

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. East Haddam Board of Education

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Appearing on behalf of the Board: Attorney Frederick Dorsey  
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Appearing before: Attorney Ann F. Bird  
Hearing Officer

**MEMORANDUM OF DECISION AND ORDER**

**Phase One**

**ISSUES:**

1. Did the Board of Education offer the Student a Free Appropriate Public Education (FAPE) for the 2017-2018, 2018-2019 and/or 2019-2020 School Years, including the 2018 and 2019 extended school years?
  - a. If not, is the Milestone School appropriate for the Student?
  - b. If the Milestone School is appropriate for the Student, should the Student be placed at Milestone School?
2. If the Board of Education did not offer the Student a Free Appropriate Public Education (FAPE) for the 2017-2018, 2018-2019 and/or 2019-2020 School Years, including the 2018 and 2019 extended school years, is the Student entitled to compensatory education, and if so, what are the essential features of such compensatory education?

**PROCEDURAL HISTORY:**

The Student initiated this special education due process case on June 13, 2019. This Impartial Hearing Officer was assigned to the case on June 13, 2019. A Prehearing Conference was convened on June 25, 2019. Attorney Kathleen Reiser appeared on behalf of the Student and Attorney Frederick Dorsey appeared on behalf of the Board of Education (Board). It was established that the deadline for filing the final decision in this case was August 26, 2018. On August 21, 2019, the Student requested an extension of the deadline for filing the final decision in the case. The Board consented to the extension and it was granted, extending the deadline to September 25, 2019.

On August 20, 2019 the Hearing Officer issued an Order bifurcating the issues whether the Milestone School is appropriate for the Student and whether the Student should be placed at the Milestone School from the other issues presented in this case. The remaining issues in the case (not concerning the Milestone School), including the question of compensatory education other than a Milestone School placement, if any, would be decided in Phase 1 of the case, and the remaining issues concerning Milestone School would be heard as Phase 2 of the case as soon as possible thereafter.

Evidentiary hearings were conducted on August 21, 2019, August 22, 2019 and August 30, 2019 for Phase 1. The parties submitted written briefs on September 3, 2019.

The following witnesses testified:

Student's Mother  
Mitchell Katz, M.D., Pediatrician  
Joshua Martin, Director of Pupil Services  
Liana Lilburn, Special Education Teacher  
Jennifer Dupre, Occupational Therapist  
Tracey Eissa, BCBA, Behavior Consultant

Hearing Officer Exhibits HO 1 through HO 4 were entered as full Exhibits. Student Exhibits P-1 through P-75 were entered as full Exhibits. Finally, Board Exhibits B-1 through B-150, B-152 and B-153 were entered as full Exhibits.

**SUMMARY:**

The Student's program was not implemented as written during much of the 2017-2018 and 2018-2019 School Years. In addition, the Board dramatically reduced the Student's service hours without a reasoned basis to do so and then failed to revise the program or adequately assess the Student's behavior needs when it became clear that the program was not effectively addressing dangerous and disruptive maladaptive behaviors that were limiting the Student's educational progress.

**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 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

**FINDINGS OF FACT:**

1. The Student was born on July 3, 2009, and is now ten years of age. (Exhibit B 12 (B \_); Testimony of Mother (T \_))
2. The Student received Birth to Three early intervention services in the home due to significant delays with fine motor skills, cognition, self-help and receptive and expressive communication. A Vineland Adaptive Behavior Scale and Autism Diagnostic Observation Schedule at age 21 months concluded that the Student met the qualifications for an educational diagnosis of Autism. He was identified as eligible for special education and related services under the category of Autism and has received services through the East Haddam Board of Education since May 2012. (Exhibit B-65)
3. The Student is a kind and funny young man who loves butterflies. (T Mother)
4. The Student demonstrates average cognitive ability in the domains of visual-spatial reasoning and relations and fluid reasoning, with significant weaknesses in working memory and processing speed. He exhibits below average receptive and expressive and pragmatic language skills and moderate sensory processing deficits that interfere with his education. (Exhibit B-67; Exhibit B-65)
5. Academically, the Student has solid skills in the areas of reading accuracy, fluency and oral reading, but his reading comprehension is very low. He does relatively well in Mathematics, but struggles with Written Expression. (Exhibit B-63)
6. The Student is diagnosed with Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactive Disorder (ADHD). He also suffers from anxiety. (T Mother; T Katz; Exhibit B-65; Exhibit B-124)
7. For years, the Student has exhibited several dangerous and disruptive maladaptive behaviors at school, including physical aggression, self-injurious behavior and more recently, threatening verbalizations. (T Eissa; T Mother; T Lilburn; T Katz)
8. These maladaptive behaviors limit the Student's ability to access his education and progress in his school program. (T Lilburn; Exhibit B-20; Exhibit P-20; Exhibit B-42; Exhibit B-69; Exhibit p-25; Exhibit B-97; Exhibit P-27; Exhibit B-127; Exhibit B-127; Exhibit B-137; Exhibit P-39; Exhibit P-38)
9. The Student's Individualized Education Program (IEP) for the second grade (4/26/16 through 4/26/17) identified the following areas of "Need/Concern" in the Present Levels of Performance section for the Behavioral/Social/Emotional category:

[Student] still needs some prompting to initiate peer play (but has made improvements), engage for a sustained period of time with appropriate interactions; eye contact, back & forth verbal exchanges, share materials. Joining existing play

groups (recess) will be important. Maladaptive behaviors requiring reduction; whining/crying, dropping, throwing/swiping. Some of these have increased.

(Exhibit B-20)

10. The Student's IEP for the second grade provided special education and related services in individual or small groups in a segregated setting as follows:

Academics	15.00 hours weekly
Occupational Therapy	1.00 hour weekly
Speech/Language	2.00 hours weekly

During this time, the Student was scheduled to spend 4.50 hours weekly with non-disabled peers.

(Exhibit B-20)

11. The second grade IEP included two Social/Behavioral goals in addition to four Academic/Cognitive goals, two Communication goals and one Gross/Fine Motor goal. (Exhibit B-20)

12. Social/Behavioral Goal No. 7 was to "decrease the maladaptive behaviors that interfere with learning during his school day." Social/Behavioral Goal No. 8 was to "engage in cooperative play skills (e.g. initiate and maintain play with peers, demonstrate eye contact, verbal exchanges, and turn-taking." (Exhibit B-20)

13. In addition to these services, the Student's IEP included the services of a Behavioral Intervention Consultant for the teacher on a weekly basis and a one to one instructional assistant for the Student in all settings of the school day as well as weekly consultation with the parent. (Exhibit B-20)

14. A Functional Behavior Assessment (FBA) was performed in December 2016 when the Student was seven years of age and mid-way through the second grade by BCBA Saccacio. The FBA identified the behaviors of concern as follows: throwing and swiping objects, dropping, whining/crying, self-injurious behavior, bolting and aggression. (Exhibit B-33)

15. BCBA Saccacio concluded that the Student's target behaviors were most likely maintained by access to preferred items and activities, with escape as a secondary maintaining variable. (Exhibit B-33)

16. BCBA Saccacio and BCBA Disch developed a Behavior Intervention Plan (BIP) in light of the FBA in January 2017. The January 2017 BIP was designed to reduce maladaptive behaviors and increase adaptive behaviors. (Exhibit B 37)

17. An annual review Planning and Placement Team (PPT) meeting was conducted on March 21, 2017. At that meeting, the Student's PPT indicated the following as the Student's Present Level of Performance in the area of Behavioral/Social/Emotional:

We are working on sustained period of time with appropriate interactions with peers, eye contact, back & forth verbal exchanges, share materials. Maladaptive behaviors requiring reduction: Whining/crying, dropping, throwing/swiping. Some of these have increased.

(Exhibit B-42)

18. At that time, the Student was making Satisfactory progress on his Social/Behavioral goal No. 7, to decrease the maladaptive behaviors that interfere with learning during the school day in the second grade. He Mastered his Social/Behavioral goal No. 8, to engage in cooperative play skills in the second grade. (Exhibit B-39; Exhibit B42)

19. In addition, the Student Mastered two of his Academic goals as well as his Communication goal. He made Satisfactory progress on three Academic goals and his Gross/Fine Motor goal. (Exhibit B-39)

20. The PPT planned an Extended School Year program for the Student for the Summer of 2017, consisting of four days per week for four weeks. The Student was to receive four hours per day of specialized instruction and 1.50 hours per week of Speech/Language service and .50 hours per week of Occupational Therapy. (Exhibit B-42)

21. The PPT also developed a new IEP for the Student's third grade year (4/4/17 through 4/4/18) providing special education and related services in individual or small groups in a self-contained setting as follows:

Academics	15.00 hours weekly
Occupational Therapy	1.00 hour weekly
Speech/Language	1.50 hours weekly

During this time, the Student was scheduled to spend 5.00 hours weekly with non-disabled peers.

(Exhibit B-42)

22. The third grade IEP included two Social/Behavioral goals in addition to four Academic/Cognitive goals, three Communication goals and one Gross/Fine Motor goal. (Exhibit B-42)

23. Social/Behavioral Goal No. 8 was to "decrease the maladaptive behaviors that interfere with learning during his school day." Social/Behavioral Goal No. 9 was to "engage in cooperative play skills (e.g. initiate and maintain play with peers, demonstrate eye contact, verbal exchanges, and turn-taking." (Exhibit B-42)

24. In addition to these services, the Student's IEP included the services of a Behavioral Intervention Consultant for the teacher on a weekly basis and a one to one instructional assistant for the Student in all settings of the school day as well as weekly consultation with the parent. (Exhibit B-42)

25. The Student's progress on the goals and objectives for the March 2017 IEP were reported in June of 2017. At that time, the Student was making Satisfactory Progress on each of his goals and objectives, except only that two Communication objectives had not been introduced, progress on one Motor objective was Unsatisfactory and one Motor objective had been Mastered. (Exhibit B-44)

26. The Student began his third grade year in the Fall of 2017. On January 2, 2018, the Student's PPT met for his triennial review and to develop a new IEP in light of recent evaluation results. (Exhibit B-69)

27. School Psychologist Christina Revicki performed various assessments of the Student's intelligence and behavior in December 2017. (Exhibit B-65)

28. The Student's intellectual functioning was measured using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). It was not possible to develop a Full Scale IQ score because the Student exhibited too much variation in his intellectual strengths and weaknesses. However, composite scores for the five domains of intelligence were developed as follows:

Verbal Comprehension Index	86	Low Average
Visual Spatial	100	Average
Fluid Reasoning	91	Average
Working Memory	67	Extremely Low
Processing Speed	63	Extremely Low

(Exhibit B-65)

29. The Behavior Assessment System for Children – Third Edition (BASC-3), indicated that the Student's behaviors at school and home were Clinically Significant for Hyperactivity, Attention Problems and Atypicality. Aggression, Conduct Problems and Withdrawal were also significant. The Student's Adaptive Skills were assessed as ranging from At Risk to Clinically Significant. (Exhibit B-65)

30. Administration of the Conners-3 Assessment demonstrated that the Student exhibited behaviors similar to individuals with ADHD Predominantly Hyperactive-Impulsive Type. (Exhibit B-65)

31. The Gillam Autism Rating Scale – Third Edition (GARS-3) confirmed the Student's Autism diagnosis. The Adaptive Behavior Assessment System - Third Edition (ABAS-3) reflected the Student's teacher's observation that he has relative strengths in the

adaptive skills areas of Functional Academics, Community Use and Self Care with relative weaknesses in the areas of Health and Safety and Self Direction. (Exhibit B-65)

32. Academic testing with the Woodcock Johnson Tests of Achievement – IV produced a Superior standard score for Word Attack and High Average standard scores for Letter-Word Identification, Spelling and Oral Reading. The Student earned Average standard scores for Applied Problems, Passage Comprehension, Calculation, Writing Samples and Low Average standard scores for Sentence Reading Fluency and Math Facts Fluency. He had a Low standard score for Sentence Writing Fluency. (Exhibit B-63)

33. On the Gray Oral Reading Tests, the Student had Average scores for Rate, Accuracy and Fluency but a Very Poor score for Comprehension. (Exhibit B-63)

34. An evaluation was also performed of the Student's Language skills using the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF -4). On this assessment, the Student's scores were as follows:

Core Language Score	66	Very Low
Receptive Language Index Score	75	Low
Expressive Language Index Score	65	Very Low
Language Content Index	80	Borderline
Language Structure Index	67	Very Low
Working Memory		could not complete

(Exhibit B-67)

35. An educational Occupational Therapy evaluation was also completed. The Sensory Profile: School Companion, a questionnaire that evaluates students from the teacher's perspective to determine how sensory processing may impact participation in school, was implemented. This Profile reflected that the Student presents sensory seeking, sensitivity, registration and avoiding behaviors that impact his overall performance at school. (Exhibit B-64)

36. In addition, the Educational Assessment of School Youth for OT was administered to evaluate the Student's fine-motor, gross-motor, visual perceptual, visual-motor and self-help skills. This assessment revealed that the Student is independent for most self-help tasks in the school setting, including eating and drinking and personal hygiene. He independently manages his clothes, his backpack and his workspace. He does need assistance with opening containers, placing papers in a pocket folder and writing assignments in his notebook. (Exhibit B-64)

37. An earlier Occupational Therapy Evaluation performed in 2015 had determined that the Student's fine motor skills were sufficiently developed for the educational setting. (T Dupre)

38. An FBA was conducted in January 2018 as part of the triennial evaluation, this time by BCBA Tracy Eissa. (Exhibit B-68)

39. BCBA Eissa' FBA identified virtually the same behaviors of concern as had earlier FBAs, but relabeled some and added "non-compliance." The new target behaviors were: aggression, elopement, grounding, non-compliance, object misuse, self-injurious behavior and crying. (Exhibit B-68)

40. Eissa found that gaining access to tangible items or activities was the primary function of the targeted behaviors of aggression, elopement, grounding, non-compliance and object misuse. She concluded that escape from demands was a significant secondary function of these behaviors. (Exhibit B-68)

41. Eissa also discovered that escape from demands was the primary function of the targeted behaviors of crying and self-injurious behavior, with gaining access to tangible items or activities the secondary function of these behaviors. (Exhibit B-68)

42. While somewhat more nuanced, Elissa's analysis was consistent with the earlier FBAs. (Exhibit B-68)

43. Eissa used her FBA to develop a new BIP for the Student, incorporating many of the strategies included in the BIP of January 2017. As before, the goal of the BIP was to reduce the occurrence of the targeted behaviors and increase appropriate behaviors. (Exhibit B-68)

44. BCBA Eissa met and consulted with the Student's special education teacher and instructional assistants on a near weekly basis to review behavior data, sometimes observe the Student, and modify the behavior plan. She issued written summaries of these consultations throughout the Student's third and fourth grade years. (Exhibit B-48, Exhibit B-51, Exhibit B-52, Exhibit B-54, Exhibit B-56, Exhibit B-58, Exhibit B-59, Exhibit B-60, Exhibit B-71, Exhibit B-72, Exhibit B-73, Exhibit B-76, Exhibit B-77, Exhibit B-78, Exhibit B-80, Exhibit B-81, Exhibit B-83, Exhibit B-88, Exhibit B-95, Exhibit B-96, Exhibit B-99, Exhibit B-102, Exhibit B-115, Exhibit B-131, Exhibit B-132, Exhibit B-142, Exhibit B-144, Exhibit B-145, Exhibit B-148, Exhibit B-149)

45. The PPT of January 2, 2018 indicated the following as the Student's Present Level of Performance in the area of Behavioral/Social/Emotional: "When prompted and engaged, [Student] will share topics of interest to adults." In the Concerns/Needs section, the PPT stated:

Without coping skills/strategies [Student] has difficulty self-regulating his behaviors and feelings/emotions.

(Exhibit B-69)

46. The PPT also reported on the Student's academic and behavioral performance at the meeting. The Student made Satisfactory progress on his two Social/Behavioral goals, to decrease the maladaptive behaviors that interfere with learning and to engage in cooperative play skills. (Exhibit B-62)

47. The Student made Satisfactory progress in his four Academic goals and his Motor goal. He Mastered his three Communication goals. (Exhibit B-62)

48. The PPT developed a new IEP for the remainder of the Student's third grade year (1/1/18 through 6/29/18). The new IEP provided for delivery of special education and related services in as follows:

Language Arts Instruction	.75 hours daily	resource room
Math Instruction	.75 hours daily	regular classroom
Behavior support	.50 hours daily	[sic]
Occupational Therapy	.50 hours weekly	resource room
Speech/Language	1.33 hours weekly	resource room
Social Skills Instruction	.50 hours weekly	resource room

(Exhibit B-69)

49. For the remainder of the third grade and start of the fourth grade, the Student was scheduled to have 10 hours per week of special education and related services and to spend most of his instructional time - 20.17 hours weekly - with non-disabled peers in the mainstream environment. This was a significant departure from the Student's previous IEP, which provided more than twice as much time - 25 hours per week - for special education and related services in a segregated environment.

(Exhibit B-69; Exhibit B-42)

50. None of the evaluations that the PPT reviewed or had available at the January 2, 2018 triennial evaluation meeting recommended that the Student should be educated primarily in the mainstream or that his specialized instruction or related service time should be dramatically reduced. (Exhibits B-62; B-63; B-64; B-65; B-67; B-68; B-69) Nor did the Student's performance on his IEP goals and objectives for the second grade warrant this action. Although he was doing well in Communication, he did not master his Academic, Social/Behavioral or Motor goals. (Exhibit B-62)

51. The January 2, 2018 IEP included three Social/Behavioral goals in addition to five Academic/Cognitive goals, two Communication goals and one Motor goal. (Exhibit B-69)

52. Social/Behavioral Goal No. 8 was to "decrease the maladaptive behaviors that interfere with learning during his school day" Social/Behavioral Goal No. 9 was to "engage in cooperative play skills (e.g. initiate and maintain play with peers, demonstrate eye contact, verbal exchanges, and turn-taking." Social/Behavioral Goal No. 10 was to "with support, . . . increase his ability to self-regulate his behaviors and responses by 50%

during social skills instruction as measured with data collection by January 2019.” (Exhibit B-69)

53. In addition to these services, the Student’s IEP included the services of a Behavioral Intervention Consultant for the teacher on a weekly basis and a one to one instructional assistant for the Student in all settings of the school. (Exhibit B-69)

54. In April and May of 2018, the Student experienced a dramatic spike in maladaptive behaviors. As a result of these behaviors, it was not possible to instruct the Student with non-disabled peers in the mainstream. (T Mother; T Eissa; Exhibit B-78)

55. As a consequence of this behavior spike, the IEP’s provision for time with non-disabled peers was not implemented as written in the IEP from April 2018 through the end of the 2017-2018 School Year. (T Mother; T Eissa; Exhibit B-78)

56. The Student’s PPT met on June 19, 2018 to review his progress. (Exhibit P-25)

57. At that time, the PPT reported that the Student was making Satisfactory progress on most of his goals and objectives in the Social/Behavioral area (now renumbered 11, 12 and 13). (Exhibit P-25)

58. In addition, he was reportedly making Satisfactory progress on his Motor goal and Communication goals. Progress on some Academic goals was also Satisfactory. (Exhibit P-25)

59. The PPT increased the Student’s Social Skills Instruction with the School Psychologist from .50 hours per week to .75 hours per week, but made no other changes to his service time, even though the Student was not actually being instructed in the mainstream due to his interfering behaviors at that time. (Exhibit P-25; T Eissa)

60. The Student was also offered an Extended Year Program for the Summer of 2018 consisting of Academic Support with a Special Education Teacher and Instructional Assistant for four hours per day for four days per week for four weeks. In addition, the Student was scheduled to receive .50 hours per week of Occupational Therapy and .50 hours per week of the Speech/Language service. (Exhibit B-69; Exhibit P-25)

61. For his fourth grade year, the Student transitioned from the East Haddam Elementary School to the Nathan Hale-Ray Middle School. (Exhibit B-97) This transition brought with it not only a new setting, but new teachers and a new schedule with room transitions for academics. (Exhibit B-105)

62. Consistent with his IEP, the Student began the fourth grade primarily in a mainstream classroom and was pulled out for individual specialized instruction and related services in segregated settings. (Exhibit B-105; T Lilburn)

63. The Student exhibited increasing intensity in his aggression and escalating emotion and anger in his threatening statements towards classmates and others during the course of the fourth grade. These behaviors, combined with the disruptive activities of eloping and talking out, quickly resulted in elimination of virtually all time in the mainstream. Within weeks of starting the fourth grade, the Student was receiving almost all of his instruction in the segregated resource room. (Exhibit B-105; T Lilburn; T Eissa)

64. The PPT met early in the Student's fourth grade year, on October 1, 2018. At that time, the Student's behavior and performance were reviewed. It was reported that five of seven targeted behaviors were occurring less frequently than at the end of the 2017/2018 School Year but that two targeted behaviors, Self-Injurious Behavior and Aggression were more frequent than before. The overall percentage of the day the Student demonstrated maladaptive behaviors was somewhat reduced over the prior year. (Exhibit B-97)

65. The PPT did not change the IEP's provision for a primarily mainstream program with only 10 hours per week of Special Education and Related Services in the resource room, even though the Student was actually being educated primarily in the segregated environment. (Exhibit B-97; T Lilburn)

66. The BIP was adjusted to introduce the use of social stories, and brushing was added to the sensory diet. (Exhibit B-97; T Eissa; T Dupre)

67. One of the Student's instructional assistants was changed on October 10, 2018 due to an allegation of neglect. (Exhibit B-105; T Martin; T Mother)

68. The allegation of neglect was not substantiated after thorough investigation. (Exhibit B-153; T Martin; T Mother)

69. The PPT met again on October 31, 2018. Again, the Student's behavior and academic performance were reviewed. (Exhibit B-108)

70. Between August 30, 2018 and October 26, 2018, the frequency of aggression, elopement, grounding, non-compliance, object misuse and screaming declined over 2017-2018 levels, while self-injurious behavior increased. The percentage of the day that maladaptive behavior was observed increased from 8.6%<sup>1</sup> to 10.1% over the 2017-2018 School Year. (Exhibit B-105)

71. Between August 30, 2018 and October 26, 2018, the Student was restrained on eight occasions for between one and four minutes per restraint. (Exhibit B-105)

72. The Student had not been restrained at all during the third grade year. (T Martin; T Eissa)

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<sup>1</sup> This was erroneously reported as 10.1% in the report of October 31, 2018 and corrected on December 10, 2018. (Exhibit B-105; Exhibit B-127)

73. Between August 30, 2018 and October 25, 2018, the frequency of aggression, grounding, non-compliance, object misuse and screaming remained constant. The frequency of his elopement and self-injurious behavior over this same period, however, increased, as did the overall percentage of the day that maladaptive behavior was observed. (Exhibit B-105)

74. The Student continued to receive almost all of his instructional services in a segregated setting even though his IEP called for a mainstream program. (T Lilburn)

75. The IEP was not changed to reflect the actual duration of instructional services being provided to the Student in the segregated classroom. (Exhibit B-105)

76. On November 13, 2018, the Student's family's home was damaged in a storm. The family moved to temporary quarters in Old Saybrook while the home was being repaired, until February 21, 2019. (T Mother)

77. The PPT met on December 10, 2018 for the Student's annual review. The PPT reviewed the Student's Annual Behavior Summary as well as progress reports from the Student's Special Education Teacher, Psychologist, Occupational Therapist and Speech Language Therapist. (Exhibit B-127)

78. The Student's private psychiatrist, Dr. Bregman, reported results of his assessments that the Student continues to experience Autism Spectrum Disorder and Attention Deficit Hyperactive Disorder. Dr. Bregman recommended that the Student have an educational program that is highly structured, provides for instruction in a distraction free environment and affords the Student social skills instruction and opportunities to interact with non-disabled peers to develop and model social skills. (Exhibit B-124)

79. BCBA Eissa reported that the percentage of the day that maladaptive behavior was observed had risen to 11.3%, an increase over the prior year's percentage of 8.6%. In addition, self-injurious behavior was significantly more frequent over the prior year, while aggression, elopement, grounding, non-compliance, object misuse and screaming were lower. (Exhibit B-122)

80. A new behavior, termed "harmful verbalizations" was now being observed, along with perseverative verbalizations. "Harmful verbalizations" are expressions that are injurious or destructive, including suicidal and homicidal threats. (Exhibit B-122; T Eissa)

81. The School Psychologist reported that the Student was able to self-regulate his behaviors, have reciprocal conversations and maintain a calm body when working alone with the psychologist in a room without distractions. In that setting, the Student was able to accomplish a task in order to get a reward and delay receipt of the reward for up to fifteen minutes. In addition, he could identify emotions and sometimes feelings in that setting. He continued, however, to require adult support for self-regulation and use of coping skills in the classroom environment. (Exhibit B-119).

82. The Special Education Teacher reported that the Student was having lunch, recess and some special subject classes in the mainstream with peers. Testimony revealed that these were generally disabled peers. In addition, the Student sometimes had two 15 minute chunks of time with non-disabled peers in the mainstream English class. (Exhibit B-120; T Lilburn)

83. The Student’s mother requested that an evaluation by a neuropsychologist be conducted. This request was rejected. (T Mother)

84. By the time of the December 10, 2018 annual review, the Student had mastered both of his Communication goals. (Exhibit B-121). He made Satisfactory progress in his Motor goal. (Exhibit B-123)

85. The PPT indicated the following as the Student’s Present Level of Performance in the area of Behavioral/Social/Emotional: “Can be socially engaging with different adults, engages with peers with support.” In the Concerns/Needs section, the PPT stated:

Behaviors such as SIB, Elopement, and Unsafe/Aggressive language and physical behaviors are a concern. [Student] requires further development of coping skills/strategies in relation to self-regulating his behaviors and feelings/emotions. Developing ability to interact with peers in a socially appropriate manner without maladaptive behaviors.

(Exhibit B-127)

86. The PPT developed a new IEP for the remainder of the Student’s fourth grade year and start of fifth grade year (1/2/19 through 12/10/19). The new IEP provided for delivery of special education and related services as follows:

Language Arts Instruction	1.75 hours daily	Self Contained Classroom
Math Instruction	1.00 hours daily	Self Contained Classroom
Behavior support	2.00 hours daily	Self Contained Classroom
Occupational Therapy	.50 hours weekly	Resource Room
Speech/Language	.83 hours weekly	Resource Room
Social Skills Instruction	.75 hours weekly	Resource Room

This IEP was designed to afford the Student 6.67 hours per week with non-disabled peers.

(Exhibit B-127)

87. The December 10, 2018 IEP of 25.83 hours per week documented a significant increase in service over the Student’s previous IEP of only 10 hours per week of special education and related services, which was not actually being implemented. (Exhibit B-127; Exhibit B-97)

88. The December 10, 2018 IEP included two Social/Behavioral goals in addition to five Academic/Cognitive goals, two Communication goals and one Motor goal. (Exhibit B-127)

89. Social/Behavioral Goal No. 8 was to “decrease the maladaptive behaviors that interfere with learning during his school day”. Social/Behavioral Goal No. 9, identical to Goal No. 10 of the prior IEP<sup>2</sup> was to “with support, . . . increase his ability to self-regulate his behaviors and responses by 50% during social skills instruction as measured with data collection by March 2019.”

(Exhibit B-127)

90. In addition to these services, the Student’s IEP continued to include the services of a Behavioral Intervention Consultant for the teacher on a weekly basis and a one to one instructional assistant for the Student in all settings of the school. (Exhibit B-127)

91. The Student’s BIP was also updated on December 10, 2018. (Exhibit B-122) As before, the BIP continued to identify “access to Tangible items or activities” as the primary function of the targeted behaviors of aggression, elopement, grounding and non-compliance, with “escape from demands” as a secondary function of these behaviors. “Escape from demands” was thought to be the primary function for he targeted behavior of self-injurious behavior, with “access to items or activities” as the secondary function of this behavior. At this time, BCBA also added that Attention Seeking might also be a maintaining function for these behaviors. (Exhibit B-122)

92. On December 13, 2018 the Student threatened his home behavior technician with a knife. The technician was terrified. The Student was hospitalized for about five days following the incident. (T Mother)

93. The Student returned to school on January 7, 2018, after the winter break. (T Mother; Exhibit P-68)

94. On January 24, 2019, the Student was again hospitalized when he pulled a fire alarm at his temporary home, resulting in police and fire service responses. He remained hospitalized until March 13, 2019. (T Mother; Exhibit P-68)

95. The PPT met on February 13, 2019, while the Student was still hospitalized. No changes were made to his IEP. (Exhibit B-137)

96. The Board provided tutoring for the Student while he was hospitalized through a third party provider. (Exhibit B-141)

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<sup>2</sup> The Student had apparently already mastered this skill during social skills instruction in a one to one setting with the School Psychologist. (Exhibit B-119)

97. The PPT met again on March 6, 2019. The Student's psychologist attended the meeting by telephone and advised that the Student would likely be discharged the following week. The Student was able to tolerate tutoring at the hospital for up to an hour daily. Self-injurious behaviors and aggression were less frequent, while verbal threatening and elopement continued. The psychologist recommended that the Student be placed in an out of district therapeutic program upon discharge from the hospital. (Exhibit P-39)

98. The Student's parents also requested that he be placed in an out of district therapeutic program. The PPT rejected that request and decided to continue the Student's IEP and placement at the Board's middle school. (Testimony of Mother; Exhibit P-39)

99. The PPT increased the Student's counseling with the School Psychologist to 15 minutes per day and modified his instructional assistant support to provide two to one coverage upon his return to school. In addition, the Occupational Therapist was directed to reassess the Student's needs. No other changes were made to the IEP. (Exhibit P-39)

100. The Student returned to school on March 18, 2019. (Exhibit P-68)

101. From his return to school on March 18, 2019 through the end of the school year, the Student was instructed primarily in a segregated environment. He had access to peers only during lunch and recess, when other disabled students joined him in his segregated setting. He participated in short academic and social skills activities in small groups with disabled peers in the afternoon. (Exhibit P-38; T Lilburn)

102. The PPT reconvened on May 24, 2019. The Student's parents did not attend, as they were out of town at that time. (Exhibit P-38)

103. BCBA Eissa reported on the frequency of the Student's targeted behaviors over the 2018-2019 School Year. Aggression, grounding, harmful verbalizations (1/8/19 to 5/20/19) and non-compliance were essentially level. Elopement and self-injurious behavior declined slightly. Perseverative comments decreased substantially (1/8/19 to 5/20/19) as did profanity (3/18/19 to 5/17/19). (Exhibit P-68)

104. The overall percentage of the day that maladaptive behavior was observed increased slightly during the 2018-2019 School Year. (Exhibit P-68)

105. In addition, the Student was involved in 34 incidents of restraint and escort during the 2018-2019 School Year before May 21, 2019. Twenty-seven of these were restraints, while seven were escorts. Fourteen incidents took place between the beginning of the school year and December 13, 2018, when the Student was hospitalized. Twenty occurred between March 18, 2019, when he returned to school and May 22, 2019. Restraints averaged 2.3 minutes in duration, while escorts averaged 2.1 minutes. (Exhibit P-68)

106. The Student was restrained an additional five times between the May 24, 2019 PPT and the end of the school year. (Exhibit B-152)

107. Restraint is not an appropriate behavior management strategy. A BIP that relies on restraint as a technique for behavior management is not appropriate. (T Eissa)

108. The Student's ongoing maladaptive behavior and repeated need for restraint to protect his safety and the safety of others were "an enormous red flag" that his program was not effective. (T Katz)

109. The Student's progress on the goals and objectives contained in his IEP for 2019 were all reported in March 2019 – the last report in the record - as "Other" due to his absence between late January and March 2019. (Exhibit P-74; Exhibit B-140)

110. The Student would benefit from placement in a therapeutic day treatment program. (T Katz; Exhibit P-42; Exhibit P-43)

### **CONCLUSIONS OF LAW AND DISCUSSION:**

1. The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq* (IDEA) is to open the door of public education to students with disabilities by requiring school systems to offer them a free appropriate public education (FAPE). *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982) (*Rowley*).
2. In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA. The first part of the test is whether there has been compliance with the procedural requirements of IDEA, and the second part is whether the student's IEP is reasonably calculated to enable the student to make educational progress in light of the student's individual circumstances. *Id.* at 206-207. *See also*, *Andrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017); *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000).
3. IDEA also demands that each student's program be implemented in the least restrictive environment, so that children with disabilities are educated in integrated settings with non-disabled peers "[t]o the maximum extent appropriate." 34 C.F.R. Section 300.550(b); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).
4. The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). "An IEP is a snapshot, not a retrospective." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id.*
5. The Board here had the burden to prove by a preponderance of the evidence that the IEPs it offered to the Student were both substantively appropriate and in compliance with IDEA's procedural requirements. Regulations of Connecticut State Agencies (R.S.C.A.) Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).
6. The first prong of the *Rowley* inquiry, whether the Board complied with IDEA's

procedural mandates, is a critical one. As the Supreme Court said in *Rowley*, Congress based IDEA on the “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 substantive content in an IEP.” *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet that student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).

7. From a procedural standpoint, each IEP must include: (a) a statement of the student's present level of performance in each area of disability as determined through periodic assessments; (b) a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the student's educational needs resulting from the disability; and (c) a statement of the special education and related services to be provided in order to enable the student to attain his or her goals and to progress in the general education curriculum. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320.

8. As part of the IEP process, the Student's level of performance must be assessed in all areas related to the suspected disability, including social and emotional status, general intelligence, academic performance, communication status, and motor abilities. These assessments then form the basis for the substantive content of the IEP. 20 U.S.C. Section 1414(b)(1); 34 C.F.R. Section 300.304(b)(4).

9. The Student's educational program of instruction and services must then be implemented in conformance with the IEP that is written. 20 U.S.C. Section 1401(9); *LJ v. School Board of Broward County*, 927 F.3d 1203 (11<sup>th</sup> Cir. 2019).

10. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied FAPE. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9<sup>th</sup> Cir. 2001). In matters alleging a procedural violation, a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9<sup>th</sup> Cir. 2008).

11. The second inquiry under *Rowley* is whether the Student's IEP satisfies IDEA's substantive requirement that it be reasonably calculated to allow the Student to make appropriate progress in light of his individual circumstances. *Rowley* at 206-207; *Andrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017). The “reasonably calculated” standard requires the PPT to make decisions that are informed by “their own expertise, the progress of the student, his potential for growth and his parent's views.” *Questions and Answers on Andrew F. v. Douglas County School District Re-I*, U.S. Department of Education, 71 IDELR 68, 117 LRP 50044 (2017)

12. The first issue of Phase 1 is whether the Board fulfilled its procedural and substantive

obligations to offer the Student FAPE for the 2017-2018 School Year, when he was in the third grade.

13. The Board committed a significant procedural violation on January 2, 2018 when, after conducting a triennial review, the PPT changed the Student's placement to substantially reduce his program time from twenty-five hours per week to only ten hours per week.
14. In developing the Student's IEP, the PPT was required to take into account the Student's strengths, the results of his most recent evaluations and his academic, developmental and functional needs. 34 C.F.R. Section 300.324(a). The evidence demonstrated, however, that the PPT did not adequately consider these factors.
15. In fact, the evaluations that had recently been performed did not provide a factual basis to conclude that the Student no longer required the robust level of instructional services that had been provided previously. Nor did the evaluators recommend such a reduction in services. In addition, the Student's progress on his goals did not support such a reduction. While the Student was making progress, he certainly had not mastered his goals. The Student's academic, developmental and functional needs were not markedly different than they were in the prior years.
16. The PPT's failure to base its decision to slash the Student's instructional program by more than half on any assessment of his needs resulted in a significant decline in educational services provided to the Student and denied him educational benefit. The Student's program was no longer based on his needs, and therefore was not designed to allow him to progress.
17. Indeed, the evidence reveals that within a short time after this dramatic reduction in his services, the Student's maladaptive behaviors spiked, and the school could not safely maintain him in the mainstream classroom as his IEP required. In addition, by the beginning of the fourth grade year, it was necessary to restrain the Student on multiple occasions, something that had never been necessary before. In short, the PPT's procedural violation resulted in a loss of educational benefit and denial of FAPE during the 2017-2018 School Year. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9<sup>th</sup> Cir. 2008).
18. The PPT's decision of January 2, 2018 also resulted in a significant substantive violation of IDEA, in that the IEP was not reasonably calculated to enable the Student to make educational progress. *Andrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017) The "reasonably calculated" standard requires the PPT to make decisions that are informed by "their own expertise, the progress of the student, his potential for growth and his parent's views." *Questions and Answers on Andrew F. v. Douglas County School District Re-1*, U.S. Department of Education, 71 IDELR 68, 117 LRP 50044 (2017)
19. The PPT's decision to substantially reduce the Student's services was not based on reason, such as the team's expertise, the Student's progress or potential for growth or his parent's view. As such, it was not reasonably calculated to enable him to progress and did not meet IDEA's substantive standard. *Andrew F. v. Douglas City School District*, 137 S.Ct. 988 (2017).
20. Finally, as the evidence demonstrated, the school staff was not able to implement the

January 2, 2018 IEP during the latter part of the 2017-2018 School Year because the Student's behaviors prevented him from participating in the mainstream. Thus, the January 2, 2018 IEP provision for the Student to participate with non-disabled peers for more than twenty hours per week, was not implemented, resulting in a substantive violation of IDEA during the 2017-2018 School Year. 20 U.S.C. Section 1401(9); *LJ v. School Board of Broward County*, 927 F.3d 1203 (11<sup>th</sup> Cir. 2019).

21. During the 2018-2019 School Year, the Board again violated the Student's right to FAPE. First, except for the first few weeks of the 2018-2019 School Year and until December 10, 2018, the board continued its failure to implement the IEP as written by failing to provide the Student with access to non-disabled peers. Id.

22. In addition, the Board committed a procedural violation by failing to revise the Student's IEP when it became clear that he was not making expected progress in his program. A board of education must review and revise the IEP whenever it appears that the student is not making progress. 20 U.S.C. Section 1414(d)(4)(B); 34 C.F.R. Section 300.303(a); 34 C.F.R. Section 300.324(b).

23. The Board did convene several PPT meetings during the fourth grade year and did make modest changes to his program and BIP. A new IEP that increased the Student's service hours to 23 hours per week was eventually written at his annual review on December 10, 2018. This new IEP, however, was not calculated to improve the Student's ability to progress in his program, since it merely corrected the record to reflect the mostly segregated program that was already being delivered. PPT meetings on February 13, 2019 and March 6, 2019 similarly made no significant changes to the program actually being delivered to the Student.

24. The evidence demonstrated that the Student did not make progress in the crucial area of his behavior during the fourth grade. The fact that school staff found it necessary to restrain the Student on thirty-nine occasions throughout the school year because his behavior threatened the safety of the Student or others starkly illustrates this fact: "The persistent use of such a measure [restraint] is a red flag. A tool meant as a 'last resort', deployed dozens of times over three years, is strong evidence that the behavior plan was not working." *Pottsgrove School District v. D.H.*, (E.D. Pa. 2018) 72 IEDLR 271, 118 LRP 37748)

25. Notably, the incidence of restraint actually increased throughout the 2018-2019 School Year, rather than abating, as did the overall percentage of time that maladaptive behaviors were observed. Indeed, the data demonstrated that there was essentially no improvement in the frequency of the Student's most significant maladaptive behaviors over the course of the school year despite constant monitoring and revision of the BIP. Instead, these maladaptive behaviors were intensifying in the fourth grade.

26. It was incumbent on the PPT to realize that the Student was not making progress in his behavior program and that his behavior was continuing to interfere with access to his academic program and related services. This was abundantly clear, at least by the time of the May 24, 2019 meeting when BCBA Eissa reviewed the year-long behavior data. By

that time, the Student had been in school for more than two months after his second hospitalization and was continuing to exhibit increasingly dangerous and disruptive maladaptive behaviors. Yet, the PPT took no steps to investigate the reasons for the Student's behavior or to put a different program in place that might have been calculated to change the course of events.

27. In failing to react by pursuing further evaluations or program changes when it became clear that the Student was not making progress in his behavior, the PPT committed a significant procedural violation. 20 U.S.C. Section 1414(d)(4)(B); 34 C.F.R. Section 300.303(a); 34 C.F.R. Section 300.324(b). This violation worked a deprivation of educational benefit to the Student because it meant that his program was not revised to meet his needs. The program was not modified to allow the Student to progress in his education, thereby denying him FAPE. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9<sup>th</sup> Cir. 2008).

28. The Student's IEP for the second half of the 2018-2019 School Year and first half of the 2019-2020 School Year was developed at the annual review on December 10, 2018. As part of developing that IEP and earlier IEPs, it was incumbent on the PPT to ensure that it had adequate assessments of the Student's level of performance in all areas related to his suspected disability. 20 U.S.C. Section 1414(b)(1); 34 C.F.R. Section 300.304(b)(4). At least by the time that the December 10, 2018 IEP was developed - if not before - the PPT should have pursued a more comprehensive assessment of the Student's maladaptive behaviors.

29. By December 10, 2018, the Student's behaviors were becoming more intense, more aggressive and more angry. He was restrained at school fifteen times to protect his safety and the safety of others. His BIP, which had been reviewed and revised many times, remained ineffective to address the increasingly dangerous and disruptive behaviors. Yet, the PPT did not ask for new assessments, even including a new FBA, to investigate the situation or assess the reasons for the problem. It rejected the Student's mother's suggestion that a neuropsychological evaluation be conducted.

30. The failure to accurately assess and address a student's disability or area of need is a procedural violation of IDEA when the failure impedes the child's right to a FAPE, the parent's opportunity to participate in the decision-making process, or educational benefit. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320; *RR v. Wallingford Board of Education*, 101 L.R.P. 196 (D. Conn 2001); *Newtown Public Schools*, 107 L.R.P. 59412 (CT SEA 2007).

31. The PPT's failure to adequately assess the Student's maladaptive behavior resulted in continuation and aggravation of the behaviors that interfere with his academic progress, prevent him from interacting with non-disabled peers and risk his safety and the safety of others. In addition, the absence of adequate assessment negatively impacts the parents' opportunity to participate in the decision making process, since they have insufficient information to help make decisions. This represents an additional violation of the Student's right to FAPE. Id.

32. The Student argues that the Board committed a procedural violation by denying parent participation with respect to the placement decision upon his discharge from the hospital in March 2019. The fact that the Board did not agree with or accept the Student's parents' or

psychologist's recommendation for a private school placement does not establish that the Board deprived the parents of a meaningful opportunity to participate in the placement decision. *Luo v. Baldwin Union Free School District*, 67 I.D.E.L.R. 15 (E.D.N.Y. 2016) *aff'd* 69 IDELR 88 (2d Cir. 2017). In the absence of a consensus among PPT members, as in this case, the Board is responsible for the choice of a special education placement, not the parents. *Letter to Richards*, 55 I.D.E.L.R. 107 (January 7, 2010). In this regard, the Student's position is not sustained.

33. The Student 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 (11<sup>th</sup> Cir. 2008); *M.C. ex rel J.C. v. Central Regional School District*, 81 F3d 389, 397 (3d Cir. 1996); *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 523 (D.C. Cir. 2005).

34. 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) Equitable factors are generally relevant to the calculation of remedies in special education cases. *C.L. v. Scarsdale Union Free School District*, 744 F.3d 826 (2d Cir. 2014)

35. The Student is entitled to compensatory education services as a remedy for the Board's failure to offer FAPE during the 2017-2018 and 2018-2019 School Years.

**PHASE 1 DECISION AND ORDER:**

The Student was denied a free appropriate public education during the 2017-2018, 2018-2019 and 2019-2020 School Years.

The Student is entitled to compensatory education services in the form of placement in an out of district program that offers a Free Appropriate Public Education for one and one half school years. In addition, the Student is entitled to compensatory education services in the form of home services, including specialized instruction and related services, for as much as ten hours per week, on average and as tolerated, until he can be placed in an appropriate out of district program.

This hearing will reconvene on October 11, 2019 or as soon thereafter as possible for Phase 2 to determine whether the Milestone Program is an appropriate program for the Student.

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Ann F. Bird  
Impartial Hearing Officer

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. East Haddam Board of Education

Appearing on behalf of the Student:

Attorney Courtney Spencer  
Attorney Kathleen Reiser  
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Appearing on behalf of the Board:

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21 Oak Street  
Hartford, CT 06106

Appearing before:

Attorney Ann F. Bird  
Hearing Officer

**FINAL DECISION AND ORDER**

**Phase Two**

**ISSUES:**

Phase One:

1. Did the Board of Education offer the Student a Free Appropriate Public Education (FAPE) for the 2017-2018, 2018-2019 and/or 2019-2020 School Years, including the 2018 and 2019 extended school years?
2. If the Board of Education did not offer the Student a Free Appropriate Public Education (FAPE) for the 2017-2018, 2018-2019 and/or 2019-2020 School Years, including the 2018 and 2019 extended school years, is the Student entitled to compensatory education, and if so, what are the essential features of such compensatory education?

Phase Two:

If the Board of Education did not offer the Student a Free Appropriate Public Education (FAPE) for the 2017-2018, 2018-2019 and/or 2019-2020 School Years, including the 2018 and 2019 extended school years,

3. Is Milestones appropriate for the Student?
4. If Milestones is appropriate for the Student, should the Student be placed at Milestones?

**PROCEDURAL HISTORY:**

The Student initiated this special education due process case on June 13, 2019. This Impartial Hearing Officer was assigned to the case on June 13, 2019. A Prehearing Conference was convened on June 25, 2019. Attorney Kathleen Reiser appeared on behalf of the Student and Attorney Frederick Dorsey appeared on behalf of the Board of Education.

On August 20, 2019 the Hearing Officer issued an Order bifurcating the hearing so that the Phase One issues would be heard and determined before those of Phase Two.

Phase One hearings were conducted on August 21, 2019, August 22, 2019 and August 30, 2019. A Memorandum of Decision and Order for Phase One was issued on September 5, 2019. That Memorandum of Decision and Order is attached hereto and incorporated herein.

An evidentiary hearing for Phase Two was conducted on October 11, 2019.

The following witnesses testified in Phase Two:

Kristine Marino-Hartman, Clinical Director  
Steven Swartzlander, PhD, Chief Administrator  
Joshua Martin, Director of Pupil Services

Hearing Officer Exhibit HO-5 was entered as a full Exhibit. Student Exhibits P-76 and P-77 were entered as full Exhibits. Finally, Board Exhibit B-155 was entered as a full Exhibit.

The initial deadline for issuing the final decision – August 26, 2018 – was extended pursuant to the request of the parties to October 26, 2019.

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:**

Milestones is an appropriate program for the Student. The Student shall be placed at Milestones.

**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 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

**FINDINGS OF FACT:**

1. Milestones is a private school approved by the Connecticut Department of Education. It focuses on educating children with Autism Spectrum Disorder and other conditions that require very highly structured individualized programs using Applied Behavior Analysis. (Testimony of Marino-Hartman; Exhibit P-76)
2. Milestones staff met the Student, reviewed his file and offered a place for him in its 38 student campus in Orange, Connecticut. As a Milestones student, the Student would be one of six members of a classroom headed by a certified Special Education Teacher and staffed with a Board Certified Behavior Analyst shared between two classrooms, a dedicated Registered Behavior Technician as Lead Instructional Assistant and at least two other Instructional Assistants. (Testimony of Marino-Hartman; Exhibit P-76)
3. Milestones' special education teachers are supervised by certified school administrators and special educators. All Milestones staff are trained in Physical Management Techniques as well as in Milestones' program and how to work with autistic children. (Testimony of Marino-Hartman; Exhibit P-76)
4. Milestones offers its students a robust full time special education program from 9:00 am to 3:00 pm daily for 220 days each year. All instruction, including academic instruction and behavior support, uses Applied Behavior Analysis in individual or very small group settings. (Testimony of Marino-Hartman; Exhibit P-76)
5. Each student is assessed and evaluated upon joining Milestones and each student's individual program is revised according to his or her needs. Staff collect data and monitor progress on an ongoing basis for all aspects of each individual program – both behavioral and academic. In this way, adjustments are made promptly if progress is slow or intransigent. (Testimony of Marino-Hartman; Exhibit P-76)
6. Milestones does not educate any non-disabled students, but does offer limited opportunities for students to participate with non-disabled peers in community activities as appropriate. (Testimony of Marino-Hartman; Exhibit P-76)
7. The Milestones program is appropriate for the Student. It can offer the Student the highly structured and individualized program of behavior supports and Applied Behavior Analysis that he needs to learn and access his education. Milestones will evaluate the Student's behavior and academic needs and adapt his program to meet those needs based on a scientific, data driven approach and will constantly monitor his progress in both the academic and behavioral realms. Staff working with the Student will be trained and experienced to meet his needs. If additional specialized staff, such as speech language therapists or occupational therapists are needed, they will be added to the Student's team. (Testimony of Marino-Hartman; Exhibit P-76)
8. Unfortunately, the Student's program at Milestones will not take place in his home town and will require him to travel a significant distance each day. In addition, the Student

will not participate with non-disabled peers to any significant degree while at Milestones. Nonetheless, the Milestones program is appropriate for the Student. (Testimony of Marino-Hartman; Exhibit P-76)

### **CONCLUSIONS OF LAW AND DISCUSSION:**

1. A placement at Milestones is reasonably calculated to provide the Student educational benefit and offers the Student a Free Appropriate Public Education. Milestones' use of Applied Behavior Analysis, continuous data collection and progress monitoring and deployment of certified special education instructors and behavior analysts and technicians in a small, structured and robust program are likely to enable the Student to learn and access his education.
2. Although Milestones does not offer substantial participation with non-disabled peers, the Student's recent history suggests that he is not able to learn in a mainstream environment at this point of his development. A segregated program such as Milestones is the least restrictive environment for the Student at this time.
3. An out of district placement such as Milestones need not meet the standards that are generally applicable to public school placements, but need only be reasonably calculated to provide educational benefit. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1286 (11<sup>th</sup> Cir. 2008); *Frank G. v. Board of Education*, 459 F.3d 356, 367 (2d Cir. 2006); *Warren G. by and Through Tom G v. Cumberland City School District*, 190 F.3d 80, 84 (3d Cir. 1999).
4. Placement at Milestones is reasonably calculated to provide educational benefit and offers the Student a Free Appropriate Public Education in the least restrictive environment.

### **FINAL DECISION AND ORDER:**

1. Milestones is an appropriate program for the Student.
2. The Student shall be placed at Milestones as soon as possible. If Milestones is no longer available for any reason, the Student shall be placed in another similar full time and full year out of district program approved by the Connecticut Department of Education that focuses on educating students with Autism Spectrum Disorder using Applied Behavior Analysis and that is acceptable to the Student's parents.

3. As a concurrent remedy, the Student will be provided compensatory education services in the form of placement at Milestones for at least one and one half school years. If Milestones is no longer available for any reason, the Student shall be placed in another similar full time and full year out of district program approved by the Connecticut Department of Education that focuses on educating students with Autism Spectrum Disorder using Applied Behavior Analysis and that is acceptable to the Student's parents.

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Ann F. Bird  
Impartial Hearing Officer