

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student and Branford Board of Education

Appearing on behalf of the Student: Parent, *Pro Se*

Appearing on behalf of the Board: Attorney Linda Yoder
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT. 06103-01919

Appearing before: Attorney Ann F. Bird
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board of Education (Board) deny the Student a Free Appropriate Education (FAPE) by placing him out of district?
2. Did the Board of Education discriminate against the Student because of his disability?
3. Did the Board of Education change the Student's placement without making a manifestation determination?
4. Does the Student require a therapeutic day school program designed for students with emotional disturbance in order to receive FAPE?

PROCEDURAL HISTORY:

The Student initiated Special Education Due Process Case No. 22-0268 on February 2, 2022. This Impartial Hearing Officer was assigned to Case No. 22-0268 on February 2, 2022. A Prehearing Conference was convened on February 24, 2022. The Student's parent appeared on behalf of the Student and Attorney Christopher Tracey appeared on behalf of the Board of Education. It was established that the deadline for filing the final decision for Case No. 22-0268 was April 18, 2022. An evidentiary hearing was scheduled for April 1, 2022.

On March 14, 2022, the Board of Education initiated Special Education Due Process Case No. 22-0330, involving the same student, the same period of time and overlapping issues as Case No. 22-0268. This Impartial Hearing Officer was assigned to Case No. 22-0330 on March 17, 2022.

The Board requested that the two cases be consolidated for hearing and they were consolidated on March 17, 2022. The deadline for hearing the cases and issuing the final decision in the consolidated cases was then May 27, 2022.

An initial evidentiary hearing was conducted via videoconference on May 13, 2022. The hearing was adjourned after presentation of the Student's case in chief due to technical problems. During the hearing on May 13, 2022, the Board requested a thirty day postponement and extension of the timelines to conduct the hearing and to file the final decision. The purpose of the requested postponement and extension was to allow both parties time to present their evidence at a continued evidentiary hearing. The Student opposed the requested postponement, but it was granted and the deadline was extended to June 24, 2022.

A second day of evidentiary hearing was initially scheduled for May 31, 2022. That hearing was postponed due to the Hearing Officer's personal family emergency. On June 20, 2022 a second and final evidentiary hearing was conducted. During the hearing on June 20, 2022, the Hearing Officer dismissed the Student's claims as to Issues 2 and 3 in that the Student had not submitted evidence that the Board changed the Student's placement with or without a manifestation determination. In addition, the Hearing Officer lacks jurisdiction over claims of discrimination under the Americans with Disabilities Act or the Rehabilitation Act of 1973 and that additionally, there was insufficient evidence presented of discrimination based on the Student's disability.

Also during the hearing of June 20, 2022, the Board requested a thirty day postponement and extension of the timelines to file the final decision for Case No. 22-0330. The Student did not object. In addition, the Student requested a thirty day postponement and extension of the timeline to file the final decision for Case No. 22-0268. The Board did not object. The purpose of these requested postponements and extensions was to allow both parties time to submit written arguments and for the Hearing Officer to issue a decision. The requests were granted.

On July 12, 2022, the parties each requested additional twenty day extensions of the timeline to file the final decision for Case Nos. 22-0330 and 22-0268 in order to allow the Hearing Officer additional time to finalize the Final Decision and Order. That request was granted to August 12, 2022.

The following witnesses testified at the hearing:

Student's Parent

Catherine DeLucia, School Psychologist

Charles Cicarella, Director of Student Services and Pupil Personnel Services

Hearing Officer Exhibits HO 1 through HO 8 were entered as full exhibits. In addition, Parent Exhibits P 1 through P 9 were entered as full exhibits and Board of Education Exhibits B 1 through B 100 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 brought a request for special education due process hearing in Case No. 22-0268, claiming that the Board's decision to change his placement to an out of district program would deny him FAPE. The Board brought its request for special education due process hearing in Case No. 22-0330 to establish that the Student requires an out of district therapeutic program to receive FAPE.

The Hearing Officer concluded that the Student does require an out of district therapeutic program to receive 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, 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 May 4, 2010, and is now twelve years of age. He currently attends Francis Walsh Intermediate School (FWIS), a public school in Branford, Connecticut. (Exhibit B 80)
2. The Student lives with his parents and siblings in Branford, Connecticut. (Exhibit B 80; T Parent)
3. The Student was identified as eligible for special education and related services in 2015, during his kindergarten year, with a disability category of Emotional Disturbance. (Exhibit B 1)
4. At that time, he was attending his local public school in Branford and exhibiting chronically dysregulated behaviors, including work refusal, physical aggression towards adults and disruptive conduct. (Exhibit B 1)
5. Although the Student's Planning and Placement Team (PPT) implemented an Individualized Educational Plan (IEP) that included various interventions designed to regulate his behavior during kindergarten, including a change of placement to a more restrictive public school setting, these efforts were ultimately not successful in meeting his needs. (Exhibit B 1)
6. A psychiatric evaluation was performed by the Yale Child Study Center in July of 2016, following the kindergarten year. This evaluation resulted in a diagnosis of Attention Deficit

Hyperactivity Disorder (ADHD) - combined presentation, Disruptive Mood Dysregulation Disorder and Probable Autism Spectrum Disorder. (Exhibit B 1)

7. The Student's placement was changed to Raymond Hill School, a small, state approved out of district therapeutic day school in New Britain, Connecticut for the 2016-2017 School Year, his first grade year. (Exhibit B 1)
8. On May 24, 2018, during his third grade year, the Student's PPT conducted an annual review. Cognitive testing at that time revealed that the Student has average intellectual function with weakness in verbal comprehension. Academic testing showed average educational performance with difficulties in the areas of impulsivity and organization within the classroom. An occupational therapy assessment noted age appropriate gross motor skills but weakness in fine motor skills. Rating scales produced Clinically Significant results for Behavioral Symptoms, Withdrawal and Atypicality as well as Developmental Social Disorders. (Exhibit B 1)
9. The PPT determined that the Student continued to qualify as a student requiring special education and related services and reaffirmed his disability category as Emotional Disturbance. In addition, the PPT requested further evaluation to examine the possible classification of Autism Spectrum Disorder. (Exhibit B 1)
10. Pursuant to the May 24, 2018 PPT's request, the Board's school psychologist conducted assessments to address the possible diagnosis of Autism Spectrum Disorder in August 2018. These were the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) Module 3 and the Childhood Autism Rating Scale – Second Edition High Functioning Version (CARS2). (Exhibit B 1)
11. In addition, a second school psychologist performed the Gilliam Autism Rating Scale, Third Edition (GARS 3) in November 2018. (Exhibit B 2) A speech language pathologist conducted a Social Pragmatic Language Assessment in December 2018 using the Test of Problem Solving Elementary (TOPS-3) and Social Responsiveness Scale – Second Edition (SRS-2) instruments. (Exhibit B 6)
12. The Student's PPT met on December 6, 2018 to discuss the results of these various assessments and the possibility of classifying the Student under the category of Autism Spectrum Disorder. After a discussion and review of these assessments that included the Student's parent, the PPT determined that the Student did not meet the criteria for the educational classification of Autism Spectrum Disorder, but continued to be eligible under the classification of Emotional Disturbance. (Exhibit B 7; Exhibit B 9) As far as the record reflects, the Student's parent never formally challenged that decision.
13. The Student continued at Raymond Hill School through the winter of his sixth grade year. During his matriculation at Raymond Hill until the summer of 2019 following his fifth grade year, the Student made some progress with behavior, academic performance and in his goals and objectives. (Exhibit B 16; Exhibit B 18; Exhibit B 19; Exhibit B 21; Exhibit B 22; Exhibit B 24)

14. In July 2019, however, the PPT noted severe increases in the Student's maladaptive and risky behaviors during the extended year program. He required crisis intervention services on multiple occasions that summer. (Exhibit B 27) At a PPT on September 13, 2019, the Student's parent requested a change in school placement. At that time, the Student's behaviors, such as threatening, making provocative statements, refusing to do work, running around the building and having negative peer interactions, were continuing to escalate. He had reverted to behaviors that were extinguished previously. The PPT recommended making a referral to Aces Mill Road School as an appropriate alternative therapeutic program for the Student, while maintaining the program at Raymond Hill School during the referral process. (Exhibit B 31)

15. The Student was involved in several serious incidents of aggression that resulted in restraint and/or seclusion in September and October of 2019. (Exhibits B 33, 34, 35, 36, 37, 39) His noncompliance, out of bounds behavior and inappropriate statements all spiked up. He also struggled with his academic work, failing several classes. The PPT continued to adjust the program at Raymond Hill School. (Exhibit B 40; Exhibit B 41; Exhibit B 49)

16. In March 2020, a worldwide COVID 19 Pandemic hit Connecticut. Like most schools in the area, Raymond Hill School and the Branford Public Schools moved to a remote instruction model for the remainder of the 2019-2020 School Year. (March 10, 2020 Declaration of Public Health Emergency; Exhibit B 43; T Cicarella)

17. The Student returned to Raymond Hill School for the 2020-2021 School Year, with his parents opting to continue with remote rather than in person instruction. (T Parent; Exhibit B 69) He struggled to engage with school. Participation in school based counselling declined while maladaptive behaviors continued. (Exhibit B 48; Exhibit B 49; Exhibit B 51; Exhibit B 53; Exhibit B 55; Exhibit B 56; Exhibit B 57; Exhibit B 58)

18. In October 2020, the Student's parent reiterated earlier requests that the PPT return the Student's placement to the Branford public school setting. Although school staff felt he was not ready to return to his local school, the PPT also recognized that the Student's engagement with the Raymond Hill School program was in deep decline and that a schism between his parent and the Raymond Hill school staff had grown. The PPT agreed to revisit the issue. (Exhibit B 48; Exhibit B 50; T of Cicarella)

19. At its meeting on January 27, 2021, the Student's PPT acceded to his parent's request to change his placement to the public school remote instruction program. (Exhibit B 59; T of Cicarella)

20. The Student's placement was changed to the FWIS public school remote instruction program for the remainder of the 2020-2021 School Year on February 17, 2021. The Student initially exhibited improved compliance and engagement with his remote program. (Exhibit B 64; T Cicarella)

21. The Board performed a Re-Evaluation in April of 2021 that included an occupational therapy assessment as well as achievement and psychological testing. (Exhibit B 68; Exhibit B

69) The occupational therapist concluded that the Student no longer required occupational therapy to receive FAPE. That service was discontinued, and the Student never formally challenged that decision. (Exhibit B 68)

22. The Student’s teachers reported that he was meeting grade level performance expectations in all academic areas except written expression, mathematics problem solving and listening comprehension, which were below expectations. His scores on the Wechsler Individual Achievement Test – Third Edition (WIAT-III) for Word Reading, Oral Reading Fluency and Reading Comprehension were at or above the Expected Level, while scores for Sentence Composition, Essay Composition, Numerical Operations and Math Problem Solving were Below Expected Level. (Exhibit B 69)

23. The Student’s special education teachers completed the Behavioral Assessment Scale for Children, Third Edition (BASC-3). Their scores put the Student in the Average Range for Externalizing Problems, Internalizing Problems, School Problems and Behavioral Symptoms. He scored in the At Risk category for Adaptive Skills. (Exhibit B 69)

24. On April 23, 2021, the Student’s PPT reviewed the Re-Evaluation results, conducted an annual review, and developed a new IEP for the 2021-2022 School Year. (Exhibit B-70)

25. The Student’s 2021-2022 IEP provided for special education and related services as follows:

Academic instruction in Language Arts in individual or small group setting with Special Education Teacher	45 minutes per day
Academic Instruction in Mathematics in individual or small group setting with Special Education Teacher	45 minutes per day
Instruction in Learning Strategies in Individual or small group setting with Special Education Teacher	45 minutes per day
Counseling with School Psychologist in individual or small group setting	30 minutes per week

(Exhibit B-70)

26. The Student was slated to spend time in the mainstream environment with nondisabled peers for Science and Social Studies, Physical Education, Art, Music, STEM, Lunch and Recess. (T DeLucia; Exhibit B 70)

27. The Student's PPT identified the following areas of "Concerns/Needs" requiring specialized instruction in the Present Levels of Performance section of his IEP:

Academic/Cognitive: Language Arts: Writing – organization, elaboration, editing

Academic/Cognitive: Math: Adding and subtracting fractions with unlike denominators, finding area and perimeter, 2-3 digit by 2 digit division, solving mixed operation 1-2 step story problems

Behavioral/Social/Emotional: Classroom disruption, personal safety, appropriate language and respect, following classroom routines (work completion, asking for help, working with peers on group activities) fostering and maintaining peer relationships

(Exhibit B-70)

28. The Student's IEP also included a set of Annual Goals and Objectives that targeted the areas of Concerns/Needs identified in the Present Levels of Performance section of his IEP. Included were a goal with objectives for writing, two goals with objectives for mathematics and four goals with objectives for the Social/Behavioral realm. (Exhibit B-70)

29. The Student's goals for the Social/Behavioral realm were as follows:

Goal No 4: Within the academic setting, [Student] will reduce instances of negative comments and gestures towards staff and peers an average of 1 instance per day.

Goal No. 5: [Student] will reduce instances of Passive Non-Compliance (becomes purposely and increasingly distracted through ignoring tasks, demands, or staff directives and engaging in unsafe behaviors) to an average of 20% of intervals or less, across all educational environments.

Goal No. 6: [Student] will gain understanding of how to foster and maintain positive relationships with peers.

Goal No. 7: [Student] will participate in and follow classroom routines and activities throughout the school day.

(Exhibit B-70).

30. The Student's IEP also included a set of Program Accommodations and Modifications in the categories of Tests/Quizzes/Assessment, Grading, Organization, Environment, Behavioral Interventions and Support, Instructional Strategies and Other. (Exhibit B-8)

31. These Program Accommodations and Modifications included Interventions and Support of allowing for short breaks when necessary, providing daily feedback, facilitating personal coping skills and strategies, allowing the Student to leave class. (Exhibit B-70)

32. In addition, the Student was provided paraprofessional support during Science, Social Studies, Lunch, Recess, Physical Education, Art, Music and STEM to assist with emotional regulation. (Exhibit B-70)

33. The Student's Annual Goals and Objectives, Modifications and Accommodations, instructional services and related services targeted the areas of Concerns/Needs identified in the Present Levels of Performance section of his IEP. In addition, these services were calculated to enable the Student to receive educational benefit from his program based on the information available to the PPT at the time the IEP was adopted. (Exhibit B-70)

34. The Student participated in the FWIS in person program from the beginning of the school year under the 2021-2022 IEP. His engagement and behavior were acceptable for the first few weeks. (T Cicarella; T DeLucia) Within a short time, however, he began to exhibit dysregulated behaviors, including refusal to engage in academic work, elopement from his classroom, disruption of others and using inappropriate sexual language. (B 73; T Cicarella; T DeLucia)

35. The PPT met on October 12, 2021 to review the program in light of "demonstrated significant levels of disruption to others, refusal, inappropriate language of a sexual nature¹, and eloping which have increased in intensity, frequency and duration." In an effort to improve the Student's academic engagement and decrease his misconduct, the PPT extended paraprofessional services to include the entire school day, and further revised his Behavior Plan². (T DeLucia; Exhibit B 70)

36. The Student's Behavior Plan for the 2021-2022 School Year was based on ABA principles. It targeted four behaviors – Eloping, Refusal, Disruption to Others, and Inappropriate Behaviors of a sexual nature. It was individualized for his needs, offered various strategies and modalities for school staff's use in responding to target behaviors and called for collection of data on the occurrence of the four target behaviors and the use of coping skills and engagement

¹ The parent testified that the school staff was biased against the Student, as reflected in its use of the term "sexualized" to describe some of his behavior. (T Parent) The evidence, however, revealed that at least some of the behavior was of a sexual nature and was disruptive of the educational environment to the point that a female student complained. (T Parent; T DeLucia) The parent claimed incongruously that such behavior is common among male adolescents and also that it was a function of the Student's disability and should be ignored. (T Parent) Either way, it was appropriate for the school to describe and target these disruptive behavior for management.

² The Student argues that this was his first Behavior Plan at FWIS. This claim, however, is not supported by the evidence. The school psychologist testified that the Behavior Plan was in place within two weeks of the school year's start, and that data was being collected and analyzed from the beginning. (T DeLucia)

in appropriate behaviors, during 15 minute intervals throughout the school day. (T DeLucia; T Cicarella; Exhibit B 76)

37. Paraprofessionals assigned to work with the Student to support his behavior were constantly trained by certified staff to address the Student's individual behavior needs. Although they did not have certification as Registered Behavior Technicians (RBT) they were competent to perform the services required of them. (T DeLucia; T Cicarella)

38. The Board's School Psychologist worked with the PPT to develop and revise the Behavior Plan throughout the Student's tenure at FWIS. She is not a Board Certified Behavior Analyst, but is appropriately credentialed, trained and experienced to provide the services she performed, including behavior management analysis. (T DeLucia; T Cicarella; Exhibit B 98)

39. A follow up PPT meeting was held on October 29, 2021. At that time, behavior data revealed that the Student engaged in Disruption to Others at least once³ during 26% of 15 minute intervals of the day. He Eloped during 12% of 15 minute intervals, engaged in Inappropriate Behavior of a sexual nature during 21% of 15 minute intervals and Refused during 19% of intervals. He engaged in Appropriate Behavior during an average of 50% of intervals. (T DeLucia; Exhibit B 78).

40. At the parent's request, the PPT of October 29, 2021 decided to perform another Re-Evaluation of the Student to determine if he meets the eligibility requirement for a primary disability of Autism Spectrum Disorder. (Exhibit B 75; Exhibit B 82; T DeLucia)

41. On January 13, 2022, the PPT again met to review the Student's program and progress, review the assessments and conduct a manifestation determination. (Exhibit B 80; T DeLucia; T Cicarella)

42. The PPT determined that the Student's behaviors leading to a suspension were a manifestation of his disability. In addition, it reviewed the Behavior Plan and made more adjustments. (Exhibit B 80; T DeLucia) At that time, data revealed that the Student was spending a total of nearly 2.5 hours per day outside of his classroom due to a combination of Elopement and requests to leave the class. He regularly chose to not attend his mainstream classes in Social Studies, Science, Art and Music. While he usually attended his special education classes, he completed less than 10% of his work overall. (Exhibit B 81; T DeLucia).

43. The Student's behavior data revealed that he averaged Disruption to Others during 26% of 15 minute intervals, with Elopement and Inappropriate Behaviors each averaging 18% of 15 minute intervals. Refusal was 19% of 15 minute intervals and Appropriate Behavior averaged only 52% of 15 minute intervals. (Exhibit B 81; T DeLucia) Although the data did not capture all aspects of the Student's conduct, the PPT noted that his dysregulated behaviors were increasing in intensity, frequency and duration. (Exhibit B 80; T DeLucia)

³ Although target behaviors frequently took place more than once during any interval, they were counted only once in the data. (T DeLucia)

44. The requested Re-Evaluation was performed by the Board's speech-language pathologist and a second school psychologist. The Re-Evaluation revealed that the Student fell within the "mild to no" symptoms of Autism on the CARS-HR rating scale and "normal to mild" social-responsiveness needs and "normal" levels of restricted interests/repetitive behaviors on the SRS-2. On the BASC-3 rating scale, his levels of functional impairment were high in all three areas, indicating significant impact. These findings were consistent with the Student's school history and indicated high levels of difficulty with behavior regulation. (Exhibit B 82)

45. Unfortunately, the Student could not adequately cooperate with the language testing portion of the Re-Evaluation to achieve a full assessment. The testing that was performed, however, indicated average receptive and expressive vocabulary skills. Classroom observation revealed that the Student often engages in conversation with peers but resists communication with adults. (Exhibit B 82)

46. After reviewing the behavior data, results of the Re-Evaluation, and other information, including the parent's input, the PPT determined again that the Student does not meet the eligibility criteria for Autism Spectrum Disorder. (Exhibit B 80; T DeLucia). The PPT concluded that, although the disability categories of Emotional Disturbance and Autism Spectrum Disorder share several features, the Student's "behaviors are driven from an emotional perspective." (T Cicarella; T DeLucia; Exhibit B 80) Again, the Student has not formally challenged this determination.

47. Significantly, the PPT also decided that the Student's needs are greater than can be met with the resources available at the FWIS or even within the school district. (Exhibit B 80; T DeLucia; T Cicarella). The PPT concluded that the Student requires a small, segregated, highly structured out of district therapeutic program that can consistently, comprehensively and instantly provide staff with expertise in behavior management to attend to his behavior needs throughout the school day. (Exhibit B 80; T DeLucia; T Cicarella)

48. The Board's Director of Student Services and Pupil Personnel Services identified a number of state licensed out of district therapeutic programs that can meet the Student's needs and made referrals to them. Each of these programs have the resources and expertise to address the Student's needs and provide him FAPE. (T Cicarella; Exhibit B 84)

49. These programs are: Aces Mill Academy in North Haven, Connecticut, High Roads School of Wallingford, Connecticut, and Aspire Living and Learning Academy in Stratford, Connecticut. (T Cicarella; Exhibits B 84, 85 and 86)

50. The Board does not have such a program in its district and cannot feasibly create or implement such a program at FWIS or any other school. (T Cicarella; T DeLucia)

51. The Student's parent disagreed with the decision to place him in an out of district therapeutic school and refused to cooperate in the placement. The Student filed the request for due process hearing assigned Case No. 22-0268 on January 31, 2022. (T Cicarella; Exhibit HO 1)

52. No further steps were taken to implement an out of district placement for the Student. Unfortunately, however, the Student's behavior continued to deteriorate during the school year, as he became more threatening towards adults and almost completely refused to engage in academic work. (Exhibit B 88; T Cicarella; T DeLucia)
53. The Student did not make satisfactory progress on any academic goals and most behavior goals and was failing most of his classes in March 2022. (Exhibit B 93; Exhibit B 95; T DeLucia)
54. The Board filed its own request for due process, assigned as Case No. 22-0330, on March 14, 2022. The Board claims that the Student requires an out of district therapeutic school to receive FAPE. (Exhibit HO 3)
55. In an effort to maintain the Student in school safely as the due process hearing continued, the Board implemented a highly restrictive program for the final few weeks of the school year, with the parent's consent. The Board added consultation services of a BCBA and reduced the program to focus on the single goal of not eloping. The Student was supported throughout the school day by a certified staff member and a paraprofessional in a segregated space. He was not introduced to any new academic instruction. Although this program did stop the Student's elopement, he failed most of his classes, made unsatisfactory progress in his goals and was almost completely isolated from peers. (T of Parent; T of DeLucia; T of Cicarella; Exhibit P 9)
56. The program provided for the Student during the final weeks of the school year did not offer FAPE. (T Cicarella; T DeLucia)

CONCLUSIONS OF LAW AND DISCUSSION:

- I. IDEA Background
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, and the second part is whether the student's 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. __, __, 137 S.Ct. 988, 999 (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. Significantly, 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. § 1412(a)(5)(A); 34

C.F.R. § 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 Board of Education had the burden to prove by a preponderance of the evidence that its decision to place the Student in an out of district therapeutic program was both substantively appropriate and in compliance with IDEA's procedural requirements. Regulations of Connecticut State Agencies (R.S.C.A.) Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).

6. 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).

7. From a procedural standpoint, a PPT must (a) assess and periodically reassess the Student to identify his or her strengths, weaknesses and levels of performance in each area of disability as determined through periodic assessments; (b) based on those assessments, develop 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) provide 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.

8. In addition, the PPT must periodically review every student's progress in the IEP. If the student is not making progress as expected, the PPT must revise the IEP as appropriate. 34 C.F.R. Section 300.324(b).

II. First Issue – Denial of FAPE

A. Procedural Compliance

9. The evidence established that the Student's PPT fulfilled its procedural obligations in developing his IEP for 2021-2022 and ultimately determining that he requires an out of district therapeutic placement to receive FAPE. The PPT repeatedly assessed the Student's performance and needs using standardized measures of his cognitive and functional academic and behavioral levels, collected behavior data, and conducted classroom observations, progress reviews, teacher

and parent interviews and file reviews. The data produced through these procedures was used to inform the PPT's development of the 2021-2022 IEP. *20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320.*

10. As the school year progressed, the PPT met to review data collected on an ongoing basis concerning the Student's academic and functional progress. As the evidence reflected, the data developed during the first half of the 2021-2022 School Year revealed a student whose academic engagement and behavioral functioning continuously deteriorated. As this deterioration occurred, the PPT responded, as was its obligation, with changes to the Student's Behavior Plan and academic program. *34 C.F.R. Section 300.324(b)*. These revisions, however, did not produce improvement or provide FAPE.

11. Notably, the PPT repeatedly evaluated the possibility that the Student might experience Autism Spectrum Disorder and reassessed his disability category of Emotional Disturbance throughout his school career. Each time, the Student's PPT determined that it is emotional factors that drive this Student's behavioral dysregulation, rather than Autism Spectrum Disorder. Each time, the Student's parent did not formally challenge this determination.

12. The PPT has also consistently considered the Student's parent's input and point of view in its decision making process. The PPT reassessed the Student's disability category at his parent's request⁴. In addition, the PPT agreed to change the Student's program to return to his local public school setting in February 2021, even against the professional judgment of many team members. At every turn, the PPT sought and heard the parent's voice.

13. The fact that the Student's parent disagrees with the PPT's decision to place the Student in an out of district therapeutic program does not prove that her view was not considered. While parent choice is important, it does not overrule a PPT's placement decision. *Letter to Burton*, 17 IDELR 1182 (OSERS 1991)

B. Substantive Compliance

14. The second inquiry under *Rowley* is whether the Student's PPT satisfied IDEA's substantive requirement that program decisions be reasonably calculated to allow the Student to make appropriate progress in light of his individual circumstances. *Rowley* at 206-207; *Andrew F. v. Douglas City School District*, 580 U.S. __, __, 137 S.Ct. 988, 999 (2017).

15. A Free Appropriate Public Education under the IDEA does not implicate a "potential-maximizing education." *Rowley* at p. 197, fn. 21. Instead, the IEP must be one that "confers some educational benefit upon the handicapped child." *Id.* at p. 200. An appropriate education is one that "afford[s] the student with an opportunity greater than mere trivial advancement." *T.K. v. N.Y.C. Department of Education*, 810 F.3d 869, 875 (2d Cir. 2016).

⁴ Although the Student argued that a disability category of Autism Spectrum Disorder was appropriate and would have entitled him to a different set of services, he did not present evidence of what those services would be or how they would impact the Student's progress.

16. The evidence was overwhelming that the Student's placement at FWIS ultimately proved to fall well short of meeting the Student's needs or conferring educational benefit between September 2021 and January 2022. Despite repeated review and revision of the IEP, the Student was not completing more than 10% of his academic work and chose not to attend significant portions of his academic class time. He was failing most of his classes and not making progress in his goals and objectives. When the program was made more restrictive for safety reasons toward the end of the school year - after the relevant decisions were made - the Student was almost entirely segregated and still refusing to engage in any new academic learning. While the parent argued that the Student was experiencing success at FWIS, the data demonstrated otherwise.

17. It was incumbent on the PPT to observe the failure of the Student's program and make adjustments to meet his needs. 34 C.F.R. Section 300.324(b). The PPT fulfilled this obligation, adding services and aids and making changes over a period of several months in an attempt to produce a program that would bring more than trivial advancement. Ultimately, the Student's needs could not be met at FWIS. It became clear that the Student required a much smaller, more structured, specialized setting with expert staff constantly available to address his behavior.

18. The PPT was surely mindful of IDEA's mandate that students with disabilities should be educated with children who are not disabled in the "least restrictive environment" to the "maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998).

19. Indeed, Students should receive their education in self-contained settings or out of district programs *only* when the nature or severity of their disability is such that education in mainstream settings with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. Section 300.114(a)(2); *Walczak v Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1999).

20. Where, as here, FAPE cannot be delivered in a mainstream setting, the Board is required to provide the program in a placement that can educate the student satisfactorily. *P v. Newington Board of Education*, 546 F.3d 111 (2d Cir. 2008). A hearing officer must look at whether a student can be educated in a regular class, the educational benefits of a regular class versus a segregated class, and any negative effects of a student's presence on regular peers. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048-50 (5th Cir. 1089)

21. The evidence demonstrated that it is not possible to provide the Student FAPE at FWIS with or without the use of supplementary aids and services due to the nature and severity of the Student's disability.

22. The PPT's view that an out of district therapeutic program is likely to confer the Student with educational benefit greater than mere trivial advancement is a reasonable one under the circumstances. After all, the PPT had a half year of documented experience with the Student in a public school setting with substantial supplemental aids, supports and services, operating under a program that was constantly reviewed and revised.

23. The parent did not present persuasive evidence to undermine the credibility of the PPT's

conclusion that the Student requires an out of district therapeutic program to receive FAPE. The argument, for instance, that the FWIS program would have been successful had a BCBA been included on the team earlier was not supported by the evidence. The school psychologist who worked with the team from the beginning of the Student's return to FWIS is appropriately trained and experienced in behavior management and was well qualified to perform her duties. The parent presented no evidence that a BCBA credential would have added anything to the PPT's expertise.

24. Similarly, the parent argued that the Student's paraprofessionals at FWIS were improperly credentialed and should have had an RBT designation. Again, the evidence presented by the Board established that the paraprofessionals were appropriately trained to perform the duties assigned. The parent did not produce any evidence that an RBT credential would have had any impact.

25. Moreover, the law is clear that the choice of educational methodology is the exclusive province of the school district. School officials are professionally trained and experienced to perform the work that they do. Neither a parent nor a hearing officer has the authority – or the expertise - to dictate these matters in a school setting. *Trumbull Board of Education*, 106 LRP 10860 (SEA CT 2004); *Lachman v. Illinois State Board of Education*, 852 F2d 290 (7th Cir. 1988).

26. The parent also argued that the choice to place the Student in a program with other students who exhibit behavior dysregulation was inappropriate because the Student copies the good or bad conduct of his peers. For this reason, the parent argues, the Student should be educated with peers who behave appropriately.

27. The Student's own experience at FWIS, however, belies this claim. At FWIS, the Student's program was designed to be implemented substantially in the mainstream. Yet, his behavior was dysregulated throughout the school day, with and without disabled peers. Overall, the evidence showed that the Student's behavior was dysregulated in all school settings: with dysregulated peers at Raymond Hill School, with remote instruction and with nondisabled peers at FWIS. No set of peers seemed to improve or impair his behavior.

III. Second Issue - Discrimination

28. In the Student's due process request, the parent claims that the Board discriminated against the Student because of his disability. The evidence presented did not bear this out. None of the examples cited by the parent established different treatment of the Student under the same or similar circumstances. More significantly, however, the Hearing Officer's jurisdiction is limited to claims under IDEA, relating to the identification, evaluation or educational placement of children with disabilities or the provision of a free appropriate public education for children with disabilities under IDEA and Connecticut special education law. (R.C.S.A. Sections 10-76h-1 *et seq*; 34 C.F.R. Sections 300.500 *et seq*). This jurisdiction does not include claims of discrimination under other federal laws. This claim was properly dismissed.

IV. Third Issue - Manifestation Determination

29. The Student's claim that the Board changed his placement without making a manifestation determination was also not supported by the evidence. The Student's placement was not changed and the PPT did make a manifestation determination. Accordingly, this claim was properly dismissed.

V Fourth Issue - Therapeutic School

30. The final issue in the case, whether the Student requires a therapeutic school program designed for students with Emotional Disturbance in order to receive FAPE, is a mirror of the first issue. As discussed above, the evidence presented by the Board demonstrated that the PPT complied with IDEA's procedural and substantive requirements in reaching the conclusion that the Student requires a small, segregated, highly structured therapeutic school program in order to receive FAPE.

31. The evidence also established that the Board does not have such a program and that it would not be feasible to create one. Fortunately, however, there are several local state approved out of district therapeutic schools that can provide the Student with FAPE. These programs are: Aces Mill Academy in North Haven, Connecticut, High Roads School of Wallingford, Connecticut and Aspire Living and Learning Academy in Stratford, Connecticut.

FINAL DECISION AND ORDER:

The Student requires an out of district therapeutic program designed for students with Emotional Disturbance in order to receive FAPE.

The Board is directed to place the Student at one of the following out of district therapeutic schools with the following priority of preference:

Aces Mill Academy in North Haven, Connecticut
High Roads School of Wallingford, Connecticut
Aspire Living and Learning Academy in Stratford, Connecticut

If none of the above listed schools accepts the Student, the Board's Director of Student Service and Pupil Personnel Service shall identify an appropriate alternative state licensed out of district therapeutic school for the Student.

If the Student's parent refuses to cooperate in such placement, the refusal will be considered to be a parental refusal of special education and related services

August 9, 2022

Final Decision and Order

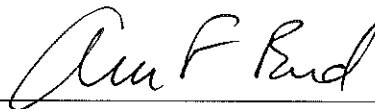
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Case No. 22-0330

ADD SIGNATURE PAGE HERE

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

ANN F BIRD

Hearing Officer Name in Print