

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Southington Board of Education

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Appearing before: Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES

1. Was the change, if any, to the Student's program on October 3, 2012 in compliance with the law?
2. Is the program provided from October 3, 2012 in compliance with the law?
3. If not, what is the appropriate remedy, if any?

PROCEDURAL HISTORY

The Southington Board of Education ("BOE") received the Student's Request for Impartial Due Process Hearing on October 2, 2012. A prehearing conference was conducted on October 9, 2012. At that time, it was determined that the hearing would be bifurcated, with the Student's challenge to the manifestation determination heard and decided first. All other issues would be heard and decided in a second phase of the case.

The BOE filed a Motion to Dismiss on October 26, 2012 challenging the Hearing Officer's jurisdiction to enforce a mediation agreement between the parties. On November 2, 2012, the Hearing Officer issued a Decision and Order re: BOE's Motion to Dismiss, granting that motion.

Evidentiary hearings in the first phase of the case, relating to the manifestation determination, were conducted on October 31, 2012 and November 1, 7 and 9, 2012. Both parties submitted witness lists and proposed exhibits. During the hearings the Student's Exhibits PA-1 through P-22 ("P-N") were entered as full exhibits and the BOE's Exhibits B-1 through B-31; B-33; B-34; B-36; B-37, p. 1; B-38 through B-41; and B-43 – B-54 were entered as full exhibits. ("B-N") Hearing Officer Exhibits HO-1 through HO-3 were also admitted.

The Student presented testimony from Joseph Erardi, PhD; Kyle Doratz; Orv Karan, PhD; and the Student's Mother during the hearings. The BOE then presented testimony from Perri Murdica, PhD; Helen Crowley; Michael Drury; Daniel Affrunti, PhD; Jennifer Wrinn and Beth Ozkan.

This Hearing Officer issued a Decision and Order Re: Manifestation Determination on November 16, 2012, upholding the determination that the misconduct at issue was not a manifestation of the Student's disability and ordering that the BOE could proceed with the expulsion process in the same manner and process that it would with a nondisabled student, and directing that the Student's IEP Team convene to develop an interim alternative educational setting for the Student. On December 3, 2012, the Student withdrew his claim that the Student's 2012/2013 School Year IEP was not appropriate.

Additional evidentiary hearings were conducted in the second phase of the case on January 15, 24 and 31, 2013, February 5, 2013, March 13 and 27, 2013 and April 4, 2013. Exhibits and testimonial evidence from the first phase of the case were incorporated for use in the second phase. During these hearings, additional Student Exhibits P-23 through P-31 and P-33 through P-35 were admitted as full exhibits. The BOE's additional Exhibits B-55 through B-77 were also admitted as full exhibits.

In the second phase, the BOE presented testimony from Nancy Chiero, Joseph Eddy, Beth Ozkan, Kathryn Reinhard, Michael Drury, Helen Crowley, and Craig Kosinski, PhD. The Student presented testimony from Orv Karan, PhD, Rose Givens, the Student and the Student's mother in the second phase.

This Hearing Officer reviewed and considered all of the evidence presented in this matter. Specific references to certain evidence here are not meant to exclude other evidence. All motions and objections not previously ruled on are hereby overruled. Moreover, to the extent that the Summary, Procedural History and Findings of Fact actually represent Conclusions of Law, they should be considered as such, and vice versa. SAS Institute Inc. v H Computer Systems, Inc., 605 F. Supp. 816, 817 (M.D. Tenn. 1985).

SUMMARY

The Student is an eighteen-year-old with a disability category of Emotional Disturbance who is enrolled at SHS. He was arrested on September 5, 2012 on two counts of sale of marijuana and one count of sale of marijuana within 1500 feet of a school. The Student's Individualized Education Program ("IEP") Team conducted a manifestation determination and determined that the misconduct was not a manifestation of the Student's disability. The Student¹ brought this proceeding to challenge the manifestation determination and also the propriety of his program. Phase 1 of this case addressed the challenge to the manifestation determination. This Impartial Hearing Officer upheld the IEP Team's manifestation determination. Phase 2 of the case addressed the Student's Alternative Education Program ("AEP"). This Decision and Order relates to the phase 2 issues only.

¹ The term "Student" here includes not only the Student himself but also, as the context dictates, his mother. The Student turned 18 on July 14, 2012. Soon thereafter, on August 3, 2012, he appointed his mother to make educational decisions on his behalf. (B-28)

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes ("C.G.S.") §10-76h and related regulations, 20 United States Code ("U.S.C.") §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACT

1. The Student is an eighteen-year-old male student with a disability in his senior year at SHS. He has been identified as a student in need of special education and related services since he was a toddler. (B-5)
2. The Student was identified under the disability category of "Other Health Impaired-ADD/ADHD" for most of his school career. As a youngster, he also suffered from developmental and language disorders. (B-5)
3. In November 2011, the Student's disability label was changed to Emotional Disturbance in response to a psychiatric report. (B-5; PA-2; PA-3; Testimony of Mother and Karan "___")
4. That report cited the following Axis I diagnoses for the Student:

313.81 Oppositional Defiant Disorder
314.9 Attention Deficit Hyperactivity Disorder NOS
304.30 Cannabis Dependence
299.80 Pervasive Developmental Disorder NOS (Mild Residual Symptoms)

(Mother; B-5)
5. At the time of these hearings, the Student's disability was exhibited in, among other things, impulsivity, spontaneous or quick decision-making, failure to acknowledge the consequences of his actions, inattention, a tendency to be easily influenced by peers, and a tendency to seek immediate gratification. (Karan; Mother; Crowley; Affrunti; Wrinn)
6. The Student's high school career, including his senior year, has been marked by significant disciplinary exclusions. All in all, he was excluded from school for disciplinary reasons for a total of 327 school days in his four years of high school. (Mother)
7. Despite these facts, the Student has earned acceptable grades, and entered his senior year of high school on track to earn a high school diploma at the end of the 2012/2013 School Year. (P-7)
8. During the Summer of 2012 and the 2012/2013 School Year, the Student was consistently respectful and polite toward the adults involved with his education. He did not present a risk of physical injury to himself or others. (B-29; B-30; B-55)

9. Near the end of the Student's junior year of high school, he filed a Request for Impartial Due Process Hearing. (B-14) That request gave rise to a Mediation Agreement between the BOE and the Student dated June 22, 2012 ("Mediation Agreement"). Among other things, the Mediation Agreement required the BOE to develop IEPs for the Summer of 2012 ("ESY 2012") and for the 2012/2013 School Year that included a plan to meet the Student's transitional needs and included completion of academic requirements for a SHS Diploma. (P-1)
10. The Mediation Agreement also required the BOE to engage Orv Karan, PhD as an "Independent Consultant" to assist the IEP Team with these tasks. (P-1) Dr. Karan is a qualified psychologist and academician who was already familiar with the Student and his educational program as the result of an "ongoing close relationship with the family as an educational advocate." (B-5)
11. The Mediation Agreement also provided that the BOE would engage a private agency, Transitional Education Unlimited ("TEU"), to perform a transitional assessment during the Summer of 2012 and report to the IEP Team with "detailed, written recommendations on an appropriate transition program" for the Student's 2012/2013 School Year program. (P-1)
12. Pursuant to the Mediation Agreement, an ESY 2012 program was developed and provided during July and August 2012. That program was described in the 2012 ESY IEP's Service Grid as consisting of the following "Special Education, Related Services and Regular Education:"

Special Education Services:

"Language Arts instruction" for 15 hours per week by "Special Education Teacher" through one on one instruction in a "Homebound" site to address goals 1 and 2;

"Vocational/transitional instruction" for 3 hours per week by "Vocational Coordinator" through one on one instruction in a "Community Based" Site to address goals 5 and 6;

"Vocational/transitional instruction" for 12 hours per week by "Vocational Coordinator" through one on one instruction in a "Community Based" Site to address goals 3 through 6.

Related Services:

None

Description of Participation in General Education:

ESY; worksite experiential

(P-25)

13. That summer, the Student received one on one instruction from a special education teacher in Language Arts at the Southington Public Library for approximately 15 hours each week. (B-20; Drury) In addition, each afternoon an employee of TEU drove the Student from the library to a restaurant for lunch, and then to another restaurant at a local amusement park, where the Student performed unskilled restaurant work for a few hours each afternoon. TEU remained on site at or near the restaurant while the Student worked, so as to be available to him in the case of need. TEU staff then drove the Student home at the end of the day. (B-29; Givens)
14. During the drive to and from lunch and the restaurant work site, TEU engaged the Student in conversations about the work he was performing, how he felt about the work, his coworkers, and

any problems he was having or might expect. They also discussed personal issues not involving the work or school. (Givens) Dr. Karan described this aspect of TEU's service as "incidental counseling."² (B-30)

15. The BOE's professional staff, not TEU, arranged the restaurant work experience. (Chiero) The Student received all training in the work tasks from the restaurant staff as part of an orientation provided to all summer workers. The Student did not earn an hourly wage from the restaurant, but was instead paid a stipend by TEU.³ The BOE's Vocational Coordinator neither implemented nor supervised this activity. (Givens; B-29)
16. TEU staff also took the Student shopping on at least one occasion. During that experience, TEU staff explained to the Student how to comparison shop. (Givens)
17. The TEU staff person was a professional educator, but was not certified as a special education instructor. (Givens)
18. The Student and the BOE each understood that the ESY 2012 IEP's references to "Vocational/transitional instruction" were intended to describe the service that was provided by TEU in ESY 2012. With the possible exception of the discussion about comparison-shopping, however, the service that TEU provided was not "special education" because it was not specially designed instruction to meet the Student's unique needs. (Givens; Drury)
19. Accordingly, the 2012 ESY Service Grid's description of the program was not accurate. TEU did not provide special education services for the Student, the BOE's vocational coordinator did not implement or supervise any service, and no instruction or other service was provided on a "homebound" basis. (Givens; Chiero; Ozkan)
20. Moreover, although TEU provided "incidental counseling" and the TEU Staff member referred to herself as a "job coach," the Student's ESY 2012 IEP did not include "incidental counseling" or any other service, including a "job coach," as a related service. (P-25; Givens)
21. Dr. Karan described the ESY 2012 IEP as being very successful. (Karan; B-30) Neither the Student nor Dr. Karan objected to any aspect of the ESY 2012 program.
22. The Student's IEP Team convened on three occasions in late August and early September 2012 for lengthy meetings to develop an IEP for the 2012/2013 School Year. (Ozkan; Murdica) The IEP Team reviewed TEU's "Individualized Community-Based Assessment Report" as part of its deliberations. That report evaluated the Student's performance of various vocational and independent living skills that had been identified for assessment. With the exception of money

² Dr. Karan wrote: "[t]he rapport and trust that developed over time with [TEU Staff] contributed to [the Student's] willingness to be open and share personal information with her. The rides to and from work also enabled natural opportunities for debriefing and provided numerous teachable moments and incidental counseling opportunities." (B-30)

³ Like the BOE, TEU encountered administrative difficulties in paying the stipend, and those payments to the Student were delayed rather than issued every week. (B-29)

management, which was not assessed because TEU was unable to provide the Student with regular paychecks, the Student showed a high skill level in all areas. (B-29)

23. According to TEU, the Student displayed self-control in the face of frustrating, annoying or provoking situations, followed through on everyday tasks, commitments and responsibilities, interacted appropriately with co-workers and supervisors alike, showed resiliency when things did not go his way, managed his time, was able to delay gratification, and made rational decisions. He met all of his employer's standards for performing the tasks of his position and did not require any accommodations, supports or special strategies. As the evaluator concluded, the Student "clearly has the skills to participate in competitive employment and has a good understanding of Expected Work Behaviors." (B-29)

24. Among TEU's list of recommendations for the Student's 2012/2013 School Year IEP was the following:

Part-time Employment.

It is recommended that consideration be given to [the Student] participating in regular, part-time work, where he can continue to develop his work ethic, gain experience, and practice many of the skills to be taught during his Transition program. It is recommended that [the Student] consider working shifts that are commensurate with his peers.

It is recommended that [the Student] work with a coach initially to assist [him] in learning and organizing tasks. Following this, the coach/school should work with [the Student] on mapping out the supervisory environment, then teaching self-advocacy skills, where he can learn to shape himself as an independent worker. Once [the Student] is firmly established in his job routine, coaching should titrate to monitoring. Skills could be taught in a transition program, and progress monitored at the job site via a coach, by regular check-ins with [the Student] and his supervisors.

(B-29)

25. Dr. Karan also made a number of recommendations to the IEP Team in his report. One of Dr. Karan's recommendations was that the BOE again engage TEU to provide "vocational and career experiences" for the Student. As Dr. Karan explained, TEU's responsibilities should include picking the Student up at SHS and driving him to a location such as the library for one hour per day to receive instruction in literacy, primarily reading comprehension as it relates to employment, careers and the rules of the road for driving. (B-30)
26. In addition, Dr. Karan recommended that TEU should work with BOE staff to secure a job for the Student and also to identify employers willing to allow the Student to visit work sites that are compatible with his career interests for short periods of time in order to provide him with real world job exposures. (B-30) Dr. Karan also recommended that, as part of these services, TEU provide the Student with "incidental counseling" as it had during the 2012 ESY program. (Karan)
27. The BOE agreed to provide the Student one hour of instruction each day at the library (including for comprehension of the drivers' manual) on a one on one basis after an short school day, as

well as a variety of job exposure activities. The BOE rejected the Student's proposal that it engage TEU as a provider of these services. Instead, the BOE designated its own staff to provide the daily one on one instruction as well as the job exposure experiences for the Student. (P-9; Murdica; Ozkan)

28. The IEP Team ultimately drafted an IEP for the 2012/2013 School Year that was used at the start of the school year.⁴ The 2012/2013 School Year IEP includes 9 goals with 39 objectives, outlined as follows:

- Goals 1 to 4 relates to "Academic/Cognitive"
- Goal 5 relates to "Communication"
- Goal 6 relates to "Post Secondary Education/Training"
- Goal 7 relates to "Employment"
- Goals 8 and 9 relate to "Independent Living"

29. The 2012/2013 School Year IEP's Service Grid lists the following under "Special Education, Related Services and Regular Education:"

Special Education Services:

English instruction for 3.75 hours per week (4.5 hours per 6 day cycle) by Special Education Teacher through small group instruction in a self contained classroom site to address goals 1 and 3 through 6;

Academic support for 5 hours per week by a Paraprofessional through one on one instruction in a "Community Based" Site to address goals 1, 2 and 5;

Vocational/transitional instruction for 10 hours per week by a Special Education Teacher in a "Community Based" Site to address goals 5 through 9.

Related Services:

None

Description of Participation in General Education:

CWEDO, Technology, Civics, PE

(P-9)

30. The IEP also stated, under the heading of "PPT Recommendations" that, among other things:

To complete credit to earn a SHS diploma, the Student will "attend classes at SHS for periods one through 4 daily and Period 5 for PE instruction . . . Courses will include Engineering Graphics, CWEDO, Current Issues Semester 1, American Culture Semester 2, Senior English (self-contained) and PE"

"Academic support was removed from the initial schedule and will be provided after school on a daily basis"

⁴ The Student initially claimed that the 2012/23 IEP was not appropriate. He later withdrew that part of his claim. (P-14)

The “[Student] will be provided with a job coach in the community setting for each vocational experiential placement,” that “[a] stipend, to be determined, will be provided for [the Student’s] participation in Vocational Job experientials.”

31. Under the Heading of PPT Meeting Summary, the IEP states, among other things, that:

The Student disagrees with the BOE’s decision to provide the “vocational program and . . . continued vocational, independent living, and academic support programming” provided by TEU per Dr. Karan’s recommendation; and

The Student disagrees with the BOE’s decision not to provide the Student with “driving instruction in order to earn his license per Dr. Karan’s recommendation.”⁵

(P-9)

32. As with the ESY 2012 Service Grid, the 2012/2013 School Year Service Grid mischaracterized some of the services as special education services when in fact they were related services. The IEP Team, for instance, understood the Student’s transition program⁶ to consist of the following three elements:

Special education instruction by a special education teacher in a self contained special education class at SHS called “Senior English.” This special education class would also address all of the Student’s goals and provide access to the general curriculum and credit toward a diploma.

Regular education instruction by a regular education teacher in a regular education class at SHS called Cooperative Work Experience: Diversified Occupation (“CWEDO”) to address all of his goals and provide access to the general curriculum and credit toward a diploma.

A series of experiences at job sites arranged and monitored by the BOE’s professional staff in order to expose the Student to various career options that might match his interests.

⁵ The BOE did agree to provide special education literacy instruction as part of “academic support”, which would include help with the drivers’ manual. (B-34)

⁶ All students over 15 years of age are to have transition services as part of their IEP. “Transition services” are defined as:

[a] coordinated set of activities . . . that . . . is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child . . . to facilitate the child’s movement from school to post-school activities; . . . based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; . . . and includes instruction; related services; community experiences; employment and other post-school living objectives and, if appropriate acquisition of daily living skills. . . . *Transition services . . . may be special education if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.*

34 C.F.R. § 300.43 (emphasis added)

33. The third element of the transition plan – job experience activities – was incorrectly identified as a “special education service”⁷ when in fact this service is more accurately described as a “related service.”⁸
34. The evidence established that the IEP Team did not expect or understand that the series of experiences at job sites would include specially designed instruction at a job site as indicated on the Service Grid. The Team did not intend to teach the Student job tasks or even basic workplace skills as part of this program. Notably, the TEU Assessment Report indicated that the Student “clearly has the skills to participate in competitive employment and has a good understanding of Expected Work Behaviors.” (B-29; Ozkan; Murdica; Karan)
35. Instead, the IEP Team understood that it was adopting Dr. Karan’s recommendation that the student have a variety of experiences at job sites in order to facilitate his exploration of career options. (B-30; Ozkan)
36. Although the IEP stated that a “job coach” would be provided for the job experiences, it did not define the precise role of the job coach or specify the qualifications of a job coach. Indeed, there were divergent views among IEP Team members as to the role of a “job coach.” Dr. Karan described the job coach as someone to provide “incidental counseling” to the Student on an as needed basis. On the other hand, TEU’s report referred to a “coach” as someone who would “assist [the Student] in learning and organizing [job] tasks . . . mapping out the supervisory environment, . . . teaching self-advocacy skills . . . to shape himself as an independent worker” at a part time job. (B-29; B-30; B-36)
37. The IEP appropriately did not adopt the recommendation that the Student be provided with a part time job. BOE staff did help the Student apply for work, but his busy schedule did not allow time for the jobs that might have been available to him. (Chiero)
38. The BOE began to implement the 2012/2013 School Year IEP – except the job experience activities - for the first few days of the 2012/2013 School Year. The job experiences did not begin immediately because, as Dr. Karan recognized, it took some time for BOE Staff to arrange these experiences. (B-30; Crowley; Chiero)
39. On September 5, 2012, just a few days into the new school year, the Superintendent and the administrative staff of the Southington Public Schools (“SPS”) learned that the Student had been

⁷ “[S]pecial education” for instance, is defined as follows:

Special education means specially designed instruction . . . to meet the unique needs of a child with a disability. 34 C.F.R. §300.39

⁸ “Related service” are:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education”

34 C.F.R. §300.34

arrested that day on two counts of sale of marijuana (C.G.S. § 21a-277b) and one count of sale of marijuana within 1500 feet of a school. (C.G.S. § 21a-278a(b)). (Erardi; B-37)

40. The Student was immediately suspended from school for ten school days. (Crowley) In the meantime, the BOE scheduled a hearing of its governing body for October 2, 2012 to consider the Superintendent's recommendation that the Student be expelled. (B-43)
41. The Student's IEP Team met on September 20, 2012 to conduct a manifestation determination and to begin to plan an AEP for the Student in the event of expulsion. (B-42; Murdica; Drury; Ozkan) The Team was not able to complete its discussion of the AEP on that day. (B-42)
42. The Student returned to school on September 25, 2012, and resumed the program that had been provided before September 5, 2012. (Crowley) The Student filed this Request for Impartial Due Process Hearing hours before the time set for the October 2, 2012 expulsion hearing. (P-14) The Student then requested that the expulsion hearing be postponed. (Erardi) With the assistance of their attorneys, the Student and the BOE's Superintendent of Schools entered into an agreement to postpone the expulsion hearing until after the challenge to the manifestation determination could be resolved. The agreement states as follows:

The Parent and the Superintendent of Schools hereby agree to postpone the scheduled October 2, 2012 expulsion hearing pending the outcome of the dispute resolution process regarding the Parent's October 2, due process complaint.

The [BOE] understands that the parent reserves the right to contest the appropriateness of the alternative educational program provided to the student, which will commence October 3, 2012. The student's receipt of tutoring services and participation in an internship, an alternative education program offered by the school district pending the expulsion hearing, shall not act as a waiver of the parent's right to contest the issues raised in her October 2nd due process complaint.

If the [BOE] prevails in the due process complaint, the students' expulsion hearing will be convened in an expeditious manner.

(B-45)

43. On and after October 3, 2012, the Student did not attend SHS, and the BOE provided the AEP that was initially discussed at the IEP Team meeting of September 20, 2012 and that was described in the October 2, 2013 Agreement between the BOE and the Student. (Crowley; Drury)
44. The AEP included the following:

The same 9 goals with 39 objectives were continued from the 2012/2013 School Year IEP (B-58)

Special Education, Related Services and Regular Education

Special Education Services

Special education instruction for 11 hours per week by a special education teacher through one to one instruction at the public library to address the general curriculum for English and Current Issues⁹ as well as the Student's goals.

Related Services Job experience activities for 6 hours per week with a member of the community (not a professional educator), monitored by a professional educator, in the community.

Participation in General Education

General education instruction for 4 hours per week by general education teachers, through one to one instruction at the public library to address the general curriculum for CAD¹⁰ and CWEDO¹¹ as well as the Student's goals.

(B-58; Murdica; Ozkan; Chiero; Reinhard; Kosinski)

45. The AEP was later discussed in more detail and adopted by the IEP Team on November 14, 2012. (*Id*) The record of the November 14, 2012 meeting reflects the basic elements of the AEP under the heading "List of PPT Recommendations" as follows:

(2) Alternative Program if the hearing officer upholds the 9/20/12 Manifestation Determination PPT and if student is expelled from Southington High School:

- Goals/objectives that were shared previously and reviewed at the 11/14/12 PPT
- 1:1 support for completion of academic work in regular education and special education subject areas
- Job Coach support for career exploration activities, which will be individualized for [the Student]
- Academic support to include review of DMV Driver's Manual (license/training materials)
- Varied career exploration activities
- Southington staff to supervise and implement all aspects of the alternative program
- 15 hours per week for academic instruction and homework completion support
- Continued provision of lunch money
- Transportation provided by Southington Public Schools
- The district clarified its financial support of student during career exploration at 11-14 PPT. Stipend of \$50/week will be provided so that student can meet his goals in the area of independent living as it pertains to money management and in skills taught through CWEDO.
- The district clarified that the student will receive a minimum of 6 hours/week of career exploration activities in an alternative program . . . The district will continue to support [the Student] in his efforts to find a paying position in the Southington Community.

⁹ "Current Issues" is a Civics class.

¹⁰ "CAD" is "Computer Assisted Drawing" also known as "Engineering Graphics."

¹¹ "CWEDO" is "Cooperative Work Experiences: Diversified Occupations."

(B-58)

46. The IEP Team did not prepare or issue a stand-alone document exclusively reflecting the Student's AEP, as distinct from the IEP that was issued for the 2012/2013 School Year. Nor did the IEP Team prepare or issue a Service Grid to reflect the AEP's elements, services or delivery sites. (B-58)
47. Although it was not referenced in the IEP documents as a related service or otherwise, several of the adults who worked with the Student on his AEP engaged him in discussions of his problems and issues both related and unrelated to the AEP on an "as needed" basis. (Reinhard; Drury; Eddy)
48. The most significant difference between the 2012/2013 School Year IEP and the AEP was that under the AEP, regular education and special education instruction was to be delivered on a one to one basis in the public library rather than in mainstream and self contained classes at SHS, and for slightly fewer hours each week. (B-58; B-32; B-47; Murdica)
49. The BOE's professional educators believed, based on both general experience and specific experience with the Student, that one on one instruction is a more efficient form of instruction than the group instruction otherwise deployed in the high school. They also felt that the Student would benefit from the one on one delivery method because he tends to be more attentive and less impulsive in a one on one setting than in the classroom. Accordingly, they were confident that the regular education courses of Current Events, CAD, CWEDO and PE as well as the special education Senior English class and academic support could be taught to the Student one on one. They believed that the Student could also earn the credit needed to graduate with 15 hours of one on one instruction per week. (Ozkan; Drury; Kosinski)
50. The library was an appropriate choice as a site for the one to one instruction because it has a relatively quiet room on the second floor with tables and chairs. It is open to the public and lies in the center of town where there are restaurants and retail businesses. (Kosinski; Reinhard)
51. The library is also an appropriate location because other non-disabled students receive one on one instruction in the library. Although the Student received instruction one on one, he was in the vicinity of other non-disabled students with whom he occasionally had brief encounters. (Murdica; Reinhard; Kosinski)
52. With a few minor exceptions¹², the AEP provided to the Student remained fundamentally unchanged after October 3, 2012 through the relevant time.

¹² At one point, the BOE directed the Student's special education instructor to also accompany the Student to his job experience site as well as lunch and then the library for his afternoon instruction. During this service, the instructor was to engage the Student in discussion about his activities, any problems he was having, and anything else he wanted to discuss, much as TEU had done in the Summer. The Student objected to this new activity. He did not want an adult to attend at his job experience or be

53. The IEP Team, including the Student's mother, conducted an extensive discussion on November 14, 2012¹³ about the special and regular education instruction being provided to the Student at the library, including a review of written and oral reports of the topics covered and the Student's progress in the both the curriculum and his goals and objectives. At the meeting, BOE staff reported that the Student made at least satisfactory progress in most of the objectives for his nine goals and was doing well in his academics. (B-56; B-57; Drury; Ozkan; Murdica; Kosinski; Reinhard).
54. As was discussed, some objectives had not yet been introduced at the time of the meeting. This was not unusual, as much of the school year remained ahead. Team members also explained that some objectives would be introduced later in the school year as aligned topics were covered in the general education CWEDO curriculum and in the special education "Senior English" course as appropriate. (Id)
55. As was also discussed, some objectives had been or were planned to be addressed at sites other than those suggested on the 2012/2013 School Year Service Grid. The Service Grid was not designed or intended as a comprehensive or exclusive road map designating when, where or by whom particular goals or objectives would be addressed. (Ozkan; Drury; Kosinski; Murdica)
56. The Student's IEP goals and objectives are all capable of being addressed in a one on one setting as well as in groups or in the community. (P 9) The IEP Team intended for the Student's goals and objections to be addressed in all settings, as appropriate. (Ozkan; Murdica; Drury).
57. The IEP Team also reviewed information from an employer who was then providing the Student with a job exposure. The employer reported that the Student was courteous, respectful and "very resourceful" among other positive attributes. (B-55)
58. On November 16, 2012 this Hearing Officer issued a decision upholding the IEP Team's manifestation determination. Soon thereafter, on December 14, 2012, the BOE convened an evidentiary hearing and expelled the Student until October 13, 2013. (B-64)

CONCLUSIONS OF LAW AND DISCUSSION

1. A student who believes that his IEP does not comply with the Disabilities Education Improvement Act ("IDEA"), may file a due process complaint with the Connecticut Department of Education to challenge the IEP. 20 U.S.C. §§ 1415(b)(6); 34 C.F.R. § 300.507; R.C.S.A. § 10-76h-2.

with him for lunch or travel with him between activities. He called Dr. Karan and voiced these objections. Dr. Karan agreed with the Student and as a result, the activity was discontinued. (Reinhard)

¹³ The IEP Team also discussed the elements of the Student's IEP should he not be expelled and returned to SHS at the November 14, 2012 Meeting.

2. The IDEA requires that IEPs must provide students with disabilities a “free appropriate public education” (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A).
3. IDEA does not articulate a specific level of educational benefit that must be provided or mandate that an educational program maximize the student’s potential. Instead, IDEA mandates only that the program must be “individually designed to provide educational benefit” to the student. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 201 (1982). Thus, in order to satisfy IDEA’s substantive demands, an IEP must be “likely to produce progress, not regression” and provide an opportunity for more than “trivial advancement.” Walczak v. Florida Union Free School District, 142 F.3d 119, 130 (2d Cir. 1998).
4. An IEP is not required to “furnish . . . every special service necessary to maximize each handicapped child’s potential.” Grim v. Rhinebeck Central School District, 346 F.3d 377, 379 (2d Cir. 2003).
5. The burden to prove that an IEP complies with the IDEA’s requirements rests on the BOE. Schaffer v. Weast, 546 U.S. 49, 62 (2005); R.C.S.A. § 10-76h-14.
6. The test of a board of education’s compliance with IDEA’s procedural demands looks not only to the procedural failure itself, but also to whether the failure significantly impeded the parent’s “opportunity to participate in the decision making process” or whether the failure “caused a deprivation of educational benefits” to the student. RE v. New York City Department of Education, 694 F.3d 167, 189-90 (2d Cir. 2012).
7. In addition, IDEA’s Least Restrictive Environment (“LRE”) provisions require that students “with disabilities . . . [must be] educated with children who are nondisabled” and “[s]pecial classes, separate school, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the [student’s] disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114.
8. A board of education may discipline a student with a disability under the same conditions that it would discipline a student without a disability if the school, the student’s parents and relevant members of the student’s IEP team determine that: (1) the student’s misconduct was not caused by, and did not have a direct and substantial relationship to, the student’s disability, and (2) the misconduct was not the direct result of the school’s failure to implement the student’s IEP. 20 U.S.C. § 1415(k)(1)(E).
9. IDEA requires that a BOE must provide an expelled student with an AEP that: 1) enables the student to continue to participate in the general education curriculum in another setting; and 2) enables the student to progress toward meeting his goals and objectives. 34 C.F.R. § 300.530(d)(1)(i).

10. The AEP need not replicate the student's IEP. A board of education "is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline." 71 Fed. Reg. 46,716 (2006).
11. The student's IEP Team is charged with the responsibility to determine the "special education and related services" necessary to "enable the child to continue to participate in his general curriculum and to progress toward meeting the goals set out in the child's IEP." (*Id.*)
12. The BOE met its burden to show that the changes made to the Student's program on October 3, 2012 complied with the law. There was no dispute, for instance, that the Student was removed from SHS and an AEP was substituted for his previous program by stipulation between the Student and the BOE's Superintendent on October 2, 2012 with the assistance of counsel. While that agreement may not be a model of clarity, it leaves no doubt that the Student agreed that the AEP first proposed for discussion at the September 20, 2012 IEP Team meeting would be implemented instead of his regular program.
13. Such agreements are acceptable under IDEA. 34 C.F.R. § 300.531; 71 Fed. Reg. 46,726 (2006). Significantly, the BOE would have been within its rights to conduct the expulsion hearing on October 2, 2012 and expel the Student if it had not agreed to the delay. As it happened, the AEP was put into effect by agreement of the Student and the Superintendent before it was fully reviewed and adopted by the IEP Team only because the Student requested that the expulsion hearing be postponed.
14. When the IEP Team subsequently adopted the AEP on November 14, 2012, it had already been in effect for nearly six weeks. The Team had an opportunity to fully discuss the AEP as it had been working and as it would go forward, as well as to review the Student's progress in the plan. The same AEP remained in effect through December 14, 2012, when the BOE expelled the Student, and thereafter.
15. The first issue, therefore, is resolved in the affirmative: The AEP was adopted and substituted for the Student's then current program by agreement in accordance with IDEA.
16. The second issue, whether the AEP meets IDEA's substantive standard for alternative educational programs, is also resolved in the affirmative. The evidence was overwhelming that the AEP was designed to enable the Student to continue to participate in his general curriculum in another setting and to progress toward meeting his goals. 34 C.F.R. § 300.530(d)(1)(i). In particular, the AEP allows the Student to receive one on one instruction from either the same instructor who teaches the subject at SHS or from an instructor who is very familiar with the particular course. The one on one instruction is designed to follow the same sequence as the instruction at SHS.
17. The professional educator members of the IEP Team determined that the one on one instruction offered as part of the AEP allowed a more efficient and speedier delivery of the material than possible in the regular education classroom or even the self contained classroom at SHS. As a

result, they reasoned that fewer hours of instruction were needed in a one on one setting to deliver the same content.

18. The IEP Team also believed, from general experience as well as specific work with the Student that he would benefit from the one on one delivery method. The Student tends to be more attentive and less impulsive in a one on one setting than in the classroom. In addition, the AEP allowed the Student to make progress on his goals and objectives, since they would be addressed through the CWEDO and Senior English curriculum as well as individualized instruction and job exposure activities in the community.
19. The Student argues for an IDEA violation because, he claims, the instruction to be provided as part of his transition program was to be conducted at the library rather than at a “community based” site. The Student’s premise that the library is not a “community based” site is debatable. The library is a public resource, frequented by disabled and nondisabled members of the community.
20. Yet, even if the library is not a “community based” site, the decision to educate the student there did not violate IDEA. The authority cited by the Student for the proposition that all transition services must be provided in the community (absent safety concerns not present here) does not support his claim. In Letter to Spitzer-Resnick, Swedeen and Pugh, 59 IDELR 230 (2012) the Office of Special Education Programs (“OSEP”) instructed that work placements implemented as part of a transition plan should enable disabled students to work alongside nondisabled individuals. OSEP did not generalize this guidance, however, to *all* transition services including those that are not “work placements.” In this case, the Student’s transition services include special and mainstream instruction provided in the library as well as job experiences in the community, where he works alongside nondisabled individuals.
21. Indeed, the only elements of the Student’s transition services under the AEP designated to be implemented at the library are parts of his regular education instruction in CWEDO and special education including Senior English. The IEP Team never designated these services for delivery in the community: they would have been delivered at SHS in the mainstream and in a self contained class if not for the expulsion.
22. As OSEP has recognized, IDEA does not require that expelled students with disabilities be educated in the public school setting “alongside nondisabled peers:”

The Act does not require that children with disabilities suspended or expelled for disciplinary reasons continue to be educated with children who are not disabled during the period of their removal. We believe it is important to ensure that children with disabilities who are suspended or expelled from school receive appropriate services, while preserving the flexibility of school personnel to remove a child from school, when necessary, and to determine how best to address the child’s needs during periods of removal and where services are to be provided to the child during periods of removal.

71 Fed. Reg. 46,586 (2006)

23. If IDEA were interpreted to require *all* transitional services for disabled students to be provided in the community, then all disabled high school students would be partially educated in the community. Such an interpretation would actually further segregate disabled students from their peers by mandating programming outside of the high school for disabled students, while most normal peers are educated inside of the high school.
24. IDEA's critical concern that disabled students be educated in the least restrictive environment seeks to avoid discrimination and segregation. This does not mean that services must be provided in the community as opposed to schools or public libraries, but only that services may not be provided differently for disabled and nondisabled students under the same circumstances.
25. IDEA's demand for education in the least restrictive environment was met by the BOE here, because the Student was educated in a public place occupied by nondisabled people and in the same manner as are nondisabled students who receive one on one instruction.
26. The Student also argues that an IDEA violation occurred because, he says, the AEP was developed outside of the IEP process. This alleged procedural deficit was not identified in the Student's Request for Special Education Hearing, and therefore is beyond the scope of this hearing. The claim also misses the mark, as it is based largely on the circumstance that the Student's AEP does not precisely match the Service Grid for the 2012/2013 School Year IEP.
27. While there are disparities between the Service Grid and the AEP, this is not evidence that decisions were made outside of the IEP process. First, the Service Grid was not written to reflect the AEP. Instead, the "PPT Recommendations" section of the November 14, 2012 document describes the AEP. Second, the IEP Team discussed the Student's AEP, including how and where goals and objectives were being addressed and the sequence of instruction at the November 14, 2012 meeting. Thus, even if the documentation did not fully describe the program, any resulting procedural deficit did not deprive the Student of an opportunity to participate in the decision making process or deprive the Student of educational benefit.
28. Finally, the evidence established that the IEP Team did not intend to provide special education instruction in the community, even in the 2012/2013 IEP. Instead, the Team intended to provide a related service in the community, consisting of a variety of job experience activities designed to expose the Student to careers matching his interests. The plan was based on Dr. Karan's recommendation, which likewise did not contemplate instruction with a special education instructor in a community setting.

FINAL DECISION AND ORDER

1. The changes to the Student's program on October 3, 2012 were in compliance with the law.
2. The program provided from October 3, 2012 was in compliance with the law.