

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Waterbury Board of Education

Appearing on behalf of the Parent: pro se

Appearing on behalf of the Board of Education: Maurice B. Mosley, Esq.
Office of Corporation Counsel
The City of Waterbury
236 Grand Street
Waterbury, CT 06702

Appearing before: Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

- I. Whether the local educational agency provides a free and appropriate public education to the child?
- II. Whether the out-of-district placement proposed by the parent is appropriate if the local educational agency does not provide a free and appropriate public education?

PROCEDURAL HISTORY

The parent requested due process on October 5, 2005. The parties agreed to hold hearings on 11/16/04, 11/17/04, 11/18/04, 12/07/04 12/8/04 and 12/14/04. At the conclusion of the hearing the parties agreed on a briefing schedule permitting time to obtain transcripts of the hearing. The final decision date is March 15, 2005.

SUMMARY

The child is disabled with bipolar disorder, attention deficit hyperactivity disorder, conduct disorder, and oppositional defiant disorder. The local education agency (LEA) has provided the child's education since kindergarten. The child's placement changed frequently as he moved through several of the district's behavior disorder learning centers (BDLC) within the LEA district. On many occasions since 2001, the parent, on the advice of her child's psychiatrist requested placement in a therapeutic setting in a specialized school for bipolar disorder. The child was suspended from school twenty

nine times, in the past five years, has been disciplined in excess of thirty times and has been the subject of six manifestation determination meetings. The parent filed for due process when the district proposed another change in placement to the LEA's therapeutic program. The parent claims the LEA cannot provide the child with an appropriate program and placement and request an out of district placement.

FINDINGS OF FACT

1. There is no dispute the student is identified as disabled with a primary disability of serious emotional disturbance (SED) and therefore eligible to receive specialized instruction and services pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1401 et seq. (Exhibit B-9)
2. A Psychological Evaluation dated May 23, 2001, by Janet Wosniak, M.D. Exhibit B-17, describes the child's condition in detail. The child presents with multiple behavioral components which are very difficult for the school staff to manage. The evaluation states his behaviors can differ between the school environment and the home environment. His behavior at home is worse. The psychiatrist notes the child's symptoms significantly interfere with the child's learning. In particular, his Bipolar II Disorder, DMS III and DMS IV, attention deficit/hyperactivity disorder, conduct disorder and oppositional defiant disorder all severely impair the child's behavior and ability to benefit from his education. The psychiatrist recommends placement in a specialized therapeutic school setting; the psychiatrist specifically states the child's conduct is a direct result of his bipolar disorder therefore a school for conduct disordered children is not appropriate for the child. A specialized school for children with bipolar disorder is recommended. The psychiatrist states the child's psychiatric disorder will lead to poor school performance due to disorganization of thinking, mood intensity and distractibility, which are always present but can become worse with mood exacerbation. Massachusetts General Hospital completed a cognitive screening and Focal Neurological battery on May 3, 2001. In summary, the child's cognitive ability is in the low average range and he demonstrates average academic achievement.
3. By way of background, when the child was in preschool, the parent requested review for dyslexia, a developmental screening, in February 1996. The school team concluded the child was appropriate in all areas. No disability was identified. (Exhibit B-1)
4. In September 1999, the parent again requested evaluation in the first grade. The school record states the child receives therapy outside the school setting and the parent suspects ADHD and dyslexia. The parent presented a therapist's report to confirm that the therapist observed ADHD symptoms. In December 1999, school personnel reports the child has difficulty following directions and respecting authority. The child tends to get into trouble during unstructured times. At the time of testing the child's behaviors were more aggressive and frequent both in and out of

school. The child started medication at the beginning of the school year and behaviors did not appear to improve. (Exhibit B-3, B-4)

5. The child's IEP dated 12/1/99 has one behavior goal, which is to follow the rules in the school and classroom. The child spends 30.75 hours in the regular education classroom and .5 hours per week in counseling. There are few behavior modifications in regular education as noted on Exhibits, B-5 p. 8 and P-8 p.8.
6. At the beginning of second grade, the child had above average reading and demonstrates strengths in receptive and expressive language skills. He is articulate and appropriate in social interactions. (Exhibit B-6 p. 1-3) Performance on the educational battery, the Detroit Test of Learning Aptitude, Developmental Test of Visual Motor Integration and the Peabody Individual Achievement Test-Revised follows: Reading is in the fourth grade level with comprehension scores in the fifth grade level. Written expression is weak in letter formation and thoughts are not expressed in full sentences however, his spelling score is at the sixth grade level. In conclusion the evaluator notes the child has exceptional reading ability and recommends he receive a high level of reading instruction. (Exhibit, B-7 pp.1-2) The IEP implements a plan which provides .5 hours per week of counseling behavioral goals and objectives and transportation on the special education bus. (Exhibit, B-5 p.5)
7. The child's full scale I.Q. is in the average range. (Exhibit B-8, p. 3) His performance on social judgment, knowledge of word meaning and fund of information is in the upper end of the average range. The child's numerical reasoning falls in the borderline range. The child's performance on visual-perceptual abilities is solidly average with a weakness in sequencing which falls in the borderline range. (Exhibit B-8, p. 4)
8. On the Behavior Assessment System for Children (BASC) the teacher's component finds the child's behavior falls within the significant range for somatization and at risk for conduct problems, aggression, hyperactivity, and depression. The teacher finds him to act in a disruptive and socially deviant manner as well as having feelings of sadness and stress. The result is an inability to carry out daily activities. The rating reported by the teacher meets the DSM IV criteria for conduct disorder. The mother's BASC results places the child's behavior in a significant range, the child meets the diagnostic criteria for attention deficit disorder, hyperactivity disorder, conduct disorder, major depression, oppositional defiant disorder, and overanxious disorder. (Exhibit B-8, pp.5-6)
9. Results of projective testing suggest themes of wanting to belong and be understood. The child is confused by expressing and understanding anger and seeks friends and a stable family environment. On the Rorschach the child's failure to follow directions is related to defensiveness and resistance to task. (Exhibit B-8)

10. An IEP meeting convened 3/29/00 to develop a Behavior Intervention Plan (BIP). The record contains a discipline log at (Exhibit B-10 p.5.) There are behavior incidents and several suspensions. The IEP recommends investigating alternative placements and a reduced school day. The parent is agreeable to observe alternative placements and believes the regular education program is inappropriate. (Exhibit B-11 p.2) The counseling notes shared by the school psychologist state the child is confused by his behaviors and he recognizes he cannot control them. (Exhibit, B-11 p.7) On June 2, 2000 the child is placed on homebound for the remainder of the year. The child receives 12 hours of education for the balance of the school year. (Exhibit B-12 p.11) The record contains a functional behavior assessment (FBA) completed at the time of a manifestation determination. (Exhibit B-13, B-14) The FBA establishes a hierarchy of disciplinary steps to be taken ranging from teacher comment to out of school suspension.
11. The IEP dated 6/2/00 developed for grade three, places the child in a resource room for 26.50 hours per week, with 1.0 hours per week of counseling and 3.75 hours per week in regular education. The child's behavior goal is to follow school rules and discuss feelings that impact his academic and school functioning. The hearing record contains no information about the structure of the BDLC classroom chosen for the child, the parent refused to permit face-down restraints. (Exhibit, P-25 p-14) The child's second grade performance is reported to be above grade level (Exhibit P-25 p.4)
12. An IEP dated 12/21/00 convened to transition the child to the intermediate self-contained classroom. (Exhibit, P.28 pp.1-3) The child has yet another change in placement. In May 2001, the child has several days of suspension. The record does not reflect the total number of suspensions for the year. (Exhibit P-29, P-30) The suspensions occur around the time the child is evaluated at Massachusetts General Hospital. (Exhibit B-17, P-32, P-33, P-34)
13. An IEP meeting convened May 31, 2001 convenes to review the Massachusetts General Hospital evaluations and develop an IEP for the fourth grade. The adopted IEP is essentially the same as the third grade program but it reduces the counseling component by .5 hours per week, even though the psychologist states there are many psychological issues the child needs to process and a need for continued counseling. (Exhibit, P-35 p.11, P-34 p. 14)
14. On 10/31/01 the child is suspended for four days for assaulting a teacher. The IEP team determined the child's behavior was not a manifestation of his disability. The FBA (Exhibit, P-40 pp.2-5) provides for implementing a point system for behavior modification, on a one-half (1/2) hour basis. The behavior intervention plan (BIP) does not include out of school suspension in the hierarchy of responses, but out of school suspension is included as a consequence of behavior. There is no provision for in-school suspension. The function of the behavior is to be sent to a preferred adult. In one month the child is suspended for engaging in a targeted behavior, which persisted for an entire day and he receives a two day suspension. (Exhibit, P-41) The

suspension is followed by another IEP meeting, dated 12/4/01. The parent requests a therapeutic day school program. The school team rejects the parent's request and concludes the BDLC program was appropriate and able to meet the child's behavioral and academic needs. (Exhibit, P.42, p.2) Within days the child is again suspended. The discipline report states he was extremely agitated and out of control in all areas of behaviors.

15. Pursuant to an IEP dated 1/15/02 the child was excluded from school for a week and was then transferred to another school within the district. The parent claims the team fails to control the behaviors before they escalate to the level that the child needs to be suspended from school. School staff testified the discipline reports do not state the disciplinary steps taken prior to referral to the administrator in charge of discipline. The discipline reports sent to the parent will note the child was agitated all day until a crisis occurs. The team decided to retain a consultant for the child's program for 3 months for 2 hours per month. The school team and parent attended training to understand ADHD and bipolar disorder behaviors/symptoms midyear in the fourth grade. At the time of the training the child was consistently working below grade level and had 11 days of suspension. (Exhibit, P-45 p.1)
16. The record indicates the training was successful. There was improvement overall. The child was not suspended and his grades improved dramatically for the balance of the fourth grade year. (Exhibit, P-49, p.1) The parent agreed the child was successful in the school environment at the end of fourth grade.
17. In the fall of 2002, a triennial evaluation was completed. The report overall concludes the child has improved dramatically in the second half of the school year. The turn around is dramatic and coincides with the change in placement with the support of the consultant. Behavior assessments completed by teacher and parent are consistent with behaviors in the average range. (Exhibit, P-50) The school psychologist's evaluation cautions the child's progress may be linked to the structure and support provided in the special education setting.
18. The IEP dated 5/22/02 planned for fifth grade. The plan is for the child to spend more time in the mainstream than he has in years, he is to be included in field trips without an aid. The child's time in the mainstream increased to 28.75 hours per week. (Exhibit, P-51)
19. The IEP dated 5/20/03 is a manifestation determination IEP. The team determined the behavior was a manifestation of the child's disability. The manifestation review reports the child has had a serious decline in the mainstream, showing aggression, both verbal and physical. (Exhibit, B-28 p.1) The child's placement is changed to 22.50 hours per week in a self-contained BDLC and 4.4 hour per week in the mainstream. (Exhibit, B-29 p.4) The child made unsatisfactory progress in his behavior goal during the reporting period beginning two months after the IEP was adopted in December 2002. The child's academic reports states his performance is above grade level in all subjects. (Exhibit P-51 p. 5) The modifications to the

mainstream, does not include most of the modifications seen in previous IEP's. (Exhibit, P-51, p.9) The child was suspended 11 days in fifth grade, fourth quarter. (Exhibit, P-59)

20. In the sixth grade, the child's placement was in the middle school, BDLC. The child was able to meet his behavior goals for 3 of 13 weeks. In his time in unified arts he is accompanied by an aide. The balance of the day he is in the contained classroom. (Exhibit, P-64 p.17) A counseling report dated 11/25/03 (Exhibit, P-64 p.14) was presented at an IEP meeting. The child had three major disciplinary events in September and November 2003 and was suspended for several days. By October 2003 the school is contemplating yet another change in the child's program. The IEP recommendation on 11/25/03 was to continue with the current program (Exhibit. P-64 p.1) The child is showing a decline in academics. The record notes concern about Reading Comprehension, Writing and Math. (Exhibit, P-64 p.2) The Special Education Supervisor testified the child's school record shows academic progress. The child was reading at the fourth grade level in first grade with fifth grade comprehension and sixth grade level spelling. The child had unsatisfactory progress in his behavioral goals which consists of one goal: To exhibit responsible personal and social behavior by following class rules refraining from using profanity and exhibiting respect for peers and authority. The child spends 20.75 hours per week in a contained classroom. He continues to receive .5 hour per week of counseling. (Exhibit, P.64 pp.8-9) The mainstream teacher's report is instructive. She notes the child is able to perform well in her mainstream class. (Exhibit, P.64 p.20) The child has numerous disciplinary referrals and suspensions in sixth grade. (Exhibits, P-64 p.22, P-61, P-62, P-63, P-65, P-66,-P-71, P-74, P-75, P-76, P-77, P-79, P-80, P-81, P-82, P-86, P-87, P-89, P-90, P-91, P-92, P-93, P-94, P-95, P-100, P-102, P-103, P-104) In a communication to the Director of Special Education, the author states the child's behavior is beyond the scope of the program. (Exhibit, P-83) The child experienced sharp decline for the sixth grade year. He had 18 suspensions and significantly lower grades. He participates in a modified curriculum in subjects that were previously relative strengths for him.
21. At an IEP meeting dated March 22, 2004. The school team proposed another placement change. At the IEP meeting, the parent questions whether the IEP is being followed. She has not received the daily reports required by the IEP and she is concerned about the student being suspended for behaviors which are a manifestation of the child's disability. The school staff is treating the symptoms as behaviors. The parent is unable to have follow-through at home without knowledge of the day's events. The program lacks consistency and suspensions are disruptive to modifying behavior and making academic progress. The team proposes a therapeutic program which includes counseling. A psychiatric report dated April 13, 2004, Exhibit P-98, states the child's behavior problems are a result of his psychiatric condition. If the child requires placement in a therapeutic school, the psychiatrist recommends one that focuses on emotional difficulties rather than a school for delinquents and criminal behaviors. The psychiatrist states the child is displaying mood symptoms of bipolar

disorder which can make him appear disrespectful of authority and rules and makes him even threatening to others. (Exhibit P-98)

22. The school social worker testified the school team continuously communicated with the family by telephone calls, daily and weekly written reports, conferences and IEP meetings. (Exhibit, B-43)
23. The special education team at the middle school has met to analyze the child's behavior, by way of a functional behavior assessment and develop goals and objects to address the behavior or plan for the necessary disciplinary action. (Exhibits, B-32, B-33, B-34, B-36 p. 1-6, B-37, B-38)
24. The child had nine days of out school suspension by October 6, 2005, of seventh grade. The team held a manifestation determination meeting and concluded the behaviors were related to the child's disability. (Exhibit, P-112 p. 1) The police were called because the child made a verbal threat. An IEP developed 10/5/04 recommends a diagnostic placement in the BDLC program in yet another school. The program is a more restrictive, therapeutic setting with full-time special education and related services. (Exhibit, B-35, P-111 p.1) The special education teacher and school social worker testified the State Street School program will provide the child with an appropriate educational program which includes individualized instruction, daily incentives and alternative learning. (Exhibits B-44, B-45)
25. The program description provided to the parent defines the program as one designed to meet the needs of Serious Emotionally Disturbed (SED) students. The primary duty of the BDLC is to enable each student to become a responsible member of society by changing behavior in a positive direction. The goal is to maintain students in their district schools and prepare them to return to the mainstream. The behavior techniques are routed in positive reinforcement. The program claims to provide structure, intended to provide the child with organization and predictability. The overall objective is to have the student internalize environmental cues and controls. Consistency of environmental response is a component of structure. The techniques employed by this program are systematic ignoring, signal interference, proximity and touch control. (Exhibit, P-118)
26. The parent's objection to the placement is the subject of the hearing.
27. The parent is seeking placement in at the Devereux Glenholme School, which provides comprehensive treatment utilizing an integrated approach. The therapeutic environment encourages the students to perform skills, activities and behaviors necessary to develop and acquire self-control of their behavior. Family participation is an integral aspect of a successful transition to the community. All students participate in milieu therapy, behavioral therapy, socialization skills training, individual and family therapy, group therapy as required, as well as family oriented Transfer of Treatment Program. The milieu therapy program consists of a token economy and a corrective and disciplined treatment program. There is a motivational

management approach designed by a team to assist the child in acquiring social skills, academic achievement, study habits and self-care behavior by developing and modifying the plan to the child's needs. Motivational management is designed to make the child less dependent on tokens and increase reliance on internal control of behavior by gradually phasing out the token system.

28. The environment is designed to be conducive to the child's treatment with clearly defined expectations. The setting provides structure and techniques that will enable the student to develop the skills and behaviors that promote social and emotional development. In addition to the typical corrective discipline techniques, the program provides for role-play of the behavior that resulted in discipline, a training system that instructs the child on appropriate behavior, through rehearsal restitution and reintegration. Reintegration must be implemented effectively to motivate the child to remain in the program rather than the preferred removal from the program. (Exhibit P-119)

CONCLUSIONS OF LAW

1. There is no dispute that the child is identified as a child with a disability and therefore entitled to receive specialized instruction and services in the provision of a free and appropriate public education pursuant to The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et. seq.* and its regulations at 34 C.F.R. § 300.520-300.528 and Connecticut General Statutes § 10-76 *et. seq.*
2. The parent seeks a day placement in an out-of-district therapeutic school. A dispute arose between the parties when the LEA proposed that the child be moved to another Behavior Disorder Learning Center at the State Street School, a therapeutic placement for the district. The parent claims the LEA's program is inappropriate because it fails to provide the child with a free and appropriate public education.
3. Whether a program is inappropriate is determined by the two-prong test articulated in *The Bd. of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982). The first prong requires the LEA to follow the procedural requirements of IDEA. The Supreme Court states, emphasis on the procedural requirements of IDEA reflects a conviction that adequate compliance with the prescribed procedures would in most cases assure much, if not all, of what congress wished in the way of substantive content in an IEP, *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998) quoting *Rowley*, 458 U.S. 176, at 206. In the present case there is no dispute between the parties regarding procedural matters.
4. The second prong of *Rowley* requires the individual education plan (IEP) offered by the LEA be reasonably calculated to enable the child to receive an educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207, *Mrs. B. v. Milford Board of Education*, 103, F.3d 1114 (2d Cir. 1997). Subsequent decisions elaborate how much benefit is sufficient to be meaningful. The act requires educational *progress* rather than a program that is merely of benefit. *Polk v. Central*

Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 488 U.S. 1030 (1989) (emphasis original). IDEA was enacted to assure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs, supported by such services as are necessary to permit the child to benefit from the instruction, *Rowley*, 458 U.S. 176, 188-189. The instruction must be at public expense and under public supervision, meet the States education standard, approximate the grade levels used in the State's regular education program and comport with the child's IEP, *Rowley*, 458 U.S. at 189. IDEA does not require states to maximize the potential of handicapped children, *id.* at 197 n. 21, 102 S. Ct. 3034, but must be reasonably calculated to receive educational benefits, *M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Ed.*, 226 F.3d 60, 62 (2d Cir. 2000).

5. In order for FAPE to be offered, a school district must show it complied with the statutory elements of an IEP; the goals and objectives in the IEP are reasonable, realistic and attainable, yet more than trivial and *de minimus*; and the special education and related services must be tailored to reasonably accomplish the goals in the IEP. *Board of Education of the County of Kanawha v. Michael M.*, Civil Action No. 2:99-0609, USDC for the Southern District of West Virginia (April 26, 2000) at pp. 18-19. Meaningful educational benefit for one child may be *de minimus* benefit for another. Since benefit is a relative term, courts have considered the potential of the student in deciding whether the IEP offered is appropriate, noting that "(w)hen students display considerable potential, IDEA requires 'a great deal more than a negligible benefit', but instead 'significant learning,'" *Ridgewood Board of Education v. N.E.*, Case No. 98-6276, USCA for the 3rd Cir. 1999. The child demonstrated a high level of achievement in the first and second grades; up until the child started middle school, he had above grade level performance. For several years the child had one very broadly stated behavior goal. The goal essentially required the child follow school rules and treat peers and staff with respect. The stated goal did not make it clear to the child, school staff or the family how the behavior goal would be satisfied. The goal may not have been attainable for someone with this disorder. The psychiatrist states in Exhibit P-98, the child is displaying mood symptoms of bipolar disorder which can make him appear disrespectful of authority and rules and makes him even threatening to others. The child requires a program of elaborate, interventions delivered by a tightly coordinated effort of everyone who came in contact with him to meet the behavior goals as they appear in his IEP.
6. The regulations promulgated pursuant to IDEA, 20 U.S.C. § 1414 (a) (4), (a) (10) (B) provide the LEA as described in 34 C.F.R. § 300.2, shall provide special education and related services. 34 C.F. R. §300.342(a) (1), provides that each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising the IEP of a child with a disability. Each LEA shall ensure that the IEP team review the child's IEP, no less than annually, to determine whether there is lack of progress towards the annual goals described in § 300.347(a), and in the general curriculum; or to address the results of reevaluations conducted under [the regulations]...and [review] information about the child, provided to or by the parents

under § 300.533 (a)(1) or about the child's anticipated needs; or other matters, 34 C.F.R § 300.343(c) (1), (2) (ii) - (iv). The IEP team members testified the child has made academic progress. The major focus of the numerous IEP meetings convened to plan for the child, however, is to address the latest behavioral crisis. The child's academic progress was lost in the focus to find a classroom or staff member who could handle the child's behavior. The LEA not only failed to provide a program to improve or manage the child's behavior, the team has not provided for a program in which the child makes adequate educational progress. The child's latest triennial evaluation as presented for the hearing record does not include educational or achievement test results. It is not clear these tests were performed even though they are listed in the Consent to Evaluate signed by the parent.

7. The child's record is complicated. The child was suspended from school numerous times as early as the second grade. He was on homebound instruction for the remainder of his second grade year. The child returned to school in the district's BDLC and provided with a behavior goal and one hour per week of counseling. The child with average intelligence had above average achievement in his academic subjects. The school therapist record notes the child is confused by his behavior. In December of the third grade the child's placement is changed to the intermediate, self-contained classroom. The child was again experiencing discipline problems and suspended several more times. He was evaluated at Massachusetts General Hospital by Janet Wozniak and identified with early-onset bipolar disorder. The parent and the psychiatrist recommend a therapeutic school specializing in treating bipolar children. The LEA denied the request and reduced the child's counseling to .5 hours per week.
8. In the fourth grade the child is suspended for many days early in the year. At a manifestation determination the team concludes the child's behavior is not a manifestation of his disability; nonetheless, they change his placement to another BDLC within the district. The parent again requests an out-of-district placement. At the new placement the staff is trained to work with bipolar children by an outside consultant. A token reward system is added to the child's program, which includes half-hour monitoring and feedback. The child improved dramatically, and his placement is changed four months later, when the team places the child in a fully mainstreamed program for the fifth grade.
9. In the fall of the fifth grade the child has a triennial evaluation in which the school psychologist cautions that the child's school success may be linked to the structure of support provided in the special education setting. At the IEP, convened to review the triennial results in December of the fifth grade, the team decides to continue the child's placement in the mainstream for 28.7 hours per week. The child's record concludes that the child began having difficulty, receiving unsatisfactory progress reports his behavior goal. The child had been earning above average grades. By May, the child has numerous suspensions for a total of 11 days. At a manifestation determination IEP meeting, the record states the child has been declining for months. The child's placement is changed again to another BDLC program within the district, placing him in a self-contained class for 22.5 hour per week.

10. In the sixth grade the child's placement is changed again to the middle school, BDLC. He again has numerous suspensions, his grades decline and teachers express concern for his academic performance in subjects in which his fifth grade record shows he had above average performance.
11. In the sixth grade the IEP team recommends yet another change in placement as early as October. The parent again requests an out-of-district placement in a therapeutic school. In the IEP minutes, the Director of Special Education states that the child's behavior is beyond the scope of the program. The LEA has pushed for the child to attend their therapeutic program but the parent rejects the program. The IEP minutes reflect the parent's concerns that the school team does not take the actions outlined in the child's IEP.
12. The school team is so focused on the child's behavior that they fail to focus on the child's academic progress. The child is out of school for suspension many days making a consistent behavior plan impossible. The time spent out of class for discipline and suspension must have an impact on the child's academic progress as well. The child's record shows that he makes better academic progress in the mainstream; his program in the contained classroom appears to be a modified curriculum.
13. In the seventh grade the child had 18 days of suspension as early as October 5, 2004. The school team proposes a move to the district behavior therapeutic program. The parent filed for due process when her request for an out-of-district placement is again denied.
14. The child's middle school experience is particularly troubling. Many of the behaviors that resulted in suspension might have been averted by more tightly coordinated staff. The record supports the parent's claim that the team often did not follow prescribed procedures. A Functional Behavior Assessment completed at the time the child was suspended (Exhibit, P-40) states the child will initiate behaviors that result in suspension to be with a preferred adult. The child's behavior is escalating to the point of police intervention. During the past several years the child's grades have declined and his behaviors are much worse. The school staff in the BDLC has not been able to develop a program that will permit the child to progress in the general curriculum and benefit from his education. The mission statement of the LEA's therapeutic program is to enable the students to become responsible members of society by changing behaviors in a positive direction. After many years in the district's programs both the child's academics and behavior have declined.
15. The Vice-Principal, who serves as the director of the therapeutic program, compared the district's program to the one proposed by the parent. She testified the programs are similar in many ways: they service similar populations using similar techniques. There is a lot of similarity in design and structure. The program has outside behavior consultants. It uses a structured behavioral approach with a token economy. Overall

the child has deteriorated severely both in academic and behavior while attending the LEA's programs. He needs a more consistent comprehensive program to make an improvement. The nexus between home and school is critical if the child is ever to meet the program objective of returning to the mainstream and becoming a responsible member of society. The LEA has not been able to provide FAPE for the child.

16. The line of cases that provides for public school funding for education in private schools includes *Burlington v. Dept. of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 359 (1985). Public school funding of private education requires a finding that the program offered by the LEA does not provide a free and appropriate public education (FAPE). The LEA has the burden of proving by a preponderance of the evidence that the child's program is appropriate, Conn. Agencies Reg. § 10-76h-14. In this case the LEA has not established by a preponderance of the evidence that they could provide a free and appropriate public education (FAPE) to the child.
17. Once a determination has been made that the LEA did not offer FAPE, it must be determined whether the private school placement is appropriate. Since the time *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993), was decided the reauthorization of IDEA in 1997, confirms that an out-of-district placement does not have to meet the standards of a Least Restrictive Environment (LRE), nor does it necessarily have to have certified instructors in special education, 34 CFR §300.403(c). A case on point that cites various Circuit Court cases is *Norton School Committee v. Massachusetts Department of Education*, 768 F. Supp. 900 (D. Mass. 1991). The least restrictive environment guarantee ... cannot be applied to cure an otherwise inappropriate placement.
18. The program description for the parent's proposed placement is outlined in detail the finding of facts. The therapeutic setting provides a nexus between home and school, which is important to transition back to the home and school community. Trained staff implements a program that provides role-play, restitution and reintegration when the child is engaged in behavior that would typically result in suspension in the LEA program. The child will be forced to work through the behavior with the objective to gain internal control. This will be a deliberate process rather than the short-sighted suspension which sends the child home to sit it out until he is allowed to return to school.
19. The child's psychiatrist has recommended this type of placement since the time the child was in the third grade. The program is necessary and appropriate to provide the child with a free and appropriate public education.

FINAL DECISION AND ORDER

1. The child's proposed IEP does not provide a free and appropriate public education.
2. The program proposed by the parent at the Devereaux Glenholme School is an appropriate program.