

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Britain Board of Education
Student v. Hartford Board of Education

Appearing on Behalf of the Parents:

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Appearing Before:

Attorney Justino Rosado
Hearing Officer

ISSUES:

1. Was the program provided by the Board for the 2008-2009 school year appropriate and did it provide the Student with a free and appropriate education (FAPE) in the least restricted environment (LRE)?
2. Was the program provided by the Board for the 2009-2010 school year appropriate and did it provide the Student with FAPE in the LRE?
3. Is the program provided by the Board for the 2010-2011 school year appropriate and does it provide the Student with FAPE in the LRE? If not;
4. Should the Student be placed at CCCD for the 2010-2011 school year in a year round program at the Board's expense?
5. Should the Board provide transportation to CCCD for the 2010-2011 school year?
6. Should the Board pay for an in-home program coordinated by a BCBA provided by CCCD?
7. Should the Board pay for OT and PT evaluations of the Student by an evaluator chosen by the Parent?
8. Should the Board provide Compensatory Education for the denial of FAPE for the 2008-2009 school year?
9. Should the Board provide Compensatory Education for the denial of FAPE for the 2009-2010 school year?

10. Should the Board provide Compensatory Education for the speech and language services that were in the IEP and not provided?
11. Should the Board reimburse the Parent for the therapeutic services provided by the Parent?
12. Should the Board reimburse the Parents for the IEE performed by Dr. Mayville?

FINAL DECISION AND ORDER

SUMMARY:

The Student is a student who has been as identified with Autism and is entitled to receive a free and appropriate public education ("FAPE") as defined in the Individuals with Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. At a PPT meeting, the Parent rejected the program offered by the Board for the 2010-2011 school year. The Parent requested a specialized program; the Board refused the Parent's request. The parties agreed to go to mediation in place of a resolution meeting. The mediation was held on November 9, 2010 but the matter was not resolved. The matter proceeded to hearing.

PROCEDURAL HISTORY:

This matter was heard as a contested case pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act, CGS §§4-176e to 4-178, inclusive, and §4-181a and §4-186.

On or about October 7, 2010, the Board received notice of the Parent's request for due process. An impartial hearing officer was appointed on October 18, 2010 and a pre-hearing conference was held on October 25, 2010. The matter proceed to hearings on the following dates: December 2, 7, and 14, 2010; January 18 and 25, 2011; February 8 and 9, 2011; and March 9 and 14, 15 and 17, 2011 and April 4 and 6, 2011.

The parties in this matter have all presented retrospective testimony and exhibits by which the parties are attempting to either show progress or the lack thereof. These retrospective evaluations and testimony are not what the PPT had at their disposal to determine the IEP for the 2010-2011 school year. Whether a student was denied FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.ed 1141, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*)). The relevance of a student's subsequent performance to the adequacy of his IEP is limited. In *Adams*, parents who had supplemented their child's education with private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The District Court found it impossible to sort out the progress the child made. The Ninth Circuit, however, rejected that approach. It stated that instead of asking whether the IFSP was adequate in light of the student's

progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey a meaningful benefit to the student. The court rejected the process of measuring an IFSP (and, by analogy, an IEP) retroactively by its results. Instead of judging the IFSP in hindsight, the proper analysis was to look at the IFSP's goals, placement and services at the time the plan was developed and ask whether the methods were reasonably calculated to confer the student with a meaningful benefit. The court stated that the IFSP was a snapshot, not a retrospective, and had to take into account what was and what was not objectively reasonable when the snapshot was taken. (*Ibid.*) A Monday night quarterback will be able to address what should have been done but the team that has the responsibility of calling the plays can only work with what they have at their disposal. I agree with the Parent that Hartford Board Exhibit 13 is retrospective evidence and as stated in *D.F. v. Ramapo Cent. School District*, 430 F.3d 595, the Second Circuit declined to decide the issue, preferring to let the lower court consider the issue in the first instance. *Id.* at 600. The observation of Dr. Mayville on December 10, 2010, Hartford Board Exhibit 13, the observation of Dr. Allen and the testimony solicited from these exhibits and reports is retrospective evidence not available to the PPT to review in order to decide the program for the 2010-2011 school year and will not be used in determining if the program offered the Student FAPE.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the Summary and Proposed Findings of Fact actually represent conclusions of law, they should be so considered by the Hearing Officer and vice versa, *SAS Institute, Inc. v. S&H Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985); *Bonnie Ann F. v. Callallen Ind. Sch. Bd.*, 835 F. Supp. 340 (S.D. Tex. 1993).

FINDINGS OF FACT:

1. The Student is a student who has been identified with Autism and is entitled to receive a FAPE as defined in IDEA. (Testimony of Father, Parent's Exhibits¹)
2. The Student commenced his education in the Board's² schools. A PPT was convened at the commencement of the Student's Head Start program and evaluations were ordered. The PPT found that the Student demonstrated significant delays in all developmental areas. The Student was initially classified as Developmentally Delayed. (P-2)

¹ Hereafter Parent's Exhibits will be designated in this decision with a "P" followed by the exhibit number. Exhibits from the Student's home district will be references with a "B" followed by the exhibit number. Exhibits from the District where the Magnet School is located will be references by "MS" followed by the exhibit number.

² The Magnet School the Student currently attends is not in his home district. This matter involves two districts, the student's home district which hereafter shall be referred to as the "Board", and the district where the Magnet school the Student attends is located which hereafter shall be referred to as the "Magnet School".

3. In 2004 the PPT ordered full evaluations of the Student in order to determine programming needs, specific special education diagnosis, and Parent's concern about the Student's behavior. The Diagnostic evaluation found that in the Kaufman Assessment Battery for Children, the Student was functioning in the borderline range of Intelligence with a composite score of 75. The Behavior Assessment for Children showed that the Student had significant levels of inattention and atypically across settings. The Childhood Autism Rating Scales were suggestive of moderate autism and the Vineland Adaptive Behavior Scales revealed low levels of self-help skills in the areas of communication, daily living skills, and socialization. The Student was found to be academically below grade level in all subject areas. (P-6, P-10)
4. A Physical Therapy Diagnostic Evaluation was also performed of the Student. The evaluator found that the Student continued to demonstrate a gait pattern that had not significantly changed. The evaluator reported that continued physical therapy would not impact his gait pattern and that this did not prevent the Student from participating in school-based activities. The evaluator recommended that physical therapy be discontinued. An Occupational Therapy Diagnostic Evaluation was also conducted and the evaluator recommended that occupational therapy be continued for the Student. (P-7, P-8)
5. A speech and language evaluation was also conducted of the Student. The assessments showed that the Student's receptive and expressive language skills was below his age and grade equivalent peers. His language skills showed weaknesses in semantics, language structure, and integrative language skills. The Student's speech intelligibility was also moderately impaired. (P-9)
6. On or about March 2004, a PPT was convened to review the results of the evaluations. The PPT changed the Student's classification to Autism and found that based on the evaluation, physical therapy should be discontinued. (P-10)
7. On or about March 2006, the PPT recommended a psychological evaluation of the Student because of disruptive, off task behaviors which were affecting his academic performance. Dr. Felicia Morgan provided a consultation summary in which she noted that there was no consistent behavior plan and recommended that one needs to be developed with the focus on task behaviors, being appropriate with others, and following directions. (P-23)
8. On or about March 2007, triennial evaluations were done by the Board of the Student. The evaluator performed a Reynolds Intellectual Assessment Scales (RIAS). The assessments showed that the Student was in the mildly deficient range in the verbal and non-verbal intellectual score; in the overall domains the Student was moderately deficient. The evaluator noted that in comparison to the Kaufman Assessment Battery for Children, which was performed in 2004, the results of the RIAS were lower. On the Vineland Adaptive Behavior Scales, 2nd Edition, his adaptive functioning appeared higher than expected in comparison to his IQ of 51. In his speech and

language evaluation, the Student demonstrated weaknesses in receptive, expressive and pragmatic language skills which impact his participation and performance within the general curriculum. (P-28)

9. On or about March 18, 2008, the PPT met in order to plan the Student's 2008-2009 school year. The Present Levels of Educational Performance indicated that (a) the Student had "a difficult time with the comprehension of reading skills, particularly making connections, retelling stories, weak fluency skills"; (b) Formation and directionality of letters and numbers need improvement; and (c) the Student was unable to write legibly at a pace which enables him to keep up with class work. Modifications were provided to assist in overcoming the impact the Student's disability was having on his involvement and progress in the educational program and appropriate school activities. (Testimony of 5th Grade Special Education teacher, P-36)
10. The March 18, 2008 PPT established team consultation time with the Student's school providers twice a month. The Parent requested to attend these sessions. The request to attend these meetings was granted and the father was invited to the team meetings. The Parent did not attend the meetings. (P-36, Testimony of 5th Grade Special Education teacher)
11. The PPT established detailed goals and objectives to address the Student's reading deficit, math deficiencies in computation, reasoning skills and written language skills. The team considered assistive technology for the Student and agreed that he was successful with the word processor and created goals to increase his typing skills. Goals were also written to improve his receptive and expressive language skills and a social skills goal was developed to address his behavior with his peers. A BCBA was not involved in the Student's program. The Parent requested an independent educational evaluation. (P-36, Testimony of Father)
12. The speech and language pathologist drafted the Student's goal and objectives for the 2008-2009 school year. The Student was able to communicate and engage with adults more than with other Students. The speech and language goal was written to address the Student's deficits in receptive and expressive language and improve the Student's ability to comprehend class instructions and thereby increase his participation in the classroom. The Student's goal and objective was developed to also reduce the Student's impulsivity. (P-36, Testimony of 2008 Speech and Language Therapist)
13. The occupational therapist noted that the Student continued to progress with his typing skills and recommended that the Student use the portable word processor in the classroom. The occupational therapist recommended that the Student's word processor become his and travel with him during the next school year. (P-44)
14. The Parent had requested a 1-1 special education teacher; at a PPT held June 12, 2008 the team agreed to have the special education teacher work with the Student on a 1:1 basis for one hour each week in the resource room. The team also agreed to provide

the Student with speech and language services during the summer of 2008 to compensate for the time he lost during the 2007-2008 school year. The Parent complained about speech and language services not being made up in emails he sent to the Board. These emails relate to the 2007-2008 school year. (P-44, P-103A pgs. 10-11)

15. During the 2008-2009 school year the student received pull out services for writing and math skills. The Student was able to read but had a deficit in comprehending what he read. The Student was in a mainstream class room with non disabled peers with modifications. The Student had preferential seating, had a desk with a cushion for his feet and a bin so he could raise his feet. The Student was advised of any changes in his routine so he would not be caught unaware. The Student's para-professional was a college graduate and followed the directions of the special education teacher. She worked with the Student 1:1 with the intent of making him independent. In the classroom the Student received instructions from the special education teacher, the regular education teacher and the para-professional. At the end of his 5th grade school year, the Student was able to add single digits but handling money was difficult for him. (Testimony of 5th Grade Special Education Teacher)
16. When the Student misbehaved or was not focused, he was taken for a walk to assist him in regaining his composure. By the end of his 5th grade school year, the student wanted to remain in the classroom and did not want to take walks. (Testimony of 5th Grade Special Education Teacher)
17. On or about July 2008, the Student had a psychological evaluation performed by Dr. Erik Mayville. The Doctor performed the Wechsler Individual Achievement Test, 2nd Edition and found a highly noticeable difference between the Student's reading decoding and reading comprehension abilities. In mathematics and oral language the student performed in the extreme low range. In his written language the Student was only capable of completing one subset; he performed in the high average range in spelling. In sentence and paragraph subtests his scores were below the level required for a norm-based score of these subtests. In the Peabody Picture Vocabulary Test, 3rd Edition, the Student performed at a 5 year 2 month age equivalent. In the Vineland Adaptive Behavior Scales, 2nd Edition, the Parent and his special education teacher were the reporters. The Parent scored the Student as low in all domains while his special education teacher scored him as falling at moderate low adaptive levels. In the maladaptive behavior scale the Student's level was clinically significant. The evaluator gave the Parent and the special education teacher the Social Response Scale to complete. The results showed that the Student had social difficulties at home and in the school setting. The problems appeared less evident in the school environment. The Parent's rating demonstrated severe impairment in contrast to the teacher's mild to moderate ratings. (B-51a)
18. Dr. Mayville recognized that an educational program for the student is a complex task. The Doctor recommended the following: (1) the student's program should be overseen by a Board Certified Behavior Analyst (BCBA); (2) a 1-1 teaching assistant

to facilitate the implementation of academic, communicative and social interaction programs; (3) teaching staff should demonstrate competency in behavior analytic procedures; (4) behavior programs to fade away prompting; (5) a home based program; (6) carefully planned and sequenced language comprehension and expression programming; and (7) the areas of the Student's programming central to his social needs are to be sequentially addressed. (P-51a)

19. The Student's occupational therapy annual review for the 2008-2009 school year reports that the Student's typing speed on the word processor had more than doubled, from 13 wpm to 28-32 wpm, and his accuracy was from 87-92%. The Student needed verbal prompting to perseverate less on performance outcomes and decrease rate of speed. The para professional had been shown strategies to help improve his level of attention. The therapist recommended continued use of the word processor for his written work and to continue with occupational therapy consultative services. (P-53)
20. The Student's speech and language pathologist evaluated the Student's progress from January 2009 to March 2009. Services during this period concentrated on comprehension of basic language and answering questions from information he hears. The Student was working on 2 step direction. The Student had difficulty completing the initial steps of the directions but could be successful in the latter step. He demonstrated difficulty with open-ended questions but was successful in identifying ideas and facts that held his interest. (P-55)
21. The special education teacher met with the Parent in November and March 2008 to go over Student's progress. At the March 9, 2009 PPT, the Parent requested that the speech and language instruction be increased to 3 times a week for 1.5 hours instead of 2 times a week for one hour. The team did not increase the speech and language because the para-professional would be able to support speech and language throughout each day. (Testimony of 5th Grade Special Education Teacher)
22. The Student's progress report for the 2008-2009 school showed that in Goal 1, he had mastered one objective and had made satisfactory progress overall on the Goal. In his math Goal 2, the Student made less than satisfactory progress. In his written language, Goal 3, the student had mastered one objective and had made overall satisfactory progress in this Goal. In his social behavior Goal, the Student had made satisfactory progress. The Student attended a homework club to assist him with his class assignments and also his socialization. Goal 5, which addressed the Student's typing skills, showed that the Student had made satisfactory progress. Goal 6 addressed the Student's deficits in speech and language and showed that the Student had made satisfactory progress. Goal 7, which addressed the Student's social and behavioral deficits, showed that the Student made some progress but in one of the objectives he made unsatisfactory progress. (P-36, Testimony of 5th Grade Special Education Teacher)
23. The PPT met on March 19, 2009 to plan the Student's program for the 2009-2010 school year. The PPT agreed to schedule another PPT for April 27, 2009 to review

the independent evaluations of Dr. Mayville. The special education teacher did not attend the PPT. The parent requested a para-professional for the 2009-2010 school year. (P- 56, Testimony of 5th Grade Special Education Teacher)

24. The Student's IEP contained 8 Goals. Five of the eight Goals for the 2009-2010 school year were Goals that the Student had from his 2008-2009 school year. The first three academic Goals were the same as the previous school year. The Student had not mastered any of his Goals during the 2008-2009 school year. The majority of the objectives for the Goals were not repetitive from the previous school year. The Student had a total of 46 objectives in his 2009-2010 IEP of which 7 were repetitive. In Goal 1, the objectives were reduced from 12 to 9; objectives 4 and 7 were repetitive from the prior year but were not mastered. In Goal 2, the math goal, the objectives were reduced from 12 to 9 with objectives 6, 7 and 9 repetitive from the prior year during which time they had not been mastered. In Goal 3, the objectives were increased from 8 to 9. None of the objectives in Goal 3 were repetitive from the prior year. The Student's speech and language Goal, Goal 6, was the same Goal as the one utilized in the 2008-2009 school year. The three objectives of Goal 6 were different. The Student's social/behavioral Goal was the same Goal as the one utilized in the 2008-2009 school year. The social/behavioral objectives were different than the prior year. (B-36, B-56)
25. A PPT was held on April 27, 2009 to review Dr. Mayville's evaluations and Parent's request for evaluations. Dr. Mayville attended the PPT via telephone conference. The Parent requested occupational therapy evaluations, physical therapy and speech and language evaluations. These evaluations had just been completed and the Student had been making progress. The Parent did not request due process for the denial of the evaluations nor were independent education evaluations requested. (P-61, Testimony of Coordinator for the Board)
26. The Parent entered the Student into the choice lottery for the 2009-2010 school year. The Student received a slot at the Magnet School and on April 23, 2009, the Parent informed the Magnet School that the Student would be attending the school for the 2009-2010 school year. The Parent completed the Home Language Survey and signed the Magnet School Compact. As of then, the Student was officially enrolled at the Magnet School for the 2009-2010 school year. The Father indicated on the enrollment form that he wanted his son to be mainstreamed for special education. The special education teacher at the Magnet School, requested that the Parent set up a PPT meeting with the Home School staff so that she could attend in order to be able to facilitate the Student's transition to the Magnet School (Testimony of Father, Testimony of 5th Grade Special Education Teacher)
27. A Physical Therapy Observation Report was prepared after observations on May 5, and 15, 2009. The report noted that physical therapy services were discontinued in March 2004 because it was felt that continued physical therapy "was not likely to result in significant improvements in his gait pattern". The report notes that the Student's teacher was concerned about the Student's safety and his slow speed on the

stairs during a recent trip to the Board's middle school. She also noted his tendency to lean forward and she expressed concerns regarding his potential to trip and fall. The report recommended that the Student's need for physical therapy services should be reassessed when he entered a school that required him to climb stairs. The PT Observation Report was discussed at the PPT meeting on June 15, 2009, but the PPT took no action on the report and the reassessment recommended by the evaluation was not performed. (P-65, P-63, Testimony of Parent).

28. On or about May 26, 2009, the Student had a neuropsychological evaluation performed at Hartford Hospital. The evaluator was Dr. Joseph Kulas. The evaluation was provided by the Parent to the Magnet School. A copy was never shared with the Board until the due process hearing. The evaluation was never discussed at a PPT meeting. The evaluator performed the RIAS and found the Student in the moderately impaired range. The evaluator performed the Wider Range Achievement Test-4th Edition and the Student's reading decoding skills and spelling to dictation were within the average range. In math computation the student was in the borderline impaired range. (P-64)

29. Dr. Kulas made various recommendations for the Student:

- a. Improving frustration tolerance;
- b. Decreasing oppositional behaviors;
- c. Improving self-help skills;
- d. That the Student be placed in as small a class as possible;
- e. That time pressure be eliminated;
- f. That visual and auditory distractions be minimized;
- g. Preferential seating;
- h. Provide frequent short breaks;
- i. Warn the Student about changes in his routine ahead of time;
- j. Provide a calming corner not as a punishment but when he becomes overly frustrated or is near to having a tantrum.

(P-64)

30. A PPT was held on June 15, 2009 at the request of the Parent, in order to conduct a program review because of the Student's proposed attendance at the Magnet School. The PPT was attended by 2 special education teachers from the Magnet School. The Magnet School personnel were there to observe. The parent informed the PPT that the Student was receiving outside services of physical and occupational therapy. The special education teacher from the Magnet School informed the PPT that they could provide the Student's IEP but needed to check. They would inform the Parent by July. The Board had planned to enroll the Student in their middle school. (P-65, Testimony of Coordinator for the Board, Testimony of Special Education Teacher from Magnet School (SETMS))

31. On July 20, 2009, the Parent met with Board personnel and signed an agreement to change the Student's IEP without convening a PPT. The Parent refused to send the Student to the Board's middle school and instead decided to place the Student at the

Magnet School. The agreement also required that the student have a 1:1 para-professional, a behavioral consultant for a minimum of 5 hours each week, and increased speech and language services to 1 ½ hours each week. The Parent was represented by an advocate. The Magnet School staff was not invited nor did they participate in the PPT. (B-68, Testimony of Coordinator for the Board, Testimony of Father)

32. The Magnet School is one of twelve regional magnet schools operated by the Magnet School Board of Education pursuant to a Stipulated Agreement between the State of Connecticut and the plaintiffs in the *Sheff v. O'Neil* case. The overall purpose of magnet schools is to allow students to be educated in an ethnically and racially diverse educational setting. Approximately 50% of the seats at the Magnet School are reserved for suburban students. The other 50% are for Magnet School Board of Education students. Parents who wish their students to attend the Magnet School (and any other inter-district magnet school) must place their names in a state-run lottery. Students are chosen at random. The Parent must actively accept the seat that is offered. The Magnet School does not have the right to refuse a seat to any student who has been accepted through the lottery system, even based on the student's special education needs. The Magnet School does not have a BCBA on staff. The Magnet School closes for summer vacation and staff is not available. The special education teacher had recommended a meeting the week before the beginning of classes. (Testimony of Magnet School Principal (MSP), Testimony of SETMS)
33. At the beginning of the 2009-2010 school year, the staff of the Magnet School attempted to set up a meeting with the Parent, but were having difficulty receiving a response from the father. (P-104 pgs. 70-94, Testimony of SETMS).
34. The Magnet School maintained a communication note book for the Student; entries were made on a daily basis with notes about the Student's homework and any issues he might have had in school. The communications book showed that the Student was having problems with the homework that was assigned. The Parent utilized the note book to communicate with the Board. The Board and the Magnet School communicated by email extensively with the Parent. (P-106, P-107, P-108, P-109, P-110, P-103, P-103A, P-104 P-105, Testimony of Father)
35. The student starts his school day at the Magnet school in skills class. The skills class had been recommended by the special education teacher rather than an elective. The Student then checks his homework, does math fluency and fills an agenda. The para-professional is with the Student at all times. The student does not perform at his grade level. The Student is provided with modifications. The modifications in his program are (1) in the amount of homework the Student gets, (2) use of a graphic scheduler, (3) modified grades based on IEP, (4) preferential seating, (5) multisensory approach for learning, (6) highlight key words, (7) modified worksheets and (8) use of manipulatives. (P-104a pg 11, P-68, Testimony of SETMS).

36. The Student attended physical therapy sessions at the Connecticut Children's Medical Center (CENTER). The Student was discharged from the Center on August 14, 2009 because the Student failed to show for physical therapy, occupational therapy and speech and language therapeutic sessions. The Center attempted to contact the Parent by mail and telephone but there was no response. On or about April 2, 2010, the Student started to again receive again occupational therapy and speech and language therapy sessions in the Center. (P-113, P-116)
37. The Student was being treated at Saint Francis Behavioral Health Group (SFBHG) since March 5, 2009. SFBHG was addressing the concerns of the Father in the Student's safety, inappropriate behavior and lack of social skills. (B-121)
38. During the 2009-2010 school year the Parent raised his concern about the Student soiling his pants. The Parent would send addition clothes in the Student's locker. There was no goal or object to address this issue. (Testimony of SETMS)
39. During the 2009-2010 school year, The Student required many hours of direct instruction; in order to provide him with more direct instructions the Student's program needed to be adjusted. At the beginning of the Student's attendance at the Magnet School there was no problem with his behavior. Beginning in January 2010, the Student had been removed from class because of disruptive behavior that impeded his learning and also affected his peers. The Student was calling out and giggling out loud. In his "tempus legend" part of his class, the Student's passive behavior in not responding and not reading was affecting his grade. There was a decline in the Student's production during the 2009-2010 school year. The Student was being removed from class to be refocused. (Testimony of SETMS, P-105 pg 21, P-87)
40. The speech and language pathologist reported that the Student was successful in his goals from October 2009 to January 2010. The progress report for his communication goals showed that the Student was making satisfactory progress in the November 2009 progress report but in his February progress report his progress was unsatisfactory. The Student's behavior was affecting his progress. A Functional Communication Profile-Revised was completed in order to determine the Student's areas of need. The report demonstrated that the Student required sensory/motor services, had a poor attention span, was easily distractible, impulsive and needed prompting to cooperate. He had poor receptive and expressive language skills, poor conversational skills and difficulty with abstract, figurative and non-literal language. The Student's articulation was adequate for communication purposes. The pathologist continued the same goals for the 2010-2011 school year because of the Student's behavior. (Testimony of Magnet School S/L Pathologist, MS 4, P-77a)
41. The father raised the concern that there was no Behavior Plan for the Student. A BCBA was not retained by the Board or by the Magnet school to manage the Student's behavior. The Student's SETMS wrote a behavior plan in May 2010. The Behavior Plan was not discussed at the PPT nor did it receive the approval of the

Parent. A Functional Behavior Assessment was not performed before the Behavior Plan was written. (Testimony of Parent, Testimony of SETMS)

42. During the 2009-2010 school year, the Student was seen by the Magnet School social worker in a small group. The Student's range of interests is narrow and he tends to perseverate on certain things. In the latter part of the 2009-2010 school year the Student was more distracted, had some unusual behaviors and produced less class work. The Parent was concerned that the academic program was too strong for the Student. The Parent was advised that the broad exposure was good for the Student and he was growing socially and academically. By the end of the school year the program was not working for the Student. The Student's social/behavioral goal was implemented and assessed but progress was not noted. (Testimony of Social Worker, MS-3 pg 1, P-56 pg 24)
43. A PPT was held on February 25, 2010 to review the testing that was done by the Magnet School. The IEP contained eight goals and provided for continuation of a 1:1 para-professional, occupational therapy consultation .25 hours per month, 1.5 hours per week of speech and language therapy, and .5 hours per week of counseling. The Parent requested an independent evaluation (I.E.E.) of the Student which was denied by the PPT. The evaluation was denied because the Student was progressing and an I.E.E. had been performed in June 2008. (P-77)
44. The February 25, 2010 PPT contained the Goals and Objectives for the Student's 2010-2011 school year. In Goal 1 the Student was making less than satisfactory progress. In Goal 2 the nine objectives demonstrate either "OG" (ongoing), or "O" (making progress). In Goal 4, 3 of the objectives are rated as "OG". In Goal 5 in the latter part of the school year, the Student's progress went from satisfactory to unsatisfactory; progress on Goal 6 was not reported. In the IEP of 2009-2010 none of the objectives were mastered and the Student was only making satisfactory progress on 3 objectives.(P-76, P-77A)
45. In the Goals and objectives for the 2010-2011 school year, Goal 1 contained eight objectives all of which were repetitive of the prior school year; in addition, for objective 1 of Goal 1b and objective 1 of Goal 1c this is the 3rd year they are included in the Student's IEP. Goal 2 contained seven objectives all of which were repetitive of the prior year; for objectives 1, 2 and 3 of Goal 2b and objective 1 of Goal 2c, this is the 3rd year in the Student's IEP. Goal 3 was reduced from 9 objectives to 3 with objectives 2 and 3 having been in the 2009-2010 IEP. Goal 4 contained 6 objectives all of which were repetitive of the prior year with objectives 1 and 2 of Goal 4a having been in the Student's 2008-2009 IEP. Goal 6 is the same as Goal 5 of the 2009-2010 IEP and the objectives are repetitive. Goal 7 is the same as Goal 6 in the 2009-2010 IEP and the objectives are repetitive with an unclear percentage for mastering. (In objective 1 it states 64% but in the evaluation column it can be mastered with 80%; objective 2 states 54% but in the evaluation column it can be mastered with 80%). Goal 8 is the same as the IEPs in the two prior years but the objectives are different. (P-77, P-56, P-36)

46. The progress reported for the period February 25, 2010 through June 2010 of the 2009-2010 IEP showed that of the 43 Goals and objectives, satisfactory progress (S or S+) was reported on 21 objectives in April 2010 and unsatisfactory progress was reported on 6 objectives and 1 Goal. Progress was assessed as "O" on Goal 2c, objective 1 ("O" defined as "making progress-will continue to require reinforcement") (P-84, p. 6); Goal 4a, objective 3 ("O" defined as "ongoing"); and Goal 5, objective 3 ("O" defined as "making progress"). In June 2010 no progress ("N") was reported on 5 objectives. (P-77, P-84; MS 3 & MS 5)
47. An Occupational Therapy Assessment was performed on March 29, 2010, by the CENTER. They found that the Student presented with significantly below average fine motor skills overall and sensory processing concerns affecting self-care independence. He demonstrated below average bilateral grip strength. The Student needed direct involvement of an OT to work on his severe deficits. The Student demonstrated poor self-care independence for his age, particularly in the areas of self-dressing and grooming/hygiene. The CENTER's plan included having the Student write 4 sentences with good legibility and that he complete toilet hygiene with supervision and verbal cues. (Testimony of CCMC evaluator, P-116)
48. On or about September 13, 2010, Dr. Erik Mayville completed a Psycho-educational evaluation of the Student. The Parent had requested an independent evaluation of the Student's educational and treatment needs. The Doctor reviewed the behavior Plan prepared by the SETMS and he noted that data collection procedures were not described, that procedures for the Student to win points back were not described, and that strategies were listed in vague terms. (Testimony Dr. Mayville)
49. Dr. Mayville performed the Nisonger Child Behavior Rating Form and had it filled out by the special education teacher and the Parent. Both raters found problems with the Student's ability to concentrate, stubbornness, distractibility, overly sensitive, repeats words and sounds over again and is overactive. The Doctor was of the opinion that these issues needed to be addressed in a Behavior Management Plan (BMP). (Testimony of Dr. Mayville, P-96)
50. The Student's adaptive behavior was evaluated by Dr. Mayville using the Vineland Adaptive Behavior Scales, 2nd Edition. The assessment looks at communication, daily living and social skills in the home and community environment. In all 3 areas the student scored low; his adaptive Behavior Composite score was 44. He scored higher than less than 1% of similarly aged peers. In his daily living skills he showed weaknesses in informing people when he was soiled, putting things away, brushing his teeth independently, holding eating utensils correctly and a lack of caution. In his socialization he demonstrated weaknesses in showing affection to familiar people, playing with others, bullying other kids, and not sharing toys or possessions. The evaluator found that his current adaptive function supported a diagnosis of Mild Mental Retardation. During his two observations the evaluator did not see the Student engaged, he had problems being focused and there was a lack of peer interaction. In

his Latin class, the evaluator saw that the student had problems with English and keeping on task. In his computer class the Student had to fill out a general survey and this was problematic for the Student. (Testimony of Dr. Mayville, P-96)

CONCLUSIONS OF LAW:

1. The New Britain and Hartford Boards of Education have the burden of proving the appropriateness of the child's program or placement, which burden must be met by a preponderance of the evidence. Conn. Reg. § 10-76h-14(a); *P. ex rel. Mr. P. v. Newington Bd. of Educ.*, 512 F.Supp.2d 89, 99 (D.Conn. 2007).
2. It is undisputed that the Student is entitled to receive special education and related services to obtain a free and appropriate public education (FAPE). Under the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1401 et. seq., FAPE is defined as special education and related services that are provided at public expense, meet the standards of the state educational agency, include an appropriate school education, and are provided in conformity with the IEP. 20 U.S.C. §1401(8).
3. The proposed program or placement must be reviewed in light of the information available to the PPT at the time the IEPs were developed. *B. L. v. New Britain Bd. of Educ.*, 394 F. Supp. 2d 522, 537 (D. Conn. 2005).
4. There is minimal express statutory authority concerning special education students enrolled in magnet schools. Section 10-264i(h) C.G.S. provides that: In the case of a student identified as requiring special education the school district in which the student resides shall: (1) Hold the planning and placement team meeting for such student and shall invite representatives from the interdistrict magnet school to participate in such meeting; and (2) pay the interdistrict magnet school an amount equal to the difference between the reasonable cost of educating such student and the sum of the amount received by the interdistrict magnet school for such student pursuant to subsection (c) of this section and amounts received from other state, federal, local or private sources calculated on a per pupil basis. If a student requiring special education attends an interdistrict magnet school on a full-time basis, such interdistrict magnet school shall be responsible for ensuring that such student receives the services mandated by the student's individualized education program, whether such services are provided by the interdistrict magnet school or by the school district in which the student resides.
5. The Connecticut Commissioner of Education's November 1, 2002 Circular Letter C-17, sets forth a variety of requirements for interdistrict magnet schools, including for Special Education: All students are eligible to attend interdistrict magnet schools and the expectation is that all students will be included, regardless of any disability. Every effort must be made to accommodate and program for

- special education students. Only in the rare event that a student could not achieve satisfactorily even with the use of supplementary aids and services in the education environment could it be found that placement in an interdistrict magnet school to be inappropriate.
6. Neither the statute nor Circular Letter-17 needs to explain the role of the PPT. IDEIA clearly defines the role of the PPT. Neither the statute nor the Circular letter diminish or reduce the responsibility of the authority of the planning and placement team. Regulations of Connecticut State Agencies (RCSA) §10-76a(1)(15) defines, "Planning and placement team" means a group of certified or licensed professionals, who represent each of the teaching, administrative and pupil personnel staffs and who participate *equally* in the decision making process to determine the specific educational needs of the child and develop an individualized educational program for the child. These shall be *persons knowledgeable in the areas necessary to determine and review the appropriate educational program* for an exceptional child. (*Emphasis added*). The Magnet School and the Board try to diminish the responsibility of their staff at the PPT to only, "for implementing the IEP once it is adopted". (Magnet School Post Trial Brief p. 10) or " [the]only responsibilities [of the Board] were to convene PPT meetings and invite representatives from [the Magnet School] to such meetings and to pay [the Magnet School] the appropriate amount due it", (Board's Post Trial Brief p. 10). IDEIA clearly gives more authority to the PPT members. R.C.S.A. § 1076a(1)(5). As equal members either the Board or the Magnet School could have objected to the Student's program or placement. There were no statements or objections noted on the recommendations or summary page of the IEP that either the Board or the Magnet School were in disagreement with the Student's goals and objectives, related services or the Student's program or placement at the Magnet School during the 2009-2010 or 2010-2011 school years.
 7. Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192. The *Rowley* court determined that the IDEA requires school districts to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Supreme Court found Congress' intent in passing the IDEA was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.
 8. However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein*

v. *Greater Clark County School Corporation*, 95 F.Supp.2d 961, 973 (S.D. Ind. 2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

9. Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have "compromised the pupil's right to an appropriate education"; (2) when the district's conduct has "seriously hampered the parents' opportunity to participate in the formulation process"; or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D.*, 88 F.3d at 556. Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard and "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Rowley*, 458 U.S. at 200; *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985).

10. The parent alleges amongst other procedural violations that the absence of the special education teacher during the March 19, 2009 PPT makes the IEP inadequate. In *A.H. on behalf of J.H. v. Dept. of Educ. of the City of New York*, 110 LRP 47104(2nd Cir. 2010), the court found that the absence of the special education teacher, "did not render the IEP inadequate. See *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381-82 (2d Cir. 2003) (holding that not every procedural error in development of IEP renders that plan legally inadequate). Relief is warranted only if we conclude based on our independent review of the record, that the error denied J.H. a free appropriate public education. See *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 69 (2d Cir. 2000). IDEA instructs that such a conclusion is warranted only where the procedural deficiencies (1) "impeded the child's right to a free appropriate public education," (2) "significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education," or (3) "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). None of these criteria is met here. The Special Education teacher had met prior to the meeting with the team and had written the goals that were to be presented and decided at the PPT. School staff who worked with the Student was present. The school psychologist was present as were the regular education teacher, the para-professional who worked with the Student and the OT and speech and language pathologist. The Parent was also present and did not object to the special education teacher not being present and did not object to a follow up PPT to review Dr. Mayville's evaluation.

11. At the February 25, 2010 the Board denied the Parent's request for an independent educational evaluation. IDEIA is very clear: "Parents have the right to an independent evaluation at public expense if the parents disagree with an evaluation obtained by the board of education. However, the board of education may initiate a due process hearing conducted pursuant to Section 10-76h-1 of these regulations to show that its evaluation is appropriate. R.C.S.A. §10-76d-9(c)(2). The PPT did not follow this procedure. The Social Worker testified that he did not mark the progress that the Student had made during the 2009-2010 school year in his social/behavior goal. The Magnet School failed to assess progress on this goal thereby impeding the Parent from making an informed decision about his son's program and placement.

12. The Boards interfered with the Parent's right to fully participate in PPT decisions by failing to call a PPT meeting when it became clear to the Magnet School that the services added by the July 20, 2009 Amendment to the IEP would not be implemented. Given the level of maladaptive behavior, the proper course was for the Magnet School to notify the Board of the need for a PPT meeting and for the Board to convene a PPT so that the requirement that a skilled behavioral specialist be used in conjunction with the Student's program as was added by the July 20, 2009 Amendment, but not implemented at the Magnet School. The Magnet School and the Board were responsible for this significant violation because although the requirement was not implemented by the Magnet School staff, both Boards failed to request a PPT meeting to discuss this deficiency and target the Student's unique needs. Neither Board failed to consider and implement an FBA and a behavior plan even though the Student's behavior clearly worsened during the 2009-2010 school year and interfered with his education. The Boards never called a PPT to discuss developing a behavior plan until the PPT meeting on May 21, 2010, four months after the teaching staff concluded that the Student's behavior was impeding his education. When a behavior plan was finally created, it was inadequate. The Behavior Management Plan created by the SETMS was inadequate because it failed to obtain any parental input or, at a minimum, provide for a review of the Plan by the Parent to ensure that all the Student's behaviors were being addressed even though the Parent was given certain obligations in the Behavior Management Plan. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].) The Student's lack of progress and the downward spiral in his behavior resulted in a denial of FAPE to the Student during the 2009-2010 school year. This was clearly noted by the staff during the 2009-2010 school year. (Findings of Fact 35, 39, 42, 44 and 46). The 2009-2010 school year program provided by the Magnet School and the Board was not appropriate and denied the Student FAPE.

13. The Magnet School and the Board violated the Parent's IDEIA procedural rights relating to the 2010-2011 school year in several respects. They failed to have the PPT determine whether the Magnet School had an appropriate program for the Student. The Student's lack of educational progress warrants a look at whether the placement at the Magnet School is appropriate. The Magnet School argues that they have no authority to remove the Student from the Magnet school. The Magnet School Principal might be correct except that as a member of the Student's PPT, the Magnet School as an "equal" member of the PPT is charged with providing an appropriate program for the Student. The Commissioner of Education in Circular Letter 17 understood that not all special education students would achieve satisfactory progress in the magnet schools. Wisely the Circular letter states, "Only in the rare event that a student could not achieve satisfactorily even with the use of supplementary aids and services in the education environment could it be found that placement in an interdistrict magnet school to be inappropriate." Clearly the "rare event" has arrived for the Student and both the Board and the Magnet School failed to recognize the Student's downward spiral and have, for the 2010-2011 school year, continued the placement of the Student at the Magnet School. The Parent does not escape from the blame; he could have withdrawn the Student from the Magnet school. But the Board and the Magnet School did not have to continue a placement that is not providing the Student with minimal benefit. As the Parent has done, they could have filed for due process and challenged the requested placement of the Student as not providing FAPE in the LRE. Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, the IDEA "does not require a school district to provide a child with the specific educational placement that her parents prefer." *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *T.F. v. Special School District*, 449 F.3d 816, 821 (8th Cir. 2006). The issue is whether the school district's placement is appropriate, "not whether another placement would also be appropriate, or even better for that matter." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997). The program offered by the Magnet School and the Board for the 2010-2011 school year is not appropriate and will not provide the Student with FAPE in the LRE.
14. The Parent's requested placement at Connecticut Center for Child Development (CCCD) is not appropriate as the Parent has not provided evidence of a program at CCCD would provide the Student with FAPE in the LRE.
15. The program provided by the Board for the 2008-2009 school year was appropriate and provided the Student with FAPE in the LRE. The evidence presented showed that the Student made progress during that year and any procedural violations did not rise to the level of a denial of FAPE. (Findings of Facts # 15, 16, 19, 20 & 22)
16. There was insufficient evidence to show that the Student would benefit from an in-home program coordinated by a BCBA.

17. In 2009 an evaluator had recommended that the Student should have a physical therapy evaluation if he were to go to a school with stair cases. This recommendation was not followed. (Findings of Facts # 27)
18. The Student was not benefiting from the occupational therapy consults and needs an evaluation. (Findings of Facts # 47)
19. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL DECISION AND ORDER:

1. The program provided by the Board for the 2008-2009 school year was appropriate and provided the Student with FAPE in the LRE.
2. The program provided by the Board and the Magnet School for the 2009-2010 school year was not appropriate and did not provide the Student with FAPE in the LRE.
3. The program offered by the Board and the Magnet School for the 2010-2011 school year was not appropriate and would not provide the student with FAPE in the LRE.
4. The program at CCCD is not appropriate.
5. There was insufficient evidence to show that the Student would benefit from an in-home program coordinated by a BCBA.
6. The Board shall provide independent occupational therapy and physical therapy evaluations of the Student. These evaluations shall be done by Connecticut Children Medical Center staff and their recommendations incorporated in the Student's IEP.
7. The Board shall hold a planning and placement team meeting within two weeks of the mailing of the decision.
 - a. The Board shall invite Dr. Erik Mayville to the PPT and Dr. Mayville shall consult with the PPT in developing and implementing an appropriate special education program for the Student. If Dr. Mayville is not available the Institute for Professional Practice will be an adequate replacement.
 - b. The program will be at the Board's Middle School.
 - c. The program shall include a BCBA that shall work with the Student 5 hours per week. The BCBA shall do a functional behavior assessment of the Student and write a behavior management plan for the Student.

8. The Student is entitled to 90 school days of compensatory education in the form of after school speech and language therapy with a private speech and language pathologist chosen by the Board and the Magnet School for 2 hours each school day or 180 hours. The compensatory education shall be provided according to a schedule developed by the speech and language pathologist in consultation with the Parent. The compensatory education shall be provided during the 2011-2012 school year. The cost shall be divided equally by the Board and the Magnet School. The Board and the Magnet School shall provide transportation to and from the speech and language pathologist they have chosen. This compensatory education is for the denial of FAPE during the 2009-2010 school year for which both the Board and the Magnet School were responsible. If the Board and the Magnet school cannot agree on a pathologist, the Parent shall choose the pathologist and the Board and the Magnet School shall pay for transportation up to a 40 mile round trip limit.
9. The Board shall reimburse the Parent only for the IEE evaluation performed by Dr. Mayville on or about September 13, 2010 to the extent that the Parent incurred out of pocket expenses. The Parent shall provide the Board with a copy of the receipt or the cancelled check for his out of pocket payment.
10. The Board does not have to reimburse the Parent for the therapeutic services provided by the Parent as there was no evidence of any cost incurred.