

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student and Canton Board of Education

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Appearing before: Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board of Education violate its Child Find duty in the 2015-2016 School Year by failing to evaluate the Student in all areas of disability?
2. Did the Board of Education violate its Child Find duty in the 2017-2018 School Year by failing to evaluate the Student in all areas of disability?
3. Did the Board of Education deny the Student a Free Appropriate Public Education (“FAPE”) for the 2015-2016, 2016-2017, 2017-2018 and/or 2018-2019 School Years?
4. If so, as to Nos. 1, 2 and/or 3 above, was Summit Academy, Vermont Academy and/or SUWS of the Carolinas appropriate for the Student?
5. If so, is the Board of Education responsible to reimburse the Student for the expense of the Student’s matriculation at Summit Academy, Vermont Academy and/or SUWS of the Carolinas, including transportation and therapies?
6. If so, is the Board of Education responsible to provide compensatory education for the Student?
7. Are any events that took place before May 15, 2017 at issue in this matter?

PROCEDURAL HISTORY:

The Student initiated this special education request for due process on May 15, 2019. This Impartial Hearing Officer was assigned to the case on May 16, 2019. A Prehearing Conference was convened on June 14, 2019. Attorney Jennifer Laviano appeared on behalf of the Student and Attorney Michael McKeon appeared on behalf of the Board of Education. An evidentiary hearing was scheduled for July 26, 2019, but later postponed.

The Board filed a Motion to Dismiss the request for due process. On September 3, 2019, the Impartial Hearing Officer issued an Order Re: Motion to Dismiss that resulted in the Student filing an Amended Request for Due Process. In addition, the Board of Education's statute of limitations defense was reserved for decision as part of the final decision in the case. New evidentiary hearings were scheduled.

On various dates between November 2019 and April 2021, the Student and/or the Board of Education requested extensions of the deadline for conducting the hearing and issuing the final decision. In each case, the requested extensions were agreed to by both parties and were granted.

Beginning in early March 2020, the Governor of the State of Connecticut issued a series of executive orders closing all public schools due to the COVID-19 pandemic. In addition, the Division of Special Education of the Department of Education issued a Guidance letter dated April 6, 2020 regarding Due Process Activities under IDEA during the COVID-19 Pandemic permitting extensions of up to 90 days for all statutory and regulatory time requirements related to special education due process activities.

Evidentiary hearings were convened on October 8, 2019, October 25, 2019, October 26, 2020 and December 15, 2020. A briefing schedule was established. On February 17, 2021, the Student submitted a Motion to Admit a Letter Dated March 15, 2017 ("Motion to Admit"), after the evidentiary portion of the case had been closed. The Board of Education objected to the Motion to Admit. The Motion to Admit was granted on March 6, 2021 and the letter was admitted as Exhibit P 28.

Further extensions of the deadline for issuing the final decision were requested, agreed upon and granted. The final deadline is May 25, 2021.

The following witnesses testified at the hearing:

Parent
Dr. Marshall Gladstone, Therapist
Andrew DiPippo, Principal
Dan Millstein, Therapist
Dr. Perry Murdica, Director of Pupil Services

Hearing Officer Exhibits HO 1 through HO 7 were entered as full exhibits. In addition, Parent Exhibits P 1 through P 28 were entered as full exhibits and Board of Education Exhibits B 1 through B 68 were entered as full exhibits.

All motions and objections not previously ruled upon, if any, are hereby overruled.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985).

SUMMARY:

The Student filed this request for due process to obtain reimbursement for the expenses of a series of unilateral placements at out of state private schools between October 19, 2015 and June 1, 2017 allegedly due to the Board of Education's failure to identify the Student as eligible for special education or related services and offer him FAPE.

The Hearing Officer concluded that the claims related to the Board of Education's decision to not identify the Student as eligible for special education or related services on September 17, 2015 were barred by the two year statute of limitations. In addition, the Board of Education had no obligation to evaluate or educate the Student while he was attending private schools out of state, in the absence of parental request. When the Student enrolled in the Board of Education's program on August 3, 2017, the Board of Education appropriately evaluated and identified him and offered FAPE.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations contained in the Regulations of Connecticut State Agencies ("R.C.S.A."), as well as the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.*, and related regulations, and in accordance with the Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

1. The Student was born on October 13, 1999, and is now 21 years of age. He appointed his parents as attorneys in fact to act on his behalf in regard to his education on August 13, 2019. (Exhibit HO 2)
2. During the relevant time, the Student resided with his mother and father and siblings in Canton, Connecticut. (Testimony of Parent ("T Parent"); Exhibit HO 2)
3. The Student attended the Canton Public Schools ("CPS") from Kindergarten through the eighth grade with an unremarkable school record. At least until the spring of eighth grade, he was a good student with no academic, behavioral or disciplinary problems in school. (Exhibits B 1

through B 17; Exhibit B 25) His success in school may have been due, in part, to extensive support from his mother, who is a trained educator. (T Parent)

4. In the spring of his eighth grade, during the 2013-2014 School Year, the Student's parents noticed a decline in his behavior at home and his performance in school. (T Parent) He continued to earn good grades, however, and had no school discipline record. (Exhibit B 16)

5. The Student's parents withdrew him from CPS for high school and enrolled him at Northwest Catholic High School, a parochial school in West Hartford, Connecticut, for the 2014-2015 School Year. The most important reason for this change was the Student's desire to play ice hockey, a sport either not available or less attractive at Canton High School ("CHS"). (Exhibit B 25; T Parent)

6. The Student's experience at Northwest Catholic High School was not successful. He began using illegal substances and skipping school. His grades fell to a GPA of 2.82 on a scale of 4.0. Despite this, he passed all of his courses that year. (Exhibit B 18; T Parent)

7. In the Spring of ninth grade, the Student threatened suicide after a romantic breakup. (T Parent)

8. Northwest Catholic High School asked the Student not to return after ninth grade. (Exhibit B 22; T Parent)

9. Neither Northwest Catholic High School nor the parents referred the Student for an evaluation of eligibility for special education or related services during the ninth grade. (T Parent)

10. The Student's parents engaged Mary Himmelstein, a psychological, developmental and educational consultant to assist them in addressing his ongoing problems of following rules at home and continuing substance abuse. (Exhibit B 22; T Parent)

11. The Student was hospitalized at the Institute of Living ("IOL"), a psychiatric hospital in Hartford, Connecticut between August 11, 2015 and August 20, 2015 for treatment of depression, anxiety and substance abuse. He was discharged to IOL's Intensive Outpatient Child and Adolescent Mental Health Adolescent Day Treatment program ("PHP") for continuing treatment of depression, anxiety and substance abuse on weekday afternoons. (Exhibit P 2; Exhibit P 3; T Parent)

12. The Student's parents notified the Board of Education of their plan to enroll him at CHS for his tenth grade year in August 2015. They shared that the Student had been hospitalized at IOL for an extended period of time and requested that CHS provide him with appropriate services and/or accommodations. They provided CHS with a letter dated August 31, 2015 from IOL briefly reporting on his recent psychiatric history and treatment. (Exhibit B 19; T Parent)

13. The IOL's letter included the following recommendations:

[The Student] will need certain supports to help with his successful return to public school. Below you will find recommendations based on [the Student's] clinical presentation and how his clinical needs might affect him academically.

...

Recommendations:

1. [The Student] is recommended to have a 504 Plan at school to help meet both his mental health and academic needs.
2. [The Student] is recommended to continue participating in the Day Program. [He] is encouraged to continue following all treatment recommendations. [He] attends daily from 1-5 pm and will need to miss some school to accommodate this. Please arrange his class schedule to support program attendance.
3. Please allow [the Student] to have extra time to complete all assignments while he is attending the program. Should [the Student] miss instructional time to attend program, he will need structured opportunities to meet with teachers to learn the material missed before any assignments are completed.
4. Please provide opportunities for [the Student] to access mental health support staff when needed. [He] is currently learning appropriate skills to help him manage his anxiety; however he is not yet proficient in these skills. When his anxiety becomes unmanageable, he is at risk for subsequent depressive symptoms and impulsive safety issues.

(Exhibit B 19)

14. Significantly, IOL did not recommend that the Student be evaluated for, or identified as eligible to receive, special education or related services. (Exhibit B 19) As Canton's Director of Pupil Services was aware, IOL customarily does recommend that students be evaluated for eligibility to receive special education or related services when it considers that appropriate. (T Murdica)

15. A 504 Meeting¹ was conducted at CHS on September 4, 2015, three days after the Student began the 2015-2016 School Year. The Student's parents attended the meeting. The 504 Team identified his qualifying impairment as "Anxiety Disorder" and the following as his Accommodation Plan:

- The Student's course schedule for the first semester of the 2015-2016 school year will be reduced due to his participation in a partial hospitalization program where he is dismissed early from school
- Time extensions on homework for quarter 1 of the 2015-2016 school year when needed. The Student will turn in homework within 24 hours of the due date.
- Weekly check in with the school psychologist or counselor as needed.

(Exhibit B 20; T Parent)

¹ The 504 Meeting was a meeting of school staff and the Student's parents to consider adopting a plan of accommodations in school pursuant to the provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794.

16. On September 3, 2015, the parent signed a Referral to Determine Eligibility for Special Education and Related Services (“First Referral”), which CHS received on September 4, 2015. In the First Referral, the parent identified “executive functioning/processing deficit” as the specific concerns, and requested that the Student be “evaluated through an IEP with regard to executive function/processing for possible help in Canton High School”. (Exhibit B 20; Exhibit B 22; T Parent)

17. A second 504 Meeting was conducted on September 17, 2015. The Student’s parents were in attendance. At this point the 504 Team reported that the Student was earning grades in the A range when he completed assignments or assessments, but that he was beginning to miss assignments and some of his grade averages were in the D-F range as a result. (Exhibit B 21; T Parent)

18. Accordingly, the Accommodation Plan was amended to the following:

- [The Student] will have SRBI² study hall in his schedule for daily support with organization and time management.

(Exhibit B 21)

19. Earlier on the same day, September 17, 2015, a Planning and Placement Team (“PPT”) meeting was conducted to address the Student’s parents’ referral for evaluation for special education eligibility. The parents attended the meeting. (Exhibit B 22; T Parent)

20. A copy of the publication “Procedural Safeguards in Special Education” was sent to the Student’s parents with the Notice of the PPT Team Meeting on September 11, 2015. (Exhibit B 22; T Murdica).

21. “Procedural Safeguards in Special Education” is a publication of the Connecticut Department of Education that describes the procedural rights afforded to parents under IDEA. This publication contains information that boards of education are required to provide to parents pursuant to federal and state law. See <https://portal.ct.gov/-/media/SDE/Special-Education/Prosaf.pdf>; 34 C.F.R. 300.503; R.C.S.A. Section 10-76d-8.

22. The PPT noted that the Student’s parents believed that he was struggling with executive functioning and processing deficits. A review of the Student’s records and report cards, including reports by the guidance counselor, school psychologist and general education teacher reflected that the Student was doing well in school, but was struggling with anxiety. (Exhibit B 22; Exhibit B 23)

23. The school psychologist stated that there was no evidence of a deficit in the Student’s executive functioning, and that his struggles “may be secondary to anxiety and substance abuse”. The PPT concluded that the Student was not eligible for special education and related services at that time and recommended convening a 504 Meeting to address possible changes to his Accommodation Plan. (Exhibit B 22)

² “SRBI study hall” was a mainstream education intervention for non-disabled students who required supplemental academic support. (T Murdica)

24. The PPT did not recommend further evaluation to explore possible executive functioning or processing problems or anything else at that time. (Exhibit B 22; T Parent; T Murdica)
25. A copy of the IEP document for the September 17, 2015 PPT meeting, including the PPT's conclusion that the Student was not eligible to receive special education or related services was mailed to the Student's parents on September 24, 2015. (Exhibit B 22)
26. The Student attended CHS with his 504 Accommodation Plan from the beginning of the 2015/2016 School Year until October 19, 2015. During this time, he also continued to participate in the IOL PHP on weekday afternoons, where he was treated for depression, anxiety and substance abuse. (Exhibit B 22; T Parent)
27. During his time at CHS in the fall of 2015, the Student acclimated well in school, earned at least passing grades in all of his courses and was not involved in any disciplinary incidents. He was considered to be very personable and a positive member of the classroom. (Exhibit B 21; Exhibit B 22; Exhibit B 23)
28. Education Consultant Mary Himmelstein recommended that the Student's parents enroll him in a residential school in Maine - Summit Achievement ("Summit") - to address his increasing substance abuse, poor performance at school, increasing dishonesty, stealing, disrespectful behavior at home and mood instability. (Exhibit B 28)
29. CHS was told only that the reason for the Student's withdrawal from CHS was to attend a different school. (Exhibit B 23; T DiPippo)
30. The Student attended Summit for the remainder of the 2015-2016 School Year, until June 17, 2016. (Exhibit B 29)
31. Summit is a residential therapeutic treatment program. Educational services are provided by an outside vendor and monitored by Summit staff. (Exhibit B 29)
32. A Neuropsychological Evaluation was performed of the Student in November 2015 while he was at Summit due to increasing academic difficulties. (Exhibit B 25)
33. The Neuropsychological Evaluation revealed the presence of information processing deficits that were appropriately diagnosed as "ADHD predominately inattentive type". The evaluation reflected that the Student enjoys generally average intelligence and suggested that increasing academic demands in late middle and high school may have contributed to his distress. (Exhibit B 25)
34. In addition, the Neuropsychological Evaluation revealed a mild but significant weakness in visual processing speed as well as attention, memory, planning and organization weaknesses, constituting a deficit of cognitive proficiency. Finally, the Neuropsychological Evaluation recommended that a Specific Learning Disorder should be ruled out. (Exhibit B 25)

35. In addition to neuropsychological assessments, the Neuropsychological Evaluation included a brief survey of the Student's academic achievement. The Student's performance in reading rate, written expression and mathematical reasoning were average or better. His performance in reading comprehension was low, but of questionable validity, and his performance in mathematical functioning was below average. (Exhibit B 25)
36. A variety of recommendations for educational accommodations were made in the Neuropsychological Evaluation, but none included the provision of special education or related services. (Exhibit B 25)
37. Summit did not offer, and the Student did not receive, specialized instruction or related services at Summit. (Exhibit B 26; Exhibit B 27; Exhibit B 28; Exhibit B 29; Exhibit B 34)
38. The Student's overall experience at Summit was positive. Although he experienced some behavioral struggles, he made good progress in most of his treatment goals and did well in most of his academic course work, earning A's and B's in English, History and Geometry and a C in Biology. He was praised for excellent writing skills. Summit's Discharge Summary noted that the Student "has strong view points and sometimes communicates them in bold, offensive ways; he should continue working on appropriate means of communication and recognize and respect varying viewpoints." (Exhibit B 27; Exhibit B 28; Exhibit B 29; T Parent)
39. The Student returned to live in Canton for the summer of 2016. At about that time, he began to receive therapy with Dr. Marshall Gladstone. (Exhibit P 10; T Gladstone; T Parent) Dr. Gladstone found that the Student was developing a disorder known as Borderline Personality Disorder ("BPD"). BPD is a psychiatric condition that emerges during adolescence, when a young person is differentiating him or herself from his parents and finding his or her own identity. It is not diagnosed before the age of eighteen because of its developmental nature. (T Gladstone)
40. The Student's BPD eventually began to exhibit itself in confrontational, provocative behavior of an offensive nature. He adopted a false bravado, offending others in order to feed his anxiety and insecurity. He was unable to follow social norms. Dr. Gladstone noticed the beginning of this offensive behavior, born of BPD and its attendant anxiety, when the Student was at Summit. The Student's subsequent therapist, Dan Millstein, agreed with Dr. Gladstone's assessment, as did Mary Himmelstein. (T Gladstone; T Millstein)
41. At the recommendation of Mary Himmelstein and staff of Summit, the Student enrolled next at Vermont Academy, another residential private school, on July 13, 2016 for the 2016-2017 School Year. (Exhibit B 31; T Parent)
42. Like Summit, Vermont Academy did not provide the Student any specialized instruction or related services during his time there. (T Parent; Exhibit B 34)
43. The Student's experience at Vermont Academy was disastrous. (T Parent)
44. In December 3, 2016, the Student posted a series of offensive and mean-spirited slurs targeting several CHS students to a social media conversation initiated by a CHS student about her

holiday visit to New York City. These postings denigrated the CHS students based on their perceived sexual orientation, weight, ugliness and smelliness, and explained that no one liked them. (Exhibit B 30)

45. The Student's posts were sent to CHS' Principal DiPippo as part of a cyberbullying complaint by a former CHS student. Vermont Academy learned³ of the posts and responded by suspending the Student and referring him for a stint at SUWS of Carolina, a therapeutic wilderness program in North Carolina. (Exhibit B 33; Exhibit P 17; T Parent)

46. At that time, the Student's problems were listed upon admission to SUWS of Carolina as Disruptive Mood Dysregulation Disorder, Generalized Anxiety Disorder, Parent – Child Relational Problems, Rule Out Conduct Disorder and Emergent Personality Disorder. (Exhibit B 33)

47. SUWS of Carolina is a therapeutic wilderness program that provides individual and group psychotherapy, family counseling and some academic instruction. (Exhibit B 33)

48. SUWS of Carolina did not offer, and the Student did not receive, specialized instruction or related services there. (Exhibit B 33; Exhibit B 34)

49. The Student attended SUWS of Carolina from December 27, 2016 to February 2, 2017. During this time, he again made progress in his therapeutic treatment. There is no report of his academic progress, if any, in the record. (Exhibit B 33)

50. The Student returned to Canton in February 2017 to await his next school enrollment, which was to be a return to Vermont Academy. (Exhibit B 33; T Parent)

51. While in Canton, the Student attended a basketball game between CHS and a public high school from Hartford, Connecticut in February 2017. The Hartford players and fans were predominately black. (T DiPippo; T Parent)

52. At the game, the Student and others in his group harassed the Hartford group by chanting and displaying pointed race based messages, including statements like "White is Right", "Trump is Your President" and similar hurtful remarks. (T DiPippo; Exhibit P 21)

53. The basketball game incident drew state-wide and national media attention. Canton and CHS were portrayed as racist. It was disruptive and embarrassing to the school and the community. (T DiPippo; T Murdica; T Parent; Exhibit P 21)

54. A CHS Assistant Principal notified and warned the Student's parents that the Student was not permitted on CHS property or at CHS events due to his behavior at the game in a letter dated March

³ Although the Student believes someone from CHS spitefully informed Vermont Academy of the Student's involvement in the incident, there was no evidence to support this claim. (T DiPippo) Moreover, the complainant herself was a more likely candidate, as she knew the Student was at Vermont Academy and was quite insistent that he be held accountable for his behavior. (Exhibit B 30)

5, 2017. (“No Trespassing Letter”)(Exhibit P 28) The No Trespassing Letter was personally delivered to the Student’s home in Canton by a local police officer. (T Parent)

55. Shortly after the basketball game incident, the Student returned to Vermont Academy to complete the 2016-2017 School Year. He attended Vermont Academy until June 1, 2017, when he returned to Canton. (Exhibit B 40)

56. Vermont Academy asked the Student not to return for the following school year, determining that it did not have the resources necessary to support his needs. (Exhibit P 17; T Parent)

57. While at Vermont Academy, the Student earned a cumulative GPA of 2.03, with 1.84 high school credits. (Exhibit B 40)

58. On May 15, 2017, CHS’ Assistant Principal lifted the No Trespassing Letter in order to allow the Student to attend his sister’s end of year activities with the Board of Education. (T Parent)

59. On August 3, 2017, the Student’s parents notified CHS of their plan to enrolled him there for the 2017-2018 School Year. The parents provided a brief summary of his high school experience, his “ADHD, LD issues and emotional struggles” and requested that he be provided accommodations as of the first day of school. (Exhibit P 4; Exhibit B 34; T Parent)

60. The Board of Education had no information about the Student’s education or progress from October 19, 2015 when he left CHS, until August 3, 2017 when his parent contacted CHS. It was not until August 7, 2017, for instance, that the Board of Education received a copy of the Neuropsychological Evaluation that had been conducted in November 2015. (Exhibit B 25; T Murdica)

61. On August 7, 2017, the Student’s parent submitted a Referral to Determine Eligibility for Special Education and Related Services to the Board of Education (“Second Referral”). The Second Referral identified the areas of concern as Academic, Social/Emotional, Behavior, Communication and Activities of Daily Living. In it, the parents stated that the Student had never received special education or related services in the past. (Exhibit B 34)

62. The Student’s parents were anxious that, although he had never received specialized instruction or related services, he should be evaluated for special education eligibility and have a special education program in place for the first day of school of the 2017-2018 School Year. They made this position clear on several occasions. (Exhibit P 5; Exhibit P 17; T Parent; T Murdica)

63. The Student’s parents met with Victoria Rich, CHS Special Education Department Chair in mid-August, 2017 to discuss the special education process. (B 37).

64. By August 21, 2017, the Student’s parents had engaged a special education attorney to represent the Student. (Exhibit P 5)

65. It was not possible for CHS to convene a PPT meeting to plan a possible evaluation of the Student before the school year began due to the absence of staff during the summer recess and the press of other demands in opening the new school session. (T Murdica)
66. A meeting of the Student's PPT, including Dr. Marshall Gladstone, was convened on September 5, 2017 to consider the Second Referral. Dr. Gladstone shared results of psychological testing he had performed as well as his clinical impressions of the Student's BPD and its impact on his education. At that meeting, the PPT decided to implement a trial placement in special education at CHS for diagnostic purposes and to conduct a comprehensive evaluation for eligibility. (Exhibit B 38; T Parent; T Gladstone; T Murdica)
67. The Student's schedule for the trial placement included 3.2 hours per week of specialized instruction with a special education teacher for study skills as well as .8 hours per week of counselling with the school psychologist. In addition, an academic goal to improve study skills and a social/behavioral goal to address anxiety were added to his plan. Finally, he was provided accommodations and modifications of using a calculator, having an alternate setting and extra time for tests and work, preferential seating, checking work in progress, regular check ins with school psychologist and allowing him to leave class for support when needed due to anxiety. (Exhibit B 36)
68. A battery of assessments of reading, math, behavior, and social/emotional functioning were scheduled to take place in the CHS setting as part of the diagnostic placement. No one at the meeting, including Dr. Gladstone, recommended that the Student have a psychiatric assessment at that time. The Student's parents signed consent for the evaluation on September 5, 2017. (Exhibit B 38; T Parent; T Murdica)
69. The Student began attending CHS after the September 5, 2017 meeting and after participating in an informal meeting with CHS Principal DiPippo. Principal DiPippo intended to convey to the Student that he was welcomed at CHS and had a clean slate. The Student and his parent, unfortunately, interpreted the message as a warning not to misbehave. (Exhibit P 7; T Parent; T DiPippo)
70. On September 15, 2017, the Student wore a shirt to school with the legend: "Goat Lives Matter". He explained to his classmates that goats had been raped in Afghanistan and that Muslims were responsible for the September 11 attack on the World Trade Center. He was outraged that there was an insufficient acknowledgement of the September 11 tragedy. He demanded an apology from a Muslim classmate and followed her into the hall to get it. He asked a transgender classmate whether they were a boy or a girl. (T DiPippo)
71. The Student's behavior on September 15, 2017 was met with a disciplinary suspension from school for five days. This was reduced to two and one half days in response to the parents' advocacy. (Exhibit B 42; Exhibit P 19; T Parent)
72. On September 20, 2017, CHS staff requested, and the Student consented, to perform a Functional Behavior Assessment as part of the diagnostic evaluation. (Exhibit B 41)

73. Also on September 20 2017, the Student posted a video of himself holding a firearm with the word “Warning” scrolling across the image on social media (“Gun Post”). (T DiPippo; Exhibit B 42)
74. Several parents of students in the community immediately alerted CHS’ Principal about the Gun Post. Those students, parents and CHS’ Principal interpreted the Gun Post as a threat of violence against CHS and the Canton community. They reasonably feared for their children’s safety. (T DiPippo)
75. The Student was arrested by the local police department and spent five days in a juvenile detention center. (Exhibit B 43; T Parent)
76. In addition, the Student was suspended from school for ten days pending possible expulsion. (Exhibit B 42). CHS later declined to pursue the expulsion because the Student was in the process of being evaluated for special education eligibility and, later, was placed in a therapeutic setting. (T Murdica)
77. A PPT meeting was convened on October 17, 2017 to discuss the Gun Post. The PPT decided to place the Student in a private, out of district therapeutic day school to be selected jointly by the Student and the Board of Education for the duration of his diagnostic placement. In addition, the PPT decided – with the Student’s consent - to extend the diagnostic period and to add psychiatric and school threat assessments to the evaluation. (Exhibit B 45; T Murdica)
78. Dr. Gladstone agreed that an out of district therapeutic placement became necessary at that point due to the Student’s BPD and associated predisposition to provoke or harm mainstream students. (T Gladstone)
79. The Student’s parents noted that the Student was continuing in outside therapy with a new counselor, Dan Millstein. (Exhibit B 43; T Millstein)
80. The Student did not attend CHS between September 20, 2017 when he posted the threat until November 27, 2017, when he was diagnostically placed at Wheeler Clinic’s Northwest Village School (“Northwest Village”). Instead, he was provided out of school tutoring during this time. The PPT, including the parents, agreed that since the diagnostic placement would continue at Northwest Village, the evaluation would be completed by Wheeler’s Diagnostic and Referral Team (“DART”). The diagnostic period was extended by agreement to accommodate these changes. (Exhibit B 48; Exhibit B 49; Exhibit P 12; Exhibit P 13)
81. Northwest Village provided a small, structured therapeutic program where the Student could receive intensive individual attention and clinical services. (Exhibit B 48)
82. The DART Report, completed between December 2017 and February 13, 2018, presented a comprehensive evaluation of the Student’s strengths, weaknesses and needs. It concluded with a series of recommendations for an appropriate education program. (Exhibit B 51; T Murdica)

83. The Student's parents endorse the DART Report and agree that it accurately describes his strengths, weaknesses and needs and makes appropriate recommendations. (Attorney Laviano's Opening Statement)

84. The DART Report revealed, among other things, that with only modest exceptions, the Student's academic achievement was above or average in all areas despite having received very little specialized instruction or related services. In addition the DART Report noted that, as discovered in November 2015, the Student enjoys average intellectual functioning. Finally, he experiences "at least mild difficulties with symptoms related to ADHD" but these symptoms are very likely negatively impacted by social-emotional factors such as anxiety and depression. (Exhibit B 51)

85. An Executive Functioning assessment revealed only "mild difficulties" in the area of planning. Verbal organization, cognitive flexibility and inhibitory control were all at least average. Finally, the Student's visual spatial learning and memory are intact. (Exhibit B 51)

86. At the same time, the DART Report concluded that the Student continued to experience significant emotional problems. The DART Report identified the following diagnostic considerations for the Student:

- Persistent Depressive Disorder with anxious distress
- Social Anxiety Disorder
- Opiate dependence in early remission
- Benzodiazepine dependence in early remission
- Nicotine dependence
- ADHD: Predominantly Inattentive Presentation (mild to moderate)
- Binge Eating Disorder
- Parent/Child Relational Problem
- Academic/Educational Problems

(Exhibit B 51)

87. The DART Report recommended that the student be identified as eligible for special education and related services under the category of Emotional Disturbance because "his persistent depression and social anxiety coupled with his limited coping skills for managing his feelings have had a long-standing negative impact on his ability to function in a typical educational setting." (Exhibit B 51)

88. The DART Report did not recommend that the Student receive specialized instruction or related services for processing or memory problems or for executive function deficits. (Exhibit B 51)

89. The DART Report and the Student's progress at Northwest Village were reviewed at a PPT meeting on April 4, 2018. Consistent with the DART Report recommendation, the PPT determined the Student eligible for special education and related services under the category of Emotional Disturbance. (Exhibit B 53; T Murdica)

90. The PPT decided to place the Student at Northwest Village permanently, maintaining continuity with his diagnostic placement. In addition, the PPT developed an IEP that included specialized instruction and services to address his identified needs. (Exhibit B 53; T Murdica)
91. The IEP identified the Student's Present Levels of Academic Achievement and Functional Performance as Age Appropriate in the areas of Academic/Cognitive: Language Arts, Academic/Cognitive: Math; Other Academic/Nonacademic Areas; Communication; Health and Development; and Fine and Gross Motor. (Exhibit B 53)
92. The IEP included five Measurable Goals in the areas of Social/Behavioral (Goal Nos. 1 and 2), Independent Living (Goal No. 3), Employment (Goal No. 4) and Postsecondary Education/Training (Goal No. 5), along with instructional and related services to address them. (Exhibit B 53)
93. The IEP did not include any Academic or Communication goals or specialized instruction or services to address processing speed, memory or executive function deficits. (Exhibit B 53)
94. The Student earned A's and B's in his academic courses and progressed in his goals and objectives at Northwest Village until his attendance fell off during the 2018-2019 School Year because he chose to work full time during the school day. (Exhibit B 50; Exhibit B 54; Exhibit B 56; Exhibit B 62; Exhibit B 63)
95. The PPT met to discuss the issue of the Student's poor attendance on October 17, 2018. (Exhibit B 58). On October 26, 2018, the PPT reduced the Student's schedule to three days per week in order accommodate his work schedule. (Exhibit B 61)
96. Unfortunately, this change did not produce improved attendance. (Exhibit B 63) On June 17, 2019, the PPT recommended that the Student attend a five week summer session at Northwest Village to finish his academic requirements for high school graduation. The Student agreed to attend the program. (Exhibit B 67)
97. As of October 7, 2019, the Student had completed the requirements for his high school diploma. (T Parent; T Murdica)

CONCLUSIONS OF LAW AND DISCUSSION:

Legal Overview

1. The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq* ("IDEA") is to open the door of public education to students with disabilities by requiring school systems to offer them a free appropriate public education ("FAPE"). *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982) ("*Rowley*").
2. In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA. The first part of the test is whether there has been compliance with the procedural requirements of IDEA. The second part is

whether the student's Individualized Education Program ("IEP") is reasonably calculated to enable the student to receive educational benefit in light of the student's individual circumstances. *Id.* at 206-207. See also, *Andrew F. v. Douglas City School District*, 580 U.S. __, __ (2017); *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000).

3. IDEA also demands that each student's program be implemented in the least restrictive environment, so that children with disabilities are educated in integrated settings with non-disabled peers "[t]o the maximum extent appropriate." 20 U.S.C. Section 1412(a)(5)(A); 34 C.F.R. Section 300.114(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).

4. The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). "An IEP is a snapshot, not a retrospective." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id.*

5. The first prong of the *Rowley* inquiry, whether the Board of Education complied with IDEA's procedural mandates, is a critical one. As the Supreme Court said in *Rowley*, Congress based IDEA on the "conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet that student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).

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

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

8. A board of education must conduct a full and individual initial evaluation of each student before the initial provision of special education or related services. 20 U.S.C. Section 1414(a)(1); 34 C.F.R. Section 300.301.

9. An initial evaluation can be requested by a parent or by a state or local educational agency, a teacher or doctor, to determine if a child is eligible to receive special education or related services because he or she has a disability and is in need of specialized instruction or services to benefit from education. Such an evaluation must be completed and the educational program, if any, put in place within 45 days of the referral. R.C.S.A. Section 10-76d-7; R.C.S.A. Section 10-76d-13.

10. In addition, boards of education have a “Child Find” obligation under IDEA. In this regard, a board of education must locate and evaluate all children with disabilities who are in need of special education or related services within its school district. 20 U.S.C. Section 1412(a)(3)(A); 34 C.F.R. Section 300.111; R.C.S.A. Section 10-76d-6; *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012).

11. The obligation to “find” or locate children who have disabilities and are in need of special education or related services extends to children who attend private schools situated within the school district, even if the child resides in another state. 20 U.S.C. Section 1412(a)(10)(A); 34 C.F.R. Section 300.111; 34 C.F.R. Section 300.131.

12. The obligation to evaluate children for special education eligibility, unlike the duty to find or locate them, however, *does not* include children who are attending private schools located outside of the school district *unless* the child’s parent has requested such an evaluation. *Id. District of Columbia v. Abramson*, 493 F.Supp. 2d 80 (U.S.D.C. 2007); *Upland Unified School District*, 112 LRP 57989 (E. Jones, 2012); *Letter to Eig*, 52 IDELR 136 (OSEP 2009).

13. The duty to evaluate children for special education eligibility does not require that every struggling student receive a formal evaluation. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012); *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn. 2008).

14. Not all students with disabilities are eligible for services under IDEA. In order for a student’s disability to qualify him or her as eligible, the initial evaluation must reveal that the student has a disability such that he or she requires specialized instruction or related services in order to benefit from his or her education. 20 U.S.C. Section 1401(d)(1)(A); 34 C.F.R. Section 300.8. A qualifying emotional disturbance is one that is exhibited over a long period of time and to a marked degree. 34 C.F.R. Section 300.8(c).

15. Substance abuse does not, in itself, qualify as a disability under IDEA even if a student is unable to benefit from educational services without special education or related services. 34 C.F.R. Section 300.8; *Board of Education of Frederick County v. J.D.*, 232 F.3d 886 (4th Cir. 2000).

Burdens of Production and Proof

16. The Student had the burden in this case to produce evidence in support of his claims that the Board of Education committed violations of the IDEA and in support of the remedies requested. The Board of Education had the burden to prove by a preponderance of the evidence that it offered the Student FAPE. R.S.C.A. Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).

Statute of Limitations

17. A request for a special education due process hearing must be brought within two years of the date that the parent or public agency knew or should have known about the violation being alleged. 34 C.F.R. Section 300.511(e); 34 C.F.R. Section 300.507; R.C.S.A. Section 10-76h-4; *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012); *M.D. v. Southington Board of Education*, 334 F.3d 217 (2d Cir. 2003). Accordingly, claims based on events taking place more than two years after the complaining party knew or should have known of the alleged violation are barred and cannot form the basis for liability under IDEA. *Id.*; *Somoza v. New York City Department of Education*, 538 F.3d 106 (2d Cir. 2008).

18. There are only two exceptions to this two year rule:

Exceptions to the timeline. The timeline . . . does not apply to a parent if the parent was prevented from filing a due process complaint due to—

- (1) Specific misrepresentations by the [board of education] that it had resolved the problem forming the basis of the due process complaint; or
- (2) The [board of education]'s withholding of information from the parent that was required under this part to be provided to the parent.

20 U.S.C. Section 1415(f)(3)(D); 34 C.F.R. Section 300.511(f).

19. The evidence here clearly demonstrated that the two year timeline for initiating this special education due process complaint was triggered on September 17, 2015. That was the day in the Student's tenth grade year that the PPT rejected the First Referral and decided that he did not qualify for special education services under IDEA. The Student's parents were present at the meeting and knew that the Board of Education denied their request for an full evaluation and special education services for their son on that day. The parents did not testify to the contrary, or submit any evidence that the Student was not aware of the alleged violation on September 17, 2015.

20. The Student had until September 17, 2017, two years later, to submit his request for a due process hearing. The Student did not do so within that time.⁴

21. Although the Student argued that each of the two exceptions to the two year statute of limitations apply in this case, he produced no evidence at all in support of either claim. Moreover, the Board of Education did present compelling evidence to disprove each of these claims.

22. With respect to the first exception, there was no evidence that the Board of Education made any "specific misrepresentations" that it had resolved the alleged problem of the Student's eligibility for services under IDEA. Instead, the evidence demonstrated that the Board of Education considered and rejected the parent's First Referral at a PPT meeting on September 17, 2015 and made its true position on the parents' request for a full evaluation and services clear to them on that day. The Board of Education did not hide or misrepresent anything. The Student could have requested a

⁴ The Student's argument that the statute of limitations was reset when he became an adult is without foundation in reason or the law and is rejected.

special education due process hearing to challenge this decision at that time.

23. The PPT's statement to the parents on September 17, 2015, that the Student was not eligible for special education or related services was transparently not a "specific misrepresentation", as required for the first statute of limitations exception. The statement was neither an inaccurate statement of the Board of Education's position nor intended to mislead the parents to believe that their claim had been resolved. It was, instead, a clear and unambiguous expression of disagreement with, and rejection of, the parent's point of view. As such, the statement does not satisfy the first exception to the statute of limitations. *D.K. v. Abington School District*, 696 F.3d 233, 246 (3d Cir. 2012)

24. The Student's argument that the PPT's statement that he was not eligible for special education or related services constitutes a "specific misrepresentation" sufficient to toll the statute of limitations would have the exception swallow the rule. The argument has been specifically rejected by the courts. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012); *L.H. v. Cumberland Valley School District*, 842 F. Supp. 2d 762, 775 (M.D.PA 2012). The Student has provided no authority to suggest otherwise.

25. Similarly, the Student's suggestion that the Board of Education failed to share information with the Student that it was legally obligated to provide lacked any evidentiary basis. The text of the second exception to the statute of limitations plainly states that only the failure to supply *statutorily mandated* disclosures can toll the statute of limitations. Thus, the Student could have satisfied this exception by showing that the Board of Education failed to provide the Procedural Safeguards in Special Education publication to the parents. *D.K. v. Abington School District*, 696 F.3d 233, 246 (3d Cir. 2012).

26. The Student did not, however, make such a showing in this case. No one testified that the Student was *not* provided the necessary information. Moreover, the evidence presented by the Board of Education demonstrated that it *did* provide the parents with a copy of the Procedural Safeguards in Special Education publication when it issued its Notice of the PPT Meeting on September 11, 2015. In other words, the evidence overwhelmingly established that the second exception to the statute of limitations is not applicable.

27. Accordingly, the statute of limitations bars all claims arising before May 15, 2017, which was two years before the request for this special education due process hearing was submitted. This bar includes all claims arising from the Board of Education's decision to find the Student not eligible for special education or related services on September 17, 2015.

Claims Arising After May 15, 2017

28. The only possible events, chronologically speaking, that could possibly form the basis for an IDEA violation took place on and after August 3, 2017⁵ when the Student was again enrolled as a student with the Board of Education after having attended a series of out of state private boarding

⁵ August 3, 2017 was the day that the Student's parent first notified the Board of Education of the intention to enroll the Student at CHS. For ease of discussion, this is referred to as the date of enrollment.

schools.

29. The Board of Education had no obligation to the Student under IDEA between October 19, 2015 and August 3, 2017 because the Student was not eligible for special education services, was attending a series of private schools out of state and did not request an evaluation of eligibility for special education services⁶. 34 C.F.R. Section 300.131; *District of Columbia v. Abramson*, 493 F.Supp. 2d 80 (U.S.D.C. 2007); *Upland Unified School District*, 112 LRP 57989 (E. Jones, 2012); *Letter to Eig*, 52 IDELR 136 (OSEP 2009).

30. The evidence was undisputed that between October 19, 2015 and August 3, 2017, the Student was not enrolled with the Board of Education but was instead attending a series of boarding schools in other states. As such, any child find duty that may have existed to locate the Student as possibly eligible for special education rested with the school districts where his boarding schools were located in those states and not the Board of Education. 20 U.S.C. Section 1412(a)(10)(A); 34 C.F.R. Section 300.131.

31. The Board of Education would have been obligated to evaluate the Student for special education eligibility if his parents, who continued to reside in Canton, had requested an evaluation during that time. The Student's parents did not, however, request such an evaluation during the relevant time or until August 3, 2017, 20 U.S.C. Section 1412(a)(10)(A); 34 C.F.R. Section 300.111; *District of Columbia v. Abramson*, 493 F.Supp. 2d 80 (U.S.D.C. 2007); *Letter to Eig*, 52 IDELR 136 (OSEP 2009).

32. The evidence also demonstrated that the Board of Education did not violate the Student's rights under IDEA after he was enrolled on August 3, 2017 because it appropriately and timely evaluated and identified him as eligible for special education and offered him FAPE.

33. In this regard, the Student complains that the Board of Education did not have an appropriate program in place for him on the first day of the 2017-2018 School Year. While it is true that the Board of Education did not convene the first PPT meeting to consider the Second Referral until September 5, 2017, a few days after school began, it had no obligation to move more quickly.

34. When a referral for special education eligibility is presented between school years, as was the one here, the referral is deemed effective on the first day of school. The Board of Education had 45 days from the first day of school to conduct the necessary evaluation, make an eligibility decision and provide services. It certainly had no duty to complete an evaluation and put a program in place before the school year began. R.C.S.A. Section 10-76d-13.

35. The Student also argues that the Board of Education did not properly evaluate the Student in the fall of 2017 because the evaluation plan did not initially contemplate a psychiatric assessment. While this is true, it is also the case that when the initial evaluation plan was developed, the Student

⁶ The Board of Education's allegedly inconsiderate treatment of the Student between October 19, 2015 and August 3, 2017, including sharing his December 3, 2016 social media post with Vermont Academy and barring him from school grounds after the basketball game, were unrelated to any special education evaluation, program or placement and therefore outside this Hearing Officer's jurisdiction. 34 C.F.R. Section 300.507.

had no history of threatening violence. He had not yet posted the social media message with the word “Warning” and image of the Student holding a firearm. In addition, the PPT that initially planned the evaluation had input from the Student’s then therapist, Dr. Gladstone, who provided valuable insight into his emotional problems. No one, including Dr. Gladstone, thought a psychiatric evaluation was necessary at that time. If the parents disagreed with the evaluation plan, they were free to request an Independent Educational Evaluation. 34 C.F.R. Section 300.502. They did not do so.

36. Finally, once the Student made a threat of violence, the PPT appropriately and promptly revised its evaluation plan to include a psychiatric assessment and threat assessment. The Student’s parents fully endorsed the result of that plan, the DART Report. There was no evidence that the short delay in requesting a psychiatric assessment had any impact on the Student’s access to education or his parent’s ability to participate in the IEP process. Consequently, even if this delay worked a procedural violation, it did not amount to a deprivation of FAPE. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).

37. While there were also delays in completing the evaluation that was ultimately issued as the DART Report and implementing the diagnostic special education program at Northwest Village, the Student was not disadvantaged as a result. The Student had the same special education program and services at Northwest Village for his diagnostic placement as of November 27, 2017 as he later received for his permanent program. His parents endorsed that program as appropriate. In addition, they consented to the private placement at Northwest Village for the diagnostic period as well as extensions of the assessment period to complete the DART Report. The evaluation and placement were completed in a timely fashion under the circumstances.

38. Notably, the evidence established that the Student’s program and placement at Northwest Village were appropriate. The program was based on the DART Report, which his parents endorse and agree is accurate and appropriate. The Student made academic and emotional progress, progressed in his goals and objectives and ultimately earned a high school diploma. The Board of Education extended itself in accommodating the Student’s absenteeism and changing preferences and schedule. There was no evidence presented that the Student or his parents ever objected to any aspect of the Northwest Village program. The Board of Education fully satisfied its obligation to offer the Student FAPE. *Andrew F. v. Douglas City School District*, 580 U.S. __, __ (2017); *Cerra v. Pawling Cent. Sch. Dist.* 427 F.3d 186, 191 (2d Cir. 2005); *M.S. v. Board of Education of the City School District of the City of Yonkers*, 231 F.3d 96, 103 (2d Cir. 2000).

39. Finally, the Student’s complaint that in March 2018 while he was attending Northwest Village, his image was displayed at CHS with a “Call 911” message is not cognizable under IDEA. That image, if it was displayed, had no relation to the Student’s special education evaluation, program or placement. Similarly, the Student’s complaint that the Board of Education never conducted a manifestation determination after his suspension for the Gun Post is unavailing. The Board of Education did not pursue expulsion once the evaluation process was underway. Thus, although there may have been some miscommunication about the manifestation determination, there was no impact on the Student’s program, his educational benefit or his parents’ participation in the process. There was no deprivation of FAPE. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).

Conclusions

40. The statute of limitations bars the Student's claims relating to events occurring before May 15, 2017. Moreover, the Board of Education had no responsibility to locate or identify the Student as eligible to receive special education and related services between October 19, 2015 and August 3, 2017. During that time, the Student was attending private schools in other states and his parents did not request an evaluation of his eligibility during that time.

41. The Board of Education fulfilled its obligations to the Student under IDEA from August 3, 2017 until he completed requirements for his high school diploma in 2019. It conducted a comprehensive evaluation in response to the Student's parents' referral. The Student endorses the accuracy of the evaluation that was completed. In addition, from the date of his eligibility and before, the Board of Education offered the Student a special education program and placement at Northwest Village that supported the Student's educational progress and ultimately led to his graduation from high school. In so doing, the Board of Education offered the Student FAPE during the entire period of his eligibility for services under IDEA.

FINAL DECISION AND ORDER:

The events that took place before May 15, 2017 are barred by the statute of limitations and are not at issue in this matter.

The Board of Education did not deny the Student FAPE after May 15, 2017.

The Board of Education is not responsible to reimburse the Student for the expense of the Student's matriculation at Summit Academy, Vermont Academy and/or SUWS of the Carolinas, including transportation and therapies.

The Board of Education is not responsible to provide compensatory education for the Student.