

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Danbury Board of Education

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Appearing on Behalf of the Board: Attorney Rebecca R. Santiago
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Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUES:

1. Was the program provided by the Board for the 2010-2011 school year appropriate and did it provide the Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?
2. Is the program provided by the Board for the 2011-2012 school year appropriate and does it provide the Student with FAPE in the LRE? If not;
3. Does Easton Country Day School provide the Student with FAPE in the LRE?
4. Should the Board pay for the placement of the Student at Easton Country Day School for the 2011-2012 school year?

FINAL DECISION AND ORDER

SUMMARY:

The Student has been identified as Autistic and is entitled to receive a free and appropriate public education (FAPE) as defined in the Individuals with Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a et seq. At a Planning and Placement Team (PPT) meeting, the Parents rejected the program offered by the Board for the 2010-2011 school year. The Parents requested placement at Easton Country Day School for the 2011-2012 school year at the Board's expense. The Board refused the Parents' request.

PROCEDURAL HISTORY:

This matter was heard as a contested case pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in

accordance with the Uniform Administrative Procedure Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

On or about July 1, 2011, the Board received notice of the Parents' request for due process. The parties agreed to go to mediation in place of a resolution meeting.

An impartial Hearing Officer was appointed on July 13, 2011 and a pre-hearing conference was held on July 20, 2011. Hearing dates of September 15, 20 and 19, October 25, November 15, 17 and 18, December 2, 5, 6, 9 and 12, 2011 were chosen by the parties. The November 15, 17 and 18, 2011 hearing dates were cancelled. The Board submitted Exhibits 1 through Board's Exhibit 31. The Parents submitted Parents' Exhibit 1 through Parents' Exhibit 5. There were no objections to the exhibits presented.

The date for the mailing of the Final Decision and Order was extended to accommodate the parties' mediation, hearing dates and post trial briefs. The date for mailing the Final Decision and Order is May 14, 2012.

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

FINDINGS OF FACT:

1. The Student is diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified, Attention Deficit Disorder, General Anxiety Disorder, Developmental Coordination Disorder and Disorder of Written Expression. He is classified as a student with Autism and is eligible to receive special education and related services as defined in IDEA. (Testimony of Father, Board's Exhibit¹ No. 19).
2. The Student had attended the Board's schools from kindergarten until the end of his 6th grade school year, 2010-2011. As the Student entered the 2010-2011 school year at the intermediate school, his social interactions became more troublesome. The Student demonstrated his anxiety by fidgeting and picking up objects from the ground. Other students would complain about it, and the special education teacher believed it was distracting to the Student and would interfere with his learning. (Testimony of Father, Testimony of Special Education Teacher)

¹ Hereafter Board's Exhibits will be noted as "B" followed by the exhibit number, Parent's Exhibits will be noted as "P" followed by the exhibit number and Hearing Officer's Exhibits will be noted as "H.O." followed by the exhibit number.

3. During the 2009-2010 school year the Student mastered Goal No. 1, reading comprehension. Under Goal No. 2, written expression, the Student mastered one objective and made satisfactory progress in the other 2 objectives; overall the Student made satisfactory progress in Goal No. 2. (B-2, pgs. 35-37)
4. The Student's 5th grade Connecticut Mastery Test (CMT) showed that his overall scores were at the Proficient level in the Science test, the Reading test and the Writing test. In the Mathematics test he scored better and was rated at the goal level. In comparison to the prior year's CMT the Student demonstrated growth in all 3 areas tested. (B-1)
5. The school psychologist conducted a psychological evaluation of the Student in preparation for the May 11, 2010 PPT. The Student's cognitive/intellectual potential was in the average to above average range. Verbal skills were found to be a relative strength for the Student. His verbal memory was average but weak. The Student demonstrated deficits in visual motor integration; he demonstrated an increase in anxiety as the novelty and difficulty of tasks increased. The Student demonstrated difficulty with executive functions and weaker skills in working memory and planning and organization. (B-2)
6. The special education teacher also conducted an educational evaluation in preparation for the May 11, 2010 PPT. The Student was found to have a difficult time initiating or maintaining eye contact with peers and adults. He was found to be more outspoken in small groups. (B-2)
7. On May 11, 2010, the PPT met to discuss and plan the Student's 2010-2011 school year and review his current progress. The team agreed that in his 6th grade program the Student would participate in a co-taught class for 7 ½ hours, 1 ½ hours of study skills with his special education teacher and/or paraprofessional and ¾ hours per week of social skills counseling. The Student would be given an assistive technology evaluation. The PPT was of the opinion that the Student did not require an extended school year. (B-2)
8. The PPT was concerned with the Student's attention span, anxiety, ability to remain focused and how his inferential comprehension was impacting his abilities in reading and written expression. The team noted and addressed his writing deficiency in his goals and objectives. The Parents expressed a need for strategies/interventions to address the Student's anxieties. The team noted that these anxieties were impacting his socialization with peers especially in a large classroom setting. Behavioral supports and interventions were included in the Student's Individualized Education Program (IEP). (B-2)
9. On October 21, 2010, the Board conducted an Assistive Technology Evaluation of the Student. It was recommended that the Student be encouraged to use a word processor. Keyboard practice was recommended in order for the Student to become more efficient with this skill. It was also recommended that the Student use large graph paper for math problems and use a slant board and graphic organizers. (B-3).
10. The Student's treating psychiatrist, Dr. John Gelinas, stated that the Student has multiple areas of developmental weaknesses and depressive disorders that have become more apparent in his school year. The Student feels as if he does not belong and it is difficult for him to interact with his

peers. The doctor has resorted to pharmaceutical treatment to address his growing anxiety and depression. (Testimony of Dr. John Gelinias)

11. Dr. Gelinias was of the opinion that the Student requires a smaller classroom setting in order to be successful. He requires an environment where he "feels good about himself". The Student believes that he is being bullied. (Testimony of Dr. John Gelinias)

12. The Student's transition into the middle school was not smooth. He was apprehensive; his anxiety manifested itself by fidgeting. The Parents requested a neuro-psychological evaluation at the PPT meeting; the team agreed to the evaluation. The Father understood that the Student had difficulty working with groups. The Student attains good grades; the issue is not his academic progress but whether he can survive with peers in his educational setting without feeling depressed. (Testimony of Father, B-4, B-8)

13. The PPT increased the amount of co-taught academics to 15 hours per week. The social skills related services in the regular classroom were increased to 3.75 hours and .5 hours of social work in the resource room was added. (B-4)

14. On or about November 18, 2010, the Father wrote a letter to the Board in regard to incidents reported to him by his son that were resulting in severe anxiety. He complained of being teased, bullied and on one occasion assaulted. The Parent requested immediate action by the Board. There was no formal bullying complaint written by the Parent. The Student sees himself as a victim. (Testimony of Father, P-5)

15. On or about February 10, 2011 the school counselor informed the assistant principal that the Student had had a disagreement with another student. The other student had called the Student a "dinosaur" and the Student had interpreted this to mean he was fat. The counselor had the students agree that they would seek him out if they had any further disagreements. The counselor did not have to intervene between these two students again. The counselor was not aware of the Student being bullied. The Student demonstrated positive interactions with other students. (Testimony of School Counselor, B-6)

16. The Assistant Principal investigated the Parents' reported harassment of the Student by another student. The other student was questioned about the reported incident and could not come up with anything concrete about the incident. The special education teacher had reported that the only incident she noticed was a student telling the Student to shut up because he was making too much noise. The students' seats were changed so they would not be sitting near each other. (B-7, Testimony of Assistant Principal)

17. On or about February 24, 2011, the Student reported to the Assistant Principal that another student was calling him inappropriate names. The other student had been calling him by his given name rather than the name he likes to be called. The Student admitted to saying unkind words back. The other student had apologized and agreed not to call him by his given name again. The students shook hands and agreed to be supportive of each other. There was no bullying report filed. (B-10, Testimony of Assistant Principal)

18. On or about March 9, 2011, a student said “excuse me” and pushed his way into the lockers. The Student complained to the Assistant Principal who called in the student. The student apologized for his rudeness and the students shook hands. The Student was satisfied with the intervention. (B-1, Testimony of Assistant Principal)

19. On or about March 10, 2011, the Student had a Neuropsychological evaluation performed by Dr. Arielle Albert as agreed to by the Parents and the Board. The purpose of the evaluation was to assess the Student’s neuropsychological profile and to assist with his educational program. Based on Dr. Albert’s evaluation, the PPT changed the Student’s classification from Other Health Impaired to Autism, Pervasive Developmental Disorder (PDD). (B-12, B-19)

20. Dr. Albert found that the Student’s math and reading comprehension skills are in the average range. His greatest weakness was in written language skills. The Student’s evaluation showed that he was below average in his reading fluency skills, spelling skills, punctuation, story composition and sentence structure. His performance in written language was consistent with a Disorder of Written Language. The Student’s weakness in areas of executive functioning contributes to his writing difficulties. (B-12)

21. The evaluator found that the Student demonstrated above average performance in his sequential ability, visual perceptive skills, verbal fluency, verbal memory and visual performance skills. He demonstrated weakness in motor planning, motor sequencing and visual motor integration. (B-12)

22. The Student’s difficulties in the social arena contribute to his anxiety and depressive symptoms. The Student has difficulty with reciprocal conversation with his peers. He wants to speak about his interests and has difficulties changing topics to include his peers’ interest. The Student demonstrates considerable social difficulties, social misperceptions and over focused interest. Dr. Albert found him to be a child who “desperately wants to connect with other children...[but] has difficulty knowing how to converse with others in an age appropriate manner causes him to feel “worthless,” “invisible,” and hopeless about the future.” The Student’s Father was given the Social Responsive Survey questionnaire which measured the severity of social difficulties. The Father’s responses placed the Student in the “severe” range in terms of the degree of social difficulty he experiences in everyday social interactions. (B-12)

23. Dr. Albert made 26 recommendations to assist the parties with the Student’s profile and plan his educational program. Among the recommendations are:

- a. A combination of mainstream classes and special education support to help with his learning, behavior and social functioning;
- b. A high degree of structure and predictability in his school day;
- c. Consultation with experts in PDD;
- d. Opportunities that can enable him to receive positive attention about his behavior;
- e. The student should continue to receive specific therapeutic intervention to improve his social skills and social communication;
- f. Opportunities for informal social interactions;
- g. Participating in structured extracurricular activities;

- h. Continued modifications to school environment to address his attentional difficulties;
 - i. Learning tools and strategies through counseling and psychotherapy to help him manage frustrations and stress;
 - j. Pre-teaching and priming to maximize his school performance and anxiety;
 - k. Organizational supports and help with prioritizing work and planning his approach to multi-step tasks.
- (B-12)

24. A speech and language evaluation was performed as recommended by the January 13, 2011 PPT. The evaluator recommended summer services to address the Student's social and communicative issues. The pathologist found the Student at risk for mood and self-esteem problems and for negative interactions with peers. She recommended the involvement of a speech pathologist for support for his communication, social thinking/problem solving and his dysfluency. Increased perspective-taking could develop the Student's awareness to the concept that others may have different ideas about the same thing. She recommended increasing non-verbal communication skills using video models and role playing and that the Student receive summer services to address his social and communication issues. (B-14)

25. During the 2010-2011 school year, the student maintained A and B grades in his academic courses. The special education teacher worked on the Student's social deficits and co-taught the student. In the resource room she worked on the Student's skills, provided pre-teaching and prepared him for tests and quizzes. The Student used an Alpha Smart device because his handwriting was difficult to read and it was an issue for the Student. (B-13, Testimony of Special Education Teacher)

26. At the May 31, 2011 PPT, the team reviewed the evaluations performed and planned the Student's 2011-2012 school year program. An occupational therapy evaluation was also reviewed by the PPT and occupational therapy services were recommended in order to address handwriting and sensory issues. Many of the recommendations of Dr. Albert were included in the Student's IEP. The student's teachers and staff members reported that he was doing well academically and making progress in social skills. Speech and language services were added to the Student's IEP. (B-19, Testimony of Special Education Teacher)

27. The Student did not master any of his goals for the 2010-2011 school year. He mastered 2 objectives in his reading comprehension goal and made satisfactory progress in this goal. In Goal No.2, his written expression goal, he made satisfactory progress and did not master any objectives. In Goal No. 4, social/behavior, the Student mastered 2 objectives and overall made satisfactory progress. (B-19 pgs. 27-30)

28. For the 2011-12 school year, the PPT recommended speech language services for .75 hours per week, individual counseling for .75 hours per week, social skills lunch group for 2.5 hours per week, social skills group for .75 hours per week, OT for .75 hours per week and study skills for 2.25 hours per week. The increase in school counseling reflected what actually had been provided to the Student during the 2010-2011 school year and was not an actual increase of services. (B-19, Testimony of School Counselor).

29. Physical Education was a source of anxiety for the Student throughout the 2010-2011 school year. The space was large and loud and “there were problems throughout the year” in gym with him and his relationships with peers. At the May 31, 2011 PPT, the district recommended removing the Student from gym. (B-19, Testimony of Special Education Teacher)

30. At the May 31, 2011 PPT, the Parents requested an out of district placement to Easton Country Day School. The request was denied. (Testimony of Father)

31. The Student participated in unified theatre. It was difficult for the Student to take the other students ideas into consideration. The Student participated in a lunch group and communicated with the other students. This was done to refocus and provide a break for the Student. He received social skills instruction during this period. There were approximately 8 students in this group. The teacher felt that there was progress during these sessions and the Student gave compliments and did not monopolize the conversation. (Testimony of Social Skills Counselor)

32. In early June 2011, an incident occurred in the gym which upset the Student to the point where he made a suicidal gesture at home that night. The students were in bus line just before dismissal. The incident occurred about something the Student purchased for his mother. The Student was pushed to the ground and he made some threats to the other student. The Physical Education Teacher separated the students and wrote an incident report. There were no witnesses to the actual incident. The Student went home and that evening, took a large carving knife out of the kitchen knife block, and held it up in the air as if he wanted to kill himself. The Father was able to get the knife away from him and calm him down. The Parents called the Student’s therapist who advised him not to take him to the hospital. The Parents did not call 911. (Testimony of Father, Physical Education Teacher, B-21, B-29)

33. The reported progress of the Student’s social behavior for the 1st rating period of the 2011-2012 IEP was satisfactory. (B-22)

34. The Student was given a shadow during transitions in the school building because of the unstructured environment. This was done because of the Parents’ concern for the Student’s safety. The Student’s paraprofessional did not report any concerns. The Student finished the school year well and never stated to anyone in school that he wanted to hurt himself. (Testimony of Special Education Supervisor, Testimony of Special Education Teacher)

35. On or about June 5, 2011, the Parents’ attorney e-mailed a report from Dr. Gelinis, the Student’s treating psychiatrist, to the Board for their review. Upon receiving Dr. Gelinis’ report, the Board requested consent to conduct a psychiatric evaluation; the Parents provided consent for the evaluation. (B-20, B-23, Testimony of Special Education Supervisor)

36. Dr. Gelina’s Psychiatric Memorandum placed the Student at risk of escalating depression and anxiety, in the context of his neurological deficits, academic and learning weaknesses, and interpersonal struggles with his peers in school. The doctor recommended that the Student be placed in a small, structured, out of district learning environment where he would be at

substantially less risk of suffering even greater anxiety and depression. The Student needs an environment where he will be comfortable. (B-20, Testimony of Dr. John Gelinias)

37. In September 2011, the Parents unilaterally placed the Student in Easton Country Day School (ECDS). ECDS enrolls students from infant through age 18. There are only 200 students in the entire school. There are Pre-School and High School programs, but the Student is in the K-8 Program which has 110 students enrolled. Of those, approximately 12 have IEPs. The Student's classes at ECDS are small, with 15 students as a maximum. Often there is more than one adult in the class as well. The Student does not complain about bullying in ECDS and is learning how to problem-solve and interact appropriately with peers. The Student does not have a paraprofessional or a shadow at ECDS. (Testimony of Director of ECDS)

38. The Student is learning how to problem-solve and interact appropriately with peers. The Student no longer reports incidents of bullying. (Testimony of Director of ECDS, Testimony of Father)

39. In September 2011, Dr. Joel Wolfson, at the request of the Board, conducted a Psychiatric Evaluation of the Student. In order for the Student to be successful in his school program. The Doctor made the following recommendations:

- a. A classroom aide to assist the Student in transitions and unstructured times;
 - b. Intense social skills programming to help facilitate successful peer interactions;
 - c. Speech and language therapy should be in a group session to encourage positive peer communications;
 - d. OT services to address fine motor and graphic motor weaknesses as well as sensory integration/sensory processing difficulties;
 - e. Identify a quiet place where the Student can go to feel more grounded and calmer, as well as person or persons he can go to for support;
 - f. A school based counselor to help him discuss and process his perception of others.
- (B-24)

40. In his interview with Dr. Wolfson, the Student did not want to return to the Board's school because he was being bullied. The Doctor did not feel the Student had suicidal ideations but wanted to be accepted. The Doctor saw that the Student was doing well academically with interventions in place but had trouble with transitions. The Doctor was of the opinion that the Student's concerns can be addressed by having intensive interventions, and a program with social skills training with role play social situations. Social Skills strategies should be integrated in the Student's program. The Doctor found that the Student's judgment was impaired as is his ability to modulate and self-regulate his emotions. He felt that the plan that had been formulated by the PPT in his IEP had not been given sufficient time to see if they were effective. The Doctor was not convinced the Student had been bullied or was having a misperception because of his perception that he was being bullied. (Testimony of Dr. Joel Wolfson, B-24))

41. On October 6, 2011, the PPT met to discuss Dr. Wolfson's psychiatric report and review the independent evaluation of DR. Gelinias. The IEP of May 31, 2011 was to be continued as the

Student's program for the 2011-2012 school year with the addition of a 1-1 tutor to assist with transitions and unstructured time. (B-25)

CONCLUSIONS OF LAW:

1. It is undisputed that the Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Improvement Act, 20 U.S.C. Sec. 1401, et seq.
2. The most comprehensive test for determining whether any violation of the IDEA has occurred is set forth by the Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). In *Rowley*, the Supreme Court reversed and remanded an order requiring the school to provide a deaf student with a sign-language interpreter in all of her classes. The Supreme Court held that the IDEA's requirement of a "free appropriate public education" is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from the instruction. *Rowley*, 458 U.S. at 201, 102 S. Ct. at 3048. The child must receive "some educational benefit" from the education provided; the best possible education is not required. *Id.*
3. The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. These procedural requirements allow for participation of the parents or guardian throughout the development of the IEPs, together with due process procedures to challenge questionable placements or decisions. Under *Rowley*, when challenges to a student's individualized education program are made, the Court undertakes a two-part inquiry, determining: (1) whether the procedural mandates of the act were followed and (2) whether the student received individualized educational services designed to provide some educational benefit. *Rowley*, 458 U.S. at 206, 102 S. Ct. at 3051. The Parents have presented no evidence of any procedural violations of IDEA. There has been persuasive evidence that the Parents have been very active participants of the Student's PPT who were listened to by members of the team. Notice requirements were clearly adhered to and the Parents did not allege or present evidence that they were not properly and timely provided with the Student's educational records when they were requested.
4. IDEA requires the relevant public education authority to prepare and review at least annually an "individualized education program" (IEP) for each child with a disability. 20 U.S.C. §1414(d)(4); 34 C.F.R. §300.324. The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored to meet the child's unique abilities and needs. See U.S.C. §1414(d); 34 C.F.R. §§300.320-300.324. A child's IEP describes, among other elements, the child's present levels of educational performance, measurable annual goals for addressing the child's educational needs that result from the child's disability and the individualized instruction and services that will be provided to help the child. 20 U.S.C. §1414(d)(1)(A); 34 C.F.R. §300.320.
5. Additionally, the IEP must include a statement of the individualized instruction and services (including supplementary aids and services and program supports and modifications for school

personnel) that will allow the child to make appropriate progress toward attaining the annual goals of the IEP, "to be involved and progress in the general curriculum" and "to participate in extracurricular and other nonacademic activities", and "to be educated and participate with other children with disabilities and nondisabled children" in those extracurricular and other nonacademic activities. 20 U.S.C. §1414(d)(1)(A)(IV)(bb); 34 C.F.R. §300.320(a)(3) The Student is receiving good grades as stated by the Parents. (Findings of Fact No. 12) The issue is whether he is being provided with sufficient independent educational support services to permit him to receive educational benefit from his instruction as IDEA mandates and the second prong of *Rowley* requires. Progressing from grade to grade and receiving passing grade is not the only indicator or requirement to show that a student is receiving FAPE. The Student's 2009-2010 school year seemed to be a successful year but as the Parent and the record shows, his 2010-2011 school year was not as successful. Although he was receiving passing grades (Findings of Fact No. 12), his IEP progress reports do not show a student receiving grades of A and B or a student making progress on his IEP goals and objectives. (Findings of Fact Nos. 2, 22, 27, 29 and 34) The Student's social skills are vital components of a meaningful education. The testimony clearly shows the Student's school environment deteriorating and progressing to suicidal ideation gestures and requiring that he be provided with a shadow to ensure his safety. The Student should have been provided with an extended school year to avoid any regression and assist with his transition to the middle school. (Findings of Fact No. 24) This is not an environment where the Student can receive educational benefit from his instruction as IDEA mandates. The 2010-2011 school year was not appropriate and did not provide the Student with FAPE.

6. The Parents claim that the Student has been bullied in the Board's school and that the Board has not prevented this from occurring. The bullying of a student with disabilities can lead to a deprivation of FAPE. *T.K. and S.K. on Behalf of L.K. v. New York City Department of Education*, 779 F.Supp. 2d 289 (2011) The Court found that "It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education." Further, "when responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination."

7. In Connecticut at the time of the 2010-2011 school year, "bullying" was defined as: "any overt acts by a student or a group of students directed against another student with the intent to ridicule, harass, humiliate or intimidate the other student while on school grounds, at a school-sponsored activity or on a school bus, which acts are committed more than once against any student during the school year. CGS §10-222d. The United States Department of Education has made it clear that harassment and bullying of children with disabilities is unacceptable. On July 25, 2000, the USDE Office for Civil Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) sent a "reminder" to educational professionals as to their "responsibilities" under Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA. That reminder included the following language on "prohibited disability harassment": "Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with

disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement ... Disability harassment is preventable and cannot be tolerated. Schools, colleges, and universities should address the issue of disability harassment not just when, but before incidents occur."

8. I agree that bullying cannot and should not be tolerated in any environment especially in any school environment. As the OSEP "reminder" states, "Disability harassment is preventable and cannot be tolerated." The Student on various occasions has stated that he has been bullied. Testimony and exhibits present approximately six occasions where the Student perceived he was being bullied. (Findings of Fact Nos. 14-18 & 32). In reviewing the record and the testimony as to these incidents, the actions were 2 of the 3 forms that bullying can take: physical and taunting. The third form of bullying, indirect, psychological bullying in the form of exclusion and isolation, *L.K. at 298*, were not perceived or presented during the course of the hearing. The Student is in mainstream programming; he has a lunch bunch to assist him with socialization, was part of unified theatre and went on excursions with his peers. As to the other forms of bullying, there was no evidence presented that the Student's perception of bullying was that it was done continuously by the same student or students; his perceptions were that it seemed to have occurred with different students, either male or female. One of the incidents of the physical bullying occurred when the Student accused a student of taking something that belonged to him, the Student was pushed down by the other student and the Student threatened to hit the other student. Neither the record nor the testimony clearly showed that what the Student accused the other student of taking was in the other student's possession. The verbal taunting was a misinterpretation of the word "dinosaur" and another was the calling of the Student by his given name. These incidents do not clearly show that the other students' acts were in fact incidents of bullying but the Student's perception that he was being bullied and, as stated by his father, "he does not seem to have the tools to suppress the emotions or compensate for the situation," (B-9), Dr. Gelinas, "the Student believes he is being bullied," (Findings of Fact No. 10) and Dr. Albert, "of the [Student's] difficulty in connecting with others causes him to feel "worthless." (Findings of Fact No. 20). The actions of the other students were not acts of bullying as perceived by the Student and defined in CGS §10-222d, *Supra*.

9. The Board requires all sixth graders to take a course called developmental guidance, in which the students are "taught about bullying, empathy, how to treat others, how to report bullying and what is bullying." To that end, under IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in his or her educational opportunities. The Board in all situations of the Student's perception of bullying acted promptly to curb and rectify the situation. (Findings of Fact # 14-18 & 32)

10. The program offered for the 2011-2012 school year was not reasonable calculated to provide the Student with educational benefits. The Student should have been provided with an extended school year to avoid any regression and as the speech and language pathologist recommended to address the Student's social and communicative issues. (Findings of Fact # 24) Since the changes made to the Student's IEP on January 31, 2011, there were 5 incidents involving the Student with another student, an incident at home with a knife and the placing of a 1 to 1 tutor to ensure the Student's safety. The October 6, 2011 IEP, adds a 1to1 tutor to help with transitions and

unstructured times. The Doctor also recommended intensive interventions (Findings of Fact No. 39). The adding of .75 hours of individual counseling with the school psychologist is not an intensive intervention. The Student needs **intensive** interventions as Dr. Wolfson recommended (Findings of Fact No. 39) and consultation with an expert in PDD as Dr. Albert recommended. (Emphasis added) (Findings of Fact No. 23) The Board should have invited a Board Certified Behavioral Analyst to consult on the Student's behavior to create a Behavioral Intervention Plan (BIP) to address the Student's issues rather than just have a tutor acting as a police officer to insure his safety and help with transitions and unstructured times. The 1to1 tutor is only a "band aid" and doesn't address the actual problem of the Student feeling "worthless" and a "victim" in his educational environment. There was no consideration or thought given in his IEP to help the Student become independent of the shadow.

11. The Parents are seeking reimbursement for their unilateral placement to ECDS. *In Stephen G., v. Arlington Central School District*, 418 F. Supp. 2d 559, the court found that, a Board of Education may be required to pay for educational services obtained for a student by his or her parent, if (i) the services offered by the board of education were inadequate or inappropriate, (ii) the services selected by the parent were appropriate, and (iii) equitable considerations support the parents' claim. *See M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers*, 231 F. 3d 96, 102, 104 (2d Cir. 2000), *cert denied*, 532 U.S. 942 (2001); *see also Walczak*, 142 F.3d at 129 (*citing Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985)). These three factors will be referred to as the "*Burlington* factors." The Board's program has been found not to provide the Student with FAPE, therefore the first factor has been satisfied. The Parents provided sufficient evidence to show that the program at ECDS was providing the Student with educational benefit. The Student social and victimization issues were being addressed properly and the Student was in an environment that did not require the use of a shadow and the elimination of gym. The program at ECDS is appropriate.

12. Hearing officers have the authority to provide compensatory education as an equitable remedy for denial of FAPE. Since the United State Supreme Court decision of *Burlington School Comm. v. Mass. Dept of Educ.*, 1984-85 EHLR 556:389, courts have consistently held that compensatory education ... is an appropriate remedy under IDEA. *See, e.g., M.C. v. Central Regional School Dist.*, 81 F.3d 389 (3rd Cir. 1996); *Pihl v. Massachusetts Department of Education*, 9 F.3d 184 (1st Cir. 1993) Further, according to the Office of Special Education Programs, United States Department of Education, IDEA grants due process hearing officers the authority to award compensatory education. *Inquiry of Kohn*, 17 EHLR 522 (OSEP 2/13/91). Compensatory education is limited to egregious denials of FAPE or egregious procedural violations. The Student in this matter was denied FAPE in the 2010-2011 and 2011-2012 school years. As to the 3rd prong of *Burlington*, ECDS appears to have been a solution arrived at by the Parents once they decided that the district was not proposing any viable alternative for their son. Therefore, the reimbursement of the Student's placement at ECDS shall be the equitable remedy for the Student, placing him in the same position as if the Board had provided the Student with FAPE. The Board shall reimburse the Parents for their out of pocket expenses for the 2011-2012 school year.

13. To the extent a procedural claim raised by the Parents is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

COMMENT: The Student should not become an “out of district statistic,” but is capable of returning to his neighborhood school and continue his education with his peers. I did not address this in my order because of the lengthy hearing, the school year which was the issue of this hearing has weeks to finish and a PPT should be being planned to address the Student’s 2012-2013 school year. That school year is not within my jurisdiction to address. The Student can make educational progress in the Board’s school if provided with an appropriate program and the necessary related services.

The parties were well represented by their respective attorneys and everyone conducted themselves very well.

FINAL DECISION AND ORDER:

1. The program offered by the Board for the 2010-2011 school year is not appropriate and did not provide the Student with FAPE in the LRE.
2. The program offered by the Board for the 2011-2012 school year is not appropriate and will not provide the Student with FAPE in the LRE.
3. The unilateral placement of the Student at ECDS was appropriate and provided the Student with FAPE in the LRE.
4. Since the program offered by the Board for the 2011-2012 school year was not appropriate and ECDS is appropriate, the Board must reimburse the Parents for their out of pocket expenses for the unilateral placement of the Student at ECDS for the 2011-2012 school year, including, but not limited to, tuition, transportation and books.