expressed concern with the rotating schedule or homework requirements in terms of the Student's ability to be successful. (Testimony, Tr. Special Education Department Chair., 8/7/13, pp. 14-16, 125).
12. The 5/5/2011 IEP provided that the Student would attend co-taught English, Math, Social Studies and Science at Cheney Tech, with a behavior plan in place. (Bd. 6, p.2 of 23).
13. The IEP included three goals: Goal No.1 addressed reading comprehension skills; Goal No.2 addressed improvement in written language skills and Goal No.3 addressed utilizing strategies to positively respond to situations that cause frustration and increase the Student's ability to interact positively with peers. (B6, pp. 8-10 of 23).
14. The Parents accepted the IEP upon its creation. (B6). The Parents did not request any changes to the IEP during the 2011-2012 school years. (B6,7,9,10).
15. A formal behavior intervention plan ("BIP") was created following a PPT meeting dated 10/6/2011. (Bd. 7, p. 2 of 3).
16. The BIP dated 10/7/2011 resulted from a functional behavioral assessment conducted by the School Psychologist, after obtaining information from Student's special education file from South Windsor and input from Student's mother, as well as data collected by various Cheney Tech staff. (B8).
17. The BIP, dated 10/7/2011, identified three target behaviors: (1) Non-compliant when given a directive; (2) Difficulty with task completion/weak organizational

- skills, and (3) Inappropriate comments/frustration. (P 23, p. 1 of 19). The function of his behavior was determined to be an attempt to control his environment. (P 23, p. 2 of 19).
18. The BIP indicated that the Student responded well to rephrasing/explanations and consistent routines, but with his difficulty in making decisions, choices were to be limited to two. (P. 23, p. 5 of 19).
  19. The BIP required that for a violation of a rule for which he could be suspended, discipline was to be according to the Student Handbook. (P 23, p. 6 of 19).
  20. The BIP indicated that if homework were not turned in, arrangements were to be made to make up the assignment according to the teacher's homework policy. (*Id.*).
  21. Subsequent progress reports, commenting on the 5/3/11 IEP, indicated that Un-Satisfactory progress was made on Goal No.1 during the first and second quarters, (B6, p. 18 of 23); satisfactory progress was made on Goal No.2 during the first and second quarters, (B6, p. 19 of 23); and Un-satisfactory progress on all of the objectives of Goal No. 3 during the first and second quarters. (B6, p. 22 of 23). There were no progress reports for the remaining quarters.
  22. An annual PPT meeting was held on 5/3/2012 in which it was documented that "Teacher reports were shared and [the Student] is in fear of failing the following core subjects: English, algebra, and global {sic} studies." (B9, p.2 of 16).
  23. The 5/3/12 PPT did not report any academic evaluations for any academic area for the purposes of developing the IEP at this meeting. (B9)
  24. The goals and objectives in the areas of academic/cognitive, social/behavioral, and transition were developed for this IEP period. (P4, pp. 5-6 of 6).
  25. The PPT continued the same level of academic support for the 2012-2013 school year that was provided during the 2011-2012 school year – strategic tutoring twice per academic week, co-taught English, Math, Social Studies and Science at least two periods each class per academic week, counseling with the school psychologist .5 hours per week and implementation of a behavior intervention plan. (B9, p.2 of 16).
  26. The 5/3/2012 BIP was slightly modified. (P23, pp. 4-6).
  27. The Student achieved passing grades during the 2011-2012 school years, with additional assistance, except that he failed Global Studies. (P21).
  28. A PPT was convened on 6/11/2012, at the request of the Parents, to address and modify the BIP. (B10). Specifically the Parents wanted to address the effect of autism on the Student's perceptions of school and behavior. (B10, p.2 of 4). An additional behavior that had been targeted in the BIP, "Difficulty interpreting social cues", was modified to provide an example to staff to utilize in identification and resolution of the behaviors. (P23, p. 7).
  29. The identified function of the Student's behavior was not modified or changed for the remainder of the 2011-2012 and the 2012-2013 school years. (P23, pp. 5, 8, 12, 16).
  30. The PPT of 6/11/2012 modified the BIP by (a) giving the Student two choices of alternate behaviors when he failed to follow directions or complete his work; (b) a structured homeroom would be provided to assess homework completion; (c) a

- homework buddy would be assigned, and (d) the teacher would provide a prompt to the Student to write down homework in class. (B10, p.2)
31. The 6/11/2012 PPT addressed the issue of encopresis by easing the Student's ability to leave the room for the lavatory, and the Parents would provide a change of clothing for the Student to utilize. (*Id.*).
  32. A PPT meeting was held on 8/28/2012 for the purposes of conducting an intermediate review for the Student; to introduce the Student and Parent to the new teachers for the sophomore year, and to provide the regular education teachers with information about the Student. (B12, p. 2 of 3).
  33. The Parents and Student attended and participated in all of the PPTs held for the Student during the 2011-2012 school year, no requests for changes to the relevant IEP's were made by the Parents. (B6, 7, 8, 9, 10).
  34. Prior to the commencement of the 2012-2013 school year, the entire teaching staff at Cheney Tech received training on working with students on the ASD (autism spectrum disorder) from Dr. Ruth Eherns, a professor from Southern Connecticut State University with expertise in that area. (Testimony, Tr. 8/15/2013, p. 20; Educational Consultant. 8/7/2013, p. 209-210).
  35. A PPT meeting was convened on 11/1/2012 to discuss conducting an evaluation of the Student. (B12) The Board attempted to schedule the PPT meeting during 10/12 but was unable to obtain a date that worked with all the participant's schedules. (Testimony, Tr. 8/7/2013, Educational Consultant, p.152).
  36. The PPT reached consensus that the Student's maladaptive behaviors were "negatively impacting the student's ability to progress academically and on IEP goals." (B12, p.2 of 3; Testimony, Tr. 6/6/13, Father, pp. 40-41).
  37. The 11/1/12 PPT agreed to move the Triennial Evaluation up as requested by the Parents (Testimony, Tr. 5/31/13, Educational Consultant, p. 37); agreed to the following evaluations: (a) file review of previous performance and observation by psychologist; (b) interview to evaluate social/emotional functioning; (c) review of cognitive functioning; (d) social work assessment to determine the impact of family dynamics on behavior; (e) test of academic functioning in the areas of reading/writing/math. (B12, p. 2 of 3); further the PPT agreed to implement an observer, 3 days per week, across settings to gather behavioral data; continue to utilize the IEP and BIP developed on 6/11/12; and finally, to re-convene to discuss the testing results, hopefully in December (2012) if possible. (*Id.*)
  38. The PPT developed the following list of questions for the evaluator:
    - a. How much time does [Student] spend on task? When is he off task, what is he doing?
    - b. What are the academic, social and emotional "triggers" to [Student's] off task behaviors?
    - c. What educational supports are needed to improve [Student's] on task behavior?
    - d. How does [Student's] emotional functioning and social awareness impact [Student's] academic and social performance in school?
    - e. What recommendations are suggested for the school and family to support [Student's] academic, social and emotional growth?



39. The substitute teacher (observer) began collecting data on “defiance” (P12); “off-task frequency” (P13) on 11/15/12. Data on “peer interactions” (P11) was not collected after 12/17/12. (P11, p. 9).
40. The Board conducted a comprehensive educational evaluation of the Student between November 29, 2012 and January, 2013, selecting Board Psychologist. as the evaluator. (Testimony, Tr. 5/31/2013, Educational Consultant, p.41).
41. The evaluation process, utilized by Board Psychologist included the giving and scoring of the following evaluation tools:
  - a. Woodcock-Johnson III Normative Update Tests of Cognitive Abilities and Achievement;
  - b. Gilliam Autism Rating Scale (GARS)
  - c. Asperger Syndrome Rating Diagnostic Scale (ASDS)
  - d. Conners Rating Scale 3 Teacher Form
  - e. Behavior Rating Inventory of Executive Functioning (BRIEF) Teacher Form
  - f. Social Skills Improvement System (SSIS) Teacher and Parent Forms
  - g. Systematic Observation of On Task Behavior, Positive Interactions with peers and Adults, Instances of Non-compliance
  - h. Student, Parent and School Personnel Interviews. (B14, p.1 of 30; Tr. Board Psychologist, 5/30/13, p. 206)
42. Board Psychologist reviewed a 2008 psycho-educational evaluation of the Student that was conducted by a neuropsychologist utilized by South Windsor Public Schools) (B1) as part of the comprehensive evaluation. He reviewed the Student record including prior IEP’s, conducted interviews with current teachers; the Student’s parents and the Student. Board Psychologist interviewed and observed the Student in his home environment, his school environment and in interactions with both peers and adults for a time period in excess of five hours. He spent two Saturdays interviewing the Parents as well as phone interviews with the Student’s mother. He interviewed the current school social worker, had a limited conversation with Educational Consultant, also with the shop teacher and the instructional assistant. (B14).
43. The Woodcock Johnson III Normative Update Tests of Cognitive Abilities and Achievement (“W-J III”) is designed to determine an individual’s cognitive processing, executive functioning, intellectual functioning and sequential reasoning, among other areas. (Testimony, Tr. Board Psychologist, 5/30/13, pp. 43-48).
44. A summary of the analysis of the Student’s scores on the W-J III is encapsulated below:
  - a. General Intellectual ability is low average range.
  - b. Verbal Ability Score on the W-J III is solidly average and reflects adequate language development demonstrated through understanding of words and the relationship among words. His Verbal Comprehension and General Information scores are within average limits.
  - c. Thinking Ability, comprised of visual-auditory learning, spatial relations, sound blending and concept formation, is low average.

- d. Cognitive efficiency, which provides an indication of automatic cognitive processing and is evident from processing speed and short-term verbal memory, is below average.
  - e. Executive processes score, measuring aspects of executive functioning in terms of planning, interference control or inhibition and flexibility mentally, is below average. While demonstrating adequate planning on a pencil and paper systematic figure tracing task with minimal time constraints, it is in the area of interference control or inhibition that he falls well enough below average to pull his overall score below average. (B14, pp. 7-12 of 30).
- 45. The Gilliam Autism Rating Scale ("GARS"), which is normed on an autistic population, is designed to assess social communication deficits. (Testimony, Tr. Board Psychologist, 5/30/13, pp. 48-50).
  - 46. The GARS provides a sample of three domains that represent the primary features of Autism. (B14, pp. 13-15 of 30).
  - 47. The Asperger Syndrome Diagnostic Scale ("ASDS") is designed to assess individuals on the autism spectrum in the areas of language skills, the social domain, maladaptive behaviors, and cognitive profile. (B14 p. 14, Testimony, Tr. Board Psychologist, 5/30/13, pp. 54-58).
  - 48. The Conners Rating Scale 3 Teacher's Form ("Conners") is designed to assess attention issues in a variety of subareas. (B14 p.15; Testimony, Tr. Board Psychologist, 5/30/13, p. 59).
  - 49. The Conners is a rating scale that considers students levels of inattention, hyperactivity/impulsivity, learning and executive functioning problems along with possible difficulties in peer relations and aggression. (B14, p. 15 of 30).
  - 50. The Student's Conners observes a pattern of extreme difficulties with inattention and only slightly less severe hyperactivity/impulsivity. He is seen as very often arguing with adults, getting into trouble with teachers or the principal and acting in a sneaky manipulative way. He is also seen as refusing to do what adults tell him to do and not seeming sorry about misbehaving. He is cited as often very often getting bored and often having a short attention, easily sidetracked, having trouble concentrating, easily distracted, having trouble changing from one activity to another and having trouble keeping his mind on work for long. He is often seen as leaving his seat when he should stay seated, has difficulty waiting his turn, fidgets, and gets up and moves around during lessons. (B14, pp. 14-15 of 30).
  - 51. The Behavior Rating Inventory of Executive Functioning, Teacher Form ("BRIEF") is designed to measure one's ability to regulate one's behavior and ability to engage in metacognition. (B14, pp. 16-17; Testimony, Tr. Board Psychologist, 5/30/13, pp. 61-65).
  - 52. Executive functioning entails the abilities to regulate behavior and to think about and control our thinking or metacognition. Behavioral regulation at least includes the abilities to inhibit responses, shift attention and thinking, to exert emotional control and to monitor the effect of his behavior on others. Metacognition includes the abilities to initiate or start thinking, to utilize working memory, to plan and organize tasks, to organize materials and to monitor your work. (B14, pp. 15-16 of 30).

53. The Student, rated by his special education teacher\co-teacher, suggested overall difficulties with executive functions skills. (B14, p.16 of 30).
54. Behavior Regulation is rated as having difficulty well above the average range. He is seen as often not thinking before doing, interrupting others, being impulsive, not thinking of consequences before acting. (B14, p. 17 of 30).
55. The Student's ability to shift his responses to solve problems or adapt his responses is rated as a significant problem area within school. He is rated as having a high amount of problems with emotional control; moods change quickly and seem to be easily influenced by the situation he is in and becoming too easily upset. (B14, p.17 of 30).
56. Within metacognition the Student is rated as having a severe level of problems, is seen as not being a self-starter, needs to be told when to begin tasks even when he is willing, doesn't show creativity when solving problems, has problems coming up with different ways to solve a problem and has trouble starting on homework or chores and does not take initiative. (B14, p.17 of 30).
57. In the areas of Planning and organizing the Student often has trouble handing in work, even when it is completed and is overwhelmed by large projects. He does not plan ahead for assignments, gets caught up in the details and misses the big picture, has good ideas but lacks follow through, underestimates time needed to complete tasks, starts assignments at the last minute and written work is poorly organized. (B14, p.17 of 30).
58. On the scale of Organizing Materials, teacher rated at the 97<sup>th</sup> percentile, he is seen as often losing things, disorganized backpack, and can't seem to find things in his desk or room as his desk is messy. (B14, p.17 of 30).
59. Problems with monitoring his work and his impact on others are much greater than his average peers. He often does not check for mistakes in his work, is unaware how his behavior affects others, leaves work incomplete, doesn't notice when his behavior causes a negative reaction in others, talks too loudly and his work is sloppy. (B14, p. 17 of 30).
60. Overall, his General Executive Composite falls at the 99<sup>th</sup> percentile, which is the highest range possible for these difficulties. (B14, p.17 of 30).
61. The Social Skills Improvement Scale ("SSIS") is designed to provide a broad assessment of a student's social behaviors which may affect student-teacher relations, peer acceptance and academic performance. (B14, p. 17).
62. The Student is seen by his teacher and substitute\observer as using below average social skills, with above average problem behaviors and demonstrating average academic competence. (B14, p. 18 of 30).
63. The Student is seen as having specific strengths in communications for speaking in appropriate tones and taking turns in conversation. A specific strength was also identified within self-control for using appropriate language when upset. (B14, p.18 of 30).
64. The teachers concerns show most in the areas of externalizing and internalizing behaviors, through his frequent withdrawal from others, easy distraction and having low energy or being lethargic; temper tantrums, inattention, disobeying rules or requests, acting sad or depressed or lying or not telling the truth are often observed. (B14, p.18 of 30).

65. The Student's parents identified more positive strengths in the areas of responsibility (respecting others property; engagement (starting conversations with adults); self-control (responds appropriately when pushed or hit); assertion (stands up for others when treated unfairly); empathy (tries to comfort others and shows concern for others); and cooperation (follows rules when playing games). (B14, p.20 of 30).
66. Areas of concern noted by the Parents seem to fall along the lines of skills that the Student has learned and those that he has yet to learn. For those skills rated as average for the Student, they were all within one to two points of the below average range, or low average, and seemed to deal also with externalizing and internalizing behaviors. (B14, p.20 of 30).
67. Board Psychologist answered the questions presented by the November, 2011 PPT as follows:
- a. **How much time does [Student] spend on task? When is he off task, what is he doing?** Student is on task approximately 50% of the time. When he is off task he is engaged in preferred activities such as occupying himself with his phone, walking out of class, seeking support from the school psychologist to resolve his daily and momentary concerns. He also indulges in hypochondriacal complaints that he emphatically reports to the school psychologist and requests his mother be contacted immediately so he might receive medical attention. He can get locked in in his thinking about situations and experience great difficulty shifting his responses to move on from what is bothering him, which is very much related to his autism. Multiple times when provided "two choices" he has declined to act on either choice. Sometimes he appears over stimulated by the level of activity around him and the demands of school, so he either avoids and/or attempts to gain control by leaving the class or seeking to discuss his perceived problems. He makes use of "sensory breaks" but appears to have a very hard time getting back on track. (paraphrased) (B14, p.29 of 30).
  - b. **What are the academic, social and emotional "triggers" to [Student's] off task behavior?** A distinction needs to be made between fast/external triggers and slow/internal triggers. Fast triggers would include immediate antecedents to the identified target behaviors- teacher direct requests or demands, peer comment, change of task. Slow triggers include setting events or situations – medications, fatigue, diet, disabilities, routines, in-crowds or when alone, etc. (B14, p.30 of 30).
  - c. **What educational supports are needed to improve [Student's] on task behavior?** [Student] was successful when he was supported in a self-contained classroom for math and resource support along with a para or instructional assistant in Science and Social Studies. An instructional assistant seems to be strongly needed in this high school setting. Support with realizing that he is capable on more difficult tasks but needs to spend greater efforts on easier ones. High need for external reminders and would benefit from being paired with a student who has strong focusing ability. Placed in the least distracting setting to improve work completion.

Predictability and structured routines. Helping [Student] remember requirements and standards for papers through standardizing formats across settings; providing visual examples; attacking long-term or complex assignments by showing him how to use a calendar, syllabus or schedule; help with setting intermediate goals, discover and enforce best study schedule; handling multiple steps in procedures with graphic organizers and procedure sheets, teaching memory strategies. Use of oral testing when feasible. To foster more independent work by [Student] maintain on-task behavior through use of verbal cues, use of interesting tasks, use interactive tasks for drill and rote, keep tasks brief, allow for breaks; improve time management by setting intermediate goals, offering frequent feedback; emphasize accuracy over quantity; enhance awareness of relevant information by previewing materials, using highlighter to note critical features, show how to cross out unimportant information; handle assignments with multiple objectives by simplifying assignments, focus on a few objectives rather than all of them, make objectives clear; respond to increasing reading and writing demands by providing procedure sheets and providing examples. (paraphrased) (B14, p.28 of 30).

- d. **How does [Student's] emotional functioning and social awareness impact [Student's] academic, social performance in school?** As [Student] himself is well aware, his PDD NOS greatly impacts his abilities to understand and work cooperatively with others. [Student] is experiencing developmental immaturities that diminish his capacity to perform and produce at the level of the average student his age. However he is quite capable intellectually when what is presented to him is tailored to his needs in a very individualized manner. The Student's General Intellectual Ability is in the low average range. (B14, pp.7, 30 of 30).
  - e. **What recommendations are suggested for the school and family to support [Student's] academic, social and emotional growth?** There is little doubt [Student] needs a smaller, closed educational setting that has predictability and consistency. All of the detailed recommendations regarding improving his executive functioning and social skills are needed. [Student's] disabilities are production disabilities. Both his autism and ADHD inhibit his performance of the work and organizational demands of high school. He is overwhelmed by traditional high school requirements; he needs modification in curriculum and instructional strategies to succeed. (paraphrased) (B14, p.30 of 30).
68. The Parents received a copy of the Board Psychologist report on January 24, 2013. (Testimony, Tr. 6/7/2013, Father, p.38). The Board scheduled a PPT meeting to discuss the Board Psychologist report for January 28, 2013. (B20, p.1 of 9).
  69. The Parents requested and were granted a delay in the PPT, with a new scheduled date of February 14, 2013 by mutual agreement. (Testimony, Tr. 6/7/2013, Father, pp. 39-40, Educational Consultant, 8/7/2013 p. 162).
  70. Father then requested a postponement of the PPT meeting, via email dated 2/14/2013, citing an emergency work situation that he was unable to get out of.

- (P16, p.2; Testimony, Tr. 6/6/2013, Father, pp. 70-72, 122-123). Father is employed with a steel corporation in Bettendorf, Iowa, where his job duties are located. (Testimony, Tr. 6/6/2013, Father, p.16).
71. The Board received the email requesting the postponement of the PPT meeting on the morning of 2/14/2013<sup>3</sup>. (Testimony, Tr. 5/31/2013, Educational Consultant, pp. 53-55).
  72. The Board held the PPT meeting on 2/14/2013, with Mother present, and with the Parents choosing to not allow the Student to participate. (Testimony, Tr. 8/7/2013, Educational Consultant, p. 160, 167; School Psychologist, 8/6/2013, p.70-71; Special Education Department Chair, 8/7/2013, p.32; B15).
  73. After a review of the comprehensive evaluation conducted by Board Psychologist and discussion by the participants, the PPT, with clear opposition from Mother, concluded that the Student's needs could not be met at Cheney Tech and that the Student should be returned to his LEA, South Windsor for programming and placement purposes, pursuant to C.G.S. §10-76q. (Testimony, Tr. 8/7/13, Special Education Chair, pp. 33-34; School Psychologist, 8/6/2013, pp. 70-71; Educational Consultant, 8/7/2013, pp. 162-168; B15, p. 3 of 4).
  74. The minutes of the PPT indicate that the Parent requested an IEE because she disagreed with the Board Psychologist evaluation; an explanation of the requirements for requesting an IEE was also discussed by Educational Consultant. (B15).
  75. The PPT minutes document the consensus that the Student was failing all core academic classes, and that his behavior was unacceptable in that his time on task was on average, 50%. (B15, p.3 of 4).
  76. The Parents subsequently invoked stay-put and rejected the IEP. (B15, p.3 of 4).
  77. The Parents filed for a due process hearing on 2/20/2013, amending their complaint on 2/22/2013. (P1; P2).
  78. The Board filed on 2/22/2013, for a due process hearing regarding the issue of the appropriateness of their comprehensive evaluation, and the Parents request for an IEE. (H.O.1).
  79. The Board held a PPT meeting on 4/24/2013. The Parents participated, with Father participating by telephone. The Board reiterated its decision that the Student be returned to his sending LEA, in addition to suggestions to provide services to the Student in the interim that were in keeping with that decision; the Parents reiterated their rejection of that proposal and their continuing demand that stay-put be continued pending the outcome of the due process hearing.
  80. The Board held a PPT meeting on 5/17/2013. The Parents were not in attendance, having made a request to have the meeting scheduled through their legal counsel as a due process complaint had been filed. The Parties disagree as to if that request for a meeting was scheduled through the Parents counsel. (B18, p.7 of 9).
  81. Disciplinary data maintained by the Board showed significant behavioral defiance by Student over the course of his enrollment at Cheney Tech. There was one incident of the Student refusing to hand over a piece of metal he was sharpening

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<sup>3</sup> It is unclear by the email referenced, if Father would have physically been at the PPT meeting or would have participated via speakerphone, which he had done in the past.

- into a tool for his father without teacher permission. After repeated requests, the Student handed the tool to one of the teachers. (B27, pp.1-6)
82. The 5/17/2013 PPT recommended a therapeutic day placement during the pendency of the due process complaint, following self-harming statements made by the Student, which were reported to the Parents. (B18, p.7 of 9).
  83. Statements had been made by the Student, both in and out of school, utilizing the term "suicide" which caused the Board concern and the Parents to request an evaluation by his therapist. (Testimony, Tr. 6/3/2013, Therapist, pp. 29-31).
  84. Therapist stated that in his professional opinion the "suicidal" incidents were ideation on the part of the Student and that he was not a danger to either himself or others, and that similar statements and behaviors had been made years ago as reported by another therapist. (Testimony, Tr. 6/3/2013, Therapist, pp. 46-51).
  85. Therapist opined that the Student has emotional reactions to academic demands when he's getting either fatigued or frustrated. (Testimony, Tr. 6/3/2013, Therapist, pp. 55-56).
  86. The Parents further amended their complaint on the record, with consent from the Board, on 6/3/2013 (one of the hearing dates), to include three additional hearing issues: (Testimony, Tr. 6/3/2013, Counsel for Parties)
    - i. The appropriateness of the IEP for the 2013-2014 school year;
    - ii. The PPT decision to recommend a therapeutic day treatment program at the 5/17/2013 PPT meeting;
    - iii. The decision to hold the 5/17/2013 PPT meeting without the Parents

### **CONCLUSIONS OF LAW AND DISCUSSION:**

1. The Parties, individually, have brought this action in accordance with the Individuals with Disabilities Education Act which provides for special education and related services to children with disabilities, from birth through age 21. It is undisputed that the Student is entitled to receive a free and appropriate education ("FAPE") with special education and related services under the disability category "Autism", pursuant to state and federal laws. See C.G.S. §§ 10-76 *et. seq.*; the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 *et. seq.*
2. The standard for determining whether FAPE has been provided is set forth in *Rowley*, *supra*. The two pronged inquiry is first, whether the procedural requirements of IDEA have been met and second, whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). The Supreme Court has made clear that "appropriate" under the IDEA does not require that the school districts "maximize the potential of handicapped children." *Walczak v. Florida Union Free School District*, 142 F.3d 199, 130 (2d Cir. 1998), citing *Rowley*, *supra*. Rather, school districts are required to provide, as the "basic floor of opportunity ... access to specialized services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, *supra*, 458 U.S. at 201; see also *K.P. v. Juzwic*, 891

- F. Supp. 703, 718 (D. Conn. 1995) (Goal of IDEA is to provide access to public education for disabled students, not to maximize a special education child's potential). In this Circuit, the Court of Appeals has said that the proper gauge for determining educational progress is "whether the educational program provided for a child is reasonably calculated to allow the child to receive "meaningful" educational benefits." *Ms. B. v. Milford Board of Education*, 103 F. 3d 1114, 1120 (2d. Cir. 1997).
3. The Court of Appeals has also cautioned the meaningful educational benefits are "not everything that might be thought desirable by loving parents." *Tucker v. Bay Shore Union Free School Dist.*, 873 F.2d 563, 567 (2d Cir. 1989). "Of course, a child's academic progress must be viewed in light of the limitations imposed by the child's disability." *Ms. B. v. Milford*, supra at 1121. When determining the appropriateness of a given placement courts will also consider evidence of a student's progress in that placement. The student's capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit to the child. See, *Hall v. Vance County Bd. of Ed.* 774 F.2d 629, 635 (1985).
  4. The cases where procedural violations have been found to constitute a denial of a free appropriate public education have involved misinforming parents of their rights under IDEA, and/or significantly inhibiting them from meaningful participation in the development of an IEP. See, e.g., *Briere v. Fair Haven Grade School District*, 948 F. Supp. 1242 (D. Vt. 1996); *Hall v. Vance Co. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

**Is the Board's comprehensive educational evaluation completed over November 29, 2012 through January 13, 2013, appropriate for this Student?**

5. The Parents did not accept the Board's comprehensive evaluation and requested an IEE, to be paid at public expense, pursuant to 34 C.F.R. §§300.502 (a)(1) and 300.103(b)(1). The Board, acting pursuant to §300.103(b)(2)(i), promptly filed a request for a due process hearing on the premise that their evaluation, conducted by the Board's evaluator, between the dates of November, 2012 and January, 2013, was appropriate.
6. The IDEA 2004 requires that local education agencies ("LEA") "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child." 20 U.S.C.A. § 1414(b)(2)(B) (2008). It is also required that the local educational agency "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C.A. § 1414(b)(2)(C) (2008) (emphasis added). *Blake B., and Jack and Yvonne B., v. Council Rock School District*, 51 IDELR 100, 108 LRP 58171. The court also requires that "assessments and other evaluation materials used to assess a child ... are used for purposes for which the assessments or measures are valid and reliable," and "are administered in



accordance with any instructions provided by the producer of such assessments." 20 U.S.C. § 1414(b)(3)(A) (2008) (emphasis added). *Id.* 34 CFR §300.304(c)(1)(iv) requires that assessments and other evaluation materials used to assess a child under this part "are administered by trained and knowledgeable personnel;..."

"In determining the standard of appropriateness of an evaluation, the focus is on whether the evaluation (1) used a variety of essential tools; (2) was administered by trained, knowledgeable and qualified personnel; (3) was administered under the standard conditions and in accordance with instructions provided by the producer of the assessments; (4) incorporated various information sources such as classroom observations and review of existing data; and (5) whether the independent information would provide any new information." *Westport Board of Education v. Student*, Final Decision and Order 11-0355, (CT 2011), citing *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3<sup>rd</sup> Cir 1999); 34 CFR §300.502.

7. The Board's evaluator has a Ph.D. in Educational Psychology. (Testimony, Tr. 5/30/2013, Board Psychologist, p.35). Board Psychologist is certified by the Connecticut State Department of Education as a school psychologist. (B16). He has 25 years of experience in school psychology. (Testimony, Tr. 5/30/2013, Board Psychologist, p.27). His experiences range from working as a direct line staff with people with disabilities, including those along the autism spectrum, to becoming more directly responsible for the evaluation of students as he progressed in his academic and employment career. (*Id.*, pp 28 – 34) He has conducted hundreds of evaluations of students over the course of his career. (Testimony, Tr. 5/30/2013, Board Psychologist, p. 67). The regulatory requirement that the evaluator be a "trained and knowledgeable personnel" has been met.
8. The following components made up the evaluation given by Board Psychologist (B14):
  - a. Woodcock-Johnson III Normative Update Tests of Cognitive Abilities and Achievement;
  - b. Gilliam Autism Rating Scale (GARS)
  - c. Asperger Syndrome Rating Diagnostic Scale (ASDS)
  - d. Connors Rating Scale 3 Teacher Form
  - e. Behavior Rating Inventory of Executive Functioning (BRIEF) Teacher Form
  - f. Social Skills Improvement System (SSIS) Teacher and Parent Forms
  - g. Systematic Observation of On Task Behavior, Positive Interactions with peers and Adults, Instances of Non-compliance
  - h. Student, Parent and School Personnel Interviews
9. Testimony given by the Board Psychologist, which was not refuted by the Parents expert, indicated that the assessments used were normed. In some instances, the assessment was specifically normed with the diagnostic category and more relevant for use with this particular Student. (Testimony, Tr. 5/30/13,

Board Psychologist, pp. 43-50) No testimony or evidence was offered which suggested or indicated that the assessments used were not administered in the fashion from which they were intended to be administered, in accordance with 20 U.S.C. § 1414(b)(3)(A).

10. The requirement to incorporate various other sources of information was met, as the Board Psychologist testified that he reviewed all records that were provided to him, specifically IEP's, any prior evaluations that had been completed, data information collected by the Board, interviews with staff and parents, including information provided by the Parents from earlier in middle school. (Testimony, Tr. 5/30/2013, Board Psychologist, pp. 42-70).
11. The Parents argue that the Board's evaluation fails on a number of levels. (Parents Proposed Findings of Fact, pg.11-13, No.'s 30 – 32). First, the Parents do not accept the abilities of the evaluator as being sufficient to conduct and interpret a comprehensive evaluation for their child. For all of the reasons stated above referencing the requirements for properly conducting an evaluation, the Parents argument fails. Secondly the Parents argue that the evaluator did not conduct an analysis of the Student's freshman year at Cheney Tech. (Parents Proposed Findings of Fact, p.11, No.31). The evaluator reviewed evaluations from as far back as 2008, all of the IEP's for this student, inclusive of the first IEP written for this Student prior to entering Cheney Tech, his eighth grade educational assessment, the annual IEP conducted during the freshman year and subsequent IEP's created since that time. (B14). Given that the freshman year review would have been retrospective at the time of the Board Psychologist's evaluation, there would be negligible information that would have been helpful that was not covered in all of the data provided up to the freshman year annual review.
12. The Parents also dismiss the responses given by the Board Psychologist to the questions posed by the PPT for him when evaluating the Student. (Parents Proposed Findings of Fact, p.12-13). I find that the Parents perspective of the responses are in direct contradiction to the actual information contained within the evaluation itself, in which the Board Psychologist responds to each question directly, though not in the same order. (B14, pp. 14-30; Findings of Fact No. 68). As the information describing that analysis is provided in the finding of facts, I will not replicate it here.
13. The Parents argue that the evaluator did not directly observe enough of the emotions or behaviors that may have affected the Student's performance; however the Parents provide no legal argument that such long term, intensive observation is required. The evaluator utilized a wide variety of data sources, all of which are identified in his comprehensive evaluation, all of which meet the statutory and regulatory requirements of IDEA. 20 U.S.C.A. § 1414(b)(2)(C) (2008). That the evaluator's conclusions are different from those of the expert that the Parents hired to review his evaluation does not make the evaluation any less appropriate.
14. An independent educational evaluation "is an evaluation conducted by a qualified examiner who is not employed by the district responsible for the child's education." 34 CFR 300.502 (a)(3)(i).

15. The Parents utilized the services of a skilled and knowledgeable expert, in their quest to obtain the best services for their child, who did not work for the district. (P19). He did not, however, conduct an IEE of the Student. He did provide the Parents with a Consultative Report, in which he rightly or wrongly critiques the evaluation and evaluative process of the Board's evaluator. (P18). There are critiques and examinations of information that was gathered by prior evaluators; limited direct observation of the Student (2 days), an historical review of the record, interviews with stakeholders, and a review of the data collected by the Board concerning behaviors, but there are no new assessments or evaluations given directly to the Student by the Parents expert. (P18) The critique of the information regarding the implementation of the Student's BIP, could be quite useful, but in and of itself, does not satisfy the overall requirement that the IEE (1) *used a variety of essential tools*; (2) *was administered by trained, knowledgeable and qualified personnel*; (3) *was administered under the standard conditions and in accordance with instructions provided by the producer of the assessments*; (4) *incorporated various information sources such as classroom observations and review of existing data*; and (5) *whether the independent information would provide any new information.* " (emphasis added) *Westport Board of Education v. Student*, Final Decision and Order 11-0355,(CT 2011), citing *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3rd Cir 1999); 34 CFR §300.502. With the exception of the critiquing information, which may or may not be valid, there is minimal new educational information (transition planning) about the Student that has been garnered through this Consultative Report that was not already provided in the Board's comprehensive evaluation. (P18). The area in which this Consultative Report could have outshined the Board's evaluation would have been if specific evaluations relative to transitional planning had been conducted and the results incorporated into future IEP planning. Unfortunately, no such evaluations were conducted.
16. A Parents disagreement with the results of an evaluation, without more, does not render that evaluation inappropriate. *See Rowland Unified Sch. Dist.*, 110 LRP 15993 (SEA CA 2010) (although parent disagreed with the outcome, evaluation appropriate based upon the elements of the assessments used pursuant to applicable law) *See also Blake B. by Jack and Yvonne B. v. Council Rock Sch. Dist.*, 51 IDELR 100 (E.D. PA 2008) (District evaluation appropriate where evaluator was qualified, utilized appropriate instruments, evaluated the student in all areas of suspected disability, did not rely on the results of a single test, and did not utilize biased testing, even if parents disagreed with results).
17. I find that the Board's comprehensive evaluation is appropriate for this Student and as such, the Parents are not entitled to public reimbursement for the Consultative Report as they requested.

**Did the Board provide the Student a FAPE for the academic years of 2011-2012 and 2012-2013?**

18. The first prong of the two-pronged standard for determining whether the Board offered the Student an appropriate IEP for the 2011-2012 and 2012-2013 school years concerns whether the procedural requirements of IDEA have been met. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--- (i) Impeded the child’s right to a FAPE; (ii) Significantly impeded the Parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the Parents child; or (iii) Caused a deprivation of educational benefit.” 34 C.F.R. §300.513(a)(2).
19. No evidence was presented that the Board altered or failed its usual procedure to develop an IEP for a child with a disability. (Findings of Fact No. 8). The Parents and the Student were active participants in the formation of the 5/5/11 IEP (initial Cheney Tech IEP), no evidence was presented that indicated that they were denied participation in the PPT meeting. (Findings of Fact No.’s 10, 11, 12, 13). The Parents accepted the IEP after it was created. (Findings of Fact No. 14).
20. The Parents argue additionally that the IEP for the year 2011-2012 was inappropriate because the BIP was inappropriate. The Parents argue that the goals and objectives that would relate to his behaviors and transition issues were not appropriate which contributed to the Student flunking one course and was close to flunking five others.
21. The initial Cheney Tech IEP was created at a joint meeting with the Parents, Cheney Tech and the sending LEA, South Windsor Public Schools on 5/5/2011. (Findings of Fact No. 8). The resulting IEP mirrored the South Windsor IEP in effect, in most respects, with the exception of the 5/5/2011 IEP indicating clearly that the Student has issues with depression, withdrawal, study skills and functional communication scales. The Student was further identified as being at risk clinically for significant depression and behavioral symptoms. (Findings of Fact No. 14; B6). The South Windsor Special Education teacher noted that the Student had made progress behaviorally and socially since the 6<sup>th</sup> grade. (Finding of Fact No.9). There was no evidence produced that indicated that the Parents objected to the goals or objectives of the proposed IEP prior to the start of the 2011-2012 school year.
22. C.F.R. §300.324(2)(i) states, in relevant part, “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of behavioral interventions and supports, and other strategies, to address that behavior.”
23. The BIP, though not formally written as a separate document was described in the Planning and Placement Team Meeting Summary portion of the IEP. (B6, p.2 of 23).
24. On 10/7/2011, one month after the start of the school year, a PPT meeting was held to create a formalized BIP. (Findings of Fact No. 15). The Board utilized its school psychologist to conduct a functional behavioral assessment in the creating of the BIP. (Findings of Fact No. 16). The BIP identified three target behaviors, and claimed that the function of the maladaptive behaviors by the Student was to attempt to control his environment. (Findings of Fact No. 17, 18).

25. Subsequent progress reports indicated that the Student was receiving unsatisfactory progress on two of the three goals contained in the 5/3/11 IEP. (Findings of Fact No. 22)
26. On 5/3/2012, the Board held the annual PPT for the Student, where the IEP for the 2012-2013 school years was developed, at the time of the PPT meeting the Student was in jeopardy of failing the core subjects of English, Algebra and Global Studies. (B9, p.2) The BIP was modified slightly to have tasks presented in small chunks to the Student. (P23, p.4).
27. The Student achieved passing grades for the 2011-2012 school years, with the exception of failing Global Studies, a core subject. (Findings of Fact No. 22).
28. The PPT continued the same level of academic support for the 2012-2013 school year that was provided during the 2011-2012 school year – strategic tutoring twice per academic week, co-taught English, Math, Social Studies and Science at least two periods each class per academic week, counseling with the school psychologist .5 hours per week and implementation of a behavior intervention plan. (Findings of Fact No. 26).
29. The Board held two additional PPT meetings to address concerns by the Parents; the first on 6/11/2012 in which the Board agreed to meet with all staff prior to the start of the new school year to review the 5/3/2012 IEP, the BIP, and to identify signs of frustration from the Student and how to work with him. All of the Parental requests were incorporated into the resulting IEP with the exception of the request to have the school write down or email the Student's homework to the Parents. (B10, p.2 of 4); The PPT met again on 8/28/2012 where the Student and his mother met the Student's teachers, to provide the regular education teachers the IEP and BIP. The BIP was reviewed by the special education teacher and the school psychologist. All were advised of the issue of encopresis, and informed that the Parents welcomed frequent feedback via email. (B12, p.2 of 3).
30. A PPT meeting was held on 11/1/2012 where it was agreed by the team that an evaluation would be performed, the questions for that evaluation were formulated, a process to gather data was established and to review the BIP. (B12, Testimony, Tr. 8/7/2013, Educational Consultant, pp. 153-154; 8/6/2013, School Psychologist, pp.57-58; Findings of Fact No.'s 36-40).
31. The Board conducted a comprehensive evaluation between November, 2012 and January, 2013. (Findings of Fact No. 41). The Board scheduled a PPT meeting for 1/28/2013 to review the evaluation. (Findings of Fact No. 71), rescheduled the meeting as requested by the Parents to 2/14/2013 (Findings of Fact No. 72), received a request to postpone the PPT meeting on 2/14/2013 (sent on 2/13/2013) (Findings of Fact No. 73) and subsequently denied the request to postpone and held the PPT meeting on 2/14/2013 with Mother present. (Finding of Fact No.76).
32. The PPT participants, with exception of the Parents, determined that the Student's needs precluded the ability of Cheney Tech to meet his needs and that he should be returned to his sending LEA, pursuant to C.G.S. §10-76q. (Findings of Fact No. 77).
33. I find that the Board committed no procedural violations for the 2011-2012, or the initial 2012-2013 IEP. "Only procedural inadequacies that cause substantial harm to the child or his parents – meaning that the individual or cumulative result is the

- loss of educational opportunity or seriously infringe on a Parents participation in the creation or formulation of the IEP – constitute a denial of FAPE.” *Matrejek v. Brewster Cent. Sch. Dist.* 471 F. Supp. 415, 419 (S.D.N.Y. 2007). There simply is no showing that a substantial harm was caused to this student or a Parents participation in the 5/5/11 or 5/3/12 PPT meetings due to procedural violations.
34. The second prong of the *Rowley* inquiry requires a finding that the IEP is “reasonably calculated to enable the child to receive educational benefits.” *Board of Education v. Rowley*, supra, 206-207. The court stated, in *J.R. v. Bd. of Educ. of City of Rye Sch. Dist.* “on review, hearing officer or court should consider whether the IEP was designed to confer benefit at the time it was created.” 35 F.Supp. 2d 386 (S.D.N.Y. 2004)
  35. In regards to the 2011-2012 academic years, for the reasons elucidated in No.’s 21-25, supra, I find that the IEP was reasonably calculated to enable the Student to achieve educational benefits. The Board had no reason to believe that the Student would not have been successful academically, behaviorally or socially based on the report of success from South Windsor over the previous two years.
  36. The initial IEP (5/5/2011) was tailored on a successful IEP from the sending LEA, the Board responded quickly when the Parents raised concerns about behavioral issues and created a formalized separate BIP. In the initial formulation of the IEP, prior to the comprehensive evaluation done by the Board Psychologist in 11/2012, the Board was operating on the most recent information gleaned from the most recent provider (Timothy Edwards Middle School) which indicated that the Student had success academically and behaviorally. (Findings of Fact No. 9). In *D.F. ex rel. N.F. v Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 599 (2d Cir. 2005) the court noted decisions from other circuits holding “that inquiry into whether an IEP is valid is a necessarily prospective analysis.”, See e.g. *Fuhrman v. East Hanover Board of Education*, 993 F.2d. 1031, 1040 (3rd Cir. (1993) (“measure and adequacy of an IEP can only be determined as of the time it is offered to the student and not at some later time”).
  37. I find that there were no procedural violations sufficient to deny the Student a FAPE for the IEP 2012-2013 school years in relation to the IEP’s dated 5/3/12; 6/11/12; 8/28/12 or 11/1/12. For all of the reasons noted supra in No.’s 24-28, the Parents and the Student were afforded every opportunity to participate and assist in the creation of the IEP’s. No evidence was presented that the Board denied or delayed the scheduling of any request for a PPT that the Parents made. The Parents were afforded every opportunity to provide information, they did not ask for any evaluation (prior to the request for an IEE) that was denied.
  38. In regards to the 2/14/2014 PPT meeting, the Parent claims a procedural issue arose because Father had requested a postponement until 2/28/14 due to an emergent situation at work in Iowa that he would not be able to participate in any fashion on the 14<sup>th</sup>. (Findings of Fact No’s 73-75). The Board held the meeting as scheduled, which was a previously re-scheduled meeting in which the new date was selected by both parties, and in which Father was in attendance. (Findings of Fact, No. 76). It is clear from all of the record that both Parents have been active participants in all of the PPT meetings for their son from his onset into the public school system. It is also clear from the minutes of the IEP’s that Father has

participated via teleconference on more than one occurrence due to his work location. In terms of collaboration, in terms of fulfilling the ultimate goal of IDEA to encourage parental participation, it would have been well within the Board's power to agree to a postponement, even if a bit inconvenient to the schedules of the participants. The Board however was under no obligation to postpone the meeting given that at least one parent was going to be present. C.F.R. §300.322(a) states in relevant part "each public agency must take steps to ensure that one or both parents of a child with a disability are present at each IEP Team meeting or are afforded an opportunity to attend, and.." (Emphasis added). C.G.S. §10-76d-12(c) requires, in relevant part, that the Board assure that "one or both of the child's parents are afforded the opportunity to participate in the meetings..." and further "every effort shall be made to schedule meetings at a mutually agreed time and place..." The Board scheduled the meeting at a mutually agreed upon time and place when it set the meeting for 2/14/2014. Mother was able to attend the meeting; she is one of the parents of the Student, and one who has also been at every PPT meeting held for the Student, as is evident in the record. That Father could not participate, as he had in many other situations, inclusive of the due process hearings, was not at the doings of the Board, but rather an emergent work situation that the Board was not legally responsible to make accommodations for.

39. I find that there was no procedural violation sufficient to deny the Student a FAPE on the part of the Board for holding the 2/14/2014 PPT meeting with only one Parent present.
40. I find no procedural violation sufficient to deny the Student a FAPE on the part of the Board for the 4/24/2013 PPT meeting and subsequent development of the IEP, for all of the reasons previously cited.
41. I do find a procedural violation sufficient to deny the Student a FAPE on the part of the Board for the 5/7/2013 PPT meeting and the resultant IEP that was developed. As stated previously in No. 36, C.F.R. 300.322 requires that the public agency make reasonable attempts to allow one or both of the Parents to participate in the meeting. The Parents made it clear to the Board that given that due process had been initiated; they wanted all meetings to be scheduled through their attorney. (P22). The Board offered no evidence that (1) it attempted to comply with that directive and contact counsel for the Parents; and/or (2) that those attempts were unsuccessful. By holding the 5/7/2013 meeting without the Parents, the Parents were denied any meaningful participation in the creation of their child's IEP. The Board argument, cited in the post hearing brief on pg.28, that there was no harm to the Student because nothing in the IEP changed as a result of the 5/17/2013 meeting fails to consider that the harm was in the act of denying meaningful participation, specifically what §300.322 seeks to address. The regulation does not require that any change, large or small, occur before parents are required to be allowed the opportunity to participate, it is clear that the very act of having the meeting requires the opportunity to participate.
42. In regards to the second prong of the *Rowley* two prong test; I find that there was a substantive violation sufficient to deny the Student a FAPE, commencing with the 5/3/2012 IEP. This IEP is essentially identical to the 5/5/11 IEP despite the

academic (the Student was flunking virtually all of his classes) and behavioral (significant acts of defiance, sleeping in class, walking out of class, refusing to do homework) issues dealt with over the preceding year. (B6, B9). Changes to the BIP are negligible and fail to address in sufficient detail what behaviors are being addressed or how they will be significantly altered. In fact it appears the only change was to add the statement “[Student] may become easily overwhelmed and function better when tasks are presented in small “chunks.” (P23, p.3). There is no strategy or direction on how that (chunking) was to occur, or how to identify the behavior if it occurs. There was no evidence submitted that any of the behaviors addressed in the BIP were affected by the application of the BIP at all, or that the Board would be able to show any evidence it could determine, either positively or negatively, that the behaviors were affected or what the known frequency of any of the behaviors were. This renders the BIP essentially useless as a behavioral tool and as such deprives the Student of any educational benefit that a properly designed and executed BIP would be expected to render in allowing the Student to attend to academic work. None of the subsequent revisions to the BIP alter those facts, they simply continue the use of a faulty tool, with meaningless revisions that do not address specific behaviors in a meaningful way or allow any of the parties to assess the effectiveness of the interventions. (P23, pp. 3-12).

43. The Board as much acknowledged that the 2012-2013 program for the Student had been inappropriate when during the testimony of the Special Education Consultant she responded to a direct question from the Board’s counsel, if anyone at the 4/24/2013 PPT meeting thought the 2012-2013 program for the Student at that point was appropriate, to which the witness responded “Well, No. No, No” (Testimony, Tr. 8/7/2013, Educational Consultant, p.186). While the response was retrospective in nature, it outlined the reality of the IEP from the beginning. Between the 5/3/2012 and 4/24/2013 PPT meetings, and the additional modified IEP’s generated, short of the Board decision to remove the Student pursuant to §10-76q, there were no meaningful changes to the program or services offered to the Student. (B8,9,10,11,12,13,15). The 5/3/2012 program was substantially the same as the original IEP offered to the Student the previous year. Given that the Board was aware that the Student had struggled the entire year, was not being successful with the BIP, was at risk for failing most core subjects, the Board should have made meaningful changes to both the BIP and the IEP to meet the unique needs of the Student.
44. The Board failed to offer evidence which showed that the Board’s staff implemented the BIP in the manner for which it was designed. In reality the data collected by the Board regarding the targeted behaviors indicated that the behavioral interventions did not decrease the behaviors, but rather showed an increase in the behaviors. (P12; P13). Interviews conducted by the Parents expert with Board staff suggest that there was significant confusion over what specific steps were to be taken to address targeted behaviors, what specific behaviors were to be targeted, how those behaviors were to be identified, or if those interventions were successful or not. The expert observed a failure of the staff to properly implement the BIP on a consistent basis. (P18, pp.17, 23-24 of 29).



**Does the program offered by the Board for the 2013-2014 school years offer the Student a FAPE?**

45. The 5/17/2013 IEP does not offer the Student a FAPE in the least restrictive environment, nor does it offer an appropriate program and services for the Student. The Board offers a therapeutic day treatment program for the Student. (B18, p.7 of 9). The Board has the burden of proof for proving the appropriateness of the Student's program or placement, which must be met by a preponderance of the evidence. R.S.C.A. §10-76h-14(a); *P. es rel. Mr. P. v. Newington Bd. of Educ.*, 512 F.Supp.2d 89, 99 (D.Conn. 2007). The Board fails to do so, despite the alleged concerns for the safety of the Student following the suicidal ideation that was presented. The therapist for the Student, who had worked with the Student for over a year, testified that he did not find the Student to be at a risk to himself or others, and that this was not new behavior for the Student as similar behavior had been noted by a former evaluator and appeared to be a stress behavior as opposed to an actual threat. (Testimony, Tr. 6/3/2013, Therapist, pp.44-48). This same therapist has extensive knowledge of therapeutic day treatment programs and felt that the Student was an inappropriate candidate for them due to the lack of severity of his psychiatric needs. (*Id.*), 34 C.F.R. §300.116 requires placement of the Student in the least restrictive environment. The Board failed to provide any other evidence which suggested or indicated that the restrictive environment of a therapeutic day treatment program was warranted.
46. I find that the program and services offered in the 5/17/2013 IEP are insufficient to allow the Student to obtain any meaningful educational benefit per the requirements of the *Rowley* court. The services and program offered in the 5/17/2013 IEP consist of daily tutoring for up to 4 hours per day while awaiting placement, plus ten (10) counseling sessions with a therapist of the families choosing, with additional services to be decided after the 10 sessions are exhausted. (B19, p.7 of 9). Virtually none of the recommendations by the Board's evaluator were incorporated into the IEP (utilizing smaller less elaborate settings; use of an instructional assistant; a method to monitor and promote successful interactions with peers; engagement in sensory breaks; help connecting with assignments; having the BIP make a clear distinction between fast/external triggers and slow/internal triggers; providing predictable, consistent and enforceable limits). (B14, pp. 27-30).

**Does the Hearing Officer have jurisdiction to address an alleged discriminatory action by the Board by failing to provide supplementary aids, services, and modifications to the curriculum to allow the Student to fully participate in the placement programs, in violation of 29 U.S.C. §794 Nondiscrimination under Federal Grants and Programs?**

47. No. The Hearing Officer does not have jurisdiction to address discriminatory actions in violation of U.S.C. §794 Nondiscrimination under Federal Grants and Programs.

**Did the Board improperly apply Connecticut General Statute ("C.G.S.") §10-76q(c) by expelling/discharging the Student from Howell Cheney Tech without first**

**considering the supplementary aid, services, and modifications that would be needed to allow the Student to proceed?**

48. The Regulations of Connecticut State Agencies governs the regulations concerning children entitled to receive special education services within the State of Connecticut. Specifically, RCSA §10-76a deals with General definitions. §10-76a (2) "Board of education" is defined in relevant part as "... a public body or public agency responsible for the education of children. The term shall include but not be limited to ... regional vocational-technical schools..."
49. Cheney Tech is a regional vocational-technical school located within the geographical confines of the State of Connecticut. (Findings of Fact No. 6).
50. §10-76a also defines, in relevant part, "a child requiring special education" as meaning "any exceptional child who ...(1) who meets the criteria for eligibility for special education pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq., ..." The Student meets that eligibility requirement. (Findings of Fact, No. 3).
51. §10-76b-1 Authority states in relevant part... "These regulations shall be applicable to all boards of education as defined by these regulations." The Connecticut Technical High School System is the board of education for Cheney Tech. (Findings of Fact, No. 7).
52. §10-76d-1 Special Education, states in relevant part "Each board of education shall provide a free, appropriate public education for each child requiring special education and related services described in subdivision (i) of subparagraph (A) of subsection (4) of section 10-76a-1 and subparagraph (B) of subsection (4) of section 10-76a-1 of the Regulations of Connecticut State Agencies and for each preschool child requiring special education and related services.... (a) General requirements. Each board of education shall provide special education and related services in accordance with the following requirements.
  - (1) Such education shall be consistent with the requirements of law and regulation;
  - (2) Such education shall be provided under public supervision at public expense and at no cost to parents; provided that, if a child is eligible for any public or private insurance, or health or welfare benefit, nothing in this section shall be construed as relieving the insurer or provider from an otherwise valid obligation to provide or to pay for any service or services;
  - (3) Such education shall be in conformity with the child's individualized education program; ...."
50. The Student's IEP dated 5/3/12 has been deemed to be inappropriate, as were the subsequent IEP's which followed and/or were derivatives of that IEP. The Student was denied a FAPE as a result of the procedural and substantive defects identified above.
51. The Board cites §10-76q as the legal justification for removing the Student from Cheney Tech, if the PPT determines that the Student's needs preclude attendance at the program. The question arises as to when a PPT is justified in concluding that a student's needs are so great as to prevent a program from meeting the

student's needs. The regulations do not identify when that threshold is met, or even the criteria to be considered. (RSCA §10-76a et seq.).

52. 34 C.F.R. §300.116(b) the placement decision, states in relevant part, that the determination of a proper placement for a disabled child "is based on the child's IEP; and...". The Board has made a placement decision to send the Student back to his sending LEA, however that decision was made based upon an inappropriate 2013-2014 IEP. To follow the dictates of §300.116(b) correctly, it is required that the IEP be developed correctly and fully prior to the determination of placement. As such, the Board's decision on placement must follow the development of a proper IEP, not precede it. When a proper IEP is developed, with the proper determination of what supports and services meet the Student's unique needs, the Board will then be in a proper position to determine if Cheney Tech is capable of providing the program and services that this Student needs.
54. When applied in the proper circumstances, §10-76q does not violate the statutory requirements of the IDEA.
55. To the extent that a procedural claim raised by the Parent is not specifically raised herein, the Hearing Officer has concluded that the claim lacked merit.

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

1. The Board's comprehensive evaluation of the Student was appropriate and as such the Parents are not entitled to reimbursement from public funds for the Consultative Report provided by their expert.
2. The Board did not commit procedural or substantive violations with the 2011-2012 IEP.
3. The Board did not commit a procedural violation in the 5/3/2012 IEP.
4. The 5/3/2012 IEP was substantively inappropriate and deprived the Student of a FAPE.
5. The 5/7/2013 IEP was procedurally and substantively inappropriate and deprived the Student of a FAPE.
6. A placement of the Student in a therapeutic day treatment program is not warranted and would violate the requirement of IDEA to place the Student in the least restrictive environment.
7. The Hearing Officer does not have jurisdiction to determine issues of discrimination in relation to 29 U.S.C. §794.
8. The Board did improperly apply §10-76q when discharging the Student to his sending LEA.
9. The Hearing Officer does not have the jurisdiction to determine if a statute is discriminatory.

10. The Board will immediately convene a PPT meeting which includes the mandated participants to address all of the Student's unique needs, including transition planning and services; conduct a functional behavior analysis with proper behavioral data, which will determine what specific services and program, are required by the Student to be successful in the current placement.

11. Once the IEP is developed, the PPT will address if the placement and program are such that can be provided to the Student at Cheney Tech and make a placement decision based upon the IEP.

12. The Board will provide the Student compensatory services in the form of tutoring for the core subject (Math, English, Social Studies, Science) areas. The Board will provide one hour of tutoring per week for each of the four subjects, totaling four (4) hours per week of tutoring for one academic year.

13. Should, after the IEP is developed, the PPT come to the determination that Cheney Tech is not able, based upon the dictates of IDEA, to properly provide the program and services that the Student needs, and a return to the sending LEA is warranted, CTHSS will retain responsibility for the funding of the compensatory services required in number 12 above.