

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Middletown Board of Education

Appearing on behalf of the Student: Attorney Courtney Spencer
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Appearing on behalf of the Board: Attorney Rebecca Santiago
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Appearing before: Attorney Uswah A. Khan
Hearing Officer

FINAL DECISION AND ORDER

PROCEDURAL HISTORY:

The Student requested a special education due process hearing in the above-captioned matter on May 14, 2019. The Impartial Hearing Officer was appointed to hear the case on May 14, 2019. A telephonic Prehearing Conference was convened on May 29, 2019 and a second one on May 31, 2019 to allow for earlier hearing dates. Attorney Courtney Spencer appeared on behalf of the Student and Attorney Rebecca Santiago appeared on behalf of the Board of Education.

The deadline to conduct the hearing and issue the final decision was initially June 29, 2019. An evidentiary hearing was scheduled for July 17 and July 19, 2019. On June 29, 2019, the parties jointly requested that the mailing date be extended as the hearings were scheduled in July due to counsel's summer vacations. The request and subsequent monthly requests due to the pendency of the hearings and briefs were granted and the final mailing date extension scheduled for March 27, 2020.

On July 17, 2020, the first evidentiary hearing matter was conducted. The parties agreed that further evidentiary hearings would be necessary and subsequently added scheduled hearings for July 19, August 7, August 14, August 15, September 5, September 13, October 16, October 25, October 29, and finally November 20, 2019.

Evidentiary hearings were conducted on July 17, 2019, July 19, 2019, August 7, 2019, August

14, 2019, August 15, 2019, September 5, 2019, September 13, 2019, October 16, 2019, October 25, 2019, October 29, 2019, and November 20, 2019.

The following witnesses testified:

Student's Mother
Amy Clarke
Dr. Adrienne Smaller
Jamie Kreinest
Yolanda Williams
Daniel Lyons
Jillian Slater
Beth Stone
Adina Ciobataru
Michelle Pritchard
Marybeth Abbatello
Linett Talamona

Hearing Officer Exhibits HO 1 was entered as a full exhibit. Student Exhibits P 1 through P43, P 45 through P46 were entered as full exhibits. Finally, Board Exhibits B 1 through B 38 were entered as full exhibits.

All motions and objections not previously ruled upon, if any, are hereby overruled.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Calallen Independent School District, 835 F.Supp. 340 (S.D. Tex. 1993); SAS Institute Inc. v. H. Computer Systems, Inc., 605 F.Supp. 816 (M.D. Tenn. 1985).

SUMMARY:

The Student claimed that the Board failed to offer a FAPE for the 2019-2020 school year and ESY 2019. In particular, the Student claimed that the IEP did not meet the Student's complicated needs, failed to provide appropriate related services and proposed improper goals and objectives. The Student submits that the program available at the Intensive Education Academy (IEA) is the appropriate program for the Student for the 2019-2020 school year, and that the Board should be ordered to place the Student at the IEA Program for the 2019-2020 school year.

The Board of Education argues that the program it provided and offered is appropriate for the Student and that the Board met its burden to offer a FAPE for the 2019-2020 school year and ESY 2019, and the Student's planning and placement team ("PPT") appropriately recommended a program that included individualized goals and objectives, paraprofessional support, adult support in the general education setting and during transitions, and various special education services, including: literacy and numeracy; occupational therapy ("OT") services; counseling; speech and language services; reading consultation with a reading specialist; and Board Certified Behavioral Analysis (BCBA) consultation.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (“C.G.S.”) Section 10-76h and related regulations, the Individuals with Disabilities Education Act (“IDEA”), 20 United States Code (“U.S.C.”) Sections 1400 *et seq.*, and related regulations, and in accordance with the Uniform Administrative Procedure Act (“U.A.P.A.”), C.G.S. Sections 4176e to 4-178 inclusive, Section 4-181a and Section 4-186.

ISSUES:

1. Did the Board offer a free and appropriate program for the 2019-20 school year, including ESY 2019?
2. If not, is the IEA Program the appropriate program for the Student for the 2019-2020 school year, and should the Board be ordered to place the Student at the IEA Program for the 2019-2020 school year?

FACTS:

1. The Student (D.O.B. 07/27/10) is presently nine years old and lives with her mother, (Parent), in Middletown, Connecticut. [B15, p.1; Tr. 7/17/19, p.42 (testimony of Parent)]. At the time of this hearing, the Student was a rising fourth grader. [B15, p.1].
2. In March of 2016, the Student was found eligible to receive special education services. [B14, p.6-7]. She continues to be eligible to receive special education services under the category of OHI-ADD/ADHD and is entitled to a free appropriate public education (“FAPE”) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (“IDEA”), and its state counterpart, Connecticut General Statutes (“C.G.S.”) § 10-76a *et seq.* [B15, p.1; B18, p.3].
3. The Student has challenges with sustaining attention and regulating her behavior and metacognition, particularly within the school setting. [B14, p.10]. She has a Full Scale IQ Score of 70, which falls within the very low range. [B14, p.13]. Her reading profile is consistent with dyslexia, and her handwriting ability is below grade level expectations. [B3, p. 17; B14, pp. 64-66]. On the Woodcock-Johnson IV Tests of Achievement, the Student scored in the very low range for reading, math, and writing. [B14, pp. 28-36]. Her working memory falls within the low average range and at the 9th percentile. [B14,

p.15]. The Student is also identified as having a Specific Oral Language Impairment. [B14, p.44].

4. Prior to January of 2018, the Student attended public schools operated by the Board. [See B1, p.1; B14, p.4]. Most recently, she attended the Van Buren Moody School (“Moody”) from kindergarten through the winter of her second grade year (i.e., December 2017). [See B14, p.6; Tr. 7/17/19, pp.76, 80-81].
5. During the fall of her second grade year (i.e., September to December 2017), the Student exhibited positive behaviors and achieved academic gains. [B5, pp.2-5, 11-27; Tr. 10/16/19, p. 184].
 - a. On average, she used kind words 90% of the time; kept her hands to herself 98% of the time; and stayed in her area 96% of the time. [B5, p.5; Tr. 9/13/19, p. 223]. The Student was involved with her peers in the regular education classroom, and frequently used her typical peers as behavioral models. [Tr. 9/13/19, pp. 226-227]. She was able to rotate through work centers, sit on the rug, and attend specials with her peers. [Tr. 9/13/19, p. 193; Tr. 10/29/19, p.18]. The Student also attended lunch and recess with her peers. [Tr. 9/13/19, pp. 193-194]. She particularly enjoyed playing with other girls in her class, and referred to them as her friends. [Tr. 9/13/19, pp. 193, 224]. Overall, the Student was engaged with her classmates and enjoyed interacting with them. [Tr. 11/20/19, pp. 19-20].
 - b. The Student achieved satisfactory progress in her reading, phonemic awareness, writing, math, social, visual and fine motor, and written expression skills. [B5, pp. 12-25]. The Student had access to a paraprofessional and was in the regular education classroom much of her day, but received special education services through the pullout model. [Tr. 9/13/19, p. 194, 226]. In this model, the regular and special education classroom teachers collaborated weekly to review Student’s progress and create materials for her. [Tr. 9/13/19, p. 194].

- c. The Student's regular education teacher used the Wilson Foundations reading program and her special education teacher provided Orton-Gillingham instruction, a multi-sensory reading approach, for 45 minutes, four days a week. [Tr. 9/13/19, pp. 194-195, 197]. During regular and specialized instruction, the Student used TouchMath, a visual, multi-sensory, and individualized approach to teaching math. [Tr. 9/13/19, pp.194, 202]. The Student also enjoyed "window math," an exercise where she would perform TouchMath on windows using whiteboard markers. [Tr. 9/13/19, p. 206]. On a math assessment dated December 12, 2017, the Student independently achieved 100% on a three minute timed test, adding up to the number 18. [B-5, p.8; Tr. 9/13/19, p. 223].

 - d. The Student developed her social skills through her meetings with Linett Talamona, the school social worker, which occurred twice a week. [Tr. 10/29/19, p.19]. Through her work with Talamona, the Student was able to demonstrate appropriate behaviors in the classroom and work on activities independently. [Tr. 10/29/19, p.18]. The Student was highly motivated to engage with her peers and had many positive interactions with them. [Tr. 10/29/19, pp. 13-14]. Talamona and the rest of the team regularly communicated the Student's progress with her parents, including daily behavioral reports. [Tr. 10/29/19, pp.20-21 (Testimony of L. Talamona); Tr. 11/20/19, pp.22-24 (Testimony of A. Clarke); *See also* B5].
6. Midway through her second grade year (2017-18), her parents unilaterally placed the Student in a private school, Intensive Education Academy ("IEA").

 7. After the Student visited IEA, she told her special education teacher that she did not want to leave Moody, and that she wasn't ready to go to her new school. [Tr. 9/13/19, p. 214].

 8. In January of 2018, the Student began attending IEA, a private special education program approved by the Connecticut State Department of Education ("CSDE"), located in West Hartford, Connecticut. [Tr. 8/15/19, pp. 4-5, 51 (testimony of Jillian Slater)]. The Student began attending IEA after the Parent and the Board reached a settlement agreement with respect to her academic programming for the 2017-2018 and 2018-2019

school years, including extended school year (“ESY”) 2018. [B6; Tr. 7/17/19, p.81]. The parties’ settlement agreement, dated January 18, 2018, waived any and all claims through June 30, 2019. [B6, p.3-4].

9. The Parent does not contest the enforceability of the parties’ January 18, 2018 settlement agreement. Nor does she dispute its unambiguous terms. [Tr. 7/17/19, pp. 5, 17-18 (statements by Attorney Spencer)]. The Parent, through counsel, concedes that she may not base any claims on circumstances occurring “prior to June 30, 2019[.]” Parent’s July 9, 2019 Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, p.4, lines 1-2. Additionally, this Hearing Officer ruled that she “expect[s] the parties -- to stay within the purview of the terms of [their] agreement.” [Tr. 7/17/19, pp.19-20]. At no point did the Parent challenge this ruling.

10. On April 6, 2018, while the Student was attending IEA, the Board held a planning and placement team (“PPT”) meeting for the Student. [B9]. At this meeting, the Board conducted an annual review and recommended that a reevaluation of the Student be completed by March 18, 2019. [B9, p.2]. The Parent attended this meeting and consented to this reevaluation, which included the following areas of assessment: academic achievement, speech and language, occupational therapy (“OT”), classroom functioning, cognitive processing, social/emotional/behavioral, adaptive skills, and reading. [B9, p.1; B10; B14, p.2]. At this April 6, 2018 PPT meeting, the PPT also provided the Parent with the procedural safeguards in special education and a notification regarding the laws relating to restraint and seclusion. [B9, p.2; B10]. The Parent previously received a copy of the procedural safeguards in special education on August 15, 2017. [B9, p.3].

11. In December 2018, after nearly one full year within IEA’s program, IEA strongly considered dismissing the Student from their program due to her behaviors and lack of progress. [See B20, p.3; Tr. 7/17/19, p.162-63 (testimony of Parent); Tr. 8/15/19, p.21, 34-35, 49-50 (testimony of J. Slater)]. IEA reported that the Student required three adults to support her at times and that they did not have the staff to support her. [P25, p.3; Tr. 7/19/19, pp. 235-36]. IEA staff were concerned about the Student’s unsafe behaviors,

including bolting from the class, aggression, object aggression, using inappropriate language, off-task behaviors, and calling out. [P25, p.3; Tr. 7/19/19, p.236]. Despite the Student's behavioral support plan, she was not making progress. [P25, p.3; Tr. 7/19/19, p.237]. Ultimately, IEA decided to keep the Student, whereby the Board moved forward with its evaluation and initial plan to hold a PPT meeting prior to March. [B20, p.3; Tr. 11/20/19, p.72].

12. The Board timely completed its reevaluation of the Student on February 11, 2019 [B14, p.2], incorporating a psychological evaluation, an academic achievement assessment, a speech and language evaluation, an OT evaluation, and a functional behavioral assessment ("FBA") into a comprehensive multidisciplinary evaluation. [B14]. As credibly explained by Jamie Kreinest, a board certified behavioral analyst ("BCBA") employed by the Board, a multidisciplinary evaluation allows a PPT to develop tailored recommendations that benefit students, like this Student, after considering how each evaluation informs the student's unique areas of need. [See Tr. 8/7/19, p.92]. In other words, the multidisciplinary evaluation "help[ed] all the staff become better informed about [the Student]." [Tr. 8/7/19, p.92].

13. During approximately ten nonconsecutive days between December 6, 2018 and January 23, 2019, the Board observed the Student at IEA and in structured settings, and performed various assessments. [See B14, p.3-4]. Board staff also reviewed the Student's social, developmental, and academic history during this process. [B14, p.4-7]. The evaluations revealed the following information:
 - a. Structured Observation
 - i. On December 10, 2018, Marybeth Abbattello, a school psychologist employed by the Board, observed the Student at IEA. During her observation, Abbattello observed the Student engage in noncompliant and "frequent off-task verbal behavior." Abbattello observed the Student to be "on task" approximately 63 percent of the time and observed the student engage in off-task verbal behavior approximately 54 percent of the time. [B14, pp. 9-10]. Abbattello also observed the student make comments such as, "I hate this, I

don't like it;" "When I get angry that means I go to the quiet room," and "I'm going to throw up on you." [B14, p.10]. Abbatello testified that these comments were either ignored by staff, or, when addressed, led to argumentative discourse. [Tr. 10/25/19, p.15, 56]. Abbatello observed the Student arguing with peers, and testified that she saw no appropriate interactions between the Student and her peers. [Tr. 10/25/19, pp. 12-14]. Relatedly, Abbatello did not observe any peers demonstrating appropriate social skills for the Student [Tr. 10/25/19, p. 14]. Moreover, Abbatello observed the Student receive only 18 minutes of reading instruction. [B14, p.10; Tr. 10/25/19, pp.16-17]. Abbatello described her reading instruction as consisting of the Student eating her snack and then leaving. [Tr. 10/25/19, p.17]. She stated, "[F]rom what I can remember, it was mostly her eating her snack and getting settled in, and then it was almost time to leave." [Tr. 10/25/19, p.17].

b. Psychological Evaluation

- i. On December 20, 2018 and January 11, 2019, Abbatello conducted assessments at Lawrence Elementary School in Middletown. During one of these testing days, the Student appropriately interacted with non-disabled peers during recess and was able to navigate the playground without adult support. [B14, p.11]. Testing further revealed, among other things, that "verbal reasoning is difficult" for the Student [B14, p.13], she had "difficulty understanding and applying concepts, drawing inferences, and may appear confused with task demands upon first practice" [B14, p.14], and "likely benefits from visual stimuli when asked to hold and manipulate information within working memory." [B14, p.15].
- ii. The Parent and the Student's special education teacher at IEA, Yolanda Williams, completed a Behavior Assessment System for Children - Second Edition (BASC-2), a Vineland Adaptive Behavior Rating Scale - Second Edition (Vineland-II), and a Conners Rating Scale - Third Edition. These assessments revealed the following: the Student "exhibit[ed] levels of

hyperactivity, aggression, and conduct problems that are at a much higher level than her same-age peers” [B14, p.18]; the Student had “a moderate level of difficulty exchanging information with others” and struggled with “writing the letters of the alphabet using the correct orientation, writing simple sentences of three or more words, writing 20 or more words from memory and demonstrating an understanding of alphabetic order” [B14, p.22]; the Student’s profile indicates that she “desires to be social with others and has play skills which may be age-appropriate, however she experiences difficulty coping with setbacks in an age-appropriate manner” [B14, p.23]; and that the Student “demonstrates levels of hyperactive and impulsive behavior that are much higher than expected for her age and gender.” [B14, p.26].

c. Academic Achievement Evaluation

- i. On December 6, December 14, December 20, 2018 and January 23, 2019, Michelle Pritchard, a special education teacher employed by the Board, conducted various assessments that tested the student’s baseline levels of academic achievement. [B14, p.28]. The tests were conducted at Lawrence Elementary School in Middletown. [Tr. 9/13/19, p. 233]. Although the Student was not familiar with this elementary school, Pritchard reported that she arrived to the sessions in a good mood, transitioned well, and had no behavioral issues, aside from mild redirections. [Tr. 9/13/19, p. 233-234]. Moreover, the Student was excited to see Pritchard. [Tr. 9/13/19, p. 234].
- ii. The Woodcock-Johnson IV Tests of Achievement highlighted the Student’s weaknesses in reading and writing. [See B14, pp.29-33, 36-37]. Pritchard noticed that during the passage comprehension section, the Student relied heavily on the use of pictures, suggesting she had regressed in her ability to read and decode. [Tr. 9/13/19, p.238]. The test also revealed that the Student struggled with addition and subtraction [B14, p.34-35]; data from December of 2017 indicated that, prior to leaving the Board’s schools, the Student made satisfactory progress on her objectives that specifically related to addition and subtraction. [See B5, p.20]. Pritchard testified that the Student had regressed

in math since attending IEA, as she was frequently counting on her fingers and had difficulty differentiating between addition and subtraction. [Tr. 9/13/19, pp. 238-239].

- iii. Pritchard noted the Student's writing ability had similarly regressed. [B14, p.36; Tr. 9/13/19, p. 240]. Words that the Student had previously been able to sound out and write independently, such as the words "fun" or "got," now presented difficulty for the Student *Id.* Moreover, her handwriting was not as fluid as it was when she attended Middletown. [Tr. 9/13/19, p. 240]. When the Student attended Middletown, Pritchard collaborated regularly with the occupational therapist to ensure they were using the same motor pattern for teaching writing. [Tr. 9/13/19, p. 241].
- iv. Additional testing conducted by Pritchard revealed that the Student struggled with punctuation, grammar, and spelling. [See B14, pp. 39-42]. She also struggled "identifying and labeling symbols and punctuation marks." [B14, p.41].

d. Speech and Language Evaluation

- i. On December 6, December 13, and December 21, 2018, Kelly Dalrymple, a speech-language pathologist employed by the Board, conducted multiple testing sessions to assess the Student's speech and language needs. Such testing revealed, for example, that the student had some "articulation errors" that were no longer developmentally appropriate [B14, p.46], "did not always use appropriate tones of voice or facial expressions when conversing" [B14, p.47], and made several inappropriate comments and used inappropriate language. [B14, p.47]. In connection with this evaluation, staff from IEA indicated that the Student "does not have much of a connection with peers." [B14, p.47]. Dalrymple also noted that the Student received sixty minutes of speech/language instruction per week while at IEA. [B14, p.45].

e. OT Evaluation

- i. On December 13 and December 21, 2018, Erica Berthiaume, an occupational therapist employed by the Board, observed the Student and completed various assessments. Berthiaume noted that the Student had difficulty sitting still and focusing towards the end of the morning sessions, and that “transitions back to the testing room following breaks became more challenging at this time as well.” [B14, p.62]. Berthiaume successfully managed those transitions, however, through redirection, positive reinforcement, and reviewing expectations. [B14, p.62]. Testing revealed that the Student particularly struggled with her ability to place letters and numbers on a baseline and the ability to use sentence conventions, such as using “a beginning capital, letters close within words, space between distinct words, and ending punctuation.” [B14, p.64].

f. FBA

- i. On December 5, December 10, December 12, and December 18, 2018, Jamie Kreinest observed the Student at IEA for a total of 990 minutes in connection with her completion of an FBA. [B14, p.72]. She also reviewed data and information provided by Daniel Lyon, the BCBA employed by IEA, and conducted a student interview. [B14, p.67].
- ii. According to the information provided by Lyon, the targeted behaviors for the Student were non-compliance, object aggression, aggression, bolting, inappropriate language, and duration of time out of the classroom. [B14, p.67]. The data from IEA from August 29, 2018 to December 5, 2018 revealed that, on average, the Student engaged in non-compliance four times per day; object aggression thirteen times per day; aggression twenty-one times per day; bolting seven times per day; inappropriate language thirty-two times per day; and was out of the classroom seventy-eight minutes per day. [B14, p.67-68; P30, pp.1-2]. Between December 5, 2018 and January 16, 2019, the data provided by Lyon illustrated a decrease in the average occurrences of the Student’s targeted behaviors, but she continued to use inappropriate language

at least nine times per day.¹ [B14, p.68].

- iii. Notably, prior to leaving the Board's schools in December 2017, the Student stayed in her area 96 percent of the time during the day; used kind words 90 percent of the time during the day; and kept her hands to herself 98 percent of the time during the day. [B5, p.5].
- iv. During her direct observations of the Student, Kreinest observed the Student argue with peers and staff on a number of occasions, including one instance where a student threatened to "stab [Student] in the face with a knife." She also heard the Student call a staff member an "annoying piece of sh**" during an argument, and screamed and yelled on a number of occasions. [See B14, p.73-75].
- v. Kreinest observed IEA's gym teacher ask, "If someone said I can give you something to zap your brain, would you say yes?" [B14, p.73]. The Student replied, "Yes, I want to get zapped." *Id.* Meanwhile, another student made comments and laughed about "breathing blood." *Id.*
- vi. During the observation, the Student's teaching assistant used vocabulary the Student could not understand, such as, "You had an object aggression." Similarly, he stated that he was going to "start her 'noncompliance' because she was not listening." [B14, p.75]. Lyon testified that the words "object aggression" and "noncompliance" were inappropriate to use with the Student [Tr. 9/13/19, p.54].
- vii. Kreinest identified demands and transitions as the primary antecedent behaviors for the Student, and listed the target behaviors as noncompliance,

¹Although this data revealed a decrease in the frequency of the Student's target behaviors, it is important to note that the sample size of this data was only forty-two days and was interrupted by (1) absences due to testing associated with the Board's multidisciplinary evaluation and (2) the holiday vacations of Christmas and New Year's Day. [See B14, pp. 3-4, 68; B38, p.2 (dates of attendance at IEA, which shows school not in session between 12/22/18 - 1/02/19)]

object aggression, bolting, inappropriate language (including yelling), aggression, and out of classroom duration. [B14, p.78-79, 82]. She also hypothesized that attention, escape from demands, and access to tangibles were the root causes of her behavioral challenges. [See B14, p.79].

14. Among other areas of need, the multidisciplinary evaluation identified the Student's areas of need as follows:

- a. In reading, she had difficulty with "blend and segment words," struggled to "consistently recall sight words" that she had mastered before leaving the Board's schools, and had "significant weaknesses with reading and listening comprehension based tasks." [B14, p.80].
- b. In writing, the Student could not formulate sentences, demonstrated inefficient letter formation, had difficulty with letter sizing, did not adhere to sentence conventions, and "took more time than expected to copy a sentence." [B14, p.81].
- c. In math, the Student struggled with identifying numbers 21-1000, had a difficult time with adding and subtracting, and possessed a limited understanding of grade level math terms. [B14, p.81].
- d. With respect to the Student's social/emotional/behavioral obstacles, she demonstrated high levels of acting out behaviors, inattentive and hyperactive behaviors, and negative self-talk. She also "displayed difficulty transitioning between activities, attempted to delay the start of tasks, and refused to complete some assignments." [B14, pp. 81-82].

15. The members of the team who devised the multidisciplinary evaluation collectively made various recommendations, including: "being educated in a structured setting with access [to] staff to support social/emotional/behavioral functioning"; a "multi-sensory approach"; "opportunities to access typical peers that would allow for natural practice with social skills and language exposure"; creating a BIP based on the FBA; regular

movement breaks, a structured/visual schedule, and breaking longer assignments into manageable chunks to address her attention difficulties; providing “strong adult and typically developing peer language models”; and embedded keyboarding instruction. [B14, pp.82-85].

16. Several witnesses testified to the social and academic benefits the Student would receive from access to typical peers.
 - a. Beth Stone testified that typical peer models would greatly benefit the Student’s language skills. [Tr. 9/5/19, pp.59-60]. She explained that for a student with an expressive receptive language disorder, such as this Student, knowledge of everyday words is gained mostly through conversation. *Id.* Therefore, to have typical peer models who are using conversational language and everyday words is very beneficial for the Student. *Id.* Stone also testified that a student learns from a peer who is slightly ahead of her in a skill, also known as the zone of proximal development, so having typical peer models would be “very important” for the Student’s language, reading, and spelling skills. [Tr. 9/5/19, p.60].
 - b. Pritchard testified that the Student would also benefit from typical peer models because “it’s a natural way for [the Student] to learn new skills and strategies.” [Tr. 9/13/19, pp.226-27]. Pritchard stated that typical peers are “very important for [this Student],” and when she took breaks with the Student during testing, “[The Student] was constantly seeking out typical peers.” [Tr. 10/16/19, p.37]. When the Student was in the classroom with her typical peers, she followed along with them and engaged in work, interacted in different groups, and transitioned to different activities. [Tr. 10/16/19, p.42]. Pritchard noted the benefit of increased independence when the Student was in the classroom with her typical peers: “Very frequently, the paraprofessional or certified staff wouldn’t have to give a follow-up direction for [the Student] because she typically followed her peers.” *Id.* Moreover, the Student “loved” working with her typical peers during instructional time. *Id.*
 - c. Talamona testified that the Student would gain improved social and behavioral skills through access to typical peers in the Board’s proposed program. [Tr. 10/29/19, p.38-39]. Specifically, that the Student could practice appropriate social interactions with typical peer models. *Id.* It was not of concern to Talamona that the Student is

not at grade-level. [Tr. 10/29/19, p.38]. She explained that all Students are at different levels, “but they still have the opportunity to be with peers and engage and interact with peers and make friends.” *Id.* Talamona emphasized the fact that the Student is a very social child, she enjoys being with her peers, and it is helpful for the Student to have those typical peer models. [Tr. 10/29/19].

17. As part of this reevaluation process, Beth Stone, an independent evaluator selected by the Parent, conducted a reading evaluation of the Student on January 25, 2019. [B13; Tr. 7/17/19, p.119 (Parent testimony regarding selecting Beth Stone)]. Stone previously conducted a reading evaluation on the Student in March 2017. [B3].
18. After the March 2017 evaluation, Stone consulted with Middletown Public Schools to implement structured literacy lesson plans and materials for the Student [Tr. 9/5/19, p.11-17]. As part of this consult model, Stone observed the Student working with Michelle Pritchard, a Middletown special education teacher. [Tr. 9/5/19, p.12]. Stone observed that the Student had a “very nice working relationship with Mrs. Pritchard” and “was able to get through a full lesson.” *Id.* After Middletown implemented Stone’s recommended structured literacy approach, the Student’s frustration level diminished. [Tr. 9/5/19, p.15]. Stone observed that the Student’s behaviors were “quite good,” and did not stop her from completing her lessons. [Tr. 9/5/19, pp.118-19]. The consult model also included training for Middletown staff, including Michelle Pritchard and Katie Seifert, Middletown’s reading specialist. [Tr. 9/5/19, p.18]. The training consisted of phonemic awareness and handwriting skills, as well as various accommodations and modifications that would be appropriate for the Student *Id.* Beth Stone noted the skill level of both Michelle Pritchard and Katie Seifert as “very gifted.” *Id.* Stone stated that Seifert “is the type of reading specialist you would kind of hope is in a school district because she keeps current on everything that’s out there,” and “is well versed in many structured literacy programs.” [Tr. 9/5/19, p.19].
19. In her January 2019 evaluation, Stone administered the same tests as she did in 2017 to evaluate the Student’s progress over time. [B13; Tr. 9/5/19, p.23]. Stone indicated that, although the Student had improved in some areas since March 2017, certain challenges

persisted or “remained static.” [See B13, p.4-5, 9]. For example, scores associated with her ability to “recognize words in sentences, syllables in words, and individual phonemes (sounds) in words” “remained static, and her errors were similar to the last administration.” [B13, p.4]. She was only able to read 12.5 percent of sight words. [B13, p.5]. And her spelling appeared “to have plateaued, and in some cases declined, since the 2017 evaluation.” [B13, p.7]. Stone did not expect these skills to remain static, as she had received about two years of instruction by the time of the January 2019 evaluation. [Tr. 9/5/19, p.24]. Stone stated that, based on her observations, she felt the Student overall had regressed from what she observed during the Middletown consultation. [Tr. 9/5/19, pp.29-32, 126-27].

20. Stone testified that, based on the Student’s inability to break down words, it appeared that memorization was a strong component of the Student’s instruction at IEA. [Tr. 9/5/19, pp.30-33]. For example, if Stone gave the Student a word such as “kid,” the Student could read the word, but experienced difficulty breaking the word down into “k” “i” and “d.” *Id.* Stone advised against the use of memorization as a literacy approach for the Student [Tr. 9/5/19, pp.30-33]. IEA also used the Milestones Reading Program and Wilson as part of the Student’s literacy program. [Tr. 8/14/19, pp.105, 109 (Testimony Y. Williams)]. Stone advised against the use of the Milestones Reading Program, as it was originally intended for students who are hearing impaired and “misses a lot of, again, those foundational areas that would be very beneficial to [the Student]” [Tr. 9/5/19, pp.35-37]. Similarly, Stone advised against the use of Wilson, a stepped literacy program, for the Student as it was originally intended for middle school students and includes many skills in one lesson. [Tr. 9/5/19, pp.38-40]. In Stone’s opinion, the use of Wilson could result in frustration for the Student [Tr. 9/5/19, p.42]. Stone expressed similar concerns with the use of Wilson Foundations and Lucy Calkins literacy programs. [Tr. 9/5/19, pp.44-48; p.130]. Stone testified that there was no evidence that IEA used a structured literacy program with fidelity at the intensity that would be needed for reading, or for spelling. [Tr. 9/5/19, p.62]. The IEP used by IEA included no reading goals. [B32; B33; Tr. 9/5/19, p. 66]. Stone concluded that she does not believe that IEA is providing appropriate reading instruction to the Student [Tr. 9/5/19, p.62].

21. In her January 2019 evaluation, Stone made various recommendations, including: a multisensory structured literacy approach; a minimum of forty-five minutes per school day of one-to-one, multisensory intervention; and the Student should work on various reading and spelling skills, including “single syllable words containing am, an, al, and all patterns.” [B13, pp. 9-11]. Stone testified that the Board’s recommendation of four forty-five minute multisensory literacy instruction sessions was appropriate to enable the Student to make progress, as the Student would benefit from having a day off to keep her engaged and motivated. [Tr. 9/5/19, pp.55-56]. Stone also testified that the Board appropriately accounted for phonemic awareness in its proposed program, as updated testing by Pritchard revealed gains, and structured literacy programs inherently include phonemic awareness. [Tr. 9/5/19, pp.59, 128-29]. Moreover, Stone observed Pritchard appropriately implementing phonemic awareness in her structured literacy lessons. [Tr. 9/5/19, p.129]. Stone concluded that the Board offered an appropriate program for the Student [Tr. 9/5/19, pp.57-59, 61].
22. Stone also testified that the Student would benefit from positive peer models in order to gain foundational language skills and could succeed in a regular education classroom with supports. [Tr. 9/5/19, pp.59-60]. Stone explained that everyday words are acquired mostly through conversation. *Id.* Stone stated that it would therefore be “very beneficial” for the Student, a student with an expressive receptive language disorder, to have typical peer models who use conversational language and everyday words. [Tr. 9/5/19, p.60]. Stone expressed concern with the Student’s models having lower communication skills. *Id.* She reiterated that typical peer models would be “very important,” as a student learns from someone who is slightly ahead of her in skill level, also referred to as a student’s “zone of proximal development.” *Id.* Stone testified that the Student could succeed in a regular education classroom in a public school with supports. [Tr. 9/5/19, pp.60-61].
23. Contemporaneous with the abovementioned evaluations, the Parent also obtained an independent psychological evaluation from Adrienne Smaller, Ph.D. In her evaluation, Smaller noted that “[the Student’s] patterns of behaviors, marked deficits in all areas of learning and cognition, as well as her diagnosis of ADHD[,] render her to be extremely fragile in the learning setting.” [P25, p.25]. She identified the Student’s “social

relatedness” as a “significant strength for her.” [P25, p.25]. Smaller did not speak with Middletown staff as part of her evaluation, nor did she observe the Student in Middletown Public Schools. [Tr. 9/5/19, pp. 150-152]. Smaller did observe the Student at IEA, and witnessed no instances where the Student engaged in reciprocal communication or play skills with her peers. [Tr. 9/5/19, p.148]. Smaller recommended continued placement at IEA, but also acknowledged that IEA staff spoke with the Parent and informed her that they had decided they could no longer program for the Student due to her behaviors. [P25, p.3].

24. On January 15, 2019, the PPT sent the Parent a notice of a PPT meeting scheduled for February 14, 2019. [B12].

25. Leading up to the February 14, 2019 PPT meeting, progress reports and other documents from IEA revealed the following information regarding the Student: Despite being eight years old and in the third grade, she was at a Kindergarten level for reading and used the Lucy Calkins Reading and Writing Workshop program. [P26, p.1; see also Tr. 8/15/19, p.15]. Notably, she entered IEA at a Kindergarten reading level. [P23, p.1; B28, p.1; Tr. 8/14/19, p. 57, 93-94 (testimony of Y. Williams)]. Additionally, when she left the Board’s program in December 2017, she had made “satisfactory progress” on math objectives related to adding and subtracting numbers “through 20.” [B5, p.5]. But as of January 28, 2019, she could only “add and subtract single digit numbers when using a number line,” according to her special education teacher at IEA, Yolanda Williams. [B30, p.5]. Between August 29, 2018, and December 5, 2018, the Student experienced 167 instances of noncompliance, 577 instances of object aggression, 888 instances of aggression, 321 instances of bolting, and 1387 instances of inappropriate language. [B16, pp.8-9].

26. As of February 14, 2019, the Student received only *fifteen minutes* of reading instruction by a Wilson teacher, *three times per week*, which is a fraction of Stone’s recommendation that she receive forty-five minutes of daily reading instruction. [See ¶13; Tr. 8/14/19, p. 10, 100-101, 192-93 (testimony of Y. Williams at about 11:50 AM)].

27. Between April 2, 2018 and August 31, 2018, IEA secluded the Student on at least six occasions due to her behaviors. [See B27]. Staff at IEA felt the need to seclude her for various reasons, including running from staff with her shoes untied [B27, p.1], hitting and kicking IEA staff [B27, p.2, 9], and/or swearing in front of other students. [B27, p.9]. Notably, to address the Student's challenging behaviors, the BIP that IEA staff developed for her included restraint and seclusion as a planned intervention strategy, in violation of Connecticut law and guidance from the CSDE, which contradicts its obligations as an approved private special education program. [P36, p.4; Tr. 9/13/19, p.72; see ¶8, supra]. Jillian Slater, the Director of IEA, acknowledged that, as an approved special education program, IEA must follow the CSDE guidance regarding the operation of private special education programs, including the guidance addressing restraint and seclusion. [Tr. 8/15/19, p. 51; see also Understanding the Laws and Regulations Governing the Use of Restraint and Seclusion in Schools: July 2019, CSDE].²
28. Prior to the February 14, 2019 PPT meeting, staff from the Board, on two occasions, offered to the Parent the opportunity to discuss the various evaluations contained in the multidisciplinary evaluation. [B15, p.2 (offered meetings on 2/8/19 and 2/11/19); B15, p.6 (Parent picked up evaluations, but declined opportunity to review them with staff)]. She declined these opportunities, but did pick up the evaluations on February 7, 2019. [B15, p. 2, 6; B18, p. 4, 8].
29. The Parent and grandparent of the Student, assisted by counsel, attended the February 14, 2019 PPT meeting. Williams, Slater, and other staff from IEA participated in the meeting via telephone. [B15, p.1; Tr. 7/17/19, p.150; Tr. 8/15/19, p. 76, 94-95 (discussion about technology); see also B37]. Smaller also participated in the February 14, 2019 PPT meeting by telephone. [B15, p.1; Tr. 7/19/19, p. 213-17]. The following staff from the Board attended the meeting: Amy Clarke, the Director of Pupil Services and Special Education; Michelle Pritchard, a special education teacher; Marybeth Abbatello, a school

²This Hearing Officer takes judicial notice of the CSDE's guidance. *See* Regulations of Connecticut State Agencies ("R.C.S.A.") § 10-76h-15(f) ("The hearing officer may take administrative notice of any general, technical or scientific facts within the knowledge of the hearing officer, and any other judicially cognizable facts."); *see also* Connecticut General Statutes ("C.G.S.") § 4-178(6) ("notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge").

psychologist; Linett Talamona, a school social worker; Kelly Dalrymple, a speech and language pathologist; Erica Berthiaume, an occupational therapist; and Jamie Kreinest, a BCBA. [B15, p.1; B18, p.1]. The Parent testified that the IEP accurately reflected who attended the meeting. [Tr. 7/17/19, pp.151-153].

30. Clarke, a former principal for six years at Spencer Elementary School [B23, p.2], ran the February 14, 2019 PPT meeting, which was held at the Board's central office. [See Tr. 7/17/19, p.150]. No other PPT meeting took place on February 14, 2019, and the Parent did not attend any other PPT meeting on this date. [B15, p.1; B18, p.3; Tr. 7/17/19, p.149-53; Tr. 8/7/19, p.137]. The Parent also received procedural safeguards at this meeting. [B15, p.2; B18, p.4]

31. During the February 14, 2019 PPT meeting, the PPT had extensive discussion regarding a proposed IEP for school year 2019-2020, including ESY 2019. The PPT recommended placement at an "in-district elementary school with Intensive Case Management." [B15, p.2; B18, p.4]. As Kreinest credibly testified, she described the Intensive Case Management ("ICM") model to the Parent, grandparent, and the rest of the PPT at that time, indicating that the Student would be placed at Spencer Elementary School. [See Tr. 8/7/19, pp.136-38; see also B17]. Clarke, Pritchard, Abbatello, and Talamona each testified that the ICM program was described in detail at the PPT. [Tr. 7/19/19, pp.41-43 (A. Clarke); Tr. 9/13/19, p.255-56 (M. Pritchard); Tr. 10/25/19, p.41-43 (M. Abbatello); Tr. 10/29/19 p. 26 (L. Talamona)]. Moreover, the Parent, Grandparent, and counsel had the opportunity to ask questions if they desired. [Tr. 9/13/19, p.257]. The ICM program at Spencer "is designed for 3-5 grade students needing significant social/emotional and behavioral supports." [B36, p.4]. Kreinest explained that ICM offered "wrap around" supports and that various trained staff, including a social worker, a behavior technician, a BCBA, and a school psychologist would be available to the Student. Additionally, she explained that the program "is a fluid process in that if students needed more time in general [education] to exposure to their peers, that's where they could be if they needed more time in the resource room that intensive case management based on student need [sic]. That's where they would spend time." [Tr. 8/7/19, p.137]. In other words, the ICM model could adjust to the Student's particular needs on any given day, such that the

Student could spend more time within the general education setting if she was doing well behaviorally one day, but could spend more time in the special education classroom on a different day if her behaviors were particularly problematic. [See B35, p.3].

32. The PPT explained to the family that, in the ICM model, the Student would be based in the regular education classroom, but would have a dedicated space for specialized instruction, and access to a sensory and cool down room that could be used flexibly for the Student. [Tr. 11/20/19, p.44].
33. The ICM Manual (“Manual”) for the Spencer School outlines the ICM model and describes the general strategies that are used for students in the program. [B35; Tr. 8/7/19, p.54]. The Manual is typically given to paraprofessionals and the staff working within the program. [Tr. 8/7/19, p.54]. As detailed in the Manual, the ICM program at Spencer is designed for students who have significant interfering behaviors (*i.e.*, aggression, non-compliance) in a typical classroom. [B35, p.3]. Although specific target behaviors are determined by the individual student’s profile, target behaviors generally include: elopement, aggression, property destruction, inappropriate verbal remarks, and non-compliance. [B35, pp.9-10]. The goal of the program is to eliminate interfering behaviors through teaching and promoting appropriate behaviors to students who have not responded in a meaningful way to more typical case management and interventions. [B35, p.3]. The model emphasizes preventative strategies, small group and 1:1 instruction and support, teaching appropriate replacement behaviors, reinforcement systems, and proactive strategies to maintain appropriate behavior. *Id.* The extent to which a student is removed from general education is driven by student need, and students at all levels are included to the greatest extent with non-disabled peers. *Id.* The ICM framework is designed to provide intensive supports and instruction with a primary focus on returning a student to general case management. *Id.*
34. The PPT invited the family to tour the ICM program at Spencer Elementary School, and also highly recommended that the Student participate in a shadow day to support her transition. [B17; Tr. 11/20/19, pp.42-43]. As part of the shadow day, the Student would gain familiarity with the classroom space and meet her teacher for the following year.

[Tr. 11/20/19, p.109]. The family did visit the program in June 2019, but declined the Board's offer to have the Student participate in a shadow day. [Tr. 11/20/19, pp.42-43].

35. The PPT offered, inter alia, the following specially designed special education instruction, related services, and accommodations for the Student that addressed her unique needs during the 2019-2020 school year:

- a. Twenty-six hours per week with typical, non-disabled peers.
- b. Five hours per week of "pull-out" special education in literacy and numeracy.
- c. Three hours per week of literacy education which would take place in a special education resource room according to a flexible schedule depending on student need. Tr. 10/16/19, p. 40 (testimony of M. Pritchard regarding 45 minutes per day, 4 days a week of reading)].
- d. Two hours per week of numeracy education which would take place in a special education resource room according to a flexible schedule depending on student need.
- e. Thirty minutes per week of direct OT services, which would occur in a small group or individual setting.
- f. One hour per week of direct counseling services, which would occur in a small group or individual setting.
- g. One hour per week of direct speech and language services, which would be flexible depending on student need.
- h. Thirty minutes per month of OT consult to support embedded handwriting and keyboarding daily programs.
- i. Three hours per school year of reading consult with a reading specialist.
- j. The creation of a BIP prior to her enrollment.
- k. A dedicated 1:1 paraprofessional.
- l. Adult support in the general education classroom to support accommodations and implementation of a BIP.
- m. Adult support during transitions and at recess.
- n. Four hours per month of consult with a BCBA.
- o. Visual cues, visual schedule, and visual supports.
- p. Structured paper with lines for all writing.
- q. Breaking lessons into smaller steps.

- r. Multisensory instruction strategies and manipulatives. [B18, p.32, 35-36; see also B15, p.30, 33-34]
 - s. Approximately fifteen to twenty-three students would be present in the regular education setting, while no more than five students would be present in the special education setting at any one time. [Tr. 7/19/19, pp.8-10 (testimony of A. Clarke)]. All teachers in the Board's public schools are trained on how to differentiate classwork so that all students in a regular education classroom learn the same topic, but at their own individual instructional level. [Tr. 10/16/19, p. 186; Tr. 10/25/19, p. 84]. And, according to the ICM model, the Student would receive her specialized literacy and numeracy education in a resource room on a one-to-one or, at most, a one-to-two basis. [Tr. 7/19/19, p. 9-10 (testimony of A. Clarke)]. Between six and eight students would receive their education through the ICM model. [Tr. 7/19/19, p. 11]. The ICM staff includes a full-time special education teacher, BCBA, school psychologist, social worker, speech and language pathologist, as well as full-time paraprofessionals. [Tr. 11/20/19, pp.26-28]. The ICM staff also includes occupational therapy and physical therapy support. [Tr. 11/20/19, p.28]. This level of dedicated staffing is unique to the ICM Model, and provides flexible and responsive support to its students. [Tr. 11/20/19, pp.28-29].
36. The PPT also recommended ESY services for 2019 to provide instruction as well as to assist the Student with transitioning back to the Board's public schools. [See B17; Tr. 10/16/19, pp. 39-40]. The ESY program would have been located in the Lawrence School, the same building in which the Student was evaluated by Middletown staff, so the Student would be familiar with the setting. [Tr. 10/16/19, p.39]. The ESY services would enable the Student to see other students that would be in her classroom at Spencer. *Id.* The Student would also gain familiarity with the staff at Spencer, including the BCBA who would be working directly with her. *Id.* The PPT offered the following to address the Student's unique needs for ESY 2019:
- a. Eight hours per week of academic support, which would occur within the Board's ESY program.
 - b. Thirty minutes per week of direct OT services, which would occur in a small group or individual setting.

c. Thirty minutes per week of direct speech and language services, which would be flexible depending on student need. [B18, pp.35-36; see also B15, pp.33-34].

Clarke testified that these recommended hours were appropriate to enable the Student to make progress in her goals and objectives. [Tr. 7/19/19, pp.132-33, 169; Tr. 11/20/19, pp.54-55]. Clarke noted that ESY is typically a briefer program, not intended to recreate the full school day. [Tr. 7/19/19, p.132]. Pritchard testified that recommended hours, including eight hours per week of academic support, thirty minutes per week of direct OT services, and thirty minutes per week of direct speech and language services, were “a great amount of time,” and would enable the Student to see other students that would be in her classroom at Spencer. [Tr. 10/16/19, p.39]. Both Clarke and Pritchard testified that the recommended ESY program was appropriate and would help that Student transition back into Middletown Public Schools. [Tr. 11/20/19, pp.54-55 (Clarke); Tr. 10/16/19, p.39 (Pritchard)].

37. The PPT discussed assistive technology, and determined that it was not required at the time. [B15, p.33]. Michelle Pritchard credibly explained that, based on the Student’s cognitive profile, materials and manipulatives were more useful than technology because technology could distract the Student. [Tr. 10/16/19, p.168]. Relatedly, the Board did not complete an assistive technology evaluation after the PPT while the Student was at IEA because it would be more appropriate to complete the evaluation, including recommended materials, within the Board’s recommended setting. [Tr. 10/16/19, p.195]. The Board planned to conduct an assistive technology evaluation, using the state-recommended flowchart, when the Student began attending Middletown Public Schools. [Tr. 11/20/19, p.57].

38. The PPT, in accordance with the evaluations and information before it on February 14, 2019, proposed goals and related objectives that specifically addressed the Student’s unique areas of need. For example:

- a. To address the recommendations and areas of need identified by the psychological evaluation performed by Abbattello, the PPT recommended visual cues, visual supports, and a visual schedule. [B15, p.30]. These recommendations aligned with Abbattello’s observation that the Student “likely benefits from visual stimuli when

- asked to hold and manipulate information within working memory.” Goal 5 proposed by the PPT also sought to “improve [the Student’s] listening comprehension and oral expression of narratives.” [B15, p.19; see also B18, p.20]. The related objectives required the Student to answer questions associated with, for example, the “setting” and “feeling” of a story. [B15, p.19-20]. Goal 5 and its related objectives therefore aligned with the Student’s difficulties “understanding and applying concepts, drawing inferences,” and her weakness with “verbal reasoning.” [See ¶ 13.b.i, supra]. The PPT also recommended a BIP and four goals to address Abbattello’s concerns about the Student’s challenging behaviors. [See ¶ 13.b.ii, supra; B15, pp. 21-26, 30; B18, pp.23-28]. Goal 2 and the related objectives focused on “independent writing skills” and targeted the weaknesses Abbattello identified in spelling and crafting grammatically correct sentences. [B15, pp.13-15; B18, p.15-17]. Goal 10 and the related objectives targeted the “rate and accuracy of written expression,” including “accurately and legibly” copying responses, given her challenges with “correct orientation” and “writing simple sentences of three or more words.” [See ¶ 13.b.ii, supra; B15, p.27; B18, p.29].
- b. To address the recommendations and areas of need identified by the academic achievement evaluation performed by Pritchard, the PPT recommended a paraprofessional and “adult support during transitions and at recess.” [B15, p.30; B18, p.32]. These recommendations specifically addressed the Student’s difficulty with transitions. [See ¶ 13.c.iii, supra]. Goal 3 and related objectives also addressed her weaknesses in math, especially with respect to adding and subtracting. [B15, p.16; B18, p.18; see ¶ 13.c.i., supra]. Goal 10, and specifically objective 2, addressed her challenges with reversing the letters “b” and “d.” [B15, p.27; B18, p.29; B14, p.27]. Goal 2 also addressed the weaknesses Pritchard identified in spelling and grammar. [B15, p.13-15; B18, p. 15-17; see ¶ 13.c.ii].
- c. With respect to Dalrymple’s recommendations and areas of need she identified in her speech and language evaluation, the PPT offered the Student with one hour per week of speech and language services (thirty minutes, twice per week) for the 2019-2020 school year and thirty minutes per week for ESY 2019. [B18, p.1, 35-36; B15, p.33-

- 34]. Such services aligned with the services the Student received at IEA and would address her “articulation errors” and inappropriate “tone of voice or facial expressions when conversing.” [See ¶ 13.d, supra].
- d. To address the recommendations and areas of need identified by Berthiaume’s OT evaluation, the PPT recommended thirty minutes per week of direct OT instruction and thirty minutes per month of OT consult to support embedded handwriting and keyboarding programs. [B18, p.32, 35; B15, p.30, 33]. Considering the Student’s transition difficulties [see ¶ 13.e., supra], the PPT recommended adult support during transitions and “positive reinforcement,” which Berthiaume found to be effective when trying to manage the Student’s transitions. [B15, p.30; B18, p.32; see ¶ 13.e., supra]. The PPT also recommended using structured paper with lines for all writing, based on the Student’s challenges with placing letters and numbers on a baseline and difficulty with spacing. [B15, p.30; B18, p.32; see ¶ 13.e., supra]. Indeed, Goal 10, a fine / gross motor goal, required the use of “structured paper” and provides an objective that squarely addressed accurate and legible writing. [B15, p.27; B18, p.29; see ¶ 13.e., supra]. And due to her difficulty and frustration with writing, Goal 11 sought to improve the Student’s computer access and keyboarding “in order to assist ease of written expression.” [B15, p.28-29; B18, p.30-31; see ¶ 13.e, supra].
- e. With respect to the social / emotional / behavioral concerns identified by Kreinest, the PPT recommended positive reinforcement, that a BIP be developed, and that adult support help implement the BIP. [B15, p.30; B18, p.32]. Additionally, the PPT recommended four hours per month of BCBA consult, which Kreinest testified was appropriate amount of time, and the typical amount of consult hours for students in the ICM model. [Tr. 8/7/19, pp. 129-136]. With respect to the BIP, Kreinest and Lyon testified that it is best practice to create a BIP for the building the student will be attending. [Tr. 8/7/19, p.70 (J. Kreinest); Tr. 9/13/19 pp.62-63 (D. Lyon)]. Lyon explained that it is important to create a BIP contemporaneously with entrance to a new environment, because a previous plan does not necessarily translate to a new setting. [Tr. 8/14/19, p.206; Tr. 9/13/19 pp.62-63]. Kreinest stated that she planned to create the BIP before the Student transitioned to the Board’s school during ESY

2019. [Tr. 8/7/19, pp.161-62]. Moreover, the Student's attendance during ESY 2019 would provide an opportunity to fine tune the BIP. [Tr. 7/19/19, p.78; Tr. 11/20/19, p.55]. Both Kreinest and Lyon testified that a BIP is not always required to be created at the same time as an FBA. [Tr. 8/7/19, p.70 (J. Kreinest); Tr. 9/13/19, p.55 (D. Lyon)]. The PPT also drafted four goals, which encompassed fifteen related objectives, to specifically address her various behavioral obstacles, including her aggressive and argumentative behavior towards others, her difficulties with self-regulation and transitioning, and her use of inappropriate language. [See B15, pp.21-26; B18, pp.23-25; ¶ 13.f.ii, iv-v, supra; ¶ 14.d, supra]. The PPT offered to supplement these recommendations with one hour per week of direct counseling services. [¶ 35.f, supra]. Talamona testified that one hour per week of direct counseling was appropriate based on the student's current functioning. [Tr. 10/29/19, pp. 36-37].
- f. With respect to the independent reading evaluation conducted by Stone, Goal 1 in the February 14, 2019 IEP addressed the Student's weaknesses with sight and CVC words that Stone identified. [B15, p.10-12; B18, p.12-15; ¶19, supra]. The PPT also incorporated, nearly verbatim, certain objectives that Stone recommended. [See, e.g., B13, p.13 (Goal 5.7); B15, p.14 (Goal 2.6); B18, p.16 (Goal 2.6)]. Goal 2 further sought to strengthen the Student's spelling skills, which Stone noted had "plateaued, and in some cases declined" since 2017. [B15, p.13-14; B18, p.15-16; ¶19, supra]. Stone stated that the Student could make appropriate progress in four days of forty-five minute structured literacy programs, and that the Student was a student who would benefit from having a day off to keep her engaged and motivated. [Tr. 9/5/19, p.56]. Stone testified that the program offered by Middletown for spelling and reading, including its goals and objectives, was appropriate and specific. [Tr. 9/5/19, pp.57-58]. Stone had conversations with Michelle Pritchard as she drafted the goals. [Tr. 9/5/19, p.58]. Pritchard and Stone agreed that, based on Pritchard's updated testing of the Student, goals regarding phonemic awareness were no longer required, given that those skills would always be included in structured literacy lessons. [Tr. 9/5/19, p.59]. Stone had also previously observed Pritchard implement phonemic awareness in her literacy lessons with the Student, and was

impressed by her skill. [Tr. 9/5/19, p.129].

- g. The PPT's recommendations also aligned with some of Smaller's observations. For instance, the PPT offered to create a BIP, required Board staff to consult with a BCBA, and recommended weekly speech and language therapy. [See ¶¶ 23, 35.g, j, and n, supra]. Additionally, Smaller's belief that "social relatedness" was "a significant strength for [the Student]" aligned with both Abbatello's observation that the Student could appropriately interact with non-disabled peers [see ¶13.b, supra] and the PPT's recommendations that the Student spend a majority of her time with non-disabled peers. [See ¶ 35.a, supra]. Goals 7 and 9, and their accompanying objectives, sought to leverage the Student's "significant strength" in this area by challenging her to "increase her awareness of how her behavior may impact . . . interpersonal relationships" and "increase social skills by engaging in cooperative play with peers to improve interpersonal relationships." [B15, p.22, 26; B18, p.23, 27; ¶23, supra]. Indeed, the PPT's recommendation that she enter the ICM model appropriately balanced this "significant strength" with Smaller's recommendation that the Student receive instruction with "no more than 5 students." [¶23, supra]. As Clarke and Kreinest credibly explained, the Student would receive her "pull out" special education services on a 1:1 or 1:2 basis; no more than five students would be in the special education resource room at Spencer at any one time; and although her regular education class would have between fifteen to twenty-three students, the flexible ICM model allowed her to spend less time with non-disabled peers, if necessary. [See ¶¶ 31, 35.s, supra].
- h. Finally, the program offered by the PPT aligned with many of the collective recommendations contained in the multidisciplinary evaluation, including the PPT's decision to offer the Student multi-sensory instructional strategies, breaking her lessons into smaller steps, and creating goals and objectives designed to strengthen her math skills. [See B15, p.15-16, 30; B18, p. 18-19, 32; ¶¶13-14, supra].

- i. The Board's special education teacher, who was familiar with the Student, testified that the program was appropriate and supported the PPT's recommendation to return the Student to Middletown under the ICM model. [Tr. 10/16/19, p.37].

39. Notwithstanding the comprehensive IEP offered by the Board, the Parent, through counsel, requested that the Board place her daughter at IEA. The PPT denied this request. [B15, p. 2, 5]. The Parent received a copy of the February 14, 2019 IEP, and also received prior written notice. [Tr. 7/17/19, p. 153 (testimony of Parent); see also B15, pp. 3-5; B18, pp 5-8].
40. The Student's behavioral challenges continued at IEA, even after the February 14, 2019 PPT meeting. Between January 16 and April 23, 2019, data from IEA indicated that the Student engaged in non-compliance three times per day; object aggression six times per day; aggression nine times per day; bolting four times per day; inappropriate language twenty-two times per day; and was out of the classroom thirty-two minutes per day. [P30, pp.1-2]. According to Williams, the Student became "more available to learn" in January 2019 and that her behaviors decreased due, in part, to a medication change. [Tr. 8/14/19, p.27-28]. The data demonstrated, however, that her behaviors continued. [Tr. 8/7/19, p.40; Tr. 8/15/19, pp. 39-40; P30, pp.1-2; see also B13, p.3].
41. In accordance with the terms of the parties' settlement agreement, the Student remained enrolled at IEA through the end of the 2018-2019 school year. [See B6]. For the 2018-2019 school year, her classroom at IEA had five students (three of whom were male), one special education teacher, and four teaching assistants (5 : 1 : 4 ratio) [Tr. 7/17/19, p.123 (testimony of Parent); 8/14/19, p.8-9, 48-49, 144-45 (testimony of Y. Williams)]. Once period per day, she would also be placed in a "combined" elementary class, which included an additional "five or six students" (approximately 10 : 1 : 4 ratio), in order to prepare for transitions and to work on her social skills. [See Tr. 8/14/19, p.26-27, 43 (testimony of Y. Williams)]. However, the Student experienced minimal progress in her social skills. As reflected in the Student's 2018-2019 report card, her social development benchmarks, including showing respect, courtesy, and demonstrating self-control, were each marked "U" for unsatisfactory. [B28, p.2; Tr. 9/13/19, pp. 74-75].

42. The Student experienced minimal progress in other areas, including her ability to write, and regressed in other areas, including “expression.” [See Tr. 8/14/19, p.127-30 (testimony of Y. Williams); P31]. For the 2019-2020 school year, Williams’ classroom would include six students, one special education teacher, and four teaching assistants (6 : 1 : 5 ratio). [8/14/19, p. 145]. Williams testified that, while at IEA for the 2018-2019 school year, the Student tended to mimic the behaviors of other students, including the distracting behaviors of other students in her IEA classroom. [Tr. 8/14/19, p. 8, 20, 138]. Williams, on occasion, would also argue with the Student [Tr. 8/14/19, p.137-38]. IEA also used the same “quiet space” with the Student for lunch, de-escalation, and seclusion. [Tr. 8/14/19, p. 68-69 (testimony of Y. Williams); see also Tr. 8/15/19, p. 51-52]. The Student spent 50-60% of her day in this quiet room. [Tr. 9/13/19, p.36]. And with respect to lunch, the Student usually ate alone with a staff member, as other students did not tend to sit with her. [Tr. 8/14/19, p. 140-41 (testimony of Y. Williams); Tr. 9/13/19 (testimony of A. Ciobotaru)]. The Student spent most days alone, including during recess. [Tr. 9/13/19, pp. 171-172 (testimony of A. Ciobotaru)].
43. IEA did not individualize the Student’s program. Williams testified that, in 2017-2018, IEA “switched over to the Lucy Calkins [reading program] which [she uses] with all the students in [her] class.” [Tr. 8/7/19, pp. 106-07]. All students at IEA used the same reading program because “the education leader decided to change the program” to see if it was a better approach for all students. [See Tr. 8/7/19, p.105-06 (testimony of Y. Williams)]. In other words, the reading programs employed at IEA are suited to IEA’s general needs, as opposed to being student specific. Similarly, Williams tended to employ the same “de-escalation” strategies for all students in her class. [Tr. 8/14/19, p.79-80].
44. IEA develops and implements its own service plans on IEP direct for students who are unilaterally placed within its program. [See, e.g., Tr. 8/14/19, p. 186-87 (testimony of Y. Williams); Tr. 8/15/19, pp. 8, 53-55 (testimony of J. Slater)]; see also P28A; B32; B33]. Additionally, staff from IEA had access to the February 14, 2019 IEP proposed by the Board through IEP Direct. [B19; Tr. 7/19/19, p. 16-19 (testimony of A. Clarke); Tr.

8/15/19, p. 67 (testimony of J. Slater)]. Notably, Slater, the Education Director at IEA, testified that “we design goals and objectives *that would meet our programming.*” [Tr. 8/15/19, p. 57 (emphasis added)]. Indeed, Slater explained that “we always tweak the goals to fit our program.” [Tr. 8/15/19, p. 57-58]. Thus, IEA adapts a student’s goals and objectives to meet *their program’s* specific needs rather than providing a program that meets *the student’s* unique needs.³

45. Subsequent to the February 14, 2019 PPT meeting, staff from IEA accessed the proposed IEP and “probably went in and edited [it].” [Tr. 8/15/19, p. 69-70 (testimony of J. Slater); see B19; Tr. 7/19/19, p.16-19]. Amy Clarke notified IEA staff to stop editing the document on several occasions. [B-19; Tr. 11/20/19, pp.50-52]. Whether due to IEA staff altering the challenged February 14, 2019 IEP or simply because of clerical errors or inadvertent omissions, certain recommendations made by the PPT on February 14, 2019 were not included in the IEP. In particular, the credible testimony of Clarke and Kreinest explained that, during the February 14, 2019 PPT meeting, members of the PPT recommended “4 hours of BCBA consult monthly,” “counseling 1 hour per week (2x30 min weekly),” and “speech and language 1 hour per week (2x30 min weekly).” [B18, p.1; see also Tr. 7/19/19, p.18-19 (testimony of A. Clarke); 8/7/19, p.135-36 (testimony of J. Kreinest); Tr. 10/29/19, p.29-30 (testimony of L. Talamona)]. The BCBA consult recommendation was not reflected in the February 14, 2019 IEP; counseling was listed as “10.00 hr/yearly,” as opposed to “1 hour per week”; and the speech and language services were not listed as two, thirty minute sessions. [See B15, p.30, 33; B18, p.1; Tr. 7/19/19, p.18].

46. The Parent did not dispute that these recommendations were made during the February 14, 2019. [Tr. 7/17/19]. Instead, she stated that she did not recall. [Tr. 7/17/19, pp. 89-90, 102-106, 154-56].

³Much of Slater’s testimony lacked credibility. She claimed to not recall the answers to most questions, and at one point, she even admitted to changing her testimony on re cross-examination. [Tr. 8/15/19, p.128; see also id., p. 90, 95, 120-21, 128-31]

47. The Parent filed a request for due process on May 13, 2019. [Hearing Officer 1]. During the mediation period that followed, members of the PPT noticed the clerical errors, inadvertent omissions, or alterations to the February 14, 2019 IEP noted above. [See ¶45; see also Tr. 7/19/19, p. 19]. Subsequently, on May 21, 2019, the Board corrected the errors in order to accurately document the recommendations made by the PPT on February 14, 2019. [See B18, p.1; see also Tr. 7/19/19, pp.16-19; Tr. 11/20/19, p.115]. The persuasive and credible evidence reveals that the May 21, 2019 letter from Clarke to the Parent, which included a copy of the “corrected” February 14, 2019 IEP, simply documented what actually transpired during the February 14, 2019 PPT meeting and what the PPT recommended. The February 14, 2019 IEP, as corrected on May 21, 2019, is therefore the challenged IEP for purposes of this hearing.

The hearing in this matter occurred between July and November 2019 on the dates listed above. The credible and substantial evidence demonstrates that the Board met its burden to offer a FAPE for the 2019-2020 school year and ESY 2019. The Student's planning and placement team ("PPT") appropriately recommended a program that included individualized goals and objectives, paraprofessional support, adult support in the general education setting and during transitions, and various special education services, including: literacy and numeracy; occupational therapy ("OT") services; counseling; speech and language services; reading consultation with a reading specialist; and BCBA consultation.⁴ The program would be delivered at the Board's Spencer School in the Intensive Case Management ("ICM") model, which would provide intensive, "wrap around" support to the Student and flexibility for the Student to access typical peers as much as possible but also the support of staff and the access to a smaller setting as needed. The PPT recommendations were made after considering the results of a comprehensive multidisciplinary evaluation, review of records, observations of the Student, input from the Parent and staff from IEA, and consideration of an evaluation conducted by Beth Stone, an independent reading evaluator initially selected by the Parent. Additionally, the PPT

⁴ Throughout these proceedings, opposing counsel tried to use disagreements of the past to speculate about the failure. "[C]hallenges to a school district's proposed placement school must be evaluated prospectively (i.e., at 'the time of the parents' placement decision') and cannot be based on mere speculation." MO. v. New York City Dept. of Education, 793 F.3d 236, 244 (2d Cir. 2015). "Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement. Ill. (quoting R.E., supra, 694 F.3d at 195).

had extensive discussion at the PPT meeting, which the Parent attended with assistance of counsel.

As the Board offered the Student a FAPE for 2019-2020 and ESY 2019, the inquiry before this Hearing Officer ends there. But even if this Hearing Officer were to review the second issue, placement at IEA is clearly not appropriate. Since enrolling at IEA, the Student's behaviors have declined (including being secluded 6 times) and she has remained stagnant or regressed in her academics. Indeed, only approximately two months prior to the February PPT meeting, IEA had strongly considered dismissing the Student from their program for lack of progress and inability to control her behavior. Moreover, IEA lacks positive peer models, which the educators all agree is important for the Student. For these reasons this Hearing Officer finds for the Board.

ARGUMENT

The Board offered the Student a FAPE for the 2019-2020 school year and ESY 2019. Under the two-part test in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-07 (1982) ("Rowley"), typically, a school district must first comply with the procedural requirements under the IDEA and secondly meet a substantive obligation by proposing an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Id.*; see also A.M. v. New York City Department of Education, 845 F.3d 523, 534 (2d Cir. 2017). However, in this case, a settlement agreement waives all claims through June 30, 2019, thus removing the "procedural" obligations imposed by Rowley.

Thus, the sole issue before the Hearing Officer is whether the Board met its substantive burden. The U.S. Supreme Court recently clarified that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas County School District RE-I, 137 S. Ct. 988, 999 (2017). The "reasonably calculated" language "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and underscores that development of an IEP is a "fact-intensive exercise" based on "the expertise of school officials" and input from parents. *Id.* at 999.

When assessing substantive obligations under the IDEA, the "absence of a bright-line rule should not be mistaken for 'an invitation to the courts to substitute their own notions of

sound educational policy for those of the school authorities which they review.” Id. (quoting Rowley, 458 U.S. at 206). Hearing Officers and courts must show deference to educational professionals. "Any review of an IEP must appreciate that the question is whether the IEP is reasonable,⁵ not whether the court regards it as ideal." Id. at 999 (emphasis in original). Thus, the Board must only establish that its proposal for the Student was reasonable in light of the circumstances and the information available to the PPT at the meeting. Finally, the school district has the burden of proving the appropriateness of a program by a preponderance of the evidence (more likely than not). See Regulations of Connecticut State Agencies ("R.C.S.A.") § 10-76h-14(a).

A) Procedural Claims Occurring Prior to June 30, 2019 are Waived. There Were No Procedural Violations.

Procedural claims regarding the creation of the only IEP in question the February 14, 2019 IEP, as corrected on May 21, 2019⁶ are not properly before this Hearing Officer based on a waiver of claims through June 30, 2019.⁷ [B6, pp. 3-4]. The Parent, through counsel, concedes that the settlement agreement is enforceable and that her "claims cannot reference the time period prior to June 30, 2019" [Parent's July 9, 2019 Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p.4, lines 1-2]. The IEP was created in February 2019 and amended to correct clerical errors in May 2019. These dates are all covered by the waiver. All claims with respect to the development or drafting of the IEP are barred by the waiver, as they are acts that occurred prior to June 30, 2019.

Counsel's acknowledgment that the Parent's "claims cannot reference the time period

⁵ The Parent presented evidence about alleged improvement of progress at IEA after February, but cannot be considered in evaluating the IEP. "In a due process hearing, an IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight, as an IEP is "a snapshot, not a retrospective." Adams by & Through Adams v. Oregon, 195 F.3d 1141, 1 149 (9th Cir. 1999).

⁶ Ample authority supports the finding that the May 21, 2019, IEP is the relevant IEP for the purposes of this hearing. see, e.g., KC ex rel. C.R. v. New York City Department of Education, No. 14-CV-836 RJS, 2015 WL 1808602, at *9-10 (S.D.N.Y. Apr. 9, 2015) (failure to include related services in IEP was a "clerical error" and an "inadvertent omission" that did not deny FAPE; documentary and testimonial evidence offered by school district "[did] not constitute retrospective evidence as to what [the school district] would have done to accommodate a student's needs; rather, it clarifies what actually transpired at the meeting and reflects the parties' original understanding of the scope of [the student's] IEP plan"); MH. v. New York City Department of Education, No. IO-CV-1042 RJH, 2011 WL 609880, at (S.D.N.Y. Feb. 16, 2011)

⁷ Settlement agreements entered into between boards of education and parents are binding on the parties. K. G. v. Plainville Board of Education, No. 3:06-CV-1907, 2007 WL 80671, at *3 (D. Conn. January 9, 2007); Mr. J. v. Board of Education, 98 F. Supp. 2d 2265 238 (D. Conn. 2000); Student v. Madison Board of Education, State Department of Education Decision No. 04-350. In this case, both parties agree the agreement is binding.

prior to June 30, 2019[.] is a binding concession. See, e.g., Purgess v. Sharrock, 33 F.3d 134, 144 (2d Cir. 1994) ("A court can appropriately treat statements in briefs as binding judicial admissions of fact."); McFarland v. Department of Developmental Services, 115 Conn. App. 306, 3 17-18 (statements made by counsel during administrative proceeding constituted judicial admissions that were binding), cert. denied, 293 Conn. 919 (2009). Moreover, Hearing Officers have dismissed procedural matters covered by the waiver of a settlement agreement. See Student v. Orange Board of Education, State Department of Education Decision No. 06-201.

Furthermore, the Board did not commit any procedural errors and certainly none that would violate the IDEA. As an initial matter, "[a] procedural violation of the IDEA entitles a plaintiff to relief only if it: '(I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits.' 20 U.S.C. §)(E)(ii); see A.M. v. N.Y.C Dep't Of Educ., 845 F.3d 523, 535 (2d Cir. 2017). That is, parents must articulate how a procedural violation resulted in the IEP's substantive inadequacy or affected the decision making process." Mr. P v. W. Hartford Bd. Of Educ., 885 F.3d 735, 748 (2d Cir.) cert. denied, 139 S. Ct. 322 (2018). Here, there were no procedural errors and none that affected the IEP or the Parent's decision making process.

The due process complaint alleges only the following procedural errors: (1) the proposed program is "not described or even mentioned in the IEP," (2) "the request for continued placement is not included in the IEP" and (3) the "IEP does not correctly document who was in attendance." Any other claims that are not specifically alleged in the request for hearing are not properly before this Hearing Officer. See A.E. ex rel. parents & next friends, Mr. and Mrs. E. v. Westport Board of Education, 251 Fed. Appx. 685, 687 (2d Cir. 2007); see also C.G.S. § 1076h(a)(3)(providing that the parents' request for a hearing "shall contain a statement of the specific issues in dispute"); CL. ex rel R.F. v New York City Department of Education, 746 F.3d 68, 78 (2d Cir. 2014)(IDEA prevents the parent from "sandbagging" the district by raising claims not stated in due process complaint).

The allegations in the hearing request have no merit. First, the program is stated in the IEP. The PPT recommended placement at an "in-district elementary school with Intensive Case Management." [B15, p.2; B18, p.4; Proposed Finding of Fact ("PFF"), 31]. The Parent argued that the PPT was required to provide more detail on Intensive Case Management in the IEP minutes.

However, there is no legal requirement to do so. Moreover, the Parents were provided a full explanation of the program at the PPT meeting.⁸ [PFF, ¶¶ 31, 32]. Indeed, several witnesses testified that the program was explained in detail so as to enable the Parent to make an informed decision. [PFF 31]. Additionally, the Parent was offered the opportunity to tour the program. [PFF ¶ 34].

Moreover, the IEP meets the requirements of the IDEA, by including: (1) a statement of the Student's present levels of educational performance; (2) annual goals and short-term objectives; (3) a description of how progress would be measured and reported; (4) the specific special education and related services to be provided; (5) the extent to which she would not participate with nondisabled students; (6) any accommodations for state and district assessments; and (7) the projected initiation date and frequency, location, and duration of proposed services. [B 15; BI 8; PFF, ¶¶ 35]. Additionally, the Parent participated in the PPT meeting, with counsel and had the opportunity to present information and ask questions. [Tr. 9/13/19, p. 257].

The allegations that the IEP did not reference the Parent's request for IEA and did not accurately reflect attendees are both factually inaccurate. The IEP minutes state "Family attorney proposed placement at IEA." [B-15, p. 2]. Further, the WPN page of the IEP notes "out of district placement" as an action refused. [B-15, p. 5]. The Parent presented no evidence to demonstrate that the participants of the PPT were not accurately reflected. To the contrary, the Parent testified that the attendees were accurately listed. (P FF II 29).

At the hearing, the Parent alleged that it was a procedural error that the Board failed to provide a BIP at the February PPT meeting. This claim was not alleged in the complaint and is covered by the waiver of claims, thus is not before the Hearing Officer. Nevertheless, it also lacks merit. The IDEA only explicitly requires a BIP for a disciplinary change of placement where the conduct is a manifestation of the student's disability. See 34 C.F.R. § 300.5300. The relevant inquiry would actually be whether the PPT considered the use of positive behavioral strategies to address the Student's behavior. See, e.g., EH. v. Board of Education of Shenendehol v Central School District, 361 Fed. Appx. 156, 160-61 (2d Cir. 2009) (IEP adequately addressed the student's behavioral needs, so lack of a formal BIP was not a per se denial of FAPE), cert. denied, 559 U.S. 1037 (2010); see also 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. §

⁸ At the hearing, the Parent's attorney attempted to preclude testimony describing ICM. The Hearing Officer ruled that the Board could explain the program and what was described at the PPT meeting. See R.E., supra, 694 F.3d at 186 ("testimony may be received that explains or justifies the services listed in the IEP").

300.324(a)(2)(i). Here, the Board's BCBA, Kreinest, conducted a thorough FBA, explained the Student's targeted behaviors, and discussed strategies to address them. [B 14, pp.66-83; PFF 13.f] The PPT also drafted goals and objectives specifically addressing the Student's behaviors, and recommended that a BIP be created upon return to Middletown. [B 18, pp.23-28, 32; PFF ¶¶ 35.j,l]. Kreinest testified that ESY would provide a good opportunity to finalize the BIP. [PFF II 38.e]. Both Kreinest and IEA's BCBA agreed that when a student is in another setting, it is best to create the BIP contemporaneous with entrance in the new setting. [PFF II 38.e]. They also both agreed that a BIP is not always required to be created at the same time as the FBA. [P FF ¶ 38.e]. The IEP acknowledged that a BIP would be created. [B-18, p. 32].

B) The Board Met Its Substantive Obligation of FAPE for 2019-2020 and ESY 2019

The Board offered a program that is reasonably calculated to provide meaningful educational benefit. In reviewing this issue, courts consider factors such as: (1) whether the program is individualized on the basis of the student's assessment and performance; and (2) whether the program is administered in the least restrictive environment. M. C. ex rel. Mrs. C. v. Voluntown Bd. Of Educ., 122 F. supp. 2d 289, 292 n.6 (D. Conn. 2000). A school district fulfills its substantive obligations under the IDEA if it "provides an IEP that is likely to produce progress, not regression and if the IEP affords the student with an opportunity greater than mere trivial advancement." Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005). When assessing whether an IEP can provide meaningful progress, "progress must be viewed in light of the limitations imposed by the child's disability." Mrs. B. v. Milford Bd. Of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997). An IEP must be reviewed "as a whole," and one deficiency is not determinative that FAPE has not been provided. See, e.g., T. Y. v. New York City Department of Education, 584 F.3d 412, 419 (2d Cir. 2009) (failure of IEP to offer appropriate speech and language services and parent training did not "render the IEP as a whole substantively deficient"), cert. denied, 560 U.S. 904 (2010).

i. The ICM Program Meets the Student's Individual Needs.

The PPT offered an individualized program based upon (1) a comprehensive multidisciplinary evaluation, (2) records available to the PPT, (3) Stone's reading evaluation, (4) consideration of Smaller's psychological evaluation and her input during the PPT meeting, and (5) input from the Parent, the Student's grandparents, and staff from IEA. [PFF, ¶¶ 10-14, 17, 19-

21, 23, 25, 27-31]. A multidisciplinary evaluation reviews each piece of the student's unique areas of need and "helps all the staff become better informed about [the Student]." [Tr. 8/7/19, p.92]. The multidisciplinary evaluation identified specific recommendations for the components of an appropriate program [PFF ¶¶ 14] as did Stone's evaluation [PFF ¶¶ 21] and the IEP offered is in conformance with those recommendations. [PFF ¶¶ 38]. Indeed, the program is also aligned with many of Dr. Smaller's observations and recommendation. [PFF ¶¶ 38g]

The Board's proposed placement within the ICM model would be based in regular education classroom, but would have flexibility to access wrap around supports, as necessary. [PFF 31-33]. The Student would have a dedicated space for specialized instruction, and access to a sensory and cool down room that could be used flexibly. [Tr. 11/20/19, p.44]. Her program would have a dedicated board certified behavior analyst ("BCBA"), a registered behavior technician, specially trained special education teachers and paraprofessionals, and embedded counseling and support, all of whom could assist as necessary. [PFF 31]. Approximately fifteen to twenty-three students would be present in the regular education setting, while no more than five students would be present in the special education setting at any one time. The Student's specialized instruction would be provided on a one-to-one or one-to-two ratio. [PFF, II 35s].

It was reasonable for the PPT to determine that the Student could make progress based in the regular education classroom, with flexibility to access staff or an alternate setting as necessary. First, when the Student last attended Middletown, her program was in a regular education classroom and she was achieving behaviorally and academically. [P FF 4, 5]. Moreover, when evaluated, Middletown staff demonstrated the skill and expertise to engage the Student and manage behavior. [PFF 13]. Further, the Student functioned well in the Middletown school during testing and did not exhibit any difficulty interacting with staff that were new to her and was pleased to see staff she had worked with prior.⁹ [PFF 13.c.i]. All teachers in the Board's public schools are trained on how to differentiate classwork so that all students in a regular education classroom learn the same topic, but at their own individual instructional level. [PFF, 35 s]. Thus, the ICM model balances of the fact that the Student was coming from a self-contained environment at IEA with her apparent readiness to be in the regular education

⁹ The Parent argued that Student could not handle transitions back to Middletown, but the Student exhibited no difficulty being evaluated in Middletown and the staff demonstrated the skill to address any behavioral concerns that arose. Moreover, a transition plan was developed and the flexibility of the ICM model would assist if any difficulty occurred at transition. The fact that a transition would occur cannot be used as a basis to continue AN. in an inappropriate program.

classroom.

Access to typical peers is an essential component of an appropriate program for the Student. Beth Stone explained that for students with an expressive receptive language disorder, such as this student, knowledge of everyday words is gained mostly through conversation. [PFF, ¶¶ 16a]. Stone also testified that the Student would learn from peers ahead of her in a skill, so having typical peer models would be "very important" for the Student's language, reading, and spelling skills. Id. Pritchard testified that the Student is very motivated by peers and learns from their skills. [PFF, ¶¶ 16b]. Talamona highlighted the importance of the Student practicing appropriate social interactions with typical peer models. [PFF, ¶¶ 16c]. In deciding the appropriateness of a program, the benefits of typical peers must be considered. See, e.g., Student v. Westport Board of Education, supra, State Department of Education Decision No. 04-292, Conclusion of Law 3 ("The district must examine the educational benefits, both academic and nonacademic, to the student in a regular classroom. Among the factors to be considered are the advantages from the modeling the behavior and language of non-disabled students...". The evidence demonstrates that placement within the ICM model is the appropriate way to provide the Student with that necessary access to appropriate peers.

ii. The Instruction Proposed by the PPT is Appropriate.

The PPT recommended eleven goals, fifty-one related objectives, paraprofessional support, adult support in the general education setting and during transitions, and special education services, including: three hours weekly of literacy; two hours weekly of numeracy; thirty minutes per week of occupational therapy ("OT"); one hour per week of counseling (thirty minutes of individual and thirty minutes direct); one hour per week of speech and language services; reading consultation with a reading specialist for three hours per year; and BCBA consultation four hours per month.

School staff testified as to specific strategies that would be in place for the Student.¹⁰ For example, to address her attention difficulties, her lessons would be broken down into smaller steps with regular movement breaks. [See PFF, ¶¶ 15, 35.q]. For math, the PPT offered two hours per week of "pull out" numeracy teaching. [See PFF, ¶¶ 35.d, 38.1)]. Math services were

¹⁰ The Parent argued that the Board should have included assistive technology. Michelle Pritchard credibly explained that, based on the Student's cognitive profile, materials and manipulatives were more useful than technology because technology could distract the Student. Nevertheless, at the PPT, the Board stated that they would consider AT using the state-recommended flowchart, when the Student entered Middletown. [PFF II 37] [See PFF, 25].

critical given that the Student regressed in her addition and subtraction skills at IEA.

To address the student's challenges in writing, the PPT recommended structured paper with lines and specific keyboarding goals and objectives to develop her "written expression." [PFF 35.p; B 18, pp.30-31]. Pritchard, who was the student's teacher and conducted the academic part of the multi-disciplinary evaluation, testified the program was appropriate and met her needs. [PFF, ¶ 38.i].

For reading and spelling, the Board offered three hours per week of literacy instruction, three hours per year of consult with a reading specialist, and multi-sensory strategies. [See PFF, ¶¶ 15, 35.c, i, r] The three hours per week equates to four days of 45 minute lessons. The outside, independent reading evaluator, Stone, stated that the student could make appropriate progress in four days of forty-five minute structured literacy programs, and that the student was a student who would benefit from having a day off to keep her engaged and motivated. [PFF, 38.f]. The PPT incorporated, nearly verbatim, certain objectives that Stone recommended. [See, e.g., B13, p. 13 (Goal 5.7); B15, p. 14 (Goal 2.6); B18, p. 16 (Goal 2.6)].⁸ Goal 2 further sought to strengthen the student's spelling skills, which Stone noted had "plateaued, and in some cases declined" in IEA. [B 15, p. 13-14; B1 8, p. 15-16; ¶19, supra]. Stone had conversations with Michelle Pritchard as she drafted the goals. [Tr. 9/5/19, p.58]. Pritchard and Stone agreed that, based on Pritchard's testing of the student, goals regarding phonemic awareness were not required, given that those skills would always be included in structured literacy lessons. [Tr. 9/5/19, p.59]. Stone testified that the program offered by Middletown for spelling and reading, including its goals and objectives, was appropriate and specific. [PFF, ¶¶ 21, 38.f.].

iii. The Student's Related Services Are Appropriate.

The PPT offered thirty minutes per week of direct OT services and thirty minutes per week of OT consult to work on her handwriting and keyboarding skills. [See PFF, 35.e, h]. The PPT also recommended sixty minutes per week of direct speech and language services. [PFF II 35 g]. These services would appropriately address the needs identified in the evaluation. [PFF II 38]. Moreover, this recommendation aligned with the amount of services she received at IEA. [See PFF, ¶¶ Id, 35.g]. The Board offered counseling services I hour per week (2 x 30

⁸ The PPT did not adopt every recommendation by Stone or Smaller. But the PPT was only required to consider their recommendations; the student's PPT was "not required to implement [Stone's or Smaller's] suggestions." *Mr. P. v. West Hartford Board of Education*, 885 F.3d 735, 753 (2d Cir.), cert. denied, 139 S. ct. 322 (2018); see also *Watson v. Kingston City School District*, 142 Fed. Appx. 9, 10 (2d Cir. 2005). To be clear, "[p]arental participation does not require that the Board acquiesce to the preferences of the Parents." *A.E. v. Westport Board of Education*, 463 F.Supp.2d 208 (D. Conn. 2006), aff'd, 251 Fed Appx. 685 (2d Cir. 2007).

minutes weekly) and 4 hours of BCBA consult monthly.¹¹ The Board's social worker and BCBA testified that these services were appropriate. [PFF II 38e]

iv. The Board's Proposed Program is the Student's Least Restrictive Environment.

The Board's proposed placement aligns with the IDEA's mandate that the student be educated in her least restrictive environment ("LRE"). The student has demonstrated an ability to interact appropriately with non-disabled peers, a strong desire to be social with others, and significant strength with social relatedness. [PFF, ¶¶ 5.a, 5.d, 13.b.i., 23]. IEA also reports an increased availability to learn since January 2019 due to a medication change. [PFF, 40]. "The IDEA expresses a strong preference for education of disabled students alongside their non-disabled peers; that is, in their [LRE]." M. W. ex rel. S. W. v. New York City Department of Education, 725 F.3d 131, 143 (2d Cir. 2013) (internal quotation marks omitted); see also 20 U.S.C. §1412(a)(5)(A) (school districts must ensure that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . .")."

The Second Circuit employs a two-part test to determine whether a school district has met its LRE mandate. "First, can the student be satisfactorily educated in the regular classroom, with the use of supplemental aids and services. To answer that question [courts] consider: (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. If a school district actually remov[es] the child from [a] regular classroom [into] a segregated, special education class, a second question confronts [a court]: whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate." M. W. ex rel. S. W. v. New York City Department of Education, 725 F.3d131, 143—44 (2d Cir. 2013); accord P. ex rel. Mr. and Mrs. P v. Newington Board of education, 546 F.3d I 11, 120 (2d Cir. 2008). As noted above, the student can be educated in the regular education classroom with the flexibility that is inherent in the ICM model. Further the continued segregation of this student is detrimental to her growth. [See PFF 16].

¹¹ Amy Clarke credibly testified that she corrected clerical error in the February 14, 2019 IEP via the May 21, 2019 correspondence and accompanying IEP. (PFF, 47; B-18) The corrections corrected "clerical errors" most likely caused by IEA staff altering the Board's IEP. [PFF, ¶ 45, 47]. As several witnesses all testified that the PPT made these recommendations [See PFF, ¶ 3 1] and the Parent presented no evidence to indicate that the recommendations had not been made [PFF ¶ 46], it is clear that the PPT made the recommendations. Moreover, the Board corrected the IEP several months prior to the start of this hearing and within the 30 day resolution period in the IDEA. (PFF, 47; 34 C.F.R. § 300.510).

iv. ESY 2019 was Also Appropriate.

The Board offered ESY services for 2019 to provide instruction and to support transition. [PFF 36]. The Board offered eight hours per week of academic support, thirty minutes per week of direct OT services, in a small group or individual setting, and thirty minutes per week of direct speech and language services. Id. The ESY program would have occurred in the Lawrence School, the same building in which the student was evaluated, so the student would be familiar with the setting. Id. ESY would include other students from her classroom at Spencer. Id. The student would also interact with the staff at Spencer, including the BCBA who would be working directly with her. Id.

It is well known that ESY services generally differ from services offered in the school year because they serve different purposes. See, e.g., Letter to Myers, 16 IDELR 290 (OSEP 1989). At the hearing, Clarke noted that ESY is typically a briefer program, not intended to recreate the full school day. [Tr. 7/19/19, p. 132]. That said, both Clarke and Pritchard testified that the recommended ESY program was appropriate and sufficient to enable the Student to make progress in her goals and objectives. [PFF II 36]. Further, Pritchard testified that the recommended hours were "a great amount of time". Id. On the basis of the foregoing, it is clear that the ESY program offered by the Board was appropriate for the Student.

C. As the Board Provided FAPE Consideration of IEA is Moot. Nevertheless Placement at IEA is Clearly Inappropriate.

As the Board has offered FAPE, there is no reason to review IEA for appropriateness. Nevertheless, the Parent has failed to meet its burden.¹² The Student's progress reports demonstrate that her specific needs are not being met and she is not making progress. [See PFF, ¶¶ 13.c.ii-iii, 25]. In fact, just prior to the February 2019 PPT, IEA had indicated an intent to dismiss the student for lack of progress and an inability to meet her needs. [PFF, I 1]. The student is not receiving the amount or type of reading instruction necessary for progress to occur. When observed, the student only received approximately 18 minutes of reading instruction, and the majority of that time was spent settling in and eating her snack. [PFF, 13.a.i]. Moreover, the reading programs in use as of February 2019 were not appropriate, as they relied on memorization strategies [PFF, 19, 20], and the staff appear to lack the expertise, skill or understanding of the student's needs to appropriately instruct her. [PFF, 13.a.i; 13.f.vi].

¹² The Parent does not request tuition reimbursement in the due process complaint. Rather, the issue for hearing is whether IEA is the appropriate program for the student "and should the Board be ordered to place the Student. at IEA for the 2019-2020 school year." Complaint, p.16 (emphasis added).

Moreover, the students' program is not individualized. IEA's own Director of Education, Slater, testified that IEA "design[s] goals and objectives that would meet [its] programming" and that they "always tweak the goals [of a student] to fit [IEA's] program." [PFF, 44]

Behaviorally, the student has struggled at IEA. [See PFF, ¶¶ 25, 40]. IEA had to seclude her six times. [PFF, 27]. Even worse, the inappropriateness of IEA is underscored by the fact that the BIP devised by IEA staff includes the use of "physical restraint" and/or "seclusion" as a planned intervention strategy, in violation of Connecticut law. [See PFF, 27]. The data reflects that concerning behavior continues at IEA even after February 2019. [PFF, 40].

The student appears to be isolated at IEA. While at IEA, she does not each lunch with her peers. [PFF, 42]. And during the observation, the interactions with Students at IEA included another student threatening to "stab [the student] in the face with a knife." [PFF, II 13.f.iv]. The Parent failed to present compelling evidence that IEA's setting is more appropriate than the less restrictive environment in the ICM model. See CL. v. Scarsdale Union Free School District, 744 F.3d 826, 837 (2d Cir. 2014) (although not dispositive, "the restrictiveness of a private placement is a factor" to consider). Simply put, under "the totality of the circumstances," the Parent failed to show that IEA is an appropriate program for the student warranting funding from a public school district. See W.A., supra, 927 F.3d at 146.¹³ The unilateral placement has failed to provide individualized instruction to meet the student's needs, and for that reason, she has made no progress or regressed in most academic areas and her behavior has declined.

For all of the foregoing reasons, the Hearing Officer finds for the Board.

¹³ Tuition reimbursement is not a remedy sought in the due process complaint. But, if it had been sought, it would not be appropriate in this case. Under the Burlington—Carter test, courts look at "(1) whether the school district's proposed plan will provide the child with a free appropriate public education; (2) whether the parents' private placement is appropriate to the child's needs; and (3) a consideration of the equities." Y.F. v. N.Y.C. Dep't of Educ., 659 F. 3d, Aff'd (2d Cir. 2016). This Hearing Officer must deny tuition reimbursement if the "chief benefits of the chosen school are the kind of advantages that might be preferred by parents of any child, disabled or not." W.A., supra, 927 F.3d at 146. "Rather, the unilateral private placement is only appropriate if it provides education instructional [specially] designed to meet the unique needs of a handicapped child." Id.