

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Wallingford Board of Education

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Appearing Before: Attorney Gail K. Mangs, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer the Student a Free and Appropriate Public Education ("FAPE") for the 2002-2003 school year?
2. Did the Board violate the Parents' procedural rights by withholding an expert's report and convening a PPT without the Parents?

PROCEDURAL HISTORY:

This hearing was requested on August 21, 2002. The prehearing conference was convened on August 27, 2002. The hearing convened on the following dates: September 30, 2002, October 2, 4, 7, 10, and 11, 2002. Briefs were mailed on November 9, 2002. The date for the mailing of the final decision and order was set as November 22, 2002. The Parents presented the following witnesses: the Student's mother and father and Dr. Kathleen Whitbread. The Parents called Dr. Whitbread, the Student's mother and Fred Senechal as rebuttal witnesses. The Board presented the following witnesses: Kyle Plouffe, Jill (Mrazik) Juliano, Donna Brilla, Andrea Dayharsh, Cynthia Beesley, Michelle DelGrego, and Nancy Renner.

SUMMARY:

The Student, who has been diagnosed with Down's Syndrome, is now eight and a half years old. He attended the school district's inclusion preschool for three years. During the 2000-2001 school year, the Student attended a regular education half-day

kindergarten in the afternoon and the K-1 IEP class (a self-contained special education class) in the afternoon. During the 2001-2002 school year, the Student again attended the K-1 IEP class where he received instruction in the core academic subjects; he also spent 15 hours per week in a regular education first grade classroom with a paraprofessional. For both school years, the Student's placement was at the S. School; his home school is the P. School. He made good progress on his goals and objectives during both school years. At a PPT convened on June 4, 2002, the school district again recommended a combination of placement in an IEP class and a regular education classroom; this placement, however, was to be in the Y. School whose IEP class the school district believed was more appropriate for the Student. This school was farther from his home than the S. School. The Student's parents objected to the proposed placement and requested this hearing to challenge the school district's refusal to place the Student in a regular second grade class with supplementary aids and services and a mutually acceptable independent consultant. They also believe that at the June 4, 2002 PPT, there was no serious consideration given to home school placement or the possibility of providing instruction to the Student in the general education curriculum.

FINDINGS OF FACT:

1. The Student was born on June 28, 1994. Shortly after his birth, the Student was diagnosed with Down's Syndrome. He received early intervention services from the Connecticut Birth to Three System until his third birthday. (Exhibits P-1 through P-5, Testimony of Mother)
2. The Student began attending the school district's integrated preschool in September, 1997. He received speech, occupational and physical therapies. He also received extended school year services during the summers of 1997 and 1998. The Student spent three years at the inclusion preschool. (Exhibits P-6, P-7, and P-8, Testimony of Andrea Dayharsh (school district coordinator of special education))
3. Progress reports dated May, 1999 reflect progress although the Student continued to demonstrate delays in most areas. (Exhibit B-1)
4. At a PPT convened on May 7, 1999, extended school year services were recommended for the summer of 1999. Planning for the 1999-2000 school year also occurred at this PPT. Three full days and two half days of programming at the integrated preschool were recommended with 1 1/2 hours/week of speech therapy, 1 hour/week of occupational therapy and 1 hour/week of physical therapy. The Student's parents were in agreement with the IEP. (Exhibit B-1)
5. Psychological, speech and language, and physical and occupational therapy evaluations were performed in June, 2000. [At the request of the parent, two sentences deleted from the copy available to the public]. The Student's Speech and Language Pathologist described the Student as demonstrating a significant delay in auditory comprehension and expressive language skills. She also noted that the Student became distracted and less compliant when presented with increasingly difficult and demanding activities. The physical therapy evaluation indicated that while the Student had made progress on his goals and objectives, he continued to

demonstrate a significant gross motor delay, low muscle tone and decreased muscle strength. The occupational therapist also described progress but noted that the Student was delayed in the development of his fine and visual motor integration skills. (Exhibits B-3 through B-6)

6. On June 7, 2000, the PPT convened to plan for the 2000-2001 school year. Based on the Student's educational needs, the team agreed to place the Student in a full day program at the S. School. It was recommended that the Student attend the K-1 IEP class in the morning (a self-contained special education class for children aged 4 through 9 performing at the kindergarten and grade one levels), and a regular kindergarten class with a paraprofessional in the afternoon. In addition, the Student received 1 hour/week of occupational therapy, 1 1/2 hours/week of speech therapy and 45 minutes/week of physical therapy. The Student's parents were in agreement with the proposed IEP although they preferred that the Student be placed in his home school. (Exhibit B-2, Testimony of the Student's Mother and Kyle Plouffe, the Student's special education teacher for the 2000-2001 and 2001-2002 school years)
7. Speech, physical and occupational therapy evaluations were completed in May, 2001. The Student still required at least a moderate amount of verbal cues to combine words appropriately and maintain speech intelligibility. The occupational therapist noted that continued work on basic hand skills and visual motor skills were needed; she also stated that the Student's behavior sometimes interfered with activities. The physical therapist described the Student's areas of need as motor planning, coordination and age appropriate gross motor skills; cooperation was also an issue during physical therapy if the activities became too challenging. Continued speech, physical and occupational therapy were recommended. (Exhibits P-16, P-17, P-18)
8. A PPT was convened on May 31, 2001 to plan for the summer and the 2001-2002 school year. Extended school year services were recommended. The team, including the Student's parents, also agreed to an IEP for the 2001-2002 school year that provided continued placement in the K-1 IEP class as well as 15 hours/week in a regular education first grade classroom with a 1 to 1 paraprofessional. The IEP states that no other options were considered. Speech, physical and occupational therapies were also planned. (Exhibits P-19, P-20)
9. In a September 8, 2001 letter to Andrea Dayharsh, the Student's parents discussed their concerns about the Student's difficulties with cooperation, following directions, staying on task and self control. They requested a functional behavior analysis so that consistent strategies could be developed and used with the Student across all settings. (Exhibit B-10)
10. In response to the parents' request, the school district contracted with Benhaven, a special education school with a team of inclusion consultants, who sent Cynthia Beesley to facilitate team meetings and make suggestions with regard to the Student's behavior. Between January and May, 2002, four meetings were held during which a team composed of the Student's parents, teachers and therapists, and led by Ms. Beesley, brainstormed and strategized various ways to help the Student make progress. Ms. Beesley did not perform a functional behavioral analysis and saw her

role as that of a facilitator whose job was not to raise concerns but to respond to concerns raised by the team. She observed the Student in both his special and regular education placements approximately 3 to 4 times. (Exhibits B-11 through B-15, Testimony of Cynthia Beesley)

11. During the 2001-2002 school year, the Student received most of his instruction in core academic subjects in the K-1 IEP class with some reinforcement in the regular education classroom. Kyle Plouffe described the Student's strengths as his sense of humor and ability to be motivated, good visual discrimination and phonics skills, and strong sight word vocabulary. During the 2001-2002 school year, however, the Student displayed some lack of cooperation (such as refusing to come in from recess), a short attention span, distractibility, and difficulty staying on task and completing assignments. While the Student was not confrontational or aggressive, he did not always respond to teacher redirection and the strategies the teachers used did not work consistently in obtaining the Student's compliance. At times, his behavior got in the way of his participation in learning activities although he was more cooperative than not. Ms. Plouffe used a carrel to screen out distractions while providing the Student with his core academic instruction. She also used a timer to keep him focused. To deal with the Student's behavior issues, a sticker chart was employed; accumulating stickers led to the Student's choice of a reward such as computer time, an extra snack, or time in the dramatic play center. Ms. Plouffe testified that there was no written behavior plan because she did not feel his behaviors warranted one; she did testify, however, that she had taken baseline data but destroyed the data sheets at the end of the school year. Ms. Plouffe also testified that for a short time, she had also used a "star" program that led to a money and ice cream reward, but that this was discontinued at the request of the Student's mother. In addition, food left over from the Student's lunch was sometimes used to entice him back into school after recess. Over the course of the year, the Student did not become significantly less prompt dependent nor did the sticker system extinguish the non-compliant behaviors. During the 2002-2003 school year, Ms. Plouffe, who was still the Student's special education teacher during this hearing, continued to use stickers and edible reinforcers. (Testimony of the Student's Mother and Kyle Plouffe)
12. During the 2001-2002 school year, the Student's program in the regular education room included lunch, recess, specials, morning meeting (which included the question of the day, the calendar and reading and language arts), morning reading, poetry, field trips and parties. Modifications in the regular education class included different worksheets, preferential seating during morning meeting and paraprofessional instruction and assistance. The Student did not participate in first grade regular education science, guided reading groups or most of the math curriculum. Ms. Juliano testified that she often worked with small groups while other Students were expected to work independently. The Student has a good sight word vocabulary and was able to move through the routines in the regular education classroom with little prompting although he had difficulty with distractibility and staying on task. There were other students in the regular education class who had behavioral issues; Ms. Juliano used behavior modification plans with these students. Both Ms. Juliano and Ms. Plouffe testified that the Student was very aware if his work was different from

the rest of the class. (Testimony of Kyle Plouffe and Jill Juliano, the Student's first grade regular education teacher)

13. Donna Brilla, the Student's physical therapist, testified that the Student has made excellent progress on his physical therapy goals and on his behavior during the sessions. She believes that the Student needs to have his physical therapy needs addressed in a one on one situation because the Student does not want to appear to be different in any way. In addition, she does not believe she can address his individual needs in a group. Michelle DelGrego, the Student's speech and language therapist, also believes that the Student makes the most progress when she works with him one on one; he is less distracted and the setting allows for more practice and repetitions. Nancy Renner, the Student's occupational therapist, testified that the Student could make progress on his occupational therapy goals in the regular education classroom, but he makes more progress in the related service room where there are no distractions. The three therapists have rarely delivered their respective therapies in other than one on one situations. (Testimony of Donna Brilla, Michelle DelGrego and Nancy Renner)
14. At the January 8, 2002 team meeting facilitated by Ms. Beesely, it was noted that the Student was beginning to decode and develop a sight word vocabulary. Areas of concern included his poor handwriting, speech (too fast and difficult to understand), brief attention span, lack of independence and lack of cooperation at home. The Student did respond to praise, the use of a sticker chart or egg timer, computer time as a reward for compliance and completion of work, and other techniques and strategies that motivated or created high interest for him. At the February 12, 2002 meeting, the team described progress on physical therapy objectives, handwriting, independent work, and increased cooperation at home. Inappropriate silly behavior and decreased cooperation at school were noted as concerns. (Exhibits B-11 and B-12)
15. The April 9, 2002 team meeting minutes state that the Student was making progress in reading, knew over 100 sight words and could follow a number line to count by 1's, 5's, and 10's. He was also described as more mature and demonstrating improved behavior. The team was still concerned about his need for prompting to work independently and his delayed social skills. On May 23, 2002 the final team meeting of the year was held. The team described the Student's progress during the 2001-2002 school year as including improved reading, writing and number recognition skills, clearer speech and better cooperation. Areas of need for the 2002-2003 school year included fine motor skills, strength and coordination, cognitive and academic skills, speech and language, social skills, self help, visual perception and reading comprehension. To deal with the Student's behavior issues (refusal to work and prompt dependency), the team recommended tracking his behavior to identify a baseline and future goals. The team also felt that the Student's needs could best be met with a 1 to 1 paraprofessional, working 1 to 1 with teachers or in small rather than large groups, and an immediate reward system. (Exhibits B-13 and B-14)
16. In a report dated May, 2002, Cynthia Beesley stated that the Student's special education class, with its smaller group size, attention and structure, appeared to be appropriately suited to his needs. She described the regular first grade class as also

appropriate for the Student, where she observed him answering questions and interacting with the other children, although he became somewhat distracted and fidgety when group learning activities became too long or challenging. She recommended further modification of such activities to enable the Student to participate whether with the entire class or with his paraprofessional. She also recommended that specific goals be identified for the Student's inclusion in the regular education classroom so that his regular and special education teachers could plan to allow for activities (such as preteaching) that would help the Student get more out of his time in the regular education classroom. Ms. Beesley testified that the Student's paraprofessional was capable but could have been more effective in facilitating the Student's participation in the regular education class. She also testified that the Student could learn in the regular education classroom although not as much or as quickly. She did not recommend a functional behavior assessment based upon the school staff's belief that the Student's behavior issues were relatively minor. (Exhibit B-15, Testimony of Cynthia Beesley)

17. The parents testified that they never saw Ms. Beesley's report until they received the exhibits in preparation for this hearing. Ms. Beesley testified that she usually sends a copy of her final report to both the school district and the parents. She believes that she followed this procedure here. (Testimony of the Student's Mother and Cynthia Beesley)
18. At a PPT convened on June 4, 2002, the team reviewed the Student's progress and planned for the summer and the 2002-2003 school year. Satisfactory progress was noted on speech and language and occupational and physical therapy goals and objectives. The Student's special education teacher reported that the Student had made significant gains in math, reading, language and social skills. The Student's cooperation had also improved but remained inconsistent. On task behavior was described as 70% with adult prompting. School staff stated that the Student's academic skills should be taught in the IEP class (self contained special education class), with individualized instruction, and then reinforced in the regular education class. Based upon the IEP minutes and testimony of school staff and the Student's parents, school staff quickly concluded that the Student's needs could not be met with full time placement in a regular education classroom due to his poor attention span, distractibility, lower cognitive level, difficulty with abstract concepts and need for one on one instruction. Kyle Plouffe testified that this discussion was brief and not detailed. Ms. Juliano and the Student's mother testified that full time regular education placement was not discussed at all. The minutes indicate no discussion of whether the Student could be taught with the second grade regular education curriculum or what aids, services and modifications could facilitate such an educational program. There was only a brief mention of the Student's home school when Ms. Dayharsh described the possible placements along the continuum from least to most restrictive placements; according to Michelle DelGrego, this was done in a rote manner. There was no discussion of providing the Student's related services anywhere but in the related service room or the special education classroom. The IEP describes the Student's regular education placement as approximately 8.5 hours/week and as including lunch, recess, art, physical education, music, computer, science, stories, morning meeting, and social activities. The minutes do provide an extensive

comparison of the IEP classes in the Y. and S. schools. The school staff concluded that the S. IEP class, with 8 to 9 students of average to above average cognitive skills but significant distracting behaviors, would not meet the Student's needs. They recommended placement in the Y. IEP class which has about 3 students, all of whom function at a lower cognitive level and exhibit few disruptive behaviors. The IEP sets forth 13 goals; as written, some of the objectives are difficult to measure and their attainment is mostly to be determined by teacher report and observation. The Student's parents did not agree with the IEP; they requested continued placement at the S. School which is closer to the Student's home and has a student population that includes members of their church. (Exhibit B-16, Testimony of the Student's Mother, Dr. Kathleen Whitbread, Jill Juliano, Michelle DelGrego and Kyle Plouffe)

19. The Student's parents testified that they had asked for placement at the Student's home school, P. School, two years before, but were told by Andrea Dayharsh that there were no special education services at that school. They still wanted the Student placed at P. but focused on the S. School as that placement seemed more of a real possibility. Andrea Dayharsh testified that she knew that the Student's parents had always hoped for the Student's placement at P.. (Testimony of Fred Senechal (Special education consultant for the Department of Mental Retardation), the Student's Mother and Andrea Dayharsh)
20. The Student's parents sent a letter expressing their disagreement with the minutes of the June 4, 2002 PPT. First, they stated that contrary to the description in the minutes, full time regular education placement was not discussed as an option. They also felt the minutes did not reflect their requests for academic instruction in the regular education classroom nor was mention made of the Student's many successes in the regular classroom. In addition, the Student's parents stated that their request for ongoing consultation from Benhaven and the team's denial of this request was not included in the minutes. (Exhibit B-16)
21. The June 4, 2002 IEP states that the Student will spend approximately 8.5 hours in regular education during the 2002-2003 school year and receive 1 1/5 hours/week speech and language therapy, 1 hour/week occupational therapy and 30 minutes/week physical therapy. The hours to be spent in regular education were calculated incorrectly. To correct this, a PPT was convened on September 24, 2002 at which time the regular education hours were changed to 15 hours and 45 minutes per week although the basis for this new calculation was not made clear. In addition, there was some dispute as to the Student's stayput placement pending completion of this hearing. (The hearing was requested by the parents on August 21, 2002.) At this PPT, the stayput placement was clarified to consist of implementation of the May 31, 2001 IEP with mainstream placement in the second grade regular education classroom. (Exhibits B-16, B-25)
22. The Student's parents, who were unable to attend the September 24, 2002 PPT, believe there was no accommodation to their schedules and needs in the scheduling of this PPT. While the school district offered several dates and times by letter and spoke directly to the family once, agreement on a date and time never occurred and the school district went ahead with the PPT despite the parents' inability to attend.

(Exhibits P-36, P-37, B-26, Testimony of the Student's Mother and Andrea Dayharsh)

23. The Student's parents requested that Dr. Kathleen Whitbread, who has done extensive research on inclusion practices and is the director of interdisciplinary training and school age initiatives at the University of Connecticut A.J. Pappanikou Center for Excellence in Developmental Disabilities, Research, Education and Service, to perform an educational evaluation. Dr. Whitbread observed the Student at the S. School in his special and regular education placements during the spring of 2002; in the fall of 2002, she observed the Student in his special education placement at the S. School. Dr. Whitbread also observed the IEP and regular second grade classrooms at the Y., S. and P. schools. She observed teaching staff reminding the Student about his sticker chart more than five times during a fifteen minute activity with no sustained changes in the Student's behavior. She did not see a written behavior or reinforcement plan or evidence that data was being taken on the Student's behavior. (Exhibit P-35, Testimony of Dr. Kathleen Whitbread)
24. After these observations, discussions with Kyle Plouffe and Jennifer Cruet (the school district supervisor of special education) and a review of educational records, Dr. Whitbread recommended that the Student attend a regular education second grade classroom in his home school with supplementary aids and services designed to meet his individual learning needs. She saw no factors that would indicate a need for the Student's placement in a self-contained special education classroom for a significant part of his school day and stated that regular class placement for 80% or more of the Student's school day would lead to a feeling of belonging and greater continuity of educational experience. Dr. Whitbread also testified that current research indicates that special education children placed in regular education classrooms for at least 80% of their day with supplementary aids and services do at least as well as those students placed in segregated settings. Dr. Whitbread recommended a placement in a second grade classroom that allows for a mix of small group learning, cooperative learning groups, and direct instruction; the Student does not require one to one instruction all the time. She testified that in planning for the Student, each lesson must be looked at; some lessons will be too fast paced for him and will require modification, but others will not. She also recommended an independent educational consultant to facilitate the placement and minimize pullouts for related services, a functional behavioral assessment, visits by the teaching staff to inclusive classrooms, and amendments to the Student's IEP. Dr. Whitbread noted that without a functional behavior assessment and behavior strategies program, a Student can become dependent on reinforcers to perform and learn. (Exhibits P-35, P-38, Testimony of Dr. Kathleen Whitbread)

CONCLUSIONS OF LAW:

1. Both parties agree that the Student, a student who has been identified as having mental retardation, is entitled to a free and appropriate public education ("FAPE") with special education and related services as provided for under the provisions of Connecticut General Statutes Sections 10-76 et seq. and the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. 1401 et seq.

2. The standard for determining whether FAPE has been offered begins with the test established by the Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). First, the procedural requirements of the IDEA must have been met by the school district. Second, the individualized program must be reasonably calculated to enable the child to receive educational benefit. This test has been subsequently clarified to hold that FAPE requires that the individualized educational program offered to a child must provide more than a trivial educational benefit. (See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), cert denied, 488 U.S. 1030 (1989).)
3. The local educational agency has the burden of proving whether an appropriate program has been offered by a preponderance of the evidence. (Regulations of Connecticut Agencies Section 10-76h-14)
4. It is clear that the Student has received more than a trivial educational benefit from the educational program provided by the school district. The Student has made progress on many of his goals and objectives and is learning to read, write, do math and follow school routines. Meeting the Rowley test, however, is not, in and of itself, dispositive of whether FAPE has been offered. The IDEA also requires that children with disabilities be educated in the least restrictive environment (“LRE”); that is, to the maximum extent appropriate, children with disabilities are to be removed from the regular education environment “...only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (20 U.S.C. Section 1412(a)(5)(A)) 34 C.F.R. Section 300.552(e) also requires school districts to ensure that “A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general curriculum.” Mainstreaming was not at issue in Rowley; the Court assumed that the mainstreaming requirement had already been met (Greer v. Rome City School District, 950 F.2 688, 695 (11th Cir. 1991)).
5. School districts have the difficult task of balancing the statutory preference for including disabled children in regular education with the need to provide an appropriate, individualized education to meet their unique needs. Post-Rowley case law has provided some guidance as to how this balancing act should occur. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989) created a two part test for determining whether a school district has met IDEA’s mainstreaming requirement. First, it must be determined whether education in the regular classroom, with the use of supplementary aids and services, can be satisfactorily achieved. Second, if placement outside the regular classroom is necessary for the child to receive educational benefit, then it must be determined whether the school has made efforts to include the child in regular education to the maximum extent appropriate.
6. This test is also used in Greer which emphasizes the need for an individualized, fact-specific inquiry. Greer further delineates the test by adding several factors for consideration. First, the school district can compare the educational benefits to be

received by mainstream placement as supplemented by appropriate aids and services with the benefits of a self-contained placement. (Although the Greer court emphasizes that academic progress is not the only goal of mainstream placement. That academic progress would be made more quickly in a segregated setting does not justify such placement if considerable non-academic benefit, such as language and role-modeling, would be received in the mainstream setting.) Second, the school district may consider what effect the presence of the disabled child in the regular education classroom may have on the other children. Third, the cost of the supplementary aids and services may be considered (an issue never raised in this hearing).

7. The court in Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3rd Cir. 1993) also adopted the Daniel R.R. test emphasizing that the school district must consider the whole range of supplementary aids and services appropriate for the child's particular disabilities. In addition, the school district must make efforts to modify the regular education curriculum. The Oberti court states that if the school district did not give serious consideration to both modifying the general curriculum and including the child in a regular education class then they have probably violated the IDEA mainstreaming directive. The Oberti court also asserts that exclusion from a regular education classroom is not justified by the fact that a disabled child learns differently than other children in that classroom.
8. In A.S. v. Norwalk Board of Education, 183 F. Supp. 2d 534 (D.Conn. 2002), the court concluded that Oberti and Daniel R.R. provide the appropriate legal standard for mainstreaming issues. The court adopted the test used in Oberti in concluding that a disabled child should and could remain in regular education with additional supportive services.
9. In February, 2002, a settlement agreement was reached in the case of P.J. v. State of Connecticut Board of Education, No. 291CV00180 (RNC). Class members of this suit included all school-age children with the label of mental retardation who are not educated in regular classrooms. The parties to this settlement agreed that the desired outcomes for educational programs for students with mental retardation or intellectual disability would consist of five goals. Those goals pertinent here include, "An increase in the percent of students with mental retardation or intellectual disability who are placed in regular classes, as measured by the federal definition (eighty (80) percent or more of the school day with non-disabled students)...An increase in the mean and median percent of the school day that students with mental retardation or intellectual disability spend with nondisabled students...An increase in the percent of students with mental retardation or intellectual disability who attend the school they would attend if not disabled (home school)." In addition, it was agreed that a policy memo would be issued by the Chief of the Bureau of Special Education and Pupil Services of the Connecticut State Department of Education that would include directives for PPT's including the requirement that the PPT consider the placement of the student in regular classes with supplementary aids and services.
10. The result is that the IDEA's preference for mainstreaming is equivalent to a rebuttable presumption. A PPT must first assume that disabled children will be fully

included in the regular education environment. Only then, after serious consideration is given to including the child in the regular education classroom with the full range of supplementary aids and services and modification of the general curriculum, can the PPT consider why, where and when each disabled child may need to receive some or all of his or her education elsewhere. 34 C.F.R. Section 300.552 (b) and (c) establishes another IDEA preference; a child must be placed as close to home as possible. Only after serious consideration has been given to all of these factors (regular education placement, supplementary aids and services, modification of the general curriculum and placement close to home) can it be considered whether FAPE was offered.

11. Evidence of whether this school district has seriously considered regular education with supplementary aids and services is to be found within the disputed IEP as well as testimony of the Student's parents and school staff. Under 20 U.S.C. Section 1414(d)(1)(A), an IEP must include (among other requirements as stated in the statute) a statement of the child's present level of educational performance including how the child's disability affects the child's involvement and progress in the general curriculum, a statement of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum, and a statement of the special education and related services and supplementary aids and services to be provided to and/or for child and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved and progress in the general curriculum. There is no requirement that minutes of the IEP meeting be taken. But where, as here, extensive minutes were taken and relied upon by the school district, they provide a clear picture of what was, and by their absence, what was not discussed at the June 4, 2002 PPT meeting.
12. A review of the PPT minutes and of testimony of those who attended the PPT lead to the conclusion that the PPT gave no serious consideration to the substantially full time (at least 80%) placement of the Student in a regular education classroom. A review of the minutes indicates that the school district based their placement recommendation on the Student's poor attention span, distractibility, success with one on one instruction and other factors discussed in Finding of Fact No. 18. While these factors were used to justify placement in the IEP class, there was no discussion of how these factors would be affected by the appropriate use of curriculum modifications and supplementary aids and services that would enable the Student to participate and make progress in the regular education classroom and curriculum. Ms. Plouffe testified that discussion of regular education placement was brief; but both Ms. Juliano and the Student's mother testified that it was not discussed at all (see Finding of Fact No. 18). It logically follows that if there was no discussion of regular education placement, there was certainly no discussion of any supplementary aids and services that would help the Student succeed in regular education (let alone the full range of such supports). There was also no discussion of whether the Student could be placed in his home school. Ms. DelGrego testified that Ms. Dayharsh quickly ran through the continuum of possible placements in a rote manner with a mere mention of the Student's home school as the least restrictive placement. Home school placement was neither discussed nor considered as a genuine option.

Similarly, there was no real consideration of modifying the general curriculum to allow for the Student's full participation. What was fully discussed however, is whether to place the Student in the S. or Y. IEP class; a full comparison is included in the minutes along with the assumption that the Student will receive all instruction in core academic subjects in the IEP class. Therefore, based upon the June 4, 2002 IEP document and the testimony of both parents and Board witnesses, it is clear that regular education placement with supplementary aids and services, instruction in the general curriculum (modified as needed) and home school placement was never seriously considered by the school district.

13. In addition, despite numerous references to the Student's behavior issues, some of which were used to support placement in the IEP class (such as distractibility and short attention span), and which required the use of behavior modification techniques by all of the Student's teachers, the IEP contains no behavior plan or recommendation of a functional behavior assessment. The May 23, 2002 team meeting recommended tracking the Student's behavior and establishing a baseline and future goals (see Finding of Fact No. 15) but this is not mentioned in the June 4, 2002 IEP.
14. There was also no consideration given to providing the Student's therapies other than one on one in a segregated therapy room. While there may be good reasons for this at least part of the time, there is no indication that this was thought out in any way. It is simply the way it has always been done and what the therapists are accustomed to doing. There is no indication either through testimony or the exhibits that there was consideration of other ways the Student might receive his therapies successfully, and without embarrassment, in a non-segregated setting.
15. The Daniel R.R. test requires consideration of whether education in the regular classroom with the use of supplementary aids and services can be satisfactorily achieved. The Student has never the actual chance he deserves to show that he can stay and learn in the regular education classroom; there are indications, however, that the Student could be successful. First, using the standard of at least 80% regular education placement, there is time for individualized teaching and preteaching outside the classroom as necessary. Second, the school district seems to see regular education as a monolithic classroom composed of children with equal abilities and a teacher at the pinnacle. In reality, most classrooms are composed of children with varying abilities and behaviors. Most teachers recognize this by offering opportunities for large group, small group, and individualized instruction. Ms. Juliano testified that she often works with small groups during which time the other children are expected to work independently. There is no reason why this time could not be utilized by the Student's paraprofessional for one on one instruction as needed and for the Student's participation in small groups (in which, according to the team facilitated Ms. Beesley, the Student functions well). Furthermore, there is nothing to prevent the Student from receiving special education instruction in the regular education classroom; specialized instruction does not always have to take place in a segregated setting. In addition, Ms. Juliano testified that the Student learned to move through classroom routines with little prompting and that he was not the only Student in her class with behavior concerns. It must also be noted that the Student demonstrated his many capabilities by making substantial academic progress during

the 2001-2002 school year. Finally, the purpose of supplementary aids and services is to assist the student by making accommodations that will help the student succeed in the regular education environment. The school district erred in viewing the Student's disabilities as a reason to deny him access to the general curriculum and regular education placement; instead, they should have been looking at what supplementary aids and services could be used to give him the access he deserves.

16. In making placement decisions, the courts have also stated that academic progress is not the only goal of mainstream placement. Daniel R.R. and Greer both assert that there other benefits to be derived from mainstream placement including language and communication skills, role modeling, and the development of social skills and self esteem; these are not marginal benefits. Even if academic progress could be made faster in the segregated setting, such placement may not be justified if there are considerable non-academic benefits to be gained from the mainstream setting. Ms. Beesley testified that the Student *could* make progress in the regular education although not as much or as quickly as in the IEP class. This is one of those situations where faster academic progress in a segregated setting is outweighed by the greater benefits derived from mainstream placement; this is especially true where it has *not* been disputed that the Student *can* learn in the regular education environment.
17. 34 C.F.R. Section 300.552(b) and (c) states that in determining the educational placement of a child with a disability, a school district shall ensure that the child's placement is as close as possible to the child's home and, unless the IEP requires some other arrangement, that the child is educated in the school that he or she would attend if nondisabled. Having concluded that the Student can be educated in the regular classroom environment with the appropriate supplementary aids and services for at least 80% of his day, there is no reason why the Student can not receive his educational program in his home school, P., which is the school where he would be educated if not disabled.
18. Finally, no testimony or evidence was presented to suggest that the Student has a disruptive or negative affect on the regular education classroom. Therefore, this is not a factor in the decision.
19. It is therefore concluded that FAPE was not offered. The school district's actions in creating the recommended IEP do not meet the standards raised by Daniel R.R., Greer, Oberti, or A.S. They also do not comply with the spirit of the P.J. settlement. As stated by the Oberti court, if serious consideration was not given both to modifying the general curriculum and including the child in the regular education classroom, then the IDEA mainstreaming requirement has probably not been met. In the Student's case, it is clear that serious consideration was not given to either factor; neither was serious consideration given to home school placement. In addition, it has not been disputed that the Student can be educated in the regular education classroom with the provision of supplementary aids and services. The school district has not met its burden of proving that FAPE has been offered.
20. Cases submitted by the Board were generally not applicable here. The Michigan cases worked with a maximization standard so that there was no balancing of non-

academic factors in selecting the educational placement. In Needville Independent School District, 21 IDELR 702, the child in question displayed aggressive behavior that significantly disrupted the regular education class. Buchholtz v. Iowa Department of Public Instruction, 315 N.W.2d 789 looked only at the appropriateness of the IEP; the least restrictive environment was not considered. In Stamford Board of Education, 37 IDELR 29, the issue involved the provision of ABA services to a child with autism. Interestingly, in San Diego Unified School District, 34 IDELR 105, the hearing officer ruled that removal of a child from an inclusive setting was premature when behavioral interventions and a modified curriculum had not been provided. Finally, in Saco School Department, 27 IDELR 103, the hearing officer ruled that the child, who had Down's Syndrome, could be educated in a kindergarten class with the provision of an adapted curriculum; she also cited studies showing that mainstreamed children with Down's Syndrome had a significantly greater gain in mean mental age as compared with similar children in a segregated setting. Dr. Whitbread testified to similar results in other studies.

21. The school district will need assistance in planning and implementing a program that provides the Student with regular education placement in his home school. In addition to the initial planning, fine-tuning will be necessary to finally arrive at an appropriate program. Based upon the evidence and testimony, it is clear that the school district can not do this alone and will require the guidance of an independent consultant with experience in planning inclusion programs. The school district will, within two weeks of receipt of this decision, convene a PPT at which the parents and school employees will select a mutually agreed upon consultant. The consultant is to be hired and in place by January 6, 2002. If this does not occur, then the parents and school district will each select a consultant and the two consultants shall choose the independent consultant who will be a member of the PPT and will assist the PPT in planning and implementing the Student's program. The independent consultant will help draft new, measurable goals and objectives, help determine what time, if any, the Student needs to receive instruction outside the regular education classroom, help determine what supplementary aids and services are appropriate, how and where to modify the general curriculum, how and where the therapists will provide the Student's therapies and additional issues identified either by the independent consultant or by other members of the PPT. In case of any dispute within the PPT with regard to the 2002-2003 school year, the independent consultant's decision shall be final. The independent consultant shall remain a member of the PPT until the close of the 2002-2003 school year and shall assist in the planning of the Student's educational program for the 2003-2004 school year.
22. Finally, with regard to procedural issues raised by the parents, it is concluded that the school district did not intentionally withhold Ms. Beesley's report from the Student's parents. Ms. Beesley testified that it is her usual practice to send her reports to the parents and the school and that she did so here; there is no reason to doubt her testimony or to believe that the school district instructed her in this regard. As to the PPT held without the parents, the school district could probably have done more to accommodate the parents' schedule. It appears that with the hearing approaching and their knowledge that regular education hours had not been calculated correctly, the school district panicked and went ahead with the PPT rather than begin the hearing

with an obviously incorrect IEP. This is not best practice, however, the PPT was intended only to correct this oversight (and the correction is still not clear) and clarify stayput so there is no indication that their action, even if precipitous, deprived the Student of FAPE. Therefore, a finding of procedural error cannot be made.

FINAL DECISION AND ORDER:

1. The school district did not offer the Student a Free and Appropriate Education for the 2002-2003 school year.
2. Within two weeks of receipt of this decision, the PPT will convene to select an independent consultant to assist in the planning and implementation of an educational program that will provide the Student with a regular education placement in his home school, P., in accordance with the provisions of Conclusions of Law No. 21.
3. The Board did not violate the parents' procedural rights.