

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Student v. Trumbull Board of Education

Appearing on behalf of the Parents: Attorney Jennifer Laviano  
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Appearing before: Justino Rosado, Esq.  
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Does the program offered by the Board for the 2016-2017 school year provide the Student with a free and appropriate public education (“FAPE”) in the least restrictive environment (“LRE”)? If not;
2. Does the Student require an in-district program with a BCBA consultant to train the persons working with the Student? If not;
3. Should the Student be placed at the Speech Academy in a diagnostic basis for the 2016-2017 school year?
4. Is the Student entitled to compensatory education for the denial of FAPE?

JURISDICTION:

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.

SUMMARY:

The Student has been identified under the category of Autism as entitled to receive FAPE as defined in the Individuals with Disabilities Improvement Education 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 placement of the Student to High Roads (BEST Academy). The Parents requested continued placement at the District’s High School or in the alternative The Speech Academy. The Board refused the Parents’ request and the parties proceeded to due process.

### **PROCEDURAL HISTORY:**

On February 8, 2017 (Hearing Officers Exhibit<sup>1</sup> No. 3), the Board received notice of the Parents’ request for due process. The parties agreed to a mediation session. The date for the mediation session was January 27, 2017.

An impartial hearing officer was appointed on February 21, 2017 (H.O.-2), a pre-hearing conference was held on March 8, 2016. Testimony was heard on the following dates: April 26, May 1, June 6, June 14, June 23, July 12, July 31, August 2 and August 23, 2017. The following scheduled hearing dates were cancelled: April 5 and June 16, 2017. The Parents presented testimony of two witnesses and the District presented testimony of seven witnesses and one rebuttal witness. The Board presented Exhibit<sup>2</sup> No. 1 thru 135 which were full exhibits of the hearing. Board Exhibit No. 133 was not received as an exhibit. The exhibit was an evaluation performed after the date of the request for due process and not presented or reviewed at the PPT. Exhibit No. 134 pages 8 to 12 were not received as exhibits of the hearing. *R.E. v. New York City Department of Education*, 59 IDELR 241 (2d Cir. 2012). The Second Circuit ruled that in evaluating an Individualized Education Program (“IEP”) for a student with a disability, courts and administrative officers must examine an IEP *prospectively* as of the time of its creation. This precluded courts and hearing officers from considering "retrospective testimony" in IDEA reimbursement actions. The purpose of that rule was to allow parents to rely on the express terms of the IEP when deciding whether to accept the district's placement offer.

Parents presented Exhibits 1 through 25. Parents’ Exhibits<sup>3</sup> No. 5, 9, 10, 12, 13, 14 and 18 were duplicate exhibits of Board Exhibits and were not received. Parents’ Exhibits 23 and 24 were

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<sup>1</sup> Hereafter Hearing Officer’s Exhibits will be noted as “H.O.” followed by the number of the exhibit.

<sup>2</sup> Hereafter Board’s Exhibits will be noted as “B” followed by the number of the exhibit.

<sup>3</sup> Hereafter Parent Mother’s Exhibits will be noted as “P” followed by the number of the exhibit.

not received as full exhibits of the hearing; the exhibits speak of events after the request for due process.

After the evidentiary portion of the hearing, a briefing schedule was discussed and the parties agreed to file, on September 11, 2017, simultaneous post trial briefs. The parties were instructed that any factual references and arguments presented in the briefs had to have a factual basis of prior evidence presented during the hearing. The Parents' attorney requested an extension to file the briefs and the filing date was extended to September 13, 2017. The briefs were timely filed by both parties.

This Final Decision and Order set forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts 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).

The date for the mailing of the Final Decision and Order was extended to accommodate the hearing dates, the briefing schedule and the Final Decision and Order. The date for mailing the Final Decision and Order is October 27, 2017.

FINDINGS OF FACT:

1. The Student is eligible to receive special education and related services under the IDEA with the eligibility category of Autism. (B-121)
2. In April 2008, the Student transitioned from Skane School in Bridgeport, Connecticut to Frenchtown Elementary School. (B-1)

3. The Student attended the SRP (Specialized Resource Program) in the district's Frenchtown Elementary School ("FES"). (Testimony of Father, B-43)
4. While at FES the Student was instructed using Applied Behavioral Analysis ("ABA") methodologies and received the support of a 1:1 ABA-trained paraprofessional, as well as speech, occupational therapy, and adaptive physical education (APE). (B-9, B-17)
5. During the 2011-2012 school year the Student was removed from mainstream. The PPT agreed to gradually increase mainstream time with the aid of interventions as his behaviors were more in control. (B-27, Testimony of Father)
6. In April of 2013, a psychological evaluation was performed by the school psychologist. The evaluator utilized the Vineland Adaptive Behavior Scales-Second Edition ("VABS-II"). The Parents and the Student's teacher answered the rating form. The Parents rated the Student as low in the Communication Domain with a standard score of 65, Daily Living Skills Domain with a standard score of 61 and Socialization Domain with a standard score of 62. The teachers rated the Student also as low in the Communication Domain with a standard score of 67, Daily Living Skills Domain with a standard score of 68 and Socialization Domain with a standard score of 60. The Adaptive Behavior Composite score was low with a standard score for the Parents of 61 and for the teachers rating form it was 63. (B-38)
7. The Student's 2013 triennial evaluation did not require speech and language standardized testing. The PPT team which included the Father agreed that they were not required, and the team agreed to a classroom observation. The observer noted that the Student demonstrated some weakness in all areas of speech and language. (B-42)
8. During the 2013-2014 school year, there were 9 incidents in the record of the Student confronting and attacking his teacher or paraprofessional. In one of the incidents the Student attempted to stab the teacher with a pencil. (B-50, B-52, B-53, B-55)

9. At a December 3, 2013 PPT, the PPT team determined that these incidents, *Supra*, were a manifestation of his disability and recommended exploring an out-of-district educational placement. The Parents did not endorse or sign releases to explore an out-of-district placement. (B-56)
10. The Parents wanted more independence for the Student, including both within the classroom and access to the mainstream setting. The behavioral issues reported in the school were not observed or reported in the home or community environment by the Parents. (Testimony of Father, B-60)
11. In January of 2014, a psychiatric evaluation was performed of the Student. The evaluator did not find any indications of psychiatric illness or disorder; instead his behaviors would fall under the category of autism spectrum and its manifestations. (B-60)
12. The evaluator attributed the difference in his behavior at home from the school to having more academic demands placed on the Student in school. At home, he has expectations but they are embedded in a context that has a wider array of preferred activities without continuous educational demands. The Parent agreed with the evaluation. (B-60, Testimony of Father)
13. On May 9, 2014, the District retained Dr. Ajit Doolabh a Board Certified Behavioral Analyst (“BCBA”) and clinical psychologist, Director of Fairfield Behavioral Health (“FBH”), as a consultant. The doctor was asked to develop a behavioral program for the Student. (B-68, Testimony of Dr Doolabh)
14. Dr. Doolabh submitted a Summary Report of the results of his observations and review of the Student’s record. The Doctor recommended that before outplacement of the Student could be considered certain objectives needed to occur.
  - a. Student’s classroom staff needs to be in-serviced on his behavior plan.
  - b. Fidelity of implementation checks. BIP being implemented correctly and data collected reliably.

- c. BCBA present in classroom more often to facilitate this process.
- d. Updated FBA.
- e. FBA needs to include assessments of academic material.
- f. Student needs to be taught coping skills. This might not be successful given depth of his anxiety and dysregulation.
- g. Futures Plan be conducted.
- h. Student's program needs to be reconsidered.

(B-75, Testimony of Dr. Doolahb)

15. At the June 16, 2014 PPT, the doctor recommended that a BCBA support the Student in the classroom for 10-15 hours each week and conduct a functional analysis which would be part of an FBA. Based on the FBA findings update the Student's Behavioral Intervention Plan ("BIP") and include coping skills in the Student's IEP. The PPT recommended a Futures Plan. (B-76 Testimony of Dr. Doolahb)

16. The district retained Dr. Weinberg, a doctoral-level BCBA ("BCBA-D") contracted from FBH for the 2014-2015 school year. The BCBA-D conducted an FBA and recommended:

- a. A highly structured environment in an appropriate academic setting.
- b. The academic setting should be in a separate area or room to ensure safety of others.
- c. A high teacher to student ratio with 2 paraprofessionals who have experience and training with challenging behavior especially in aggression.
- d. Supervision by a BCBA for at least one hour

(Testimony of Erin Carey District's BCBA ("District-BCBA"), B-77)

17. At the start of the 7<sup>th</sup> grade, the Student was assigned two paraprofessionals, one from FBH and one provided by the District. The FBH paraprofessional worked sometimes directly with the Student in the classroom. The Student also had Dr. Weinberg, who provided consultative services to the Student's school team during the 7<sup>th</sup> grade. The plan was to fade out the second paraprofessional who worked with the Student. The Parents agreed with this plan. (Testimony of Dr. Doolahb, Testimony of District-BCBA)

18. In September 2014, the student had an incident where he attacked one of the staff. After various attempts to attack the staff member again failed; he threw himself on the floor.

(B-77)

19. The Futures Plan recommended at the June 16, 2014 PPT, was created to prepare the Student for a successful educational programming through the District's school with a vision toward a successful transition into adulthood. Discussions about the mapping of the transition plan will be reviewed when the Student is fourteen. The district members of the team that created the plan recommended that a change of educational setting in an out-of-district placement would be of benefit to the Student. The Parent did not agree with this recommendation. (B-79, B-85)

20. In October 2014, the Student's Behavioral Intervention Plan "(BIP)" was updated by the District-BCBA. The BIP addressed:

- a. Aggressive behaviors such as hitting, pushing, punching, or otherwise striking others with his body or object.
- b. Aggressive attempts-performing acts of aggression without making any contact.
- c. Scripting-Repeating words or phrases previously heard on TV, movies, computer, books or other media.
- d. Tantrum-combination of loud vocalization, crying, falling to the floor, laying on the floor for 10 seconds or longer without permission.
- e. Ritualistic Behaviors-Repeating a behavior more than once when not functional to do so.

(B-81, Testimony of District-BCBA)

21. Only one new lesson was to be introduced at a time in the Student's program to implement the error correction procedure in the BIP. Scripting was not addressed immediately in the Student's BIP since his aggression was the targeted behavior. This was the third upgrade of the Student's BIP. (B-81, B-82)

22. An Ecological Assessment was agreed to by the PPT to create a criterion for more inclusion with the objective of increasing more time in the mainstream environment without 2:1 support. (B-82, Testimony of District-BCBA)
23. The Ecological Assessment concluded that the Student's ability to be more in a mainstream environment is dependent on his ability to respond appropriately to error correction and activity interruption. The team recommended a slow and systematic implementation of error correction and response interruption. Once the Student has demonstrated he can tolerate these action; the plan to fade out the second paraprofessional can be implemented and the Student could also be exposed to more mainstream inclusion. The Parents agreed with this plan. (B-84, Testimony of District-BCBA, Testimony of Father)
24. On May 11, 2015, the PPT met to discuss and plan the Student's 2015-2016 program. The Student was provided with 2 paraprofessionals supervised and trained by the District-BCBA. Dr Goolagh from FBH provide consultative services for 2 hours a month. The District-BCBA provided 10 hours of consultation services a week. (B-87, Testimony of District-BCBA)
25. During the 2015-2016 school year academic instructions were provided in a self-contained Specialized Resource Program ("SRP") classroom. The Student was mainstreamed during unified arts, homeroom, and lunch. The Parents request that he receive regular education math and science classes. The school team members refused this request because they did not believe the Student could maintain the pace of the mainstream academic classes. (B-87, Testimony of Father, Testimony of District- BCBA)
26. With the intensive supports and consultation provided, the Student was successfully included at Hillcrest Middle School, resulting in successful experiences for him in the 7<sup>th</sup> and 8<sup>th</sup> grades. The Student's prior aggressions were a result of the staff not following the behavior plan. The Student told his Parents that he liked going to school. (Testimony of Father; Testimony of District-BCBA; Testimony of Dr. Doolabh, B-87)



27. On November 15, 2015, the Student's BIP was updated with a plan to phase-out the second paraprofessional by the end of January 2016. (B-92)
28. At the December 7, 2015 PPT, a transition plan was developed to assist the Student to transition to the high school for the 2016-2017 school year. Dr. Doolabh suggested that some of the Student's paraeducators, "swap" to the high school to transition the Student to the high school. B-92
29. A transition plan was not required because the Student was under the age of fifteen; starting in January 2016, the team started visiting the high school with the Student to establish familiarity in the high school before attending. The Student would start visiting twice a month and it would increase to twice a week. This process would be slow. (B-91, Testimony of District-BCBA)
30. The visits to the high school included some academic, reading, writing and math work. He ate in the cafeteria and participated in small group activities. (Testimony of District-BCBA)
31. In March of 2016, the paraprofessional and the psychologist from FBH were no longer working with the Student. The Student had only one paraprofessional assigned to him from March of 2016 to the end of the 2015-2016 school year. His instances of aggression, aggression attempts and tantrums were zero during this period. (B-105A, Testimony of District-BCBA, Testimony of Dr. Doolabh)
32. In April 2016, an Assessment of Functional Living Skills ("AFLS") was performed on the Student. This assessment reviews skills required for basic self-help, self-care, self-management, hygiene, and routine and core communication. The assessed skills address functional, practical, and essential skills of everyday life. The student can complete many skills with independence across a variety of settings. He requires prompting to plan things on a calendar, needs prompting when to use emergency numbers, needs help to handle

hot or dangerous items, can navigate the community with an aide but needs assistance when walking in parks and crossing streets, and does not make purchases without a caregiver but can follow the process. (B-98)

33. In preparation for the May 2, 2016 PPT, a Speech and Language Evaluation was conducted. The assessments administered were the Receptive One Word Picture Vocabulary Test-Second Edition (ROWPVT-2), Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) and Test of Narrative Language (TNL). In the TNL the Student was outside the age parameters of this assessment, standard scores are not available. His performance in the TNL suggests that his oral narrations include basic story elements when supported by visual aids, prompts and choices to facilitate his ideas. (B-99)
34. In the ROWPVT-2 and the CELF-5 assessments, the Student scored below the average range in his general language abilities. His level was below typical peers. The evaluator opined that the Student benefits from learning skills through direct instruction with the opportunity for practical and meaningful use and application. The Student's comprehension and recall is aided by visual supports and over learning of concepts in meaningful context. The use of graphic organizers is necessary to guide the development of his idea at sentence level. The Evaluator recommended he continue to receive direct speech-language support services through his IEP with goals and objectives developing his use of language concepts. (B-99)
35. In April of 2016, a Psychoeducational Evaluation was performed of the Student in preparation for his triennial evaluation on May 2, 2016. The evaluator used the Kaufman Assessment Battery for Children-Second Edition (KABC-2), Adaptive Behavior Assessment System-Third Edition (ABAS-3) and Autism Spectrum Rating Scale (ASRS). (B-100)

36. This was the second time the Student had been assessed using the KABC-2. He had been previously assessed in April of 2010 and the results of that assessment and his current assessment were similar. (B-100, B-38)
37. The Student's Father and the 8<sup>th</sup> grade SRP teacher completed ABAS-3, an adaptive behavior rating scale which measures the ability to use personal and social skills in order to meet the daily demands and expectation of the Student's environment. The Student's adaptive behavior skills were rated below average by the Father and extremely low by his teacher. The results of the ABAS-3 was compared to the Behavior Assessment System for Children 2 (BASC-2) which was utilized in April of 2013. These assessments are similar and would be expected to yield comparable results. The Student had shown growth in his adaptive behavior skills in his home environment in comparison to the prior April of 2013 assessment. (B-100, B-38)
38. The Student's Mother and the 8<sup>th</sup> grade SRP teacher completed the ASRS which is designed to measure behavioral characteristics of an autism spectrum disorder. On the ASRS, the Student's overall total core was reported to be slightly elevated by both his Mother and teacher and was consistent with an autism spectrum disorder. Although the total scores were elevated, the Student was reported to show behaviors more like same age peers. The Student interacts better with adults and less likely to interact with peers. (B-100)
39. The evaluations conducted in preparation for the Student's triennial PPT were reviewed at the May 2, 2016 PPT. The psychologist recommended that the Student should continue to focus on interaction with peers and engaging in social activities with peers. The Parents requested that the Student receive his math class in the regular education classroom. The PPT team agreed to this request. (B-102, Testimony of District-BCBA)
40. The Student took piano lessons, private speech therapy, attend church and community activities. The Father reported that there were no behavioral issues in these activities. (Testimony of Father)

41. At the May 2, 2016 PPT, it was agreed that for the 2016-2017 school year, the Student would receive 1.5 hours of speech in 30 minute intervals each week, academic and behavior supports 5 hours each week, 2.25 hours of reading with a special education teacher, 2.25 hours of math with a special education teacher, 2 hours of community outings per week, adaptive physical education for 42 minutes 2 times each week and counseling group or individual 30 minutes per week. The Student would attend ESY for 5 hours per day from July 5 to August 4, 2016. The District-BCBA worked with the Student during ESY summer 2016. (B-102, Testimony of District-BCBA)
42. The Parents requested that the Student's current eighth grade support transition with him to the high school. Neither of the Student's eighth grade paraprofessionals or BCBA, who worked with him, transitioned with the Student to the high school for the 2016-2017 school year. The District-BCBA would not be working in the district after the Summer 2016. (Testimony of Father, Testimony of District-BCBA)
43. On May 19, 2016, the PPT met to revise his IEP and conduct reevaluations. The high school speech and language pathologist stated she would conduct assessments for 2.5 hours throughout the ninth-grade year. The Parents requested that the Student be allowed to participate in band. The school team agreed with this recommendation. The reading comprehension goals and vocational goal were reviewed and modified. The Parents agreed with the proposed special education hours and related services. (Testimony of Father, B-104)
44. The Student's 8<sup>th</sup> grade report card for the first three marking periods showed that he was receiving A's and B's in all his classes. (B-105)
45. The Student started his ninth grade in the high school's SRP classroom, except for special education math class taught by a special education teacher. The math class had 10 students with 3 paraprofessionals. The Student had a 1:1 paraprofessional. The science class was team taught with approximately 26 regular and special education students. The

Student attended a band class with more than 20 students. This is regular education class. His APE was taught in an auxiliary gymnasium with other special education students. (Testimony of High School Coordinator of Special Education (“HSCSE”))

46. The Student had a paraprofessional assigned to him. The paraprofessional had 10 years of experience in the SRP. The Student responded well to the para. The paraprofessional, his special education teacher and his math teacher were trained on his behavior plan.

(Testimony of Student’s High School BCBA (“HSBCBA”))

47. The Student started to display behavioral difficulties almost on the onset of his ninth grade. He began by displaying ritualistic behaviors and tantrums. These dysregulated acts escalated to an incident report of an aggressive act toward one of his teachers. This act was precipitated by the removal of a timer from the Student’s desk. The Student was physically restrained. The restraint was administered a second time because he attempted to attack the teacher a second time. His aggression, attempts of aggression, tantrums, ritualistic and crying behaviors continued to escalate during the first quarter of his 2016-2017 school year. (B-105A, B-106,, B-121 Testimony of HSCSE)

48. Calming strategies that previously worked for the Student in middle school were utilized but did not have the same calming effect. The Student would be asked to take deep breaths or count to ten, but the deep breaths strategy rather than calm him just made him more agitated. The District brought in Dr. Doolagh observe the Student look at the data and advise how the work was affecting the Student.(Testimony of HSBCBA)

49. In September of 2016 Dr. Doolagh, from FBH, was contracted to work with the Student again. He made observations and interviewed the Student’s current BCBA. The Student demonstrated behaviors that Dr. Doolagh had not previously seen. He saw the Student crying, play with his hair and facial tics even when at a break or doing preferred tasks.

(Testimony of Dr. Doolagh)

50. Dr. Doolagh opined that the Student's program was not appropriate. The Doctor recommended academic demands be scaled back to stop introducing new IEP objectives and reintroduce coping skills. He should work on maintenance. The Student's BIP was revised to include and address the behaviors that had not been previously seen. (Testimony of Dr. Doolagh, Testimony of HSCSE, B-107)
51. In September 2016, the team discussed calling a PPT to address the Student's dysregulation. The Parents were informed of the concern. The parties agreed to wait and try the interventions suggested by Dr. Goolagh and if they were not successful assemble the PPT. (Testimony of HSCSE)
52. On November 9, 2016, the Student's special education teacher proposed changing a team meeting into a PPT to address the Student's IEP. The Mother was not ready to have a PPT and wanted the scheduled team meeting to remain as such. (Testimony of HSCSE, B-122 pgs. 23-24)
53. The Father felt the Student was not learning in his current environment. The Parents felt his homework was not at his level. The Parents created homework to keep Student at his level. (Testimony of Father)
54. There was no request from the Parents for additional speech and language services. The Parents were concerned with the Student's participation in SRP and that the level of work was too easy. They were concerned that the Student's classroom teacher did not like the Student. The classroom teacher was observed in the classroom and seemed concerned for the Student. She greeted him when he came into the classroom and willing to make changes if needed. School team was concerned that the Student was not making progress or able to receive instructions on any new objective. His teachers were maintaining what he had learned on objectives. (Testimony of HSBCBA)
55. On November 15, 2016, the Student demonstrated aggressive behavior and attacked and injured his math teacher. The paraprofessional noticed the Student getting agitated and

before the staff could move away from the Student, he grabbed the teacher by the neck and threw her on the floor. (B-111, Testimony of HSCSE)

56. The Father believed that the Student's acts of aggression were defensive. Based on the report of the November 15, 2016 incident, the staff did not act inappropriately or aggressively with the Student. (Testimony of Father)

57. On November 21, 2016, the Student's HSBCBA and Dr. Goolabh updated his BIP. To address the increased frequency of crying and self-injurious behavior. (Testimony of HSBCBA)

58. On November 22, 2016, a PPT was held. This PPT had been planned prior to his aggression on November 15, 2016. The HSBCBA noted that the school team had reduced the rigor of the Student's work, and had been presenting only previously mastered work. The Student was not progressing in his IEP objectives. The Student's dysregulation was being noted across all instructional settings. Dr. Doolagh recommended an updated Futures planning and psychiatric evaluation to determine if there were any changes in the Student's mental health because of puberty. The Parents requested a second paraprofessional for the Student. The team refused the Parents request. (Testimony of HSCSE, B-109)

59. At the November 22, 2016 PPT, the team discussed the incident of November 15, 2016 concerning the Student's aggression toward his math teacher. The Parent requested material for home schooling the Student. The school team refused the Parent's request. The school team recommended a diagnostic placement. The team needed additional information about the Student's aggression and they felt that a diagnostic placement would provide that information. This would assist the school team to fulfill the plan that had been developed in the middle school for the Student. (Testimony of HSCSE, B-109)

60. The school team offered a diagnostic placement at Cooperative Educational Services ("CES"). The Parents refused the diagnostic placement, but they were willing to go and

see the placement. The team recommended an FBA, a Futures planning update and a psychiatric evaluation. (Testimony of HSCSE, B-109, B-122 pg. 28)

61. On December 21, 2016, the Student demonstrated another aggressive behavior incident. He charged at his paraprofessional and grabbed her wrist. The staff in the classroom blocked his attempt to exit the classroom and the Student threw himself on the floor. A counting strategy was used to calm him down and the Student was directed to sit in a chair, he complied with the request. (Testimony of HSBCBA, B-111 pg. 20)
62. On January 6, 2017, after the Student returned from the holiday break, a PPT was held. He was provided with a program in a self-contained classroom. No other students were present and the Student did not attend APE. He received his related services in the room. The Student would pick the lunch he wanted to order; it was brought to him and he would eat lunch in the room. The Student was in this highly restrictive environment for 6 weeks. The Student was assigned two male paraprofessionals. Since the HSBCBA was certified as a special education teacher, she was his special education teacher and his BCBA. The Student's related services were provided in the individualized resource room. (Testimony of HSBCBA)
63. The Team recommended a diagnostic Outplacement. It was also recommended that the Student be assessed in the following areas: FBA and Future's Planning Update. The Parent did not sign the consent for the assessments. (B-113, B-109-41A, B-109-41B, B-109-41C)
64. The HSBCBA reviewed the interventions that the school team had utilized at the high school. The team modified the work. The rigor of the work, increased break, decreased demands, reinforcements, social praise, perceived control, teaching him to request a break. The HSBCBA would model the interventions. (Testimony of HSBCBA, B-113)
65. On January 10, 2017, a psychiatric evaluation of the Student was conducted by Barbara Rickler, M.D. As part of the evaluation, the psychiatrist had an initial consultation with



the Parents and did an observation of the Student in his school setting. There were two BCBA therapist at the time of the observation. The HSBCBA was working with the Student on material he was familiar with. According to the HSBCBA, the Student was not ready to handle new material. If he became frustrated, he would breakdown and cry. During the observation of the Student, he demonstrated facial tics e.g. blinking and facial grimacing. During various times of the observation the student would hum. (Testimony of Dr. Rickler, B-114)

66. The Parents gave Dr. Rickler permission to speak with the Student's pediatrician and with the youth minister at the Student's church. The pediatrician was not aware of the Student's aggressive behavior issues and agreed with the psychiatrist that a medication trial or an alternative placement might be appropriate. The youth minister stated that the Student participates in the group, likes everyone and sometimes gets frustrated. The psychiatrist attempted to meet with the Parents again but it was cancelled by the Father. The evaluator decided not to meet with the Student. (Testimony of Dr. Rickler, B-114)
67. Dr. Rickler recommended that the Student would benefit from a highly specialized school environment where the staff ratio would be more conducive to safety. It would be optimal for him not to be in such a restrictive setting. It is problematic that the Student only interacts with adults and is not able to socialize with peers. The High School cannot make any further substantive changes. The injury to his teachers would cause other teachers to be fearful in being in a classroom with the Student thereby reducing the pool of available staff. (Testimony of Dr. Rickler, B-114)
68. The Parents requested a one-to-one BCBA to always be with the Student during the school day. The psychiatrist opined that this request would be too restrictive and would not allow for interaction with his peers. (Testimony of Dr. Rickler)
69. On February 6, 2017, a summary report was prepared of the Student's behavior and programming status in his segregated setting by the HSBCBA and Dr. Goolabh. The highly segregated setting did not allow the Student to interact with his peers. The Student

continued to dysregulate. The report presents a seven-step plan of criteria to provide guidance on moving the Student forward in his program. (Testimony of HSBCBA, B-121)

70. The HSBCBA introduced certain objectives of his IEP while he was in this highly segregated setting. The Student worked on objectives of his reading regarding comprehending content vocabulary and answering questions. He struggled answering “when” and “where” questions. He is reading at an 1<sup>st</sup>/2<sup>nd</sup> grade level. The Student had been reading at 2<sup>nd</sup> grade level. In prior assessments, the Student had been reading at 2<sup>nd</sup> grade level in April of 2015 and March 2016. He can solve 2 step multiplication and division problems, but struggles with math word problems. The use of technology to assist the Student with writing was not fruitful because he struggles with the thought process required for writing. (Testimony of HSBCBA, B-101)

71. The Student’s speech and language pathologist provided services to him while he was in the segregated setting. The pathologist began providing services to the Student when he entered high school. It was not until the end of November beginning of December 2016 that the Student became less anxious realizing that the pathologist would not let him struggle. The Student has an expressive disorder. Pathologist opined that communication is only one cause of the Student’s behavior issues. He displays anxiety, and high emotional dysregulations. These behaviors were displayed when doing challenging activities but also when performing preferred activities. Even when no demands were placed on the Student these dysregulations, crying, hair pulling, facial tics and humming, would be displayed. The pathologist used a lot of visual aids and repetition during speech and language sessions. She did not believe Student needed more speech and language as requested by Parents. (Testimony of High School Speech and Language Pathologist (HSSLP),

72. On February 7, 2017, the PPT met to review the psychiatric evaluation, and the Summary Report from Dr. Doolabh and the HSBCBA. The psychiatrist opined that an outplacement would be more appropriate for the Student. Her recommendation for

outplacement was because of concern that the results of aggression have resulted in injury to staff. (Testimony of Dr. Rickler, B-121))

73. Dr. Doolabh reported that he noted marked differences in the Student's behavior, e.g. tics and body movements. The Student at times has a 3:1 ratio with ABA trained staff in the restrictive setting. (Testimony of Dr. Doolabh, B-121)

74. At the February 7, 2017 PPT, the district team members recommended High Roads as an outplacement for the Student. The Parents disagreed with the outplacement. The Parents requested that the Student continue his program at the district high school. In the alternative, the Parents requested placement at the Speech Academy. (Testimony of Father, Testimony of HSCSE, B-121)

75. Ms. Toni Giannone, the Director of the Speech Academy ("Academy"), testified that the Academy could provide the program that the Student required. The Academy is speech and language based and certified as a special education school. They have children in the Academy who are on the Autism Spectrum and they accept children with behavioral issues. The Director in a review of some of Student's records and an intake interview believed the Student has expressive language disorder and has ability to communicate but has difficulty retrieving words. His communication disorder impacted his behavior and becomes frustrated. (Testimony Ms. Giannone)

76. Ms. Giannone did not have knowledge of all the aggressive outbreaks the Student had toward the school staff. The Academy does not accept students unless they have difficulty in communicating or have behavioral issues that cannot be met at the school. The Academy does not have a fulltime BCBA. The role of the BCBA would be clearly defined when the Student enters the Academy. They employ two full-time behavior therapists who are not state certified and are trained by internet courses. The Parents were not told Student would have a full-time BCBA, Ms. Giannone did not speak with anyone concerning the Student's behaviors nor review the BCBA's report of the Student. The

Parents had not given her a release to speak with school personnel. (Testimony Ms. Giannone)

77. The Student's program, at the Academy, would include two hours each day of speech and language therapy in four ½ hour sessions in a 1:1 setting, The BCBA would develop the Student's program. The Academy would either increase the hours of the current part-time BCBA or outsource a new BCBA to meet the Student's needs. The Student would have some classes in a 3:1 setting. (Testimony Ms. Giannone)

78. The District team recommended High Roads Best program for the Student. The Parents were not in agreement with an outplacement to High Roads. The HSCSE stated that the program had BCBA supports and related service supports. The HSBCBA had been to High Roads and had observed the program and it would be an appropriate place for the Student. He would have access to peers and a therapeutic placement and counseling and BCBA support, going back out into the community regularly. A transition plan would be created where the high school staff would work closely with the High Roads staff and have the High Roads staff come and observe him. (Testimony of HSCSE, Testimony of HSBCBA)

79. Amy Farmer LCSW, Operations Manager of High Roads (BEST Academy), testified that she was unable to attend the February 7, 2017 PPT because she was invited late. High Roads has not met with the Student because does not have permission from the Parents. High Roads would not be able to meet his APE Goals, The Student would not be provided time with non-disabled peers. (Testimony of Amy Farmer LCSW, Testimony of HSCSE)

### **CONCLUSIONS OF LAW AND ARGUMENT:**

1. It is undisputed that the Student is eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 1401, et seq. FAPE is defined as special education and related services that are provided at public expense, meet the standards of the state

educational agency, include an appropriate school education, and that are provided in conformity with the IEP. 20 U.S.C. §1401(8).

2. The Student in this matter was diagnosed with autism. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 CFR § 300.8(c)(1)(i).
3. The IDEA's purpose is "to ensure that all children with disabilities have available to them a free and appropriate public education. "20 U.S.C. § 1400(d)(1)(A) A FAPE, as the Act defines it, includes both "special education" and "related services." § 1401(9). "Special education" is "specially designed instruction ... to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child ... to benefit from" that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services "in conformity with the [child's] individualized education program," or IEP. § 1401(9)(D).
4. The standard for determining whether a District has provided FAPE is set forth as a two-prong inquiry in Board of Education of the *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The first question to be determined is whether the Board complied with the procedural requirements of the Act? The second question to be determined is whether the IEP, "reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-207.
5. The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B)

These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. § 1414. The IEP is how special education and related services are "tailored to the unique needs" of a particular child. *Rowley*, 458 U.S., at 181.

6. In determining whether the Student's IEP was designed to provide FAPE, one must first determine whether the District complied with the procedural requirements of IDEA. The Parents were active participants of the PPT, there was no allegation that they did not receive their procedural safeguards in a timely manner and the issues of this hearing do not include that the District committed procedural violations.
7. The second prong of *Rowley* is to determine whether the IEP, "reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-207 This prong was further clarified, that the child's educational program must be "appropriately ambitious" and give the child a "chance to meet challenging objectives." *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017). According to the *Andrew* decision, "a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly ... awaiting the time when they were old enough to 'drop out.'" In this matter, the IEP was written and revised to give the Student "appropriate ambitious" goals and objectives. Two weeks after writing the May 2, 2017 IEP, the PPT convened another PPT and revised some of the Student's goals and objectives. The Parent agreed to the proposed IEP. (Findings of Fact No. 41 and 43).
8. An IEP can be written with "appropriately ambitious" goals and objectives at the time of its inception, but an IEP needs to be fluid and subject to change. As a child with Autism, the Student's deficits clearly affected his educational performance. The May 19, 2016 IEP was tailored to address his academic needs in math and reading. (Findings of Fact Nos. 25, 31, 41 and 45) The Student in the seventh grade and part of the eighth grade had two paraprofessionals assigned to him. (Findings of Fact Nos. 17, 24 and 31) The Parents

did not object to his 2016-2017 IEP. (Findings of Fact No. 43). The Student was successful in both his 7<sup>th</sup> and 8<sup>th</sup> grade. (Findings of Facts Nos. 26 and 44)

9. The Student from the start of his ninth grade in the District High School began to struggle with his program. When it was written, in May of 2016, it would have provided the Student with FAPE, (Findings of Fact Nos. 41 and 43) but his dysregulation impeded him from performing the task of his IEP objectives. This was recorded by his teachers and HSBCBA and the consultant from FBH. (Findings of Fact Nos. 50, 58 and 65) As his dysregulation continued to increase, it seemed that the purpose of his instructions was to maintain and impede any regression in his education. (Findings of Fact No. 50) As if his IEP was not written as ESY Program to maintain the Student and avoid regression. New objectives would only be introduced if they did not cause a flare-up of his behavior. The Student's behaviors were governing when new objectives were to be introduced but at the same time the new objectives being taught would exacerbated his behaviors. If the purpose of the IEP was to avoid regression it should have been revised so that anyone who read it would know, from the IEP, what should be taught and not have to decide if maintenance of prior mastered goals and objectives is what the Student requires. He needs stability and consistency in his education. IDEA does not impede the number of times an IEP may be modified or adjusted to enable the Student to receive FAPE. If maintenance is what the Student requires then the IEP should reflect that is what the team recommends and for how long. The Parents invoked stay-put on February 8, 2017 (H.O.-1) when they requested due process. Prior to that the Board had the ability to recommend and have the PPT change the Student's IEP to show that the program being provided to the Student was maintenance with new objectives presented on an as tolerated basis in the restrictive environment. On January 6, 2017, the LRE was changed but his goals and objectives were not altered. (Findings of fact No. 62) The program provided for the 2016-2017 school year, at the District High School, is not appropriate and did not provide FAPE. The Student's dysregulation impedes The District High School from providing the Student with a program that would provide him with FAPE.

10. IDEA also requires that students be educated in the least restrictive environment. Each public agency must ensure that:

- To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)

11. The LRE requirement is one of the central concepts of appropriate placement under the IDEA. Compliance with the IDEA's LRE provision essentially requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the students' nondisabled peers and community. The Student in this matter was being educated in a 3:1 environment with no other peers present. (Findings of Fact Nos. 59 and 70) The 2d Circuit joins the 3d, 5th, 9th, 10th, and 11th Circuit Courts of Appeals in adopting a two-prong test to review placements on the LRE continuum. This fact-specific test requires courts to consider: 1) whether the student can be satisfactorily educated in the general education environment with the use of supplemental aids and services; and, if not, 2) whether the student was mainstreamed to the maximum extent appropriate. *Oberti v. Clementon Sch. Dist.*, 19 IDELR 908 (3d Cir. 1993).

12. In determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first prong of the two-part mainstreaming test .., the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the



education of the other students in the class. *P. v. Newington Board of Education*, 546 F.3d 111 (2d. Cir. 2008) The District clearly made reasonable efforts to accommodate the child in a regular classroom to the most extent possible. His IEP called for science class with approximately 26 regular and special education students, and inclusion in band class with more than 20 students. (Findings of Fact No. 45) These efforts were thwarted by the behavioral issues of the Student. The anxiety and dysregulation were displayed whether he was doing a challenging activity, or a preferred activity. (Findings of Fact No. 71) The District provided a BCBA, a BCBA outside consultant and a paraprofessional, speech and language pathologist. The District team tried to the maximum extent possible to provide the Student with a least restrictive environment but his behavioral issues created a safety concern for the Student and staff. (Findings of Fact Nos. 47, 55, 67) His behavioral issues impede him from receiving any benefit in a less restrictive environment.

13. There was no evidence that the Student aggressions were directed toward peers. The Father testified that his aggressions are not displayed at home and the youth pastor of their church did not see these behaviors in church. (Findings of Fact No. 66) The impact to other students in the classroom could have a negative impact. The aggressive acts and behavioral actions of the Student could cause his peers in the class to be afraid of him and create anxiety in their school day when they witness any aggressive acts toward school staff. The students in his class were removed from the classroom when the Student became aggression. These actions would have a negative effect on the other Students. The High School currently is not an appropriate placement as his aggressive acts and behavior would have a negative impact on other Students.

14. The Speech Academy is not an appropriate placement for the Student. The Speech Academy only has a part-time BCBA and would increase the hours of the part-time BCBA or outsource for a BCBA to meet the Student's needs. The Speech Academy would more clearly define the BCBA's role. The assigned BCBA's role could be to develop an appropriate program for the Student, when He enters the Academy. Ms. Giannone was not aware of the aggressive acts of the Student. The Director, a certified

speech and language pathologist, has concluded that the Student's needs are language based and his communication is the cause of his behaviors. The Director did not perform any assessments of the Student and did not speak to any of the District staff or evaluators. The Parent did not give permission for her to contact the District High School. It does not seem that the Academy has a program that would address the Student's needs. The Student needs a program that would meet his needs from his entrance in the program. The Student cannot wait for a program to be created once he enters the Academy. The Student needs consistency and stability in his program. The Director did not portray that the Student would receive consistency and stability in his program at the Speech Academy. The Speech Academy is not an appropriate placement for the Student.

15. The District recommended High Roads, BEST Academy as a placement for the Student.

The Parents were not in agreement with this program. (Findings of Fact No. 78 ) The Parents want to maintain the Student in the District High School. The program in the District High School is not appropriate. The Speech Academy does not offer an appropriate program for the Student. This does not necessarily mean that by the process of elimination BEST Academy is the proper placement for the Student.

16. The Parents, various times, have not agreed to a diagnostic placement for the Student.

The District had the option of requesting Parent's consent be overridden by using the consent override procedures set out in 34 C.F.R. § 300.300(a)(3), which permit the Board to utilize the due process procedures under 34 C.F.R. §§ 300.507 through 300.516., R.C.S.A. Section 10-76d-14(b) The Board chose not to do so. If the District had exerted their right maybe the Parents would have been more agreeable to an out of district placement once they saw the results of another evaluators view of the needs of the Student. The Parents are adamant that the Student's behavior is caused by his inability to express himself. This might be part of the cause but his dysregulation shows an issue more than speech.

17. The Student requires an out-of-district placement. The Student's HSBCBA, Dr. Doolabh Dr. Wrigley and the injury and attacks to staff show that the Student requires a

therapeutic day placement that neither the District High School or Speech Academy can provide.

18. High Roads (BEST Academy) would provide access to peers, a therapeutic placement, BCBA support and community access. (Findings of Fact No. 75) The Parents have impeded High Roads meeting with the Student. The Student at High Roads would not be provided time with disabled peers but currently the Student is in a self-contained program, under stay put, where even lunch is brought to him. (Findings of Fact No. 59)
19. High Roads does not offer APE, but in the setting the Student was in, at the time due process was requested, he was not receiving APE nor interacting with any other student. High Roads (BEST Academy) would be able to provide the Student with FAPE in the LRE.

**FINAL DECISION AND ORDER:**

1. The program at the District High School is not appropriate. It does not provide the Student with FAPE in the LRE.
2. The program at Speech Academy is not appropriate. It does not provide the Student an appropriate program.
3. The High Roads (BEST Academy) is an appropriate program in the LRE for the Student to succeed.
4. The Student is not entitled to compensatory education.
5. A PPT shall be convened within 10 school days from the publishing of this decision and order.
  - a. High Roads (BEST Academy) shall be invited to the PPT and meet with the Student.

- b. A transition plan shall be developed to transition the Student to High Roads (BEST Academy).
- c. In order for the Student to succeed it is important that the transition include staff that the Student is familiar. The plan shall include the HSBCBA attending the High Roads (BEST Academy) for the first week at the start of the Student's attending the new school. This is to avoid the Student attending a new school and be confronted with faces he is not accustomed to seeing. If the HSBCBA sees that the Student has acclimated to his new environment before the week is completed; she will not have to continued going to High Roads (BEST Academy).
- d. The Student's paraprofessional shall be a part of the transition. She, like the BCBA shall attend High Roads (BEST Academy) for 2 weeks to assist the Student in his transition to High Roads (BEST Academy). If the Director of High Roads (BEST Academy) see that the Student's transition has gone well and the Student has acclimated to the new staff providing him services; the Director may tell the paraprofessional she does not need to continue coming.
- e. Dr. Doolabh shall remain involved with the Student program for one month to provide consultative services as needed.
- f. Transportation shall be provided by the District to and from High Roads (BEST Academy).

It is suggested for consideration by the PPT to have someone accompany the Student in the start of his transition on the vehicle that is transporting him. **This is NOT an order just a suggestion for the PPT to consider.**