

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich of Education

Appearing on behalf of the Parents: Attorney Meredith Braxton
Meredith C. Braxton, Esq., LLC
280 Railroad Ave., Suite 205
Greenwich, CT 06830

Appearing on behalf of the Board: Attorney Abby Wadler
Town of Greenwich
101 Field Point Road
Greenwich, CT 06830

Appearing before: Justino Rosado, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board violate child find by not identifying the Student as requiring special education and related services as defined in the Individuals with Disabilities Education Improvement Act (IDEA)? If yes;
2. Should the Parents be reimbursed for cost incurred of the unilateral placement and transportation of the Student from May 20, 2013 to August 8, 2013 at Second Nature Therapeutic Wilderness Program?
3. Should the Parents be reimbursed for cost incurred of the unilateral placement at John Dewey Academy in Great Barrington, Massachusetts (JDA) from August 9, 2013 to September 3, 2013?
4. Is the program offered by the Board for the 2013-2014 school year appropriate and does it provide the Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)? If not;
5. Is the unilateral placement of the Student at JDA appropriate and does it provide the Student with a meaningful education?
6. Should the Parents be reimbursed for cost incurred of the unilateral placement of the Student at JDA from October 15, 2013 to the end of the 2013-2014 school year?
7. Should the Parents be reimbursed for the cost of the evaluation performed by Dr. Quinten Harvey?
8. Did Board commit procedural violations by not allowing the Parents to be meaningful participants of the planning and placement team (PPT)?
9. Is the Student entitled to compensatory education for the Board's denial of FAPE?

JURISDICTION:

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 Administration Procedures Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

SUMMARY:

The Student has been identified with Emotional Disturbance and is entitled to receive 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 et seq.

At a PPT meeting, the Parents stated that the program offered the Student for the 2013-2014 school year was not appropriate and requested reimbursement for cost incurred for the unilateral placement at JDA. The Board denied the Parents' request and the Parents requested due process.

PROCEDURAL HISTORY:

On December 5, 2013, the Board received notice of the Parents' request for due process. On December 12, 2013, the request for due process was amended by agreement of the parties.

An impartial hearing officer was appointed on December 5, 2013 (Hearing Officer's Exhibit¹ No. 1) and a pre-hearing conference was held on December 12, 2013. On January 2, 2014, the parties attended a mediation session but were not able to resolve the matter. Hearing dates of January 27, 31, and February 4, 2014 were chosen by the parties. Additional hearing dates of February 19, March 5 and March 10, 2014 were later chosen by the parties.

The Board presented Exhibits 1 thru 44 which are full exhibits of the hearing. The Parents presented Exhibits 1 through 23 and were accepted as full exhibits of the hearing. The Parents presented seven witnesses and the Board presented four witnesses. The parties agreed to allow three of the Parents' witnesses to testify by telephone. The telephonic testimony was permitted because the witnesses resided in another state and requiring them to appear in person would have created an economic hardship for the Parents. The parties were provided with the procedure for the telephonic testimony (H.O. 7). Affidavits were submitted as required in the procedures for telephonic testimony. (H.O. 4, 5 and 6). A rebuttal witness was called by the Parents' attorney to rebut specific testimony from three of the Board's witnesses. A briefing schedule was requested by the parties and simultaneous briefs were timely filed.

This Final Decision and Order set 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, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. *SAS Institute Inc. v. S. & H. Computer*

¹ Hereafter Hearing Officer's Exhibits will be noted as "H.O." followed by the number of the exhibit.

Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and *Bonnie Ann F.v. Callallen Independent School Board*, 835 F.Supp. 340 (S.D.Tex. 1993).

The date for the mailing of the Final Decision and Order was extended to accommodate the hearing date and the briefing schedule. The date for mailing the Final Decision and Order is June 10, 2014.

FINDINGS OF FACT:

1. Prior to a finding of eligibility, the Student was receiving services under Section 504 of the Rehabilitation Act of 1973. On September 3, 2013, the Student was diagnosed with Emotional Disturbance and found eligible to receive special education and related services as defined in the Individuals with Disabilities Education Improvement Act ("IDEA") 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a (Board's Exhibit² No. 3, Testimony of House Administrator).
2. The Student was doing well academically in grammar and middle school and was placed in an Advanced Learning Program in the eighth grade. Upon entering high school his grades began to slip and he became overly intrigued and involved with computers. The Student's attendance began deteriorating during the second semester of his ninth grade year. The Parents provided excuses for all the Student's absences during the ninth grade. (Testimony of Mother, B.-19)
3. The Student's grade point average (GPA) dropped from a 3.51 in the ninth grade to 2.9 in the tenth grade. (Testimony of School Counselor, B-19)
4. On January 4, 2012, the Student's pediatrician advised the school that the Student had contracted mononucleosis but was able to return to school. The Student had been absent 6 days prior to the receipt of the memo allowing him to return to school. On January 10, 2012, the Student's doctor sent a memo stating that the Student's infection might cause excessive absence and he would attend school as tolerated. Even though the Student was cleared to return to school, he did not. On February 20, 2012, his pediatrician sent another note stating that Student may return to school as tolerated. (Testimony of Mother, B-4)
5. From January 6, 2012 to May 25, 2012 of the 2011-2012 school year, the Student was absent 34 times. Even though the Parents called in to excuse the Student's absences, the absences were noted as House Administrator's Excuse because of the doctor's note and to avoid having him lose credit for his classes. (Testimony of School Counselor, B-19)
6. During the Student's 2012-2013 school year, the Student was absent 40 times because of illness. The absences were all excused by the Parents. The counselor noted that the absences were excessive but there was accountability with reason for the absences. Since the absences were excused the counselor did not check to see if they were caused by depression. The counselor was satisfied with the Student's excuses for absenteeism. In

² Hereafter Board's Exhibits will be noted as "B" followed by the number of the exhibit.

February 2013, at the end of the second quarter of the 2012-2013 school year, the counselor was concerned and reached out to the Parents. (Testimony of School Counselor, B-19)

7. During the 2012-2013 school year, the Student, while at home, was acting isolated, withdrawing from family and friends, and not eating or sleeping well. The Parent felt that his infatuation with the computer was starting to confuse the Student. His school grades were crashing and he was receiving incompletes. The Parent took the Student to a psychologist recommended by his pediatrician. (Testimony of Mother, B-5 pg. 7)
8. The Parent informed the school counselor that they had met with a psychologist who felt the Student was suffering from depression. The Parents requested a meeting with the Student's school counselor. In February 2013, the school counselor met with the Parents but did not refer the Student to special education because he did not feel it was necessary: there was no diagnosis and he did not feel it would serve his needs. The school counselor recommended two therapists for the Student's emotional problems and possible depression. (Testimony of Mother, P-5 pg. 9)
9. The Student was evaluated by his psychiatrist on February 25, 2013. On February 27, 2013, the Student's psychiatrist sent a letter to the school stating the Student was diagnosed with major depressive disorder and had been symptomatic for several months. The doctor recommended homebound instructions for the month of March. (B-22a)
10. In the beginning of March, the Student was scheduled to receive 10 hours per week of homebound instruction. At the onset the Student was doing well in homebound but toward the middle of the month of homebound instruction, the Student became more involved with the computer and the Parents were not able to control his use of the computer. The Student was not attending all the sessions of homebound instruction. The Parents did not reach out to the school; they were reaching out to the Student's therapist and psychiatrist. (B-25, P-5 pg.11, Testimony of Mother)
11. On February 27, 2013, the school received a letter from the Student's psychiatrist stating that the Student's symptoms were under better control and requested 504 accommodations. On March 26, 2013, the Parent notified the Student's counselor and requested a child study team meeting/planning and placement meeting to address the need for a 504 accommodation plan. (Testimony of Mother, B-5 pg. 15, P-23)
12. The Student had issues with his Parents and was becoming addicted to the computer. The Parents advised the school social worker that the Student was depressed but they had been calling him out sick and had not advised the school that he was depressed. The Student's psychiatrist recommended reduced class time. (Testimony of Social Worker, P-9)
13. On April 1, 2013, a Section 504 Multidisciplinary team met to discuss the Student's eligibility under Section 504 of the Rehabilitation Act of 1973. The Student was found eligible under the disability of Depression. The accommodations to be provided to the

Student were: excused from the school attendance policy, extended time for all tests, limited makeup work to essential assignments only, and modified tests and assignments as needed. (B-15)

14. The multidisciplinary 504 team used information obtained from Parents, doctor, teachers and staff to decide on the Student's eligibility. There were no evaluations performed to substantiate the Student's eligibility, only a letter from the Student's psychiatrist. The team was aware of the Student's attendance and that he needed to return to school. (Testimony of 504 Coordinator, B-15)
15. The Student attended school for ten days after the 504 plan was developed. On April 19, 2013, the Student was voluntarily admitted to a psychiatric hospital. The Student had informed a friend on the internet that he was contemplating suicide. The friend called the police. The Student told the police that the suicidal ideations were due to his poor school performance. (Testimony of Parent)
16. On April 23, 2013, the Student was discharged from the psychiatric hospital. The treating psychiatrist stated that the Student could return to school. The student was to participate in individual therapy and be medically managed by his psychiatrist. The discharging physician recommended a decreased academic workload and support with his academic assignments. (B-28)
17. On April 26, 2013, a PPT was convened to plan the Student's return to the school. The Parents requested one-on-one tutoring to support the Student. The team rejected this request because it was not recommended on the Student's discharge summary and the team did not have information to support the request. The team advised the Parent that if a medical note was provided a 504 meeting would be convened to consider a one-on-one tutor. The team found that the Student did not require special education and related services. The team needed more information on his disability but no evaluations were requested at this time. The Parents did not request nor did the Board feel evaluations were necessary. The Student's issues were being met and depression does not require an evaluation. (B-1, Testimony of House Administrator)
18. After the April 26, 2013 PPT meeting, the Student did not return to school. The Student's psychiatrist requested home bound instructions with an individualized tutor for pre-calculus. This was to continue until June 2013 to help the Student catch up on work he had missed. (Testimony of House Administrator, B-29, B-30)
19. The Student stopped seeing his psychiatrist on May 20, 2013. On the advice of the psychiatrist, the Parents unilaterally placed the Student in Second Nature, a wilderness program in Georgia. The Parents decided to place the Student in Second Nature because of the Student's suicidal ideations, not attending school, poor grades and his computer obsession. The Parents did not give 10 days' notice to the Board of the unilateral placement. (Testimony of Mother, B-33)

20. The purpose of Second Nature is to make the Student more responsible. The Master Treatment Plan establishes goals and objectives to address the Student's therapeutic needs. The Student demonstrated a feeling of inadequacy because his mother managed him and he could not function without her. In one month, the Student realized that he contributed to the problems and learned cognitive strategies to help him deal with his issues. (Testimony of Wilderness Therapist, B-39)
21. The discharge summary from Second Nature recommended a residential or therapeutic placement. The discharging clinician recommended that the Student go directly into residential placement and not go home. The Student's diagnosis at Second Nature was based on information obtained from the Parents and Student. (Testimony of Wilderness Therapist)
22. At Second Nature the Student was doing independent work for academics. There are no licensed teachers at Second Nature. The discharging clinician recommended a small structured setting with clear rules/boundaries and immediate natural consequences. School accommodations and a more individualized instruction plan will be important for his academic success. Individualized, group, and family therapy sessions were recommended. (Testimony of Wilderness Therapist, P-21)
23. The Student's residential placement at John Dewey Academy (JDA) did not accept the academic credits the Student obtained at Second Nature. Biology credits are given at Second Nature for living outdoors and English credits for maintaining a journal. The Student continued to be a junior based on his credits. (Testimony of Director of JDA)
24. On May 28, 2013, the Board had a PPT meeting to address the unilateral placement of the Student at Second Nature. The PPT agreed to evaluate the Student and the parent signed consent for evaluations. The Student was not locally available for evaluation. (B-2)
25. The Parents agreed to have the school evaluate the Student at the wilderness program. The Board did not respond to the Parent's emails concerning the agreed upon evaluations. The Parents obtained their own evaluator to evaluate the Student. (Testimony of Mother, P-13)
26. The Student was evaluated at Second Nature by Dr. Quinten Harvey. The Student was diagnosed with Major Depressive Disorder, Recurrent Moderate, Anxiety Disorder, Not Otherwise Specified, Parent-Child Relationship Problems and Identity Problems. The Student's depression, anxiety and school refusal escalate and have an adverse effect on his education in that they preclude him from accessing academic curriculum within his school setting. (Testimony of Dr. Quinten Harvey, B-33)
27. The evaluator recommended that individualized academic goals be identified to assist the Student in recapturing his motivation to achieve academically, and therapeutic goals to address the emotional and behavioral issues. The Student has issues with trust and self-esteem and requires therapy to treat these issues. The Student did not mention any difficulty with his teachers in the high school. The Parent-Child Relationship is a cause

- of the Student's depression, anxiety and school refusal. It has escalated to profound levels and has had an adverse effect on his education. Weekly group therapy would not be adequate for the Student. (Testimony of Dr. Quinten Harvey, B-33)
28. The Student's computer video games obsession had escalated to an addictive quality and had caused him to become constantly tired and unable to do his school work. The evaluator felt that the Student needs to redirect his interest in computers. It is important for the Student to identify areas of life affected by his video game playing. The Student did not recall his academic decline because of his depression. (Testimony of Dr. Quinten Harvey, B-33)
 29. The evaluator was of the opinion that placing the Student in the Board's Community Learning Program (CLP) would place the Student with similar distressed students and this would not be good for the Student. It also has limited higher education opportunities. (B-33, Testimony of Dr. Quinten Harvey)
 30. On July 30, 2013, the Parents gave notice that upon being exited from Second Nature, and in the absence of an appropriate educational program for the Student, they were unilaterally placing him at JDA. On August 9, 2013, the Student was placed at JDA. The Parents were aware of the results of Dr. Harvey's evaluation before they unilaterally placed the student at JDA. (Testimony of Mother, B-32)
 31. On August 8, 2013, the Student was discharged from Second Nature. On August 9, 2013 the Student entered JDA. (Testimony of Mother)
 32. A PPT was scheduled for September 3, 2013 to review the Student's placement at JDA. The team reviewed Dr. Harvey's evaluation and the Student's transcripts from Second Nature. With the information from Dr. Harvey's report and the eligibility check list, the PPT found the Student eligible for special education and related services under the category of Emotional Disturbance. The PPT recommended a diagnostic placement at JDA. The Parent signed consent for the placement. (Testimony of Mother, Testimony of Special Education Teacher, B-3)
 33. On September 24, 2013, the PPT sent the school psychologist and the special education teacher to observe the Student at the diagnostic placement. The team reported that the Student was observed in two classes. The Student was engaged in oral questions and answered his teacher. He was focused and his attention was good. (B-21)
 34. During the observation, the school team had an informal conversation with the Student. He was found to be personable, articulate and comfortable with conversation. The Student stated that the reason he needed to be at JDA was to be motivated. The Student did not need any academic supports or tutoring. (Testimony of School Psychologist, Testimony of Special Education Teacher)
 35. On October 1, 2013, a PPT was held to review the Student's diagnostic placement. The PPT refused the Parents' request for reimbursement for the Student's placement at

Second Nature. The PPT was updated by the Director of JDA. The Student was participating in class despite not having individual therapy for two of the last four weeks. Work completion and attendance were not issues for the Student. The PPT identified small classes, individual therapy, group therapy and community building group/work experience as areas that needed to be incorporated in the Student's IEP. (B-5)

36. The Student has six classes at JDA. The student does well academically. He is permitted 6 hours per week on the computer for an online course. The students vote on the other students' progress and if they should move up in rank. The highest ranking is older membership and the privileges obtained for this rank is that the student can go home alone and to town alone. (Testimony of Director of JDA)
37. The Student is still struggling with social anxiety and worries about family dynamics. At JDA missing class is a serious issue if the Student is not sick. All students except seniors stay during the summer. The Student uses the internet to escape. JDA does not offer any advance placement (AP) classes. The program at JDA is to get the students to enter and succeed in college. Individualized therapy is provided as needed and the basis is one time per week. The Parents' concern about the Board program is whether the program is structured so that the Student would feel challenged and stimulated by his peers. The main concern for the JDA director about the Board's program would be the Student's after school hours. (Testimony of Director of JDA)
38. On October 15, 2013, a PPT was held to plan the Student's program. Before the PPT, the Parents were provided with a draft IEP. The Parents requested placement at JDA for the 2013-2014 school year. The Board refused the Parents' request. The Board members of the PPT were of the opinion that the diagnostic placement showed that the Board could provide a program for the Student. The intent of JDA was not to return the Student to public school, but to maintain him there until graduation. (Testimony of House Administrator)
39. The Parents felt that the Student needs to remain at JDA until he completes all the levels. This would take approximately 18 months. The Student has no internet access at JDA except for an online course. The Parent was concerned that that the program at ARCH/CLP was not challenging enough for the Student and he would withdraw. The Parent did not agree with the individual and group therapy. The Parents felt the amount of time allocated for group and individual therapy were not sufficient. The Parents were concerned that the Student would have too much free time after school and would be more involved with his computer and would withdraw and isolate himself. (Testimony of Mother)
40. At the October 15, 2013 PPT meeting, the team recommended an IEP to be implemented at the Alternative High School's Community Learning Program (CLP)/ARCH, an alternative community-based program located at another site from the Board's high school. The program would start at 8 am and end at 1:35 pm. The Student would have an additional 45 minutes at the end of the school day for a structured study hall. His program would end at 2:15 pm. The Student's day would begin in the resource room

with the special education teacher/aide working on goals 4 and 5. These are post-graduation planning goals. (Testimony of CLP/ARCH School Counselor)

41. Goal number 4 in the IEP of October 15, 2013 was recommended by the Parents. The Student did not have any behavioral problems while attending the Board's high school. The Student does not require extended school year services (ESY). The summer classes he had at JDA were for credit and not to maintain level of academic performance. The CLP/ARCH Program is a small individualized program with community support. (Testimony of House Administrator)
42. The October 15, 2013 IEP, provided .97 hours per week of group therapy and .47 hours per week of individual therapy. The Student's IEP goals addressed his anxiety, depression, avoidance and isolationism. (B-6)

CONCLUSIONS OF LAW and ARGUMENT:

1. It is undisputed that the Student is eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 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 that are provided in conformity with the IEP. 20 U.S.C. §1401(8).

CHILD FIND

2. The Parents allege that the Board violated the child find requirement of IDEA. Either a parent or a public agency may initiate a request for an initial evaluation to determine if a student is a student with a disability. 34 CFR 300.301 (b). Additionally, the IDEA "child find" mandate requires that districts seek out students that are potentially IDEA eligible and refer those students for an evaluation. 34 CFR 300.111. Since the child find obligation is an affirmative one, a parent is not required to request that a district identify and evaluate a child. *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996). A district may not take a passive approach and wait for others to refer the student for special education services, the district must seek out IDEA eligible students. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 996, 112 LRP 1321 2012).
3. Excessive absenteeism by itself is not a per se basis for suspecting the child has a disability. *Board of Educ. of Syracuse City Sch. Dist.*, 37 IDELR 232 (SEA NY 2002). Outcomes of cases involving child find and truant students vary widely; a district's child find obligation may be triggered where there are significant absences, a reason to believe the absences are linked to a disability, and a need for services. In *Department of Education, State of Hawaii v. Cari Rae S.*, 35 IDELR 90 (D. Hawaii 2001), for example, the court held that the student's 159 absences, numerous behavioral referrals, and failing grades should have triggered referral during the student's sophomore year.

When it comes to truancy, emotional disturbance is the eligibility category that is typically at issue. Under the IDEA implementing regulation 34 CFR 300.8 (c)(4)(i), "emotional disturbance" means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance":

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR 300.8 (c)(4)(i).

4. These conditions were demonstrated by the Student before the Student's unilateral placement. His grades were in constant decline since entering the high school; the Student was supposed to return to the school after his illness: he did not return. The Student's doctor diagnosed the Student with a grave depression. The school counselor recommended therapists to the Parents. The Student was not attending his home bound classes. The Student was having issues with his Parents. The Board did not decide to recommend the Student for special education or evaluate him but referred him to a Section 504 Multidisciplinary Team. (Findings of Fact Nos. 6, 8, 9, 12, 13,16 and 17)

5. The Student was found eligible requiring 504 services under the disability of Depression. There were no evaluations performed to measure the Student's abilities. (Finding Of Fact No. 14) Evaluation must be based on tests and other materials that have been validated and will measure the abilities, rather than the disabilities of the child. 34 C.F.R. §300.104.35.

6. The Board had opportunity and reasons to seek evaluations of the Student in a timely manner and did not. The Board has an affirmative obligation to seek out IDEA eligible students. *Id., Compton*. The Board violated child find by failing in a timely manner to seek out the Student as potentially IDEA eligible and refer him for an evaluation. The Student's suicidal ideations did not trigger a need to evaluate the Student. The team stated that they needed more information, but did nothing to obtain it. (Finding of Fact No. 17) It was not until the Parents' out-of-district placement did the Board consider IDEA. The continued absenteeism with his falling grades and the school counselor's concerns should have triggered child find. A district may not take a passive approach and wait for others to refer the student for special education services. *Id.* This is a FAPE violation and in the instant case, a denial of FAPE.

SECOND NATURE

7. The Parents seek reimbursement for their unilateral placement of the Student at Second Nature in Georgia. In order to receive reimbursement for tuition for a unilateral private school placement, three elements must be established by the evidence in the

record: 1) that the school district has denied FAPE to the student or otherwise violated IDEA; 2) that the parent's private school placement is appropriate; and 3) that equitable factors do not preclude the relief. *School Committee Town of Burlington v. Department of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 103 L.R.P. 37667 (U.S. 1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 20 IDELR 532 (U.S. 1993); *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009). In the instant case, the first prong of the analysis in a unilateral placement is whether the district/board violated IDEA. The violation of child find requirements, *Supra*, at the time of placement, resulted in the district/board failing to provide an appropriate program to the Student and therefore a finding of a denial of FAPE.

8. The second prong of the analysis in a unilateral placement case involves an analysis of whether the private school at which the parents unilaterally placed the student is appropriate. In the instant case, the Parents placed the student in a private school: Second Nature. The educational program provided by Second Nature does not provide any educational benefit. The purpose of Second Nature is to make the Student more responsible; the academic work performed by the Student was done independently. Biology credit was given for living out doors and English credits were given for maintaining a journal. The credits obtained at Second Nature were not accepted by JDA. (Findings of Fact Nos. 20, 22 and 23). Because the private school selected by the Parents failed to meet the Student's individual needs and provide educational benefit, it is not appropriate. Accordingly, it is concluded that the evidence in the record demonstrates that the private school selected by the (Second Nature) Parents for the unilateral placement of the Student is not appropriate. Reimbursement for the unilateral placement at Second Nature must be denied.

9. The third prong of the analysis in a unilateral placement case involves an analysis of whether the equities, based upon the facts and circumstances of the particular case, would justify reimbursement. In the instant case, the un rebutted evidence presented is that the Parents did not give timely notice to the Board of their intent to unilaterally place the Student at Second Nature. Failure to comply with the notice requirement will not result in a denial or reduction of reimbursement if compliance would have resulted in serious emotional harm to the Student. 34 C.F.R. §300.148 (e)(2)(ii). Evidence was not presented that giving the required notice would have resulted in serious emotional harm. The therapist at Second Nature testified that the Student's behavior, when he arrived, was that he did not want to be there and that he felt inadequate. This inadequacy was caused by his mother managing him. (Finding of Fact No. 20) The Parents failed to give proper notice. Based on this analysis, the Parents are not entitled to any reimbursement for their placement of the Student at Second Nature because the Student was not receiving any educational benefit at Second Nature and they failed to give the required notice without just cause.

JOHN DEWEY ACADEMY AUGUST 9, 2013 TO SEPTEMBER 3, 2013

10. The placement at JDA from August 9, 2013 to September 3, 2013 was appropriate.

11. There was no convincing testimony provided that the unilateral placement was not appropriate and did not provide educational benefit to the Student or that there was another program available to the Student during that period. The Board alleges that the Student does not need an extended school year in order to receive FAPE. At this time, the Board had not evaluated the Student to determine an appropriate program. At the September 3, 2013 PPT, the Board recommended JDA as the diagnostic placement for the Student and had determined that the Student required special education and related services. (Findings of Fact Nos. 1 and 32). The evaluation performed by Dr. Harvey recommended a residential therapeutic intervention. There was no convincing evidence offered that at the time of the placement the Student did not need a residential placement in order to receive FAPE. The Board shall be responsible for the residential placement at JDA from August 9, 2013 to September 3, 2013.

ARCH/CLP

12. The Student, in this matter, was later found to be eligible as a student with an Emotional Disturbance. (Findings Of Fact No. 1)

13. Once a Board has identified a child as eligible for IDEA services, it must create and implement an IEP based on the student's needs and areas of disability. Boards are not, however, required to "maximize the potential" of each handicapped student. *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n. 21 (1982)). Instead, to satisfy the IDEA, the Board must offer an IEP that is "reasonably calculated" to enable the child to receive "meaningful" educational benefits in light of the student's intellectual potential. *Id.*, at 206-207. Once the Board has designed and administered an IEP that is reasonably calculated to enable the receipt of meaningful educational benefits, it has satisfied its obligation to provide the child with FAPE.

14. If the Parent or the Student is not satisfied or believes that the program will not provide FAPE, they can challenge the educational placement. 34 C.F.R. §300.507(a)(1). It is the Board's responsibility to prove, by a preponderance of the evidence, the appropriateness of the program and placement it has provided to the Student. CGS §10-76h-14(a).

15. The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Rowley*. It must first be determined whether the Board complied with the procedural requirements of IDEA. The second inquiry is a determination of whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207.

16. The IDEA's procedural requirements and safeguards are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with LEA personnel in developing, reviewing and revising their child's IEP. Compliance with the IDEA's procedural requirements is the responsibility of the Board and not the Parents. *Unified Sch. Dist. v. Dept. of Ed.*, 64 Conn. App. 273, 285 (2001).

Procedural violations alone can be deemed a denial of FAPE. *Student v. Newtown B.O.E.*, CT DOE Case No. 07-075 (8/23/07). In order to conclude that procedural violations resulted in a denial of a FAPE, the Parents must show that the procedural errors resulted in a loss of educational opportunity. *Id.* at 22; *See, Burke County Bd. of Ed. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1999); *Evans v. District No. 17*, 841 F.2d 824, 830 (8th Cir. 1988); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (9th Cir. 1992). When a procedural violation is alleged, a Hearing Officer may find that a Student did not receive FAPE if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the Parents' child, or caused a deprivation of educational benefit. 34 CFR §300.513(a) (2) (i-iii); *Id.* at 22; *See, Burke at 982; Evans at 830; W.G. at 1484-8*. Procedural violations that interfere with Parents' participation in the IEP formulation process undermine the very essence of IDEA. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). An IEP addresses the unique needs of the child and cannot be developed if those people most familiar with the child's needs are not involved or fully informed. *Id.* Procedural safeguards are set forth in 20 U.S.C. §1415 and 34 CFR §§500-536 and include: the right for Parents to participate in all meetings (CFR §300.501(b)); the right for Parental involvement in placement decisions (CFR §300.501(c)); the right of Parents to examine all educational records (CFR §300.501(a)); the right for Parents to obtain an Independent Educational Evaluation (IEE) of their child (§300.502(b)); the requirement for Boards to consider evaluations provided by Parents at private expense in the deciding FAPE (CFR §300.502(c)). IDEA expects strong Parental input at PPT meetings, *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 86 (3d Cir. 1993). The IEP is to be collaborative developed by the Parents of the Student, educators and other specialists. Congress repeatedly emphasized the "importance and indeed the necessity of Parental participation in both the development of the IEP and any subsequent assessments." *Honig v. Doe* 484 U.S. 305, 311 (1988). Failure by the Board to develop an IEP in accordance with procedures mandated by IDEA, in and of itself, can be deemed a denial of FAPE. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir.2001).

17. The Parents allege that they were not allowed meaningful participation at the PPT. At three PPTs, September 3, 17 and October 1, 2013, the Parents were represented by counsel and the attorney attended the PPT with the Parents. At the September 3, 2013 PPT, the JDA unilateral placement was recommended as a diagnostic placement and the PPT, which included the Parent, agreed. At the September 17, 2013 PPT, the Parents requested reimbursement for the unilateral placement at Second Nature. The Board heard the Parents' request and stated they needed more information. At the October 15, 2013 PPT, the Parents requested the addition of a goal to the IEP and the Board included the requested goal. (B-3, B-4 B-5 and Findings of Fact No. 35) That the staff members of the PPT do not agree with everything the Parent requests does not mean that they are not meaningful participants. The Parents alleged that the Student's IEP was predetermined before the October 15, 2013 PPT. The copy given to the Parents before the meeting is clearly marked "draft" and, as stated *Supra*, the Parents requested the addition of a goal to the IEP and the Board included the requested goal. The Board considered the Parents' out-of-district placement at JDA and did not agree with it, even though it had been used

by the Board as a diagnostic placement for the Student. I disagree that the IEP offered by the Board was predetermined before the PPT meeting. The Parents were meaningful participants of the PPTS.

18. The Second prong in *Rowley* is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. 20 U.S.C. §1401 (14), 1414 (d)(1)(A). An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). [A]n IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

19. An annual IEP must materially meet the content requirements of IDEA and the Connecticut corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications. The Parents' concerns (Finding of Fact No. 36) were unfounded. While the Student was at JDA he did not receive individual counseling sessions for two weeks and there were no setbacks. Testimony elicited from the Director of JDA was that individual therapy is "as needed".

20. The federal law requires that handicapped children be educated with non-disabled peers to the maximum extent appropriate. 20 U.S.C. §1412(a)(5); 34 CFR §300.114. However, a district must make any placement and service decisions for a child based on their individual need. 34 CFR §300.39. A comparison must be made between the educational benefits the child will receive in the regular classroom and the benefits the child will receive in a segregated program. *Oberti v Board of Education of the Borough of Clementon School District*, 995 F.1204, 1220 (3d Cir. 1993). A segregated setting may be the most appropriate and least restrictive environment for the student. In the instant case, the Board has decided that a placement in an alternative setting other than the mainstream high school is appropriate for the Student. I disagree.

21. The record demonstrates that the Student is doing well at JDA. The Board's program offered the Student one-on-one classes in core courses like calculus while other courses would be modified to meet the his needs. These modifications can be provided in a mainstream setting. Calculus does not have to be on-on-one since it is a regular course in the mainstream setting. There is no need to isolate the Student so he can receive classes

that will prepare him in his post graduate endeavors. The Board observers reported that the Student is articulate and engaged in class participation. Nothing in their report indicates that participation in the mainstream setting with related services would be detrimental to the Student or that an alternative setting is the LRE for the Student. Counseling sessions can and should be provided in a mainstream setting. The Student requires a challenging program, and this could be accomplished with his peers. Mentoring can be done in a mainstream setting; the Student does not have to be in an alternative school to receive FAPE. The Student is a bright young man who, with proper guidance, mentoring and an educational program with related services, will become an asset to his community. The program offered by the Board is not appropriate.

JOHN DEWEY ACADEMY OCTOBER 15, 2013 TO END OF 2013-2014 SCHOOL YEAR

22. When a parent believes that a public educational placement is denying her child FAPE, the parent may choose to remove the child to a private placement. However, a parent who removes the child does so at "their own financial risk." *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 18 IDELR 1019 (9th Cir. 1992). See also *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S.1993). This means that a parent may have to pay in full for the cost of the private placement.

A parent may seek district reimbursement for the private placement if:

- a. The educational program recommended by the IEP was inappropriate to meet the child's needs.
- b. The alternative placement or additional services selected by the parents were appropriate.
- c. Equitable factors weigh in favor of reimbursement.

T.Y. v. New York City Dep't of Educ., 53 IDELR 69 (2d Cir. 2009), *cert. denied*, 110 LRP 28696, 130 S. Ct. 3277 (2010)

23. The unilateral placement at JDA is appropriate and does allow the Student to obtain educational benefits. Unilaterally placed students need not receive services pursuant to an IEP in order to obtain an award of tuition reimbursement. The IEP requirements do not apply if a child with a disability is unilaterally placed by the child's parents. The IDEA's requirements that FAPE must be provided under public supervision, meet the standards of the state educational agency, and be provided in accordance with an IEP are binding on public agencies, but they do not make sense in the context of a unilateral private placement. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S.1993).

24. The diagnostic placement at JDA demonstrated that the Student can obtain educational benefits at JDA, but it also shows that the Student does not need a residential placement in order to receive a meaningful education. The Parents' placement at JDA is premised on their belief that the Student cannot function in the Board's environment and requires 24/7 supervision in order to receive FAPE. The Student needs supervision in order to ensure he uses his time wisely. This can be accomplished with goals and objectives in his IEP, a functional behavioral assessment in order to identify any stressors and a behavior intervention plan to help him cope and overcome them. The Parents

concern is the Student's access to the computer and obsession with video games. Isolating him from the world does not resolve the issue. (Findings of Fact No. 39) The Parent-Child Relationship has been identified as a cause for the Student's depression, anxiety and school refusal. (Findings of Fact Nos. 12, 20, 27). A residential program to cope with this issue is not something the Board needs to pay for in order to provide the Student with FAPE. The diagnostic placement shows that the Student can progress and receive a meaningful education. The Student was able to function without individual counseling and, if required, it is on an as needed basis. (Findings of Fact Nos. 35 and 37). The Student does not need an out of district residential placement in order to receive a meaningful education just as he does not need an alternative placement in the district to receive FAPE. The Student can receive an appropriate education in the Board's mainstream setting but this was not provided. The residential placement was to alleviate the tension in the home environment and to address the Student's depression and anxiety: s residential placement is needed to address these issues. The Board shall pay for the educational portion of the Student's placement. The Parents shall be responsible for the residential portion.

REIMBURSEMENT FOR EVALUATION

25. The evaluation performed by Dr. Quentin Harvey was at Parents' request. The Parents patiently waited for the Board to contact them about the evaluator but the Board did not. (Findings of Fact No. 25) The Board utilized Dr. Harvey's report in the IDEA determination. (Finding of Fact No. 32). The Board shall pay for the cost associated with the Psychological Evaluation performed by Dr. Quentin Harvey.

COMPENSATORY EDUCATION

26. The Parents are entitled to compensatory education for the denial of FAPE. The purpose of compensatory education is not to provide additional benefits to the student, but rather to put the student in the position he would have occupied if the district had complied with its IDEA obligations. As such, many courts have rejected a "cookie-cutter" approach to compensatory education in which awards are based solely on the hours of services missed. *See, e.g. Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005). The award of compensatory education remains in the broad discretion of the court. *Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 49 IDELR 241 (10th Cir. 2008). Hearing Officers have the authority to provide compensatory education as an equitable remedy for denial of FAPE. *Student v. Greenwich B.O. E., CT DOE Case No. 06-005 at 19; Inquiry of Kohn*, 17 EHLR 522 (OSEP) (2/13/91) (citing with approval *Lester H v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Burr v. Ainbach*, 863 F.2d 1071 (2d Cir. 1988), vacated, 492 U.S. 902, reaff d, 888 F.2d 258 (2d Cir. 1989). Compensatory education has been recognized as an available remedy under IDEA for failure of the Board to provide FAPE. *See, KP. v. Juzwic*, 891 F.Supp, 703 (D.Conn. 1995); *Burr v. Atnbcteh*, 863 F.2d 1071 (2d Cir. 1988); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990). *Reid ex rel. Reid v. Board of Columbia*, 401 F.3d 516, 518, 524-27 (D.C. Cir. 2005).

27. The Board's violation of child find is a denial of FAPE (Conclusion of Law No. 7) and entitles the Student to Compensatory Education. The compensatory remedy for the denial of FAPE is that the Board shall pay for all costs associated with the residential placement of the Student at JDA from the time of his initial placement to the publishing of this decision, June 10, 2014. This shall place the Student in the equitable position he would have been in had FAPE been provided. This does not mean that the Student requires a residential placement in order to receive FAPE. (Conclusions of Law Nos. 24-26) This provision of compensatory education is an equitable remedy for the denial of FAPE. (Conclusions of Law Nos. 3-7)

28. 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 Board violated child find by not identifying the Student as requiring special education and related services.
2. The Board does not have to reimburse the Parents for the cost, including transportation, for the unilateral placement at Second Nature.
3. The Board shall pay for the residential placement of the Student at JDA from August 9, 2013 to September 3, 2013.
4. The Program offered by the Board for the 2013-2014 school year is not appropriate.
5. The unilateral placement of the Student at JDA does provide the Student with a meaningful education.
6. The Parents will be reimbursed for cost incurred for the educational portion of the unilateral placement of the Student at JDA from October 15, 2013 to the end of the 2013-2014 school year. The Parent is responsible for the residential costs of the placement.
7. The Parents shall be reimbursed for the cost of the evaluation performed by Dr. Quinten Harvey.
8. The Board did not commit procedural violations and did allow the Parents to be meaningful participants of the planning and placement team (PPT).
9. The Student is entitled to compensatory education for the Board's denial of FAPE. The Board shall pay all costs associated with the residential placement at JDA from October

June 10, 2014

Final Decision and Order Case No. 14-0296

15, 2013 to the publishing of the Decision and Order, June 10, 2013, for the denial of FAPE as stated in the Conclusions of Law Nos. 2-6.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

Justino Rosado
Hearing Officer Name in Print