

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Willington Board of Education

Appearing on behalf of the Student:

Attorney Courtney Spencer
Law Office of Courtney Spencer, LLC
100 Riverview Center, Suite 290
Middletown, CT 06457

Appearing on behalf of the Board:

Attorney Craig Meuser
Chinni & Meuser, LLC
One Darling Drive
Avon, CT 06001

Appearing before:

Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board of Education offer the Student a free appropriate public education between July 1, 2012 and July 1, 2014?
2. If not, is the Student entitled to compensatory education in the form of the Board of Education's payment for an education program for the Student at Ben Bronz Academy for the 2014-2015 and 2015-2016 School Years, including extended year services for both years?

PROCEDURAL HISTORY:

The Student requested a special education due process hearing in this matter on July 1, 2014. This Impartial Hearing Officer was assigned to the case on July 1, 2014. A telephonic pre-hearing conference was held on July 9, 2014. Attorney Courtney Spencer appeared on behalf of the Student and Attorney Craig Meuser appeared on behalf of the Willington Board of Education (Board).

Evidentiary hearings were conducted on September 2, 3, 10, 26, October 10, 21, 22, November 7 and December 17 and 18, 2014 and on January 8, 15, 16 and 30, 2015. The parties filed briefs and replies in March 2015, and the deadline for filing the Final Decision and Order was extended to April 3, 2015.

The following witnesses testified: Student's Mother, School Psychologist Mr. Rose, Director of Pupil Personnel Services Ms. DiBella-McCarthy, Neuropsychologist Dr. Ciocca, Ben Bronz Education Director Ms. Sharp, Case Manager and Special Education Teacher Ms. Wright, Speech Language Therapist Ms. Frasinelli, Education Professor Dr. Cherkes-Julkowski, Mathematics Special Education Teacher Ms. Hamilton, Science Teacher Ms. Rodriguez, Sixth Grade Teacher Mr. Kolleger and Pediatrician Dr. Yencho.

Hearing Officer Exhibits 1 through 5 were entered as full exhibits. Student Exhibits P-1 through P-6f, P-7 (except p. 6) through P-15, P-17 through P-20, P-22 through P-24 and P-28 were entered as full exhibits. Finally, Board Exhibits B-1 through B-55 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:

A Student with a disability category of Speech and Language Impairment claimed that the program provided by the Board of Education for her seventh and eighth grade years did not meet the legal standards for a free appropriate public education. An independent audiologist evaluated the Student for a possible auditory processing disorder and concluded that the disorder was present. The Audiologist also found that the Student demonstrated significant phonological weaknesses and recommended that the Board implement, among other recommendations, intensive phonological training. The phonological training was not implemented, negatively impacting the Student's educational benefit. Additionally, the Board failed to address the Student's school related anxiety and headaches. A remedy of compensatory education in the form of payment for a private placement was awarded.

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 December 29, 1999, and is now fifteen years of age. She attended the Board's public elementary and middle schools from her first grade year, when her parents moved to Willington, through the end of her eighth grade year, when she transitioned to Regional District 19's E.O. Smith High School in September 2014. All Willington students attend E.O. Smith High School because Willington does not operate its own secondary school. (Testimony of Mother; DiBella-McCarthy).
2. The Student was identified as eligible to receive special education and related services under IDEA near the end of her third grade year, on March 17, 2009. Her identification category was, and continues to be, "Speech and Language Impairment". (Exhibits B-4 and B-21; Mother; Frasinelli)

3. The Student has a classic language based learning disability. At its root is a phonological deficit that undermines her ability to distinguish the sounds of speech and associate them with the letters and words of written language. As a result, she has great difficulty with reading fluency, spelling and reading comprehension, and suffers from significantly weak auditory working memory. (Cherkes-Julkowski¹) In addition to, or as a part of her language disability, the Student also displays a central auditory processing disorder. (Exhibit B-9) Like many students with learning disabilities, the Student also suffers from anxiety. (Exhibit P-20). She has also been diagnosed with Specific Learning Disability Not Otherwise Specified, Reading Disorder, Disorder of Written Expression, Mathematics Disorder, Anxiety Disorder Not Otherwise Specified (Exhibit P-4d; Ciocca) and Migraine. (Yencho)
4. The Student has consistently demonstrated an excellent work ethic and positive attitude at school. She always works hard and tries her very best to do everything that her teachers ask of her. She integrates well with her classmates, sometimes plays a leadership role among her peers, and garners the affection and good will of those around her. (Exhibit B-1, p. 5; Mother; Wright; Rodriguez; Frasinelli)
5. During her sixth grade year, the Student's individualized education program (IEP) included resource time for direct instruction in reading, pull out time for speech language therapy and co-taught classes for mathematics and language arts, for a total of 8.83 hours of IEP service per week. She was educated with nondisabled peers for 31.17 hours out of the 35 hour week. (Exhibit B-1)
6. The Student's sixth grade special education teacher used two data driven specialized reading programs, Lexia and Read Naturally. She was successful with these programs, and her reading level improved appropriately. She was reading independently at a sixth grade level by the end of that school year. (Exhibit B-1; Kolleger)
7. The Student's IEP in sixth grade included a significant number of accommodations and modifications, including among other things an FM System (to improve the clarity of auditory information and reduce ambient noise), a reader for tests as needed, extra time for tests, projects and written work, test study guides, word banks, repetition of instructions, notes and outlines and homework review and models before leaving school. (Exhibit B-1)
8. The Student's triennial evaluation was conducted toward the end of sixth grade. Academic testing on the Test of Written Language produced average composite scores for Contrived Writing, Spontaneous Writing and Overall Writing on February 2, 2012. She was Below Average on the subtests for Vocabulary and Spelling, however. (Exhibit B-3)
9. Mathematics, as measured on the Keymath Revised NU, also reflected performance deficiencies. She earned "Slightly Below Average" on the composite for Basic Concepts and an "Average" for Operations. Her lowest areas, with Below Average subtest results, were Geometry and Mental Computation. (Exhibit B-3)

¹ Dr. Cherkes-Julkowski's testimony concerning the Student's disability was highly credible and compelling. Dr. Cherkes-Julkowski is an experienced special education professor. She did not formally evaluate the Student or provide information to the PPT. The facts upon which she based her conclusions were, however, available to the PPT when it made the relevant decisions.

10. The Board's Speech Language Therapist, Ms. Frasinelli, conducted the Student's speech language evaluation on March 12, 2012. Frasinelli is an experienced and well-qualified speech language therapist. The Student scored in the low average range on the Peabody Picture Vocabulary Test and in the average range on the Expressive Vocabulary Test. On the Clinical Evaluation of Language Fundamentals, Fourth Edition, she had "Significantly Below Average" on the composites for Core Language, Expressive Language Index, Language Memory Index and Working Memory. Her scores on the Receptive Language Index and the Language Content Index were only "Below Average". Her weakest areas on the subtests were Recalling Sentences, Number Repetition Total and Familiar Sequences, which were in the "Significantly Below Average" range. (Exhibit B-4)

11. On The Word Test 2 to assess expressive language and semantics, the Student scored "Below Average" on the total test, with "Significantly Below Average" scores on the Flexible Word Use and Synonym subtests. (Exhibit B-4)

12. On a screening test for central auditory processing disorder, SCAN-A, the Student's scores were in the "disordered" and "questionable" range, and "considerably lower than when last tested" indicating that her auditory system was developing at a slower rate than her peers. (Exhibit B-4)

13. Ms. Frasinelli concluded that the Student continued to exhibit a language based learning disorder and required ongoing language therapy to improve expressive language, memory and processing skills. Additionally, Ms. Frasinelli recommended an outside assessment² to further explore the possibility of a central auditory processing disorder. (Exhibit B-4)

14. School Psychologist, Mr. Rose, also an experienced and well-qualified school psychologist, conducted a cognitive evaluation for the triennial review. He used the Woodcock-Johnson Tests of Cognitive Ability III, and placed the Student's intellectual quotient (IQ) in the Average range. He found that the Student had relative strengths in the areas of Auditory Processing and Fluid Reasoning as well as Visual Processing and Visual Memory skills. Her relative weaknesses were in the areas of Short Term Memory and Working Memory for auditory information. (Exhibit B-6)

15. The Student took the sixth grade Connecticut Mastery Test (CMT) Modified Assessment System (MAS) for reading and mathematics in March 2012. (Exhibit B-10) The CMT MAS was an alternative version of the CMT (Connecticut's then State mandated standardized test) that was administered to students with disabilities who were not able to perform at grade level, even with the accommodations and modifications allowed with the standard CMT, such as extra time, a reader for instructions, and larger print. (See Exhibits B-23, B-29 and B-35; DiBella-McCarthy)

16. By using the CMT MAS for the Student in reading and mathematics, the Board in effect acknowledged that the Student was not able to perform at grade level, even with accommodations and modifications, in reading and mathematics.

17. Also significant was that although the CMT MAS in reading and mathematics were designed to test the same subjects as the standard version, it provided a number of accommodations and

² Karen Pollock conducted such an assessment in June 2012. (Exhibit B-9) Pollock is an independent audiologist who is acknowledged to be an expert in her field. (Frasinelli)

modifications that rendered the test markedly less challenging than the standard version. For instance, the CMT MAS for reading had fewer and shorter reading passages and fewer questions with fewer answer options, as well as larger type and wider margins, than the standard version. The CMT MAS for mathematics had simpler text, shorter sentences, simpler numbers, simpler equations, simpler diagrams and tables, important words in bold, and even deleted entire strands. (Exhibit B-35; Cherkes-Julkowski)

18. The Student's performance on the CMT MAS in sixth and then seventh grade, therefore, did not demonstrate that her performance in reading or mathematics was comparable to nondisabled peers or that it was "on grade level".

19. The Student did, however, also take the standard CMT for writing (with permitted accommodations and modifications) in the sixth grade and scored in the Proficient range. (Exhibit B-10)

20. At the Student's annual review in sixth grade on April 12, 2012, the PPT described her performance as "at an independent 6th grade reading level" with "[f]luency . . . at 115 wpm at the 6th grade level." The PPT also said that she "is very capable of producing basic grammatically correct sentences and paragraphs at grade level . . . and her ability to construct complex logical sentences is average." (Exhibit B-7; Kolleger)

21. The PPT also reported that the Student struggled with mathematics word problems that incorporate extraneous information, but can "follow a process for solving math problems" and that multiplication and division are areas of strength for her. (Exhibit B-7; Wright)

22. In the area of communication, the PPT noted "significant gains (11-20 pts) on standardized language measures" but that overall skills were still below average, particularly memory and higher-level language processing. Her "short-term and working memory, higher-level language processing [and] auditory processing" were all described as areas of continuing concern. (Exhibit B-7)

23. The PPT developed goals and objectives for the Student's seventh grade in the areas of writing and mathematics computation as well as in the area of communication with a focus on reading comprehension. (Exhibit B-7)

24. The plan for the Student, as initially contemplated for the seventh grade, provided for 3.17 IEP hours per week, a substantial decline from the 8.83 hours per week in her sixth grade IEP. (Exhibits B-1 and B-7) She was to be educated with nondisabled peers for 31.83 hours out of 35 hours each week. (Exhibit B-7)

25. The Student's planned seventh grade service grid consisted of .5 hours per week of speech language therapy individually or in a small group and 1.33 hours per week for language arts instruction in the resource room and 1.33 hours per week for mathematics instruction in the resource room.

26. On June 26, 2012 after the school summer recess began, the independent audiologist who was selected jointly by the Student's parents and the Board, assessed the Student. (DiBella-McCarthy) Pollock submitted a report of her assessment on June 28, 2012. (Exhibit B-9) Pollock concluded that the Student exhibits a "significant degree of inefficiency and/or immaturity of her central auditory

system” with particular weaknesses in the areas of “phonemic decoding (speech discrimination), tolerance-fading memory (auditory attention/memory/figure-ground), and organizational weaknesses.” (Exhibit B-9)

27. Pollock explained that the Student’s significant phonological weakness means that she has difficulty discriminating speech sounds quickly and accurately. Students with this profile “often miss or mishear what has been said” contributing to “problems with reading and spelling.” Further testing of phonemic decoding also revealed that the Student is deficient in her “ability to blend phonemic elements (sounds) into words.” (Exhibit B-9)

28. In addition, the Student’s “well below average” score on the Elision Subtest of the Comprehensive Test of Phonological Processing revealed an inability to repeat a word and say what is left after dropping out designated sounds. Her score on the Phonological Memory subtest demonstrated a weakness in phonological memory, a concern that can impact the ability to learn new vocabulary. (Exhibit B-9) Also of note was the Student’s below grade level performance on the Lindamood Auditory Conceptualization Test, which looks at the “ability to judge the sameness and difference in auditory patterns” and “sounds in spoken patterns.” (Exhibit B-9)

29. Pollock concluded by identifying the Student’s phonological awareness and auditory memory as relative weaknesses. She recommended that the Student receive “intensive training to improve her phonological skills” as part of her reading and/or speech language program. She added that the student should also continue to receive the auditory memory training that was part of her program in the sixth grade. (Exhibit B-9)

30. In addition to intensive phonological training, Pollock recommended the use of an FM system and listed a number of other accommodations and modifications for the Student’s school program, including preferential seating, cues before giving directions, repeating and segmenting directions, providing visual examples, teaching strategies for recalling content, advance notice of tests, extended time for tests, study guides and exemption from foreign language class. (Exhibit B-9) Many of these suggestions, including the FM system, had already been incorporated into the program.

31. The Student’s PPT met shortly after the school year opened, on September 25, 2012, to discuss the Pollock report and modify the Student’s IEP in its light. Although the PPT purported to accept and incorporate all of Pollock’s findings and conclusions, her recommendation for intense phonological training was neither included in the IEP nor ever implemented. (Exhibit B-12; Wright; Frasinelli) While Speech Language Therapist Frasinelli disagreed with the recommendation for intensive phonological training, her disagreement was not noted in the IEP as an “action refused” or otherwise. (Frasinelli; Exhibit B-12)

32. The Student’s mother reported her concern that the Student is “petrified of being called on without warning in class” and spent enormous amounts of time with homework each evening. She said that the Student “often has difficulty recalling homework directions once at home.” The mother also expressed concern that “the test scores do not represent what [the Student] knows at any point in time due to her memory and recall difficulties.” (Exhibit B-12)

33. In response to the parent's concern about homework, the PPT added a description of the Student's performance in the area of completing homework assignments to the IEP as well as a new goal and objectives in the area of organization of assignments. The PPT also made minor adjustments to the Student's goals and objectives in writing and communication. In addition, the goal and objectives for mathematics computation was dropped because the mathematics teacher felt her computational skills were adequate. (Wright; Exhibit B-12)

34. The Student's speech language therapy was increased from .5 hours per week to 1 hour per week, and she was placed in a co-taught language arts class with both a special education teacher and a regular education teacher for 6.67 hours per week. She had resource room time, previously described as for instruction in language arts and mathematics but now described as resource room time for "academic support" of 1.33 hours per week and another 1.33 hours per week for "language arts support". Finally, she had .83 hours per week for organizational support for homework in the resource room. (Exhibit B-12)

35. In total, the Student was now to receive special education and related services for 11.17 hours each week, a significant increase from the 3.17 hours per week originally planned for her seventh grade. She was to be educated with nondisabled peers for 30.50 hours out of 35 hours each week. (Exhibit B-12). Modest changes were also made to the Student's list of accommodations and modifications.³

36. The Student's new seventh grade program (and later, her eighth grade program) reflected a fundamental shift away from direct instruction in reading and language in the elementary school toward

³ The Student's Page 8 accommodations and modifications were now as follows:

Materials/Books/Equipment: Calculator

Assistive Technology: FM System

Tests/Quizzes/Assessments: Reader for Tests as needed, Reader for Tests as needed, Extra Time-Tests/Projects/Written Work, Alternate test setting, Alternative tests based on main idea, No spelling penalty, Preview Test Procedures, Prior Notice of Tests, Shortened tasks, Test Study Guide, Word Banks

Grading: No Spelling Penalty

Organization: Daily Assign/Planner Checked by Staff, Visual cues/models, Graphic Organizers, List Sequential Steps, Post Assignments, Provide Study Outlines, Templates for Written Work

Environment: Optimize auditory environment, Minimize auditory and visual stimulation, Preferential Seating

Behavioral Interventions and Support: Positive Reinforcement

Instructional Strategies: Scaffolding, Repeat Instructions, Editing Checklist, Check Work in Progress, Concrete Examples, Cueing/Prompts, Extra Drills/Practice, Have Student Restate Information, Models, Modified content, Monitoring assignments, Personalized Examples, Provide Models, Provide Notes/Outline to Student, Provide Student With Vocabulary Word Bank, Review Directions, Review Sessions, Support Auditory Presentations with Visuals, Use Mnemonics

Other: Check for understanding. Allow processing time. Modified HW length. Review HW assgnmts and provide an example to take home. Allow to add orally to completed tests. Only call on in class if hand is raised or she is prepared to answer. Periodic review of content.

(Exhibit B-12)

an emphasis in the middle school on applying learned skills to work in the mainstream curriculum. (Wright; Frasinelli)

37. Accordingly, rather than the daily direct instruction with a specialized reading program she had in the sixth grade, the Student's seventh grade resource time for language arts and speech language therapy⁴ was largely devoted to academic course work that involved reading comprehension and writing. (Wright; Exhibit B-13)

38. The Student's PPT met again on November 27, 2012. This time, the parents brought an advocate with them. (Exhibit B-14)

39. The Student's parents expressed a variety of concerns during the meeting, including but not limited to a specific request to add intensive phonological training to the program as recommended by Pollock and a request to return to use of an auditory memory training program also suggested by Pollock. (Exhibit B-14)

40. The PPT agreed to reintroduce an auditory training program as was used in earlier years, and soon thereafter Ms. Frasinelli began working with the Student on an automated memory training program known as "HearBuilder." (Frasinelli; Exhibit B-11)

41. At the meeting on November 27, 2012, the parents asked the Board to conduct weekly core meetings, which were meetings with the teaching team and service providers. The PPT readily agreed to do so. (Exhibit B-14) At some point thereafter, however, the Student's mother told the case manager that she preferred to communicate with e-mail and did not want to attend meetings. (Wright; Mother) The core meetings were not held. (Mother)

42. Again, the PPT did not introduce intensive phonological training to the IEP. Again, the PPT did not report its disagreement with the recommendation for intensive phonological training as an "action refused" or otherwise in the IEP. Nor did it identify phonological awareness or reading fluency as an area of concern or include any goals or objectives in the area of phonological awareness, reading fluency or spelling despite Pollock's suggestion that these are typical areas of weakness for students with phonological weakness. (Exhibits B-9 and B-14)

43. Students who, like the Student here, have poor phonological skills inevitably also experience difficulty with reading fluency and comprehension, as well as auditory working memory. An inability to decode accurately and rapidly, negatively impacts reading comprehension and thereby undermines academic performance in virtually all areas. (Exhibit B-9; Cherkes-Julkowski) In addition, specific learning disorders commonly co-occur with mental disorders such as anxiety disorder. (Exhibit P-20)

44. The PPT did slightly modify the Student's goals and objectives for the seventh grade. The initial goals and objectives in the areas of writing, organization and communication were maintained as initially written. New goals and objectives for mathematics word problems, reading comprehension and

⁴ Special Education Teacher Wright, also an experienced and well qualified professional, testified that she used two specialized reading programs with the Student in early seventh grade but not on a daily basis or for more than 15 or 20 minutes at a time. (Wright)

note taking were added. A new goal and objectives in communication – for auditory memory training – was also added. (Exhibit B-14)

45. The Student's speech language therapy, co-taught class for language arts and time for organizational support were not changed. Her time for language arts support in the resource room, however, was increased from 1.33 hours per week to 2.5 hours per 6 day cycle. A new block of time was added for speech language "intervention" (auditory memory training) of 1.33 hours per six day cycle. One hour per 6 day cycle was added for mathematics support in the resource room and 1.33 hours per six day cycle was added for study skills instruction in the resource room. (Exhibit B-14)

46. These changes brought the Student's IEP services up to about 13.33 hours per week, what appears to be a modest increase over the 11.17 hours per week⁵ in the earlier IEP. (Exhibit B-14)

47. The Student's accommodations and modifications were unchanged with the exception that the following was added: "Case mgr. Report prog. 1x wk". (Exhibit B-14) Despite the notation, this item was not implemented with fidelity. (Mother)

48. The PPT met again on March 21, 2013 for its annual review. (Exhibit B-18) The PPT reported that the Student mastered all of her academic goals and both of her language⁶ goals. (See also Exhibit B-15) She was "reading and comprehending on grade level." In addition, the Team reported that the Student's self-advocacy skills and confidence increased during the year and that she was making satisfactory progress with her auditory training program. The Student's behavior was excellent and her accommodations were working well for her. (Exhibit B-18)

49. The PPT reported the Student's present levels of performance in language arts as follows:

DRA⁷-Oral read fluency – Independent Gr.7, Comprehension – Independent Gr.7, Current Ave. 88%, Final Persuasive essay – (82/96) 85%, Feb Prompt 6/12

(Exhibit B-18)

50. For mathematics, the Student's level of performance was described only in terms of her class grade: "Current Ave. 95%, Dec/fract/% test 62/60". In the area of communication, the level of performance was:

⁵ The record allows only an approximation of these figures because some segments of IEP service time are described with a frequency of hours per 6 day cycle, while others are described in hours per week.

⁶ In fact, the Student's progress report at the same time indicated that she was making satisfactory progress with, but had not yet mastered, one of her communication goals, her work with the HearBuilder auditory training program. (Exhibit B-15)

⁷ The reliability of the DRA as a standardized test is controversial. (Ciocca; Cherkes-Julkowski; Kolleger) As Mr. Kolleger testified, the DRA allows the Student to look back at the text, and is not a very demanding assessment. (Kolleger) The law and the State Department of Education at one time required priority school districts to use the DRA2 for all students in Kindergarten through Grade 3. (Stipulation)

[The Student] mastered her language goal of using memory and comprehension strategies with support. She is making satisfactory progress with an auditory memory skills software program

(Exhibit B-18)

51. The PPT developed a goal and objectives for the Student in reading comprehension, with an objective to achieve a reading rate of 115 words per minute on the DRA, writing and mathematics word problems as well as a goal and objectives in the area of communication. (Exhibit B-18)

52. The new IEP for the eighth grade used co-taught classes for language arts and now mathematics. In addition, the PPT offered a summer program for four weeks, to include two hours for reading and three hours per week for mathematics and writing with special goals and objectives. (Exhibit B-18)

53. In total, the eighth grade IEP provided services for 15 hours out of 35 hours each week, another modest increase over the previous IEP. The Student was to be educated with nondisabled peers for 30 hours out of 35 hours each week. Her accommodations and modifications were not changed. (Exhibit B-18)

54. In March 2013, the Student took the seventh grade CMT. Again, she took the CMT MAS for mathematics and reading and scored in the Goal range for each. She scored in the Proficient range on the standard CMT in writing. (Exhibit B-20)

55. A few weeks into the Student's eighth grade year, the PPT met again on October 2, 2013. The Student's accommodations and modifications were adjusted by adding the following items:

Preferential seating with access to resources, access to support personnel, Break down lengthy assignments, Review Sessions, Provide hard copy of all notes – not taking notes on iPad (unless student chooses) – During direct instruction [the Student] should be listening and processing which is difficult while copying notes from board; provide a homework model or example to take home for reference; Incorporate a non-verbal cueing system in math to determine comprehension of content; Needs positive/encouraging approach to support; No late penalty for incomplete math homework when completed after additional instruction

(Exhibit B-21)

56. Between the beginning of the eighth grade school year and the end of January 2014, the Student visited the school nurse complaining of headaches on fourteen occasions. This was a significant increase from such visits in the seventh grade.⁸ (Exhibit P-12) The nurse typically gave her an over the counter pain killer and made a note for the record. The visits stopped in January 2014 because the pain killer was no longer effective. (Mother)

⁸ There were only four such visits during the entire seventh grade. (Exhibit P-12) In her fifth grade year the Student's PPT noted that "[s]ometimes she appears to experience some anxiety" and "had some headaches at the beginning of the school year." (Exhibit B-1)

57. The Student was seen by her pediatrician for the problem and he concluded the headaches were caused by stress and anxiety about academic demands at school. (Yencho) The Student's mother reported the headaches and the pediatrician's view to the school, and asked for help. (Mother; Wright; Exhibits B-40 and P-7) A meeting was arranged with the school psychologist, who worked with the Student on strategies to reduce her anxiety. (Rose; Wright) Although the headaches seemed to improve at times⁹, they inevitably returned and continued to plague the Student for much, if not most, of the eighth grade. (Mother; Exhibit P-11)

58. By October 2013, the Student stopped using the HearBuilder auditory training program because she was not able to progress any further in it. (Frasinelli; Exhibit B-23) She did master two out of the five components of the program before quitting. (Exhibit P-11)

59. In December 2013, the Student unilaterally began attending regular education Unified Arts classes in Health and Computers during part of the school day that was scheduled for the auditory training program and academic support in the resource room. Her parents supported this decision because they hoped it would alleviate some of her anxiety. (Mother; DiBella-McCarthy; Exhibit B-29)

60. An extended discussion took place between the Board's Pupil Services Director and the Student's parents regarding various alternative ways to provide the special education and related services identified in the Student's IEP while the Student also attended Unified Arts classes in the regular education setting. The parents insisted that the Student continue to receive the full amount of IEP service time, while also adding the two Unified Arts classes, but there were not enough hours in the school day to satisfy that request. (Exhibits B-25, B-26, B-38 and B-39; DiBella-McCarthy; Wright; Mother)

61. The Board offered to provide some services before and/or after school or during part of the time otherwise devoted to the Unified Arts classes, in an unsuccessful but good faith effort to satisfy the parents' request. (Exhibits B-25, B-26 and B-29; DiBella-McCarthy)

62. In the meantime, Ms. Frasinelli cut back on her time with the Student under the mistaken belief that the IEP had been revised. She made up at least some of that time when she learned of the mistake.

63. On February 11, 2014, the PPT met again to discuss how to revise the IEP to allow for the Student's attendance in the Unified Arts classes. (Exhibit B-29) The Student's parents brought a different advocate with them to this meeting, and the Student also attended. At the meeting, the PPT again reported that the Student "is meeting all grade level expectations." (Exhibit B-29)

64. A decision was made to reduce the Student's speech language time by one session per week and to eliminate the Student's goal and objectives in the area of communication going forward. This change, which reduced speech language service from 1.33 hours per 6 day cycle to .67 hours per 6 day cycle only partially addressed the problem that the schedule still did not provide the full time written in the IEP. (Exhibit B-29) In the end, the school shifted some service time from one service model to another

⁹ The Student's mother sometimes described her daughter as "carefree" or "happy" and shared that on some days her daughter did not have a headache. (Exhibit P-7)

in order to partially accommodate the impasse. This solution, however, still left the Student with fewer service hours than stipulated in her IEP for a period of time. (McCarthy-DiBella; Exhibit B-25)

65. The school staff felt that the advocate was hostile and aggressive at the February 11, 2014 meeting. (DiBella-McCarthy) In any event, the discussion grew acrimonious and the meeting broke up with the parents' announcement that they intended to file for due process.¹⁰ (DiBella-McCarthy)

66. The PPT did not meet again for the next annual review until May 2, 2014 because the parties agreed to await the report of a neuropsychological evaluation that had been commissioned by the Student's parents from Dr. Cristina Ciocca. Dr. Ciocca is an experienced and well qualified neuropsychologist in private practice. (Exhibit B-31; Ciocca; DiBella-McCarthy)

67. Dr. Ciocca reviewed the Student's records as provided by her parents, interviewed the Student and her mother, administered various tests on three separate dates in January and February 2014, and observed the Student in school on March 28, 2014. She issued her report shortly before the May 2, 2014 PPT meeting. (Exhibit P-4d; Ciocca)

68. Dr. Ciocca used the Wechsler Intelligence Test for Children – Fourth Edition to evaluate the Student's cognitive functioning, and she obtained scores that were "largely comparable to those obtained in prior assessments." The Student's Full Scale IQ was 84 and Below Average but "suppressed by her statistically weaker Working Memory Index." (Exhibit P-4d) Dr. Ciocca observed that the Student's Verbal Comprehension was weaker than Perceptual Reasoning and that Perceptual Reasoning and Processing Speed Indices were Average. (Exhibit P-4d)

69. The Student's Working Memory Index was her weakest area and in the Borderline range. (Exhibit P-4d) She demonstrated weaknesses in all language-based domains, including verbal fluency and vocabulary. She had even greater difficulty with auditory processing and receptive language. "She incorrectly took in auditory stimuli precluding the efficacy of her responding." (Exhibit P-4d).

70. Dr. Ciocca tested the Student's academic achievement using the Wechsler Individual Achievement Test – Third Edition. The Student's composite scores for Total Reading, Basic Reading, Reading Comprehension & Fluency, Written Expression and Math Fluency were all in the Below Average range, with percentile ranks ranging from 9 to 16. She had "substantial difficulty" responding to reading comprehension questions even with the possibility of reviewing the passage. Only her score on the Mathematics Composite was in the Average range.

71. The Student's score on the subtest for Reading Comprehension was at the percentile rank of 10 and grade level equivalency of 2.3. Her Word Reading subtest was at a percentile rank of 9 and a grade level equivalency of 4.5. Pseudoword Decoding¹¹ was also low, with a percentile rank of 16 and a grade level equivalency of 3.4. (Exhibit P-4d)

¹⁰ Although the Board agreed to pay for an independent speech and language evaluation at that meeting, neither side followed up and it was never arranged. The Student does not claim here that failure to pursue that evaluation violated the Student's rights. (Exhibit B-29)

¹¹ Pseudoword decoding is highly correlated with reading comprehension. (Cherkes-Julkowski)

72. The Student's Oral Reading Accuracy score had a percentile rank of 3 and a grade level equivalency of 3.0. Although her reading rate was average, her accuracy was much poorer. She "made numerous variations when reading the text. Some words were clear approximations while others were words that did not even make sense within the context of the passage." (Exhibit P-4d)

73. The Student scored similarly poorly on the Gray Oral Reading Test, where her score was in the Borderline Range. (Exhibit P-4d)

74. These low achievement scores came as a shock to the Student's parents, who had been told repeatedly that their daughter was "on grade level" in her academic subjects. (Mother)

75. Dr. Ciocca also administered psychological functioning tests. She found that the Student exhibits an "anxious conformity to the expectation of others . . . as well as an overcontrol of emerging impulses and a defensiveness about admitting psychological problems." Additionally, Dr. Ciocca noted that "[s]he experiences a chronic state of tension, often manifested in functional somatic disorders (such as headaches), due to her pervasive worry about performance and producing acceptable work." (Exhibit P-4d)

76. Dr. Ciocca applied the following diagnoses to the Student:

1. Mixed Receptive and Expressive Language Disorder (Language-Based Learning Disability)
2. Auditory Processing Disorder
3. Specific Learning Disability Not Otherwise Specified (Executive Dysfunction, Working Memory, Memory Retrieval and Nonverbal Processing Deficits)
4. Reading Disorder (Dyslexia)
5. Disorder of Written Expression (Dysgraphia)
6. Mathematics Disorder (Dyscalculia)
7. Anxiety Disorder Not Otherwise Specified.

(Exhibit P-4d)

77. Dr. Ciocca also made forty separate recommendations, thirty-eight for school and two for home. Among these recommendations were that the "pace of the classroom must be closely regulated and the mode of content exposure varied from traditional curriculum/pace to match her processing needs" and that the Student must have "daily, systematic, scientifically-based reading and writing instructional programming." For the parents, Dr. Ciocca recommended that they obtain individual psychotherapy and monitor the headaches. (Exhibit P-4d)

78. On May 2, 2014, the PPT reviewed Dr. Ciocca's report. Board staff expressed disagreement with Dr. Ciocca's assessment of the Student's academic achievement. The school staff reported that the Student mastered all of her IEP goals and that she was earning As and Bs in all of her classes. Board staff insisted that the Student was "meeting grade level expectations in math and [language arts] with support and her IEP accommodations." (Wright; Exhibits B-31 and B-34)

79. Board staff took the position that an appropriate program for the Student could be provided by Regional District 19 in the local public secondary school, E.O. Smith High School. Board staff also submitted that most of Dr. Ciocca's recommendations were already part of the Student's program and that others could be included¹² easily without substantially changing the proposed IEP for ninth grade. (Wright; Exhibit B-31)

80. The Board members of the PPT recommended an IEP for the Student's ninth grade school year as well as a summer program of 4 hours per week for 5 weeks. (Exhibit B-31) The proposed IEP was very similar to the Student's program in seventh and eighth grades. It included a combination of co-taught classes and resource room for small group or individual support and speech language therapy. Contrary to its trend in the middle school to increase service time, however, the PPT recommended a steep reduction in total IEP service time down to 6.73¹³ hours out of 33.33 hours per week. The proposed IEP included 26.62 hours per week of education with nondisabled peers. (Exhibit B-31)

81. The PPT noted the parents' concern about the Student's "level of independence with her academic skills, the level of support provided through various page 8 accommodations and [her] reported level of anxiety regarding her academic program." (Exhibit B-31)

82. The Student's level of performance in the area of language arts was described as:

DRA – Oral read fluency – Grade 8 – 102 wpm/96% accuracy, Comprehension – Gr.8, Term 1- 88%, Term 2-84%, Term 3 – currently 77%

(Exhibit B-31)

83. The Student's level of performance in the area of mathematics was again described in terms of her class grades: "Term1 – 97%, Term2 – 85%, Term3 - currently 87." (Exhibit B-31)

84. Her level of performance in communication was:

In therapy setting: increased independence in using strategies and verbalizing reasoning; needs modeling/scaffolding with abstract concepts, improvement in reading comp, written responses

(Exhibit B-31)

85. There was no mention in the IEP of the Student's many nursing visits, anxiety or headaches. There was no recommendation for an evaluation or investigation of the problem. And, although the school psychologist informally counseled the Student on stress reduction, the IEP never identified this as an area of disability, added goals or objectives, or provided services for anxiety or headaches. (Exhibit B-31)

¹² For instance, the PPT adopted the recommendation for an evaluation of Assistive Technology needs for the Student. That evaluation was not completed until after the summer recess began. (Exhibit B-32)

¹³ The service grid erroneously identifies the specialized service and instruction time as only 4.20 hours per week and the time with non-disabled peers as 29.83 hours per week (Exhibit B-31).

86. At the May 2, 2014 meeting, the Student's parents requested that the Board place the Student at Ben Bronz Academy, a privately operated approved special education school located in West Hartford. Ben Bronz Academy is a small school that focuses on educating students with learning disabilities, language based learning disorders, Attention Deficit Disorder and Asperger's Syndrome. It offers a "language rich environment" with teachers who are skilled in facilitating the development of receptive and expressive language skills in their students. It provides intensive remedial programming to address reading disorders, including phonological weaknesses. Class sizes range from 4 to 7 students, so that instructional pace can be specially individualized for each student at the most fundamental level, and auditory and other distractions can be minimized. (Sharp)

87. The Board of Education rejected the parent's request even though accepting it would not have been at the Board's financial expense (see Finding of Fact No. 1, above). The Board staff argues that the proposed placement is too restrictive for the Student, pointing out that the Student enjoys and benefits from interaction with non-disabled peers. (DiBella-McCarthy; Wright; Frasinelli; Kolleger; Rodriguez)

88. The Student passed all of her seventh and eighth grade courses with As and Bs. (B-34) There were, however, many low marks on individual tests and quizzes. (Rodriguez; Exhibit B-27) Moreover, the Student had the benefit of a great many accommodations and modifications during her seventh and eighth grades years as well as an increasingly substantial amount of support from her special education and service team. (Wright; Exhibits B-12; B-14; B-18; B-21; B-29 and B-31) The course grades, therefore, are not compelling evidence of her academic performance.

89. The school team also assessed the Student using the STAR and the DRA in seventh and eighth grade. She did not, however, achieve expected performance levels with these instruments. Significantly, the Student's reading rate actually declined from 115 words per minute at the end of sixth grade to 102 words per minute at the end of eighth grade. (Exhibits B-5, B-7, B-27 and B-31) Nor did the Student meet her goals for math and reading on the STAR assessment. (Exhibits B-27 and B-55)

90. Over the course of the Student's seventh and eighth grade years, the school staff met with the parents informally several times and engaged in very frequent e-mail communication. (Mother; Wright; Exhibits P-7; P-9; B-23; B-24; B-38, B-39 and B-40) In addition, the Board conducted six formal PPT meetings over the two years, and the board's highest level administrator for special education, Holly DiBella-McCarthy personally attended each one. (Exhibits B-12, B-14, B-18, B-21, B-29, and B-31)

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 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 that its IEPs were appropriate and therefore in compliance with IDEA by a preponderance of the evidence. 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' insistence, in IDEA's procedural scheme, "upon full participation of concerned parties throughout the development of the IEP" reflects a "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. IDEA proscribes a process by which each student's IEP must 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). First, a "full and individual evaluation" of the child's educational needs must be conducted before any decisions about a student's program can be made. 34 Code of Federal Regulations (C.F.R.) Section 300.301. In this regard, boards 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. The information derived from the evaluation is used to determine the content of the student's IEP, which in turn is designed to promote the child's access to educational benefit and progress in the general curriculum. 20 U.S.C. Section 1414(b)(2)(A).

6. A cornerstone of IDEA's procedural scheme 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 develop his or her program. 20 U.S.C. Section 1414(b)(3); 34 C.F.R. Section 300.304(c)(4).

7. 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.

8. Boards of education must involve the student's parents in each step of the process. IDEA's procedural safeguards protect the right of parents to participate in all decision-making meetings (34 C.F.R. Section 300.501(b)), the right of parental involvement in placement decisions (34 C.F.R. Section 300.501(c)), the right of parents to obtain an independent educational evaluation (34 C.F.R. Section 300.502(b)); and the requirement that boards consider evaluations provided by parents. 20 U.S.C. Sections 1414(e) and 1415(b); 34 C.F.R. Section 300.502(c).

9. 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).

10. The Student argues that the Board made unilateral decisions and shut the parents out of the decision-making process by refusing to let them speak at PPT meetings, making a unilateral decision to reduce services in early 2014, and refusing to consider alternative placements for the ninth grade. The evidence, however, did not support these claims. As a whole, the evidence painted the picture of a highly responsive board staff that was truly dedicated to encouraging parental participation and doing the very best it could for the Student. The school staff conducted many informal parent meetings in addition to six formal PPT meetings in the seventh and eighth grades. The board's highest level administrator overseeing special education attended the PPT meetings. Individual staff members responded to the many parent e-mail inquiries promptly and courteously.

11. Additionally, the PPT received, adopted and implemented several parental requests and recommendations, including setting aside time in each school day for teachers to review homework assignments with the student, adding a goal and services to improve the Student's organization of assignments and to include an auditory memory program. The PPT carefully reviewed and considered the neuropsychological evaluation secured by the parents. And, against its better judgment, the PPT even revised the Student's service delivery model in eighth grade, when the Student wanted to attend Unified Arts classes.

12. Although the Student argues that the Board's response to the Unified Arts incident itself constituted a procedural violation, the unilateral decisions of the Student and her parents left the Board with few, if any, appropriate options. Forcing the Student to attend her full IEP schedule was not likely to produce educational benefit or encourage cooperation. Moreover, once the parents announced that they were preparing for due process, it was reasonable for the Board to await the formal resolution process. In any event, a parent may not ask a school district to accede to her wishes and then try to punish it for doing so. *M.M. v. School District*, 303 F.3d 523, 333 n.14 (4th Cir. 2002); *Cleveland Heights-Univ. Heights City School District v. Boss*, 144 F.2d 391, 398 (6th Cir. 1998).

13. The Student also claims that the parents were not allowed to speak at a few contentious PPT meetings. The evidence, however, does not support this claim or place the responsibility only at the Board's feet. Instead, the testimony and exhibits reflect that the parents and their representatives were responsible for at least some of the acrimony and misunderstanding. Moreover, the fact that school staff disagreed with the parents or evaluators on some points, including the recommendation for a private placement, does not mean that the parents' point of view was not considered. A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the PPT team has participated in the IEP process in a meaningful way. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993).

14. The evidence did, however, establish several other material procedural violations of IDEA. Of particular concern were the PPT's repeated assurances that the Student was working at "grade level"

when in fact, she was falling farther and farther behind, at least in reading. At the end of the sixth grade, the Student was reading sixth grade material at an independent level and had a reading rate of 115 words per minute. Yet, by the end of the eighth grade, her reading rate had dropped to 102 words per minute. Moreover, Dr. Ciocca's academic achievement testing revealed that in January and February 2014, she was reading and doing mathematics well below grade level.

15. The Student's Case Manager testified during the hearings that the Student was reading on grade level in seventh and eighth grade *if* tested using "her accommodations and modifications". The qualification to apply accommodations and modifications, however, was not typically included in the various progress reports delivered to the PPT. Although it is true that the parents were well aware of the Student's extensive list of accommodations and modifications, there was nothing in the IEPs to specify which accommodations and modifications were used for which assessments or to what extent.

16. A board of education's inaccurate description of a student's actual levels of performance has been 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). In both of those cases, like the case here, inaccurate descriptions of the Student's level of performance materially violated the procedural requirement that the IEP reflect present levels of performance. Inaccurate descriptions also substantially interfered with the parents' ability to participate in the decision making process because they were kept in the dark about how their child was actually performing.

17. The Board's choice to set aside Pollock's diagnosis of "significant phonological weaknesses" and ignore her recommendation for "intensive phonological training" without further assessment or inquiry also violated IDEA's procedural mandate. A critical cornerstone of a board's procedural obligations under IDEA is to assess the Student in all suspected areas related to her disability. 20 U.S.C. Section 1414(b)(3); 34 C.F.R. Section 300.304(c)(4).

18. This decision impeded the child's right to a FAPE and caused a deprivation of educational benefit because it resulted in the absence of intense phonological training services and goals and objectives for phonological weaknesses. It also led to the Board's failure to assess the Student in reading fluency and consequently to provide services and goals and objectives in this area. As Ms. Pollock explained in her report, students with significant phonological weaknesses have difficulty with the reading process in general and struggle with reading comprehension. Yet, although Pollock clearly identified reading as a possible area of weakness related to the Student's disability, the PPT did not investigate that area and did not offer a specialized reading program or other services to address her need.

19. The PPT also failed in its procedural duty to investigate a possible disability related to the Student's anxiety and headaches. While it is true that the school staff and the PPT had mixed information about the Student's level of anxiety and the frequency of her headaches, the problem was of sufficient duration and significance to warrant evaluation as a possible area of need. Learning disabilities are known have a close association with anxiety, and the PPT should have evaluated this area.

20. The Board argues that no one ever recommended or requested that the school system evaluate

the Student for emotional or behavioral issues. While this is technically true, the school system, and not the pediatrician, neuropsychologist or parent, was expected to have expertise in both the field of education and the demands of IDEA. The failure of other professionals to accurately place the duty to assess the Student's anxiety did not absolve the board of its own responsibility. 20 U.S.C. Section 1414(b)(3); 34 C.F.R. Section 300.304(c)(4).

21. This procedural violation also impeded the Student's right to FAPE and deprived her of educational benefit. A more thorough investigation of the problem of anxiety and headaches may well have led to implementation of special education or related services or accommodations and modifications as well as goals and objectives that, in whole or in part, may have alleviated the Student's anxiety, promoted access to her education and met her educational needs.

22. A board of education is also required to ensure that assistive technology is made available to any child whose special education or related services program requires such technology. 34 C.F.R. Section 300.105. In this case, the board did not conduct an assistive technology evaluation until the end of the Student's eighth grade year. The evidence, however, demonstrated that the Student's program did include an FM system and that all students in the school had his or her own iPad. There was no evidence to suggest that any further technology was needed as part of the Student's program or that an assistive technology evaluation would have produced information necessary to development of an appropriate IEP.

23. The Board claims that a number of other procedural violations not expressly discussed here also impeded the student's right to FAPE or deprived her of educational benefits, such as failure to rigorously and faithfully implement all IEP elements from the first day of school forward. While there may have been some lapses in IEP implementation, the evidence did not show any of these to be of sufficient significance to support a deprivation of FAPE or to impede parental involvement.

24. The Board also faltered in its burden to prove by a preponderance of the evidence that it satisfied the substantive obligation to provide FAPE. In this regard, it was the Board's burden to prove that the IEPs at issue were 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.

25. Whether an IEP offers the student FAPE is assessed in light of information available at the time it 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.*

26. When an IEP is premised on a misunderstanding of important aspects of the Student's disability, it can hardly provide FAPE. *RR v. Wallingford Board of Education*, 101 L.R.P. 196 (D.Conn. 2001)(failure to correctly identify disability resulted in substantive FAPE violation); *Newtown Public Schools*, 107 L.R.P. 59412 (Ct SEA 2007)(same).

27. In this case, the Board operated under a misdiagnosis of important aspects of the Student's language based disability – her significant phonologic weakness and her related anxiety - when it

designed and implemented her seventh and eighth grade IEPs. As a result, the IEPs did not include services or incorporate goals and objectives¹⁴ to address these critical needs and was not reasonably designed to provide educational benefit.

28. A student's passing marks and progression from grade to grade are important factors in determining FAPE, but they are not dispositive. *Rowley* at 207 n. 28; *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1120-21 (2d Cir. 1997). Here in particular, the Student's grades and progression from level to level are not reliable indicators of progress because she had very extensive accommodations and modifications for class work and test taking, including the ability to use notes and study guides, modified content and retaking any test. She did well on the CMT MAS and DRA, but those tests are not reliable indicators of any particular level of achievement. Her performance on the STAR assessment did not reflect much progress, even if it was a valid indicator. By contrast, the Student did quite poorly on the standardized achievement tests that Dr. Ciocca administered. These indicated that she was functioning significantly below her grade level in several areas.

29. As a remedy for the failure to provide FAPE, the Student requests an order that the Board pay for two years of schooling, including summer programs¹⁵, at Ben Bronz Academy. 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).

30. 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).

31. The Board argues that the requested remedy amounts to a prospective placement at Ben Bronz Academy during a period that another local education agency, Region 19, is responsible for the Student's education. While this is true, the Student is not legally required to attend Region 19's school so long as she is educated elsewhere and Region 19 has no legal right to educate the Student. C.G.S. Section 10-186. Moreover, if the Hearing Officer cannot award prospective compensatory educational services there will be no remedy to address the denial of FAPE in this case, a result the law does not favor.

32. These facts are highly analogous to those presented in the many other cases where students were denied FAPE but are no longer under the respondent board's jurisdiction by the time a due process award is issued. Hearing Officers and courts have had no difficulty providing compensatory education remedies for students who have moved from, or aged out of, the respondent's district. *See Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285 (11th Cir. 2008) and *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 518, 524-27 (D.C. Cir. 2005).

¹⁴ There was one objective for fluency in the eighth grade, but this was too little too late.

¹⁵ The Student's IEPs included extended year programming in the seventh and eighth grades. From this it is reasonable to infer that the Student requires summer programming in order to benefit from her program. 34 C.F.R. Section 300.106.

33. The Board also objects to the proposed remedy because Ben Bronz Academy is highly segregated and is not the “least restrictive environment” for educating the Student. While this consideration is valid and important, the law is also well established that private placements are not held to the same standards as public schools in this regard. *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, 365 (2d Cir. 2006).

34. Impartial Hearing Offices in Connecticut have found Ben Bronz Academy to be an appropriate private placement for students with language and reading disabilities on several occasions. *R.R. v. Wallingford Board of Education*, 101 L.R.P. 196 (D. Conn. 2001); *Wallingford Board of Education*, 108 L.R.P. 60540 (Ct SEA 2008);

35. The fact that Ben Bronz Academy does not have a speech language therapist on staff and may not offer classes in art or computers similarly does not disqualify it as an appropriate school for the Student. *Frank G. v. Board of Education*, 459 F.3d 356, 365 (2d Cir. 2006)(private placement need not be perfect). Moreover, speech language services can be arranged in conjunction with or separate from the Ben Bronz Academy program.

36. The Student requests two years of compensatory services including summer programs, arguing that she had two years of an inappropriate programming from the Board. An award of compensatory services is not, however, 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).

37. The equitable factors here weigh against a full two school year remedy for a number of reasons. First, the expectation is that an intensive and highly individualized program at Ben Bronz Academy will quickly shore up the Student’s readiness for the academic demands of high school. Moreover, since the Student benefits from access to non-disabled peers, it would be inappropriate to extend her hiatus from public school for any longer than is absolutely necessary. Finally, there is every reason for confidence that E.O. Smith High School will provide an appropriate program to meet the Student’s needs as they will exist upon completion of the Ben Bronz program. E.O. Smith High School will have the benefit of the Student’s experience at Ben Bronz, as well as all of her evaluations and experience through the eighth grade, in determining her needs at that time.

FINAL DECISION AND ORDER:

1. The Board of Education did not provide the Student with a free appropriate public education between July 1, 2012 and July 1, 2014.

2. The Board of Education will pay all expenses associated with one academic year of educational programming, including extended year/summer services, at Ben Bronz Academy. The Ben Bronz program will commence either as soon as possible or with the start of the 2015-2016 School Year (to include the Summer of 2015) as designated by the Student’s parents.

3. If Ben Bronz Academy is not available or becomes unavailable for any reason, another similar institution approved by the Connecticut Department of Education and specializing in educating students

with language and learning disabilities that is acceptable to the Student's parents will be substituted.

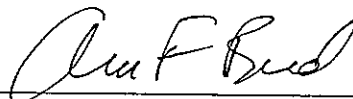
4. The Board of Education will provide transportation for the Student to attend Ben Bronz Academy (or a substituted school).

5. The Board of Education will provide speech language services for a minimum of one hour per week with goals and objectives determined by Ben Bronz Academy (or a substituted school) for the Student during or after school hours while she attends Ben Bronz Academy (or a substituted school). If such services are not provided at Ben Bronz Academy (or a substituted school), the Board of Education will also transport the Student to and from the location that such services are provided.

6. The Board of Education will also pay for an independent evaluation of the Student's anxiety and/or emotional status as they impact her education by a person of the Parents' choice that meets the Board of Education's criteria for such evaluations. The evaluation is to be conducted as soon as practical and shared with the Student's school team.

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