

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Student vs. East Haddam Board of Education

Appearing on behalf of the Board: Attorney Frederick Dorsey  
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Appearing before: Attorney Uswah A. Khan  
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer an appropriate program for the 2016-17, 2017-18, 2018-19 school years including the 2016 and 2017 extended school years, and did the Board commit gross procedural violations?
2. If an appropriate program was not offered, and the Board committed gross procedural violations, is placement at Options School the appropriate program for the Student for the 2018-19 school year and should the Board be ordered to place the Student at Options School for the 2018-19 school year?
3. Is the Student entitled to four years of compensatory education to make him whole?

PROCEDURAL HISTORY:

The Student and his Parents initiated this special education due process case by submitting their Amended Request for Due Process (Complaint) on September 13, 2018. This Impartial Hearing Officer was assigned to the case on September 13, 2018. A Prehearing Conference was convened on September 21, 2018. Attorney Courtney Spencer appeared on behalf of the Student and his Parents and Attorney Frederick Dorsey appeared on behalf of the East Haddam Board of Education (Board).

The Complaint is made on behalf of the Student who turned twenty-one years of age on October 17, 2018. He has been diagnosed with Traumatic Brain Injury (TBI), Occipital

Neuralgia, Concussion Syndrome, Post Traumatic Vision Syndrome, chronic pain syndrome and anxiety. He is eligible to receive special education under the TBI classification. The Complaint alleges that the Student on November 17, 2009, was deemed eligible for 504 accommodations. On February 7, 2013, the Student was found eligible for special education under the TBI classification and received homebound tutoring.

According to the Complaint, the Board committed multiple substantive and procedural violations, as well as the failure to provide an appropriate program for the Student, including extended school year services, failure to create an appropriate IEP, failure to accurately document an IEP, failure to provide appropriate services and failure to keep appropriate records.

The Student and his Parents claim in the Complaint that the Board denied the Student a Free Appropriate Public Education (FAPE) from the 2016-17, 2017-18, 2018-19 school years including the 2016 and 2017 extended school years, and that in doing so, the Board committed gross procedural violations. The Student and his Parents request placement at Options School as the appropriate program for the Student for the 2018-19 school year, and four years of compensatory education to make the Student whole.

The Board filed two Motions to Dismiss the Complaint on October 15, 2018 and November 2, 2018. In its Motion to Dismiss, the Board denied the claims of the Complaint. The Board submitted that the Student's Parents had no standing in the case, as the Student is over the age of 18.

On December 13, 2018, the Hearing Officer issued a decision ordering a dismissal or amendment of the Complaint. The Parents amended the Complaint, and included an authorization by the Student to the Mother to act as his legal representative by way of a power of attorney. On December 14, 2018, the Parents filed an amended Complaint. The mailing date of the Final Decision was set for March 1, 2019.

Hearings were held on this matter of the following dates: November 7, 2018, January 24, 2019, January 31, 2019, February 8, 2019, February 15, 2019, April 5, 10, 12, and 29, 2019.

The Parents presented four witnesses. They were: Mother, Josh Martin, the Director of Pupil Services for East Haddam Public Schools, Dr. Jack Thaw, Scott Wells, the Owner and Director of Options, Deb McDonald – Olsen, the special education teacher at Nathan Hale High School in East Haddam and the Board's transition coordinator. The Board presented two witnesses. They were: Josh Martin, Director of Pupil Services, and Peter DeLisa, tutor.

The Board's exhibits were B-1 to B-38 admitted as full exhibits. The Student exhibits P-1 to P-47, were admitted as full exhibits. The Due Process Complaint/Hearing Request was admitted as HO-1.

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

*Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993). All motions that were not previously ruled upon are hereby denied.

### SUMMARY

The Student alleges that he was denied FAPE in 2016-2017, 2017-2018, 2018-2019 school years including 2016 and 2017 extended school years, and that the Board committed gross procedural violations. Student requests placement at the Options program because of the violation of FAPE. In addition, the Student seeks compensatory education to make him whole. The Board maintains that it provided the Student FAPE for the FAPE in 2016-2017, 2017-2018, 2018-2019 school years including 2016 and 2017 extended school years, and that they did not commit gross procedural violations. The Board further contends that placement in Options is not appropriate and therefore, no compensatory education should be awarded.

### STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) Section 10-76h and related regulations, the Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.) § 1400 *et seq.*, and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§ 4-176e to 4-178 inclusive, § 4181a, and § 4-186.

### FINDINGS OF FACT:

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, the following facts are hereby found:

1. Student is a twenty-two-year-old young man who resides in East Haddam, Connecticut.
2. Student suffered a traumatic brain injury in 2009 when he was assaulted at school. (Mother p. 32-34; B-2; Martin p. 42-43). Due to this event, Student was diagnosed with a TBI, Occipital Neuralgia, Concussion Syndrome, Post Traumatic Vision Syndrome, chronic pain syndrome, anxiety disorder due to a medical condition, depressive disorder due to a medical condition. It became clear that due to his level of intensive pain, intermittent blindness, headaches and debilitating pain he was not going to be able to return to school. The Student was not been able to enter a school building and stay in school for six hours a day. Dr. Cohen's January 15, 2013 neuropsychological report showed deficits in auditory short-term memory, speed of mental processing and sustaining concentration over time. He also noted that the Student's above average intelligence can mask the specific deficits that may make various aspects of academics difficult for him (P-18 p.7)
3. Student's Parents referred him for special education and a PPT meeting was held on September 12, 2012. (P-17). Student was found eligible for special education on February 7, 2013, under the classification of Traumatic Brain Injury (Joint Statement of Facts "JSF" 1), as prior to this, he was under a 504 plan (P-19).
4. Nearly five months after the referral, the Student was found eligible for special education at the February 7, 2013 PPT meeting. (Stipulated Fact). However, the Board provided the same program that he received prior to eligibility, online programming and nominal tutoring. (P-19).

5. Dr. Jack Thaw is the Student's treating therapist and testified on February 8, 2019. He testified as to the Student's trauma, anxiety, and difficulties of day to day life without the stressor of school. He testified about his interaction with the school and his recommendation on the Student's progress. Dr. Thaw first met the Student in 2012, and has continued as his therapist, although the frequency of his sessions with the Student has drastically been reduced since 2016. Dr. Thaw, described Student as a courageous young man who was in extraordinary pain for a long time but was a gentle soul who was incredibly motivated to work through his pain. (Thaw p. 65). After having met the Student the week of January 28, 2019, for a therapy session, Dr. Thaw said it was clear his trauma continued to impact him and would for some time. (Id. 76-77). He referred to the Student as being in a life trap—the Student had lost 6 ½ years of his life, lost social and emotional development. He was 22 years old but presented as a 13 year old emotionally, socially and academically. (Thaw, 90). It was interesting that Dr. Thaw noted that the Student was physically, mentally exhausted and showed effects of psychological trauma (Id). He felt the Student's energy had been absorbed in managing his trauma. (Thaw, 94-106). The Student's disabilities remained even after his surgery in 2016, where one of his nerves was removed reducing his head pain. Out of all the professionals engaged with the Student, this witness understood the Student's needs, trauma, and anxiety.
6. The Board held a PPT meeting on December 19, 2014. (JSF 1).
7. Dr. Thaw wrote a summary report (P-30) on January 26, 2015, and stated that the Student required an “educational program [to] be designed (by a team of appropriate specialists) that is responsive to [Student's] needs and which occurs under conditions that maximize his attention, focus, concentration, and on-task limits...” (P-30 p. 5). Dr. Thaw was clear that anyone working with the Student would need to understand his needs and the psychological trauma he experienced and how that could be triggered at any time. (Id p. 93). In his report, he explained the Student's course of psychological treatment, diagnostic impressions, and recommendations which included an educational program to be designed by a team of appropriate specialists, that a comprehensive educational and achievement evaluation be conducted to provide specific assessment information to assist the team planning of the Student's program, mentors, and nontraditional activities as an adjunct to his overall educational program, and data metrics to be reviewed quarterly were amongst some of the key recommendations (P-30).
8. A PPT meeting was conducted on February 23, 2015 (B-5), at which Dr. Thaw was available via speakerphone. The school Board failed to heed his advice and recommendations. Dr. Thaw testified that the “educational program [to] be designed (by a team of appropriate specialists) that is responsive to [Student's] needs and which occurs under conditions that maximize his attention, focus, concentration, and on-task limits” was never provided (Thaw, 86).
9. The Board held a PPT meeting on October 4, 2015. (JSF 1).
10. The October 4, 2015, IEP noted the Student was not age appropriate in the areas of language arts, math and behavioral, social, and emotional functioning. (B-8 p. 4-5). The IEP included a goal for written expression and he did not make progress on any goal or objective. (Id; Stipulated Fact).
11. Dr. Deirdre Osypuk conducted a psycho-educational evaluation on August 30, 2015 (B-18). This was a district evaluation contracted and paid for by the District (B-17). Dr. Deirdre Osypuk's psycho-educational noted deficits in math. (B-18 p. 4). During the evaluation it took Student ten minutes to produce three sentences. (Id.) On the WIAT-III Student scored below average in the areas of essay composition, word count and grammar/mechanics. (Id p. 6). Mrs. MacDonald, his special education teacher, completed rating scales on Student and “noted several concerns when comparing [Student] to other 18 years olds.” (Id p. 9;B-22).

She noted overall concerns with internalizing problems and somatization was clinically significant. She further placed him at – risk for anxiety. (Id). In regard to the Learning Profile Scale, she rated the following as “almost always”: getting failing grades in school, does not complete tests and having problems with math. (Id.) She further rated him as “often” for avoiding adolescents and that he does not make friends easily nor does he quickly join group activities. (Id p. 10). Dr. Osypuk noted that Student needed improvement in the areas of math problem solving, numerical operations, spelling, reading comprehension and written expression. (Id p. 13-14).

12. Josh Martin is the Director of Pupil Services for East Haddam Public Schools. He oversees special education services for Students as a part of his role as director and has been the Director of Special Education for the last four years. (JSF 2). Joshua Martin, testified on February 15, 2019 as to the services that were offered to the Student, and on the background as to how the Student came to the school system, and what was and was not done for the Student. (Martin, 42-43). Mr. Martin testified he used a 2015 evaluation for Student’s present level of performance page for the 2015-2016, 2016-2017 and 2017-2018 school years.
13. The Board held a PPT meeting on October 13, 2015. (JSF 2).
14. The IEP progress report for 2015-2016 documented “No Progress” on all the Student’s goals and objectives. (JSF 2).
15. The Board did include a goal for written expression in 2015 and it was removed when he made no progress (Id p. 8; B-20). His case manager stated at a 3/29/18 PPT meeting that he had a long history of difficulty with writing, yet Mr. DeLisa nor Ms. MacDonald provided writing instruction (B-39). Further, the Board added a social and emotional goal on March 4, 2015 but after failing to make progress, the Board removed the goal. (B-8 p. 9,8; B-13 p. 16; P-34).
16. The Mother met with Mr. Martin in 2015 and explained how inappropriate the online program and tutoring was for Student, and the only change made was a different online program. (Mother p. 97; Tr. Martin, 4/10/19, p.37). In 2015, after several years of no progress, the Board reduced Student’s entire program to three hours a week of tutoring. (P-34 p. 17). He made no progress on any of his goals or objectives for the 2015-16 school year. (P-35). The Mother testified the online program was like asking Student to place his hand on a hot burner. (Mother, 1/31/19 p. 29). Mr. Martin confirmed that the Board has not conducted evaluations for Student since Dr. Osypuk’s August 30, 2015 evaluation. (JSF 1)
17. The Board held a PPT meeting on May 2, 2016. (JSF 2).
18. The May 2, 2016 IEP noted that Student had an operation to kill the nerve in his head in January and he no longer had headaches but continued to have eye issues. (B-20 p. 3). The Student’s services included were 2 weekly tutoring sessions of 1.5 hours each and use of Odysseyware for academic success in meeting graduation requirements to complete Eng1 CCSS, Pre-Algebra, Earth Science, World History, and Government. (B-20 p. 7). The Board did not change any programming based on his better health prospects. The IEP from the June 6, 2015 PPT (B-16) listed 4 total hours of special education and academic support of 10 hours. (Id. At 11). The Board at the May 2, 2016 PPT meeting suggested the Student attend school, but by this time, the Student was 20 years old making it inappropriate to place him in a classroom with 14 year olds. The Board did not provide the Student with a specialized math or spelling program, or give him additional tutoring services. (B-20).
19. In the May 2, 2016 IEP, the Board did not provide Student with ESY 2016. The Student had made ‘no progress’ in the 2015-2016 school year, and needed ESY, and yet under “ESY”, the Board stated “not required” and failed to offer the Student ESY 2016. (B-20, p.11).
20. Dr. Thaw testified he was surprised updated evaluations were not done by the Board because that would be the normal course of action. (Tr. Thaw p. 82). While he continued to have a

- TBI, difficulty with concentration, academic concerns and his vision never fully returned, he was no longer in excruciating pain. (Mother, 1/31/19, p. 13).
21. The Board held an annual review at the PPT meeting April 18, 2017, developing an IEP for the 2018-2019 school year. (JSF 2). The IEP progress report for 2017-2018 documented that Student had “unsatisfactory progress” for two of his three goals. The IEP included recommendations that the Student would continue using Odysseyware three hours per week, and would contact school staff at least 4 times during the IEP year. (B-22, p. 7). The Student was to identify and research his vocational preference, produce a written document outlining his plan to obtain employment. (Id). The Student’s academic/cognitive levels of academic achievement for language arts, math, nonacademic areas, behavioral/social/emotional/communication and activities of daily living were all noted as age appropriate. (B-22 p. 4-5). No accommodations were given to the Student, and all his direct services were removed. (Id at 8).
  22. The Student was enrolled in 5-6 courses in Odysseyware in the 2017-2018 school year. Odysseyware is an online learning program which the school can enroll a student in for self-study, whereby a student can go at their own pace. The Student continued to have below average scores, even failing grades. The Student was receiving 3 hours a week for 40 weeks, an expectation that was not consistent with the Student’s performance. (B- 22) The Student’s social skills were never assessed. The Board failed to revise the IEP for the lack of progress.
  23. Student made no progress during the 2016-2017 school year. (Id p. 18-20; B-20). Despite making no progress for two years on his goals and objectives and the fact that he was no longer in pain and available for more intensive services, at a PPT meeting on April 18, 2017, Student’s entire program in the IEP was reduced to one hour a quarter of academic support which he was required to initiate. (B-22 p. 15). The Board did not address his spelling, social skills, his writing, his math, his vision weaknesses, visual processing, executive functioning, transition needs, or anxiety and depression, nor had they ever done that appropriately through the IEP. (Id p. 19-23). Mother asked for updated evaluations and this was denied by the Board. (Id.). Despite having worked for eight years and earning only 6.5 credits, the Student was exited from special education because he aged out and was no longer eligible for services. (B-38). Student’s Summary of Performance noted no concerns nor any need for accommodations despite his long history of special education needs and total lack of progress.(P-40).
  24. No accommodations were made for the Student in terms of ESY 2017, and the Board did not provide Student with said services. The Student had made no progress in the 2016-2017 school year, and needed ESY. The Board listed ESY as “not required.” (B-22 p.11).
  25. Deb McDonald – Olsen is a special education teacher at Nathan Hale High School in East Haddam and is the Board’s transition coordinator. As part of her job description, she conducts evaluations for students in the area of academics, achievement and transition. Ms. McDonald – Olsen first worked with Student over the summer of 2013 when she provided tutoring. Ms. McDonald – Olsen was Student’s special education case manager for the years of 2016-2017, 2017-2018 and 2018-2019 (“JSF” 3). Debra McDonald-Olsen, the special education teacher and transition coordinator testified on February 15, 2019 on her interactions with the Student. She failed to present any convincing evidence that the school Board modified the IEP at PPT meetings that were favorable to the Student learning more. The Student’s goals continued to be unmastered, unassessed, and unchanged as time went on.
  26. Peter DeLisa, testified on April 29, 2019, he was one of the Student’s first tutors and testified as to how infrequent the tutoring sessions were. He only met with Student about 40% of the allotted time due to the Student making last minute cancellations due to extreme headaches.

27. Scott Wells is the Owner and Director of Options. Options was opened in 2004 and is recognized by the Connecticut State Department of Education as an approved special education school. (JSF 2). Scott Wells testified on February 8, 2019, and offered testimony about the Options program, and the Student's ability to thrive at Options. Options works with students who are older than 21 years old and has experience with working with students who have PTSD, anxiety, depression, brain injuries, trauma and students who have not been in a school program for several years. (Wells p.4,14) . Options' typical students have fallen behind in credits because of a disability, and around half of them have emotional problems such as depression, PTSD and anxiety. (Id p. 8). Mr. Wells was clear that Options can meet Student's counseling needs, life skills, can address social skills in an academic setting, on an individual basis and on the job site or at community college, can provide a comprehensive transition program, can support post-secondary education, provide comprehensive academic services and provided individualized staff with a one on one academic and vocational teacher. (Id p. 10,11, 23, 27, 29). He testified that based on the records he did have, he believed Student had poor auditory processing, difficulty with cognitive processing, concentration, anxiety and depression. (Id). Mr. Wells testified it was hard initially for Student to come in for a tour but he became engaged after understanding the model of the program. (Id p. 17). Mr. Wells testified that Student did not appear as a typical 22 year old Student, and was functioning at the level of a middle schooler as he had low confidence, was slow in his processing and unable to express his needs. (Id p. 17-19). Dr. Thaw believed Options was the appropriate placement for Student (Id.)
28. A PPT meeting was held on March 29, 2018. (B-27) The Parent requested compensatory education and the Board denied this request. (JSF 2). However, the IEP states that no other options were considered and rejected (B-27, p 3). The Student was to work on Odysseyware for 4 hours each each, and make contact with school staff to address any concerns every two weeks for a 15 minute meeting. The Student's total special education hours were .50 weekly and the Student was to spend 32 hours during the 2017-2018 school year with students who had no disability. ESY services were listed as not required, and the Student was expected to have 6.5 school hours per day. The Student's academic/cognitive requirements showed unsatisfactory progress under all the goals. (Id. at 11-12).
29. A PPT meeting was held on September 13, 2018. The Parents requested compensatory Education and placement at Options. The Board denied this request. (JSF 2). Student was exited from special education in June 2018 due to his age.

### CONCLUSIONS OF LAW AND DISCUSSION:

1. There is no dispute that Student was eligible to receive a free and appropriate public education (FAPE) and related services as set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C Sec 1401, et seq. and its implementing regulations codified at 34 CFR §300 et seq., and under Conn. Gen. Stat. Sec. 10-76d.
2. The purpose of the IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes "special education and related services designed to meet their unique needs" and "prepare them for further education, employment and independent living" and "to ensure that the rights of children with disabilities and Parents of such children are protected..." 20 U.S.C. §1400(d)(1).

3. The Act defines FAPE as special education and related services which “(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State Educational Agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under Sec. 614(d).” 20 U.S.C. §1401 (8).
4. The Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Regulation of Connecticut State Agencies (R.C.S.A.) Sec 10-76h-14.
5. The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v Rowley*, 458 U S 176 (1982). The first question to be determined is whether the Board complied with the procedural requirements of the IDEA? The second question to be determined is whether the Individualized Educational Program is "reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U S at 206-207.
6. Addressing the first prong of the *Rowley* inquiry, the initial procedural inquiry is not a formality. As the Supreme Court noted in *Rowley*, Congress’s emphasis in the IDEA “upon the full participation of concerned parties throughout the development of the IEP,” together with the requirement for federal approval of state and local plans, reflects a “conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of a substantive content in an IEP.” 458 US at 206. " *Walczak v Florida Union Free School District*, 27 IDELR 1135 (2d Cir 1998). The procedural guidelines of the IDEA are designed to guarantee that the education of each child with disabilities are tailored to meet the child’s unique needs and abilities. 20 U.S.C. § 1412 and 1415. These procedural guarantees are procedural safeguards against arbitrary and erroneous decision-making. *Daniel R.R. v State Board of Education*, 874 F.2d 1036, 1041 (5<sup>th</sup> Cir. 1989). Compliance with the IDEA’s procedural requirements is the responsibility of the board and not the parents. *Unified Sch. Dist. V. Dep’t. of Educ.*, 64 Conn. App 273. 285 (2001). However, a procedural violation of the IDEA does not, in and of itself, warrant a change in the child’s educational placement. In order to conclude that procedural violations resulted in a denial of a free appropriate public education, the parent must show that the procedural errors resulted in a loss of educational opportunity. See *Burke County Bd. Of Educ. v. Denton*, 895 F.2d 973, 982 (4<sup>th</sup> Cir. 1999); *Evans v. District No. 17*, 841 F.2d 824, 830 (8<sup>th</sup> Cir. 1988). Procedural flaws do not automatically require the Hearing Officer to find that a denial of FAPE has occurred, instead, the hearing officer must determine if the procedural inadequacies resulted in the “loss of educational opportunities or seriously infringed upon the parent’s opportunity to participate in formulating the [IEP]...” Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist.* 267 F.3d 877 (9<sup>th</sup> Cir. 2001). An IEP addresses the unique needs of the child and cannot be developed if those people most familiar with the child’s needs are not involved or fully informed. IDEA expects strong participation at PPT meetings. *Warren G. v. Cumberland County Sch. Dist.* 190 F.3d. 80 (3d Cir. 1993). The IEP is to be a collaborative process developed by the parents of the student, educators and other specialists. *Honig v. Doe* 484 US 305, 311 (1988).

7. The May 2016 IEP (B-20) did not provide FAPE because it provided less than the required amount of home tutoring under state regulations and in fact reduced the number of tutoring hours post-surgery. The PPT meeting did not consider evaluative data to justify less than the requirement hours of tutoring under law. R.C.S.A. 10-76d-15(e) provides that “instruction shall be provided ...no less than two hours per day or ten hours per week for children in grades seven through twelve. Where evaluative data indicates that these time requirements should be modified, instruction time may be increased or decreased upon the agreement of the parent and the board of education or upon a determination made by the PPT as appropriate.”
8. The April 2017 IEP (B-22) did not provide FAPE. The IEP failed to account for lack of mastery of subjects or enough credits. The IEP failed to make any accommodations for the Student. The IEP put the burden on the Student to contact the special education teacher at least 4 times a year. (See above Facts 22). It failed to confer meaningful educational benefit by offering less than the minimum amount of home tutoring under R.C.S.A. Sec. 10-76d-15(e).
9. The March 2018 IEP (B-27) did not provide FAPE. The IEP failed to make a proper transition plan for the Student. The IEP continued to put the burden on the Student to engage in Odysseyware. The IEP showed the Student was making unsatisfactory progress on his goals.
10. The Board did not look at the instructional strategies or change the program when the Student did not make progress, they instead removed goals, reduced services and eventually removed tutoring altogether (B-20, B-22, P-34). This was a gross procedural violation.
11. Despite documenting since 2015 that the Student was not age appropriate in the area of language arts, math and behavioral, social, and emotional functioning, the IEPs never appropriately addressed any of these areas, which is a gross violation that denied Student a FAPE (B-8 p.5, B-20, P-34, B-22). The Board did include a goal for written expression in 2015 and it was removed when he made no progress (Id p. 8; B-20). His case manager stated at a 3/29/18 PPT meeting that he had a long history of difficulty with writing, yet Mr. DeLisa nor Ms. MacDonald provided writing instruction (B-39). Further, the Board added a social and emotional goal on March 4, 2015 but after failing to make progress, the Board removed the goal (B-8 p. 9,8; B-13 p. 16; P-34).
12. Despite the Student having made no progress during the school year of 2015-2016 and 2016-2017, ESY for 2016 and 2017 was not offered to the Student. The school district inaccurately represented that the ESY for the Student for 2016 and 2017 was not required. Indeed, a school district's inaccurate description of a student's actual levels of performance in the IEP has been specifically recognized as a material procedural violation of IDEA. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320; *RR v. Wallingford Board of Education*, 101 LRP 196 (D. Conn 2001); *Newtown Public Schools*, 107 LRP 59412 (Ct SEA 2007).
13. Special education is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. 300.39(a)(1). The specially designed instruction is to ensure that the student can meet the educational standards within the jurisdiction. 34 C.F.R 300.39(b)(3). The Student never received specially designed instruction and clearly never met the Board’s educational standards as evidenced by his inability to graduate after eight years of high school. The Board continuously committed gross procedural violations that resulted in a denial of FAPE.

14. A Board's refusal to evaluate a Student not only impeded the Parents' opportunity to participate in the decision-making process, it foreclosed them from accessing the process at all. *M.A. v. Torrington Bd. of Ed.*, 980 F. Supp.2d 245, 270 (D. Conn. 2013). An IEP fails to confer educational benefit where there are “no procedures in place... to ensure that data was being collected, that timely evaluations were taking place or to ensure that staff was accountable for documenting progress and monitoring instructional strategies...” *Newtown Pub. Sch.*, 107 LRP 59412 (CT SEA 2007). Further, FAPE is denied where the Board staff is “consistently unable to present assessment or performance evaluation data to document program effectiveness or Student growth.” *In re A.C. 504 LRP 7672* (CT SEA 1982). Once the Student’s nerve was severed and his pain was gone in 2016, no evaluations were conducted to determine his current functioning, therefore rendering the IEP inaccurate and violated FAPE.
15. The Student was never provided with a transition evaluation or a functional behavioral assessment. Despite a long history of being unable to achieve academically, no comprehensive educational or writing evaluation was conducted. Despite vision difficulties no occupational therapy evaluation was conducted and despite a long history of anxiety and depression, no psychiatric evaluation was proposed during the statutory period. The purpose of IDEA is to prepare Students for post-secondary education, employment and independent living. 34 CFR 300.1. The Board admitted he was not prepared for any of these things. (Martin, 4/10/19, p. 39). Failure to provide appropriate transition planning resulted in an award of two years of compensatory education. *East Hartford Bd. Of Educ.*, 50 IDELR 240, 2008. Josh Martin testified that the IEP did not address or include his vocational interests, did not include his career goals or his future. (Martin, 2/15/19 p. 49). This type of information would drive transition goals. (Id.; B-22). This gross procedural violation denied the Student his transition rights and therefore denied him a FAPE. Mr. Martin testified that the only focus of the Student’s educational program was accessing Odysseyware, a general education program. (Id. P. 53). The Board’s total refusal to identify Student’s needs led to an utterly inappropriate program that denied him any hope of making progress and resulted in a significant gross procedural violation.
16. The IEP is a legally binding document that outlines the services and program the Student is entitled to. See *Honing v. Doe*, 484 U.S. 305 (1988). The Board’s failure to document the Parents request in March of 2018 for compensatory education, and failure to explain the process impeded Parent’s ability to challenge this request. (B-27; Martin, 2/15/19 p. 100-101.) A student must be reevaluated if the educational or related services needs, including academic achievement and functional performance, warrant a reevaluation. 34 C.F.R. 300.303 (a)(1). In this case, the Student’s condition drastically changed and therefore conditions warranted a re-evaluation to understand his current levels of performance.
17. Connecticut Guidelines for the Identification and Education for Students with Emotional Disturbance are persuasive in this context. Regarding the assessment of student needs, the guidelines state the following: “PPTs are charged with developing IEPs for Students who meet eligibility requirements for special education. To meet the requirements of the IDEA, when necessary, the IEP must address Students' unique needs as well as their learning issues...” The Student’s medical issues were his unique needs which caused the learning issues and they were not met and resulted in violation of FAPE as the Student could not make progress in his education.

18. The failure to provide meaningful participation to parents as a part of the IEP process can result in a denial of FAPE. School districts should consider input and placement options raised by parents. See *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2008), *cert. denied* 130 S. Ct. 90 (2009). The Parents presented the Board with letters from the mental health provider giving insight into Student's stressors and offered reports and evaluations. Parents and Student wanted to discuss alternate placement at the 2018 PPT, but this was not considered as an option. The failure to discuss information at the 2018 PPT provided by Parents or consider alternate placement impeded the Parents' right to meaningful participation.
19. As to the second inquiry of whether the IEPs were reasonably calculated to enable the child to receive educational benefits, the IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP. The Supreme Court, however, has specifically rejected the contention that the "appropriate education" mandated by IDEA requires states to "maximize the potential of handicapped children *Walczak v Florida Union Free School District*, 27 IDELR 1135 (2d Cir 1998), *citing Rowley, supra*. The IDEA requires "the door of public education [to] be opened for a disabled child in a "meaningful way." *Walczak*, 142 F.3d at 130. However, it does not guarantee "everything that might be thought desirable by loving Parents." *Id.* at 132.
20. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* Whether the program is "individualized on the basis of the student's assessment and performance" is also considered when determining the appropriateness of an IEP. See *A.S. v. Board of Education of West Hartford*, 35 IDELR 179 (D. Conn. 2001), *aff'd*, 47 Fed. Appx. 615 (2d Cir. 2002) (*citing M.C. ex rel Mrs. C. v. Voluntown Bd. of Educ.*, 122 F.Supp.2d 289, 292 n.6 (D. Conn. 2000)). The Student's program was not individualized based on the Student's functional status; did not provide the minimum amount of educational benefit provided by state regulations; and did not meet the unique needs of Student.
21. FAPE is denied when the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or caused of a deprivation of educational benefit. 34 C.F.R. § 300.513 (a) (2). Cumulative procedural violations can deprive a student of FAPE. See *L.O v. NYC Dept. of Ed.* 822 F.3d 95 (2016).
22. When a board has violated IDEA, compensatory education is available as a remedy. "Compensatory education is prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education." *Somoza v. N.Y.C. Dep't of Educ.*, 538 F.3d 106, 109 (2d Cir.2008) (internal quotation marks omitted); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 456 (2d Cir. 2015). The purpose of compensatory education is to put the Student in the position he would have occupied if the IDEA violation had not occurred. *Copeland v. Dist. of Columbia*, 64 IDELR 37 (D.D.C. 2014). Compensatory education is available to a claimant over the age of twenty one when there have been gross procedural violations. 20 U.S.C.A. § 1415(i)(2)(C)(iii); *Doe.*, 790 F.3d 440 (2d Cir.2015). Compensatory services were awarded when a student was placed in the program "solely to serve administrative convenience and without regard to his educational needs." *Id.* *Sanford Sch. Comm. v. Mr. and Mrs. L.*, 34 IDELR 262 (D. Me. 2001). In the case of *Jefferson City Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988), the Court awarded two years of compensatory education beyond the Student's twenty first birthday. *Id.* The Court was clear that compensatory education, like retroactive reimbursement, is necessary to preserve a special

education Student's right to a free education. *Breen*, 853 F.2d at 858. In *Mrs. C v. Wheaton*, the Second Circuit held that when the school Board "took advantage of J.C.'s mental infirmities in order to evade the Education for all Handicapped Children Act procedures, resulting in J.C.'s complete exclusion from an education placement until he was 21, with disastrous results" the child was entitled to compensatory education based on the state's gross violations. *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990).

23. Similarly, the Board took advantage of the fact that the Parents did not know their rights or their options and the Student was expected to advocate for himself. The Board slowly removed the Student's services until he had scant services. The Board was aware that the Student was failing to meet his IEP goals and objectives year after year, saw that he failed to obtain more than 6.5 credits despite being in high school for eight years, yet did nothing. The Board exited the Student without a basic diploma, with no transitioning or post-secondary education readiness, or ability to be employed or live independently.
24. The purpose of the IDEA is to ensure that an IEP is designed for the student's unique needs and to prepare them for further education, employment and independent living, and ensuring that the rights of children with disabilities and their parents are protected. 20 U.S.C. §1400. The Board denied the Student these protections. The gross procedural violations of this matter denied the Student a FAPE. IEP's must be reviewed to address any lack of expected progress towards the goals. 34 C.F.R. 300.324 (b) (1). Offering the same inappropriate programming year after year, amounts to a denial of FAPE.
25. Courts will look for passing marks and advancing from grade to grade as a measure of progress and an indication of the appropriateness of the IEP. 20 U.S.C. §1414(d)(1)(A)(i)(I-IV). *Andrew F.* 137 S. Ct. 988. In eight years of high school he earned 6.5 credits, and remained a freshman. Further, the Supreme Court has also established that under the IDEA, a student with a disability is entitled to an IEP that is reasonably calculated to enable the child to receive educational benefit and make progress in light of the student's circumstances. *Rowley.*, supra, 458 U.S. at 177, *Andrew*, supra at 999. The Supreme Court clarified that the standard is markedly more than de minimis. *Id.* at 1000. An IEP must provide significant learning and meaningful benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171,182, 184 (3rd Cir. 1988). In order to provide meaningful benefit, a child's IEP must be tailored to the unique and individualized needs of the student. 34 C.F.R. 300.347 (a). Services to be provided under special education must target all areas of need whether they be academic, physical, social or emotional. *Mrs. I v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir., 2007). The Board failed to offer an IEP reasonably calculated to enable the Student to make appropriate progress considering his circumstances.
26. The Student also seeks a compensatory education award in this case. Impartial Hearing Officers have broad discretion to fashion appropriate remedies in due process cases, including to award compensatory education as an equitable remedy for denial of FAPE. *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285 (11th Cir. 2008); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005). The eleventh circuit found in *Draper v. Atlanta Independent School System* that an award of compensatory education may be appropriate relief where responsible authorities have failed to provide special education students with an appropriate education as required by the IDEA and compensatory education provides services prospectively to compensate for past deficient programs. 20 U.S.C.A. § 1400 et seq.; *Draper.*, 518 F.3d 1275 (11th Cir. 2008).

Like the student in *Draper*, the Student here was placed in an inappropriate program for years. While he was suffering from intermittent blindness, he was provided with an online program. When he had excruciating pain, the Board blamed the Student for not showing up to tutoring. At PPT meetings, they asked the Student what his disabilities were and when he could not explain them, they stated he did not have disabilities. Like the district in *Draper*, the East Haddam Board provided the same program year after year without individualizing it to meet the Student's needs and his rights under the IDEA were grossly deprived.

27. Compensatory education should be designed as a "replacement of educational services the child should have received in the first place" and should "elevate [the Student] to the position he would have occupied absent the school board's failures." *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 518, 524-27 (D.C. Cir. 2005). An award of compensatory services is not based on an established logarithm, but instead on equitable considerations. *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005).
28. The program at Options, which includes clinical services, is reasonably calculated to enable the Student to receive educational benefits and conferred educational benefit that Student should have been receiving from the District. From Scott Wells testimony, and Dr. Jack Thaw's testimony, there is clear evidence that this program will prove effective for the Student.

#### FINAL DECISION AND ORDER:

1. The Board did not offer an appropriate program for the 2016-17, 2017-18, 2018-19 school years including the 2016 and 2017 extended school years, and the Board committed gross procedural violations.
2. The Student is entitled to placement at Option as compensatory education, payable by the Board, effective School year 2019-2020, Summer 2020 and School year 2020-2021, to make him whole due to the gross procedural violations.