

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Preston Board of Education

Appearing on Behalf of the Parents: Pro Se

Appearing on Behalf of the Board: Fredrick L. Dorsey, Esq.
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150 Trumbull Avenue
Hartford, CT 06103

Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUES:

1. Is the program offered by the Board for the 2005-2006 school year appropriate?
2. Is the behavior plan offered by the Board for the 2005-2006 school year appropriate?
3. Is the extended school year for the summer of 2005 appropriate?
4. Is the extended school year for the summer of 2006 appropriate?
5. Is the program for the 2006-2007 school year appropriate?
6. Is the Student entitled to compensatory education for the summer of 2005?
7. Did the Board commit procedural violations for the summer of 2005, the 2005-2006 school year and the summer of 2006?

FINAL DECISION AND ORDER

SUMMARY:

The Student is an 11 year-old young man who has been identified as having Asperger's Disorder and classified as a student with the disability of Autism as defined in Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a and is entitled to receive a free and appropriate public education (FAPE).

On or about June 12, 2006 and again in a September IEP the Board recommended an out of district placement for the Student and the Parents objected. The Parents requested that the Student's placement continue in the Board's school. The Board requested that the Student be placed in an out of district special education school. The Board noted that the Student's behavior, which included running outside, throwing furniture, poking another student, climbing bookcases

and stepping on a teacher's feet was a safety matter. The Board felt that the Student's educational program was better met at an out of district placement.

PROCEDURAL HISTORY:

The Parents requested this due process hearing in a letter dated April 18, 2006 and received by the Board on or about April 27, 2006. (Hearing Officer's Exhibit^{1[1]}-1) On or about May 11, 2006, a resolution meeting was conducted by the parties. The Parent gave the hearing officer notice that a resolution of the issues was not attained at that meeting. (Board's Exhibit^{2[2]}-BB-49) A pre-hearing conference was held on May 17, 2006 at which time hearing dates of June 15, 22 and 23, 2006 were selected at the convenience of the parties. At the request of the parties, additional hearing dates were later scheduled for July 24; August 9, 10, 15 and 24; September 20 and 28 and October 12, 2006.

In their request for due process, (HO-1) the Parents included issues that dealt with implementation of the Student's IEP. The Board on the first day of hearing made an oral motion to exclude any issue that involved implementation of the IEP. This motion was granted and the Parent did not object. A hearing officer's jurisdiction in due process hearings is limited and does not include implementation of an IEP. C.G.S. Sec. 10-76h(d)(1) The hearing officer or board shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education or the pupil if such pupil is an emancipated minor or eighteen years of age or older, has placed the child or pupil in a program other than that prescribed by the planning and placement team, or to prescribe alternate special educational programs for the child or pupil.

On June 23, 2006, the parties stipulated to program changes (HO-2) that resolved the issues of the appropriateness of the Student's extended school year program for the summer of 2006 and the length of the Student's school day during the 2005-06 and 2006-07 school years. On or about August 9, 2006, the Parent and the Board agreed that the Parent's testimony shall be in a question and answer affidavit format. The Affidavit had been notarized and was marked as HO-3. The Board's cross examination of the Parent was based on HO-3 and any reference to an exhibit within the Parent's affidavit was not meant to include the exhibit as part of the testimony but only as a reference.

The Parents called seven witnesses in their direct case and two witnesses on rebuttal. The Board called five witnesses in their direct case and one witness on rebuttal. Throughout the hearing, the Parents have invoked "stay-put" so that the Student can remain in his current placement in the Preston Plains Middle School ("PPMS"). On the last day of hearing, the Parent and the Board offered a psychiatric evaluation of the Student with other exhibits. The evaluation and the other exhibits were not accepted as exhibits. The evaluation was not part of the process that was utilized at the PPT to come to the decision of placing the Student in an out of district special

^{1[1]} Hearing Officer's Exhibits are referred to as "HO" followed by the appropriate exhibit number.

^{2[2]} Board Exhibits are referred to as "B-" or "BB-" followed by the appropriate exhibit number.

education placement. The evaluator was not present to be examined on what recommendations were being offered. The parties agreed not to enter the evaluation as an exhibit.

At the close of the evidentiary hearings on October 12, 2006, the parties were given the opportunity to file briefs postmarked three weeks after the receipt of the final transcripts, with the Decision and Order date extended by agreement of the parties until December 27, 2006.

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

FINDINGS OF FACT:

1. The Student is an eleven year old young man who has been diagnosed with Autism and eligible to receive special education and related services under IDEA 20 U.S.C. 1401 et. seq. and Connecticut General Statute §10-76a.

2. The Student transferred from a New York public school to the Board's elementary school at the beginning of the 2004-2005 school year. (B-28).

3. In July 2004, the Student participated in the Yale Social Learning Disability Project. Among the recommendations were:

- A. Have a secure and supportive environment with opportunity for individual attention and small social groups.
- B. Trained professionals to implement intervention strategies demonstrated to be effective in working with children with autism spectrum disorders.
- C. A sensitivity counselor who will focus on the child's emotional well-being and will serve as a coordinator of services. This person will serve as a "safe address" for the child to go on an as needed basis.
- D. May be beneficial for complex and novel tasks to be broken down into their component parts.
- E. Recommended to give clear and consistent routines and instructions.
- F. A circle of friends to expand friendships by providing support and encouragement within a small peer group.
- G. If the behavioral program is not as effective as one needs to be, it is recommended that the Parents consult a child psychiatrist. (B-27).

4. The Yale Social Learning Disability Project performed intellectual function evaluations of the Student. They performed a Wechsler Intelligence Scale for Children-Third Edition (WISC-III). The Student obtained a score on his Verbal IQ of 125, Performance 119 and a Full Scale score of 124. His performance revealed equally well developed verbal and non-verbal abilities with his general cognitive ability falling in the superior range. This test was consistent with a prior psychological evaluation performed of the Student. In the psychological evaluation the Student

showed a deficit in his oral language skills. (B-27, B-18).

5. The Student's initial IEP in the Board's school was developed at a PPT held on November 3, 2004 and was based on the IEP developed for the Student in New York. During the Student's 2004-2005 school year, most of the Student's school day was in a regular education class with typical non-disabled peers. (B-23 & B-42 and Testimony of Mother).

6. In November 2004 the Student was advanced from the 4th grade to the 5th grade because the IEP team felt the Student was academically ready, and he was already taking classes with 5th grade students. The 5th grade had smaller social groups with more adult assistance than the 4th grade. The Student was forming a social bond with his 5th grade classmates and this advancement would give the Student the most consistent program. The Parents agreed with this decision. (Testimony of Mother, Testimony of Student's Elementary School Psychologist, B-42).

7. On or about November 10, 2004, a behavioral plan was formed for the Student. This plan contained social stories to help teach the Student steps in dealing with certain social situations and other forms to assist the Student in recognizing his changing behavior and help him in deescalating. The plan was also used to gather information to be able to identify the triggers that brought about the Student's behavior. This plan was revised in March 2005. The Parent's Behavioral Consultant was consulted in the creation and revision of the behavioral plan. The revisions to the plan were based on information gathered at weekly meetings where the Student's behavior problems were discussed and solutions to address these problems were presented. Restraints were not a part of the Student's behavior plan while the Student was in the elementary school. This was the last modification to the Student's Behavior Intervention Plan (BIP). The elementary school psychologist was not in agreement with the use of restraints unless it was a matter of safety. (B-48, B-73 & Testimony of Elementary School Psychologist).

8. Triggers that were identified through the behavioral plan that cause the Student's behavioral outbreaks were:

- a. When demands were made to the Student.
- b. If the Student perceived a task to be difficult.
- c. If the task was difficult transitioning.
- d. Lack of a clear structure.
- e. Changes in the Student's routine. (Testimony of Student's Elementary School Psychologist).

9. The Student was physically restrained on two occasions. The first time the Student's hands were restrained because he hit a member of the school staff. (Testimony of Mother, B-207).

10. In March 2005 a Behavioral Contract was created by the Middle School Psychologist. The Student signed behavioral contracts that gave him either rewards for proper behavioral acts or consequences for behavioral outbursts. The Student's contracts were adjusted as needed. There was no need to change the BIP. (Testimony of Middle School Psychologist, Middle School Principal, Ben Haven Consultant. (B-157, B-245).

11. The Parent's Behavioral Consultant had worked with the Student for 4 years and had been actively involved in the Student's behavioral plan. Children with Asperger's Disorder have a

problem recognizing social limits and personal space. They are not aware they are violating someone's space and they need constant reminders. The Student benefits from being involved with non-disabled peers. This enables him to develop social skills. The Consultant has not been involved with the Student's program since November 2005. He has been available for consultation but has not been utilized. The Student does not fit the requirements to be in a segregated setting. When behavior has reached aggression it needs to be stopped. A plan and an agreement needs to be done in order to stop the aggression. (Testimony of Parent's Behavioral Consultant).

12. The Parent made various requests for a Functional Behavioral Assessment ("FBA"). The assessment was not done because the team agreed that the significance of a assessment was to create a behavioral plan and the Student already had one. The Parent's Behavioral Consultant and the Consultant from Ben Haven gave training on the behavior plan. (P-25, P-36, Testimony of Middle School Principal.).

13. The Principal prevented the Student from going into a class because he needed to speak with the Student. This removal was not done according to the Student's BIP. The Student was also removed from his science class which was also not done according to the Student's BIP. The reason for removing the Student from his class was in order to speak to him and ask him why he had written "die" in another Student's book. This incident occurred at the end of the 2005-2006 school year and resulted in the Student being suspended for 3 days. The Student's BIP states that presets are essential for transitions and should be used whenever possible. The Student demonstrates behavioral difficulties when he is not ready for transitions. (P-73, Testimony of Middle School Principal, Parent's Exhibit^{3[3]}-53).

14. The School Principal felt that the Student's behavior plan was not appropriate but agreed to continue with it because they did not have anything more appropriate. The Parent's Behavioral Consultant was not asked to review the plan because consultants from Ben Haven had reviewed the plan and found it appropriate. The PPT team and the Consultant from Ben Haven did not know how to address the Student's behavior. (Testimony of Middle School Principal).

15. The Student's one on one aide received his direction on working with the Student from the school psychologist and special education teacher. He began working with the Student in February 2006. This was his first time working with a student with Asperger's Syndrome. The Student's behavioral plan does not address defiant and aggressive behavior. The Student's behavioral plan was not appropriate. The aide brought this to the attention of the staff and was told the behavioral plan would be changed next year. (Testimony of Student's One on One Aide).

16. On June 2, 2005, a PPT was held to plan the Student's 2005-2006 school year. The team looked at all facets of the Student's school day at the Board's middle school and some of the issues discussed were:

- a. the Student's participation in gym;
- b. transitions to and from classes;

^{3[3]} Parent's Exhibits are referred to as "P" followed by the appropriate exhibit number.

- c. the option of assigning a special education teacher solely for the Student;
- d. use of Parent's consultant a minimum of five times during the school year;
- e. a full inclusion program with careful planning if Student became agitated and a need arose to avoid disruption in the classroom;
- f. a review of the Student's academic strength and weakness; and
- g. a review of the Student's social levels of performance. (B-84).

17. The Student was provided with 1/2 days to visit the middle school in order to facilitate his transition to the school. The Student's first impression of the middle school was negative. The Student came home stressed from his first school day there. The Parent sought a plan to avoid another stressful day for the Student. The Student stated that he did not want to attend the Board's middle school.(B-85, Testimony of Prior Special Education Director)).

18. The Student's extreme unpredictable and violent behavior caused the Board to suggest at a PPT meeting on June 2, 2005, that an outside therapeutic placement at The Learning Clinic (hereinafter "TLC") be considered for the Student's 2005-06 placement. The Team was also exploring programming at the local middle school. (B-83 and B-84).

19. The June 2 PPT also determined that the Student would be placed at TLC in an extended school year ("ESY") program for the summer of 2005. The summer program was for 38 hours per week and it was based on the Student's acceptance into the program. The next IEP that was scheduled for the Student was planned for the second week of August with the expectation of TLC presenting a proposed IEP for the 2005-2006 school year. The program provided at the June 2, 2005 IEP was created to provide the Student's 2005-2006 school year at the Board's middle school. (B-83, 84, B-97).

20. A transition plan was created for the Student's summer 2005 program at TLC. The plan called for 1 1/2 hours of school the first stage, an increase to 3 hours in the second stage, the third stage called for 4 1/2 hours of class time at TLC. If the steps were successfully completed, the Student would start the fourth week with a full day of class. The summer program ended on August 26, 2005 with the new program at TLC scheduled to start on September 7, 2005. (P-8, Testimony of Director of Special Education).

21. The Parent was not in accord with the Student's summer program being reduced from 38 hours per week to 17 hours per week. The Parent expected the transition program to be followed and the Student would be provided with his extended social skills program. The Parent made various inquiries about the Student's summer program but did not receive a satisfactory response. (Testimony of Mother, B-91, B-95, B-96, B-97, B98).

22. The Student's IEP had no requirement for the use of a restraint. Restraints are not necessary to ensure the safety of the Student and it is not a methodology for teaching. (Testimony of Middle School Psychologist).

23. During the Student's summer program at TLC there were 7 behavioral incidents. The Parent requested progress reports on the Student's summer program. There were no written progress reports from TLC. The team from TLC made an oral report of the Student's progress at the September 7, 2005 PPT. The report stated that the Student had made positive progress the last two weeks of the summer session. The Student, while at TLC, connected for the first time with another student. (Testimony of Director of Special Education, BB-71 through BB-7, B-133 and Testimony of Mother).

24. The Student did not start his school program on schedule because the Parent had not signed the restraint procedure as required by TLC. The Student would not be allowed to return to TLC until a PPT was held. (B-130, Testimony of Parent).

25. At the September 7, 2005 PPT, the Parent's advocate requested a step-by-step protocol of interventions prior to physical restraint intervention specific for the Student. TLC agreed to an eight step protocol modification. Once the Parent signed the modified restraint procedure, the Student would be accepted at TLC. (B-101, B-133).

26. The Parent modified the restraint procedure and signed the modified version. This was not acceptable to TLC. (Testimony of Mother, B-137).

27. On September 14, 2005, the Board sent the Parent a letter advising her that the Student could begin classes at the Board's middle school immediately. The IEP that would be utilized was the one created at the June 2, 2005 PPT. The Student visited the middle school on September 15, 2005. The Student did not attend school from the beginning of the school year on August 31, 2005 until September 21, 2005. The Student began his 2005-2006 school year at the Board's middle school. (B-142, Testimony of Director of Special Education).

28. On September 21, 2005 the PPT agreed to continue the goals and objectives that were developed at the June 2, 2005 PPT. The Student's program would be on a ½ day basis for the rest of the month and a one on one special education teacher would be hired for the Student. The team would review the Student's behavior plan with the Parent's Behavioral Consultant. The Consultant reviewed the plan and made some observations. From these observations the Consultant created a contract to assist the Student in controlling his behavior. (B-150, B-156, B157).

29. During the Student's 2005-2006 school year, most of the Student's school day was in a regular education with typical non-disabled peers. The benefit for the Student to be with non-disabled peers is mixed and inconsistent. (Testimony of Director of Special Education).

30. The Student demonstrated acts of aggressive behavior with school staff and toward other students. The Student also was a danger to himself. He ran out of the school building, climbed bookcases, trees and water cooler. The principal was of the opinion that no matter how extensive the plans or what experts' advice was sought there were still outbursts by the Student. A therapeutic environment was best suited for the Student. (BB-40, BB-44, BB-45, BB-50, Testimony of Special Education Director, School Principal).

31. A PPT was held on February 24, 2006. This was the Student's annual review. The team discussed doing a Functional Behavioral Assessment (FBA). The consultants from Ben Haven reported that the current behavioral plan was sufficient. The function of behavior is what an FBA would specifically look at, and what kinds of strategies could be implemented in order to change or to modify his behavior or change that behavior in order to get success. At this time it was not necessary to change the plan. It was agreed to meet in May to revise the Student's goals and objectives. (B-238).

32. The Student's 2005-2006 grades for the first 3 marking periods were:

- a. Grades 1st marking period 1 A, 2 B+, 2 B, 1 B-. The Student made the honor roll.
- b. Grades 2nd marking period 2 A, 2 A-, 2 B, 2 B-, 1 C+ and 1 C-.
- c. Grades 3rd Marking Period 2 A, 1 B+, 4 B. The Student made the honor roll for this marking period.

The Student obtained honors for the 4th marking period. (P-47, P-57).

33. In the Student's May 15, 2006 progress report, the English teacher reported that the Student's participation was average and his behavior was good. The social studies teacher marked his participation as very good and behavior as age appropriate. The Student's math teacher stated that the Student's participation was good, he asked questions and was engaged in the lesson most days. The teacher said his behavior was good. The science teacher stated that the Student's behavior was average and his participation was good. (P-45).

34. At the May 31, 2006 team meeting, the Student's behavior was listed as positive with aggression and any rudeness did not appear to be willfully mean. (B-48).

35. Toward the end of the Student's 2005-2006 school year there were various behavioral incidents:

- a. On 4/27/06, the Student was rude and yelled at his one on one. The Student also wrote the word "die", and emptied a bottle of white-out on his hands. The incident escalated when the Student left the building and attempted to climb a tree. The assistant principal called the police fearing the Student might injure himself. The Student in his written narrative of the incident did not state he went outside.
- b. On 5/9/06, the Student left the building and was belligerent with his one on one.
- c. On 6/05/06 the Student attempted to knee the principal.
- d. 6/14/06 the Student with two classmates was attempting to develop a web site to post information about classmates. The Student also wrote the word "die" in one of his classmate's yearbook. (B-30, B-40 B-56).

36. At the end of the 2005-2006 school year, the Ben Haven consultants recommended that the Student needed a very comprehensive close environment to really teach him what he needed to know in terms of social skills, in terms of behaviors and in terms of typical routines. This would help him to be successful and then be able to generalize those skills out into the general

education. The consultants felt that increasing direct instruction for social skills with the school psychologist for ½ hour per week would not be sufficient to encompass all of the Student's social/behavioral needs. (Testimony of Ben Haven Consultant, BB-79).

37. The Student's progress in behavioral and coping skills was not as consistent as his academic progress. The school psychologist noted that the Student demonstrated significant deficits in his ability to cope with situations that appear to be challenging to him. (P-56, B-81, B-82 and BB-60).

38. On 6/12/06 a PPT was held to develop the Student's IEP, to perform a manifestation determination and plan a reevaluation. The progress report on the Student's IEP showed that the Student, during the 2005-2006 school year, had made satisfactory progress in goal #1, mastered goal #2, had made unsatisfactory progress in goal #3 and goal #4, satisfactory progress in goal #5 & goal #6, unsatisfactory progress in goal #7, some progress in goal #8 and unsatisfactory progress in goal #9. (P-46, P-55).

39. There are some inconsistencies in the Student's progress in his goals and objectives. The Student is shown to have mastered goal # 2 but objectives 4 and 6 he shows unsatisfactory progress and no progress in objective # 5. In one report goal # 7 objective 1 on 4/10/06 is marked as mastered in the 3rd quarter but in the 4th quarter report the objective is marked as unsatisfactory progress. The school psychologist stated that goal #7 is also a speech and language goal and the pathologist had marked it mastered in the 3rd marking period but she did not agree so it was changed from mastered to satisfactory progress. The Parent was not informed of the change. (BB-26, P-55, Testimony of Middle School Psychologist in Rebuttal).

40. The 6/12/06 PPT recommended a clinical therapeutic intensive outpatient program for the 2006-2007 school year. The team also recommended a psychiatric evaluation of the Student to rule out any oppositional defiant disorder or any other social emotional behavior disorder. This program was rejected by the Parent. (BB-68).

41. At the June 12, 2006 IEP, the team recommended the following:

- a. Psychological evaluations to rule out social/emotional behavioral disorders or oppositional defiant disorders;
- b. Speech and language recommendations for intensive small group instruction; and
- c. Half hour of direct instruction for social skills in the public school setting was considered insufficient to meet Student's needs.

CONCLUSIONS OF LAW:

1. The parties do not dispute that the Student is eligible for a free and appropriate public education ("FAPE") with special education and related services as set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sec. 1401, et seq. and the Connecticut General Statutes Sections 10-76 et seq.

2. The IEP serves as the centerpiece of a Student's entitlement to special education under the IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). The primary safeguard is the obligatory development of an IEP which must contain a statement of the child's current educational performance, including how his disability affects his involvement and progress in the general curriculum, and a statement of "measurable annual goals, including benchmarks or short term objectives related to meeting the child's individual needs." 20 U.S.C. Section 1414(d)(1)(A)(ii); 34 C.F.R. Section 300.347; Roland M. v. Concord School Committee, 910 F.2d 983,987 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991).

SUMMER PROGRAM 2005

3. Extended school year services (ESY) must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§ 300.340- 300.350, that the services are necessary for the provisions of FAPE to the child. 34 CFR §300.309(a)(2) ESY is utilized to prevent the amount of gains obtained during the school year from being jeopardized. MM v. School Dist. of Greenville County, 37 IDELR 183 (4th Cir. 2002); JH by JD and SS v. Henrico County Sch. Bd., 38 IDELR 261 (4th Cir. 2003). The Student was provided with extended school year services at TLC for the summer of 2005. The IEP provided for 38 hours of ESY services. (Findings of Facts #20). A transition program was created to assist the Student in his program. There was no PPT called to change the Student's summer program. The Parent acquiescent to the unilaterally created transition plan but still expected the Student's extended social piece to be provided. (Testimony of Mother, HO-3) The ESY program cannot be unilaterally limited by the Board, 34 CFR § 300.309(a)(3)(ii) and any changes to an IEP must be done by the IEP team. The IEP team thought that ESY was a necessary component of the Student's IEP by providing him with 38 hours, more than a normal school day. Reducing the summer program to 17 hours, the maximum amount that was provided, does not constitute FAPE. The IDEA's procedural requirements and safeguards are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with Board personnel in developing, reviewing and revising their child's IEP. Locking the parent out of the decision making process is a procedural violation.(Findings of Fact #22) The 2005 Summer Program provided to the Student was not appropriate.

2005-2006 SCHOOL YEAR

4. The standard for determining whether a school district has provided FAPE is set forth as a two part inquiry in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). First, it must be determined whether the school district complied with the procedural requirements of IDEA and second, there must be a showing that the individualized education program ("IEP") is reasonably calculated to enable the child to receive educational benefit. The requirement of FAPE is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Education v. Rowley, 458 U.S. at 201. This standard of educational benefit, however, contemplates

more than trivial advancement. (Mrs. B. ex rel M.M. v. Milford Board of Education, 103 F.3d 1114 (2d Cir. 1997))

- 5 The IDEA's procedural requirements and safeguards are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with LEA personnel in developing, reviewing and revising their child's IEP. Assuring meaningful parental participation is so central to the goals of the IDEA that a violation of the IDEA's procedural requirements applicable to the development of an IEP may be a ground, in and of itself, for a finding that an eligible child has been denied FAPE. However, not every procedural violation warrants a finding that the LEA has failed to provide FAPE or that an IEP is invalid. Rather, the procedural violation must be gross and result in a demonstrable harm, specifically the loss of a meaningful opportunity to participate in the process by the child's representatives that results in a deprivation of FAPE for the child. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991) (to invalidate IEP based on procedural violations, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation educational benefits,); Urban v. Jefferson County School Dist., R-1, 89 F.3d 720, 726 (10th Cir. 1996) (deficient IEP did not in that case amount to a denial of an appropriate education); O'Toole By and Through O'Toole v. Olathe Dist. Schools Unified School District No. 233, 144 F.3d 7.
6. The Parents state that the Student did not have an appropriate program for the 2005-2006 school year. The PPT created an IEP at a properly constituted PPT with the Parents present on June 2, 2005. The plan was for the Student to attend TLC for the summer of 2005 and if accepted by TLC, the Student would begin his 2005-2006 program at TLC. The Student was not accepted at TLC because the Parent would not sign their restraint procedure. (Findings of Facts #20, #24 26 & 27). The Board did not immediately offer the Student an alternative placement in the Board's middle school until 3 weeks into the school year. (Findings of Facts # 27) Not having a placement for the Student could rise to the level of a denial of FAPE to the Student. The Parent also stated that she was not provided with accurate progress reports during the 2005-2006 school year or for the summer program at TLC. These procedural violations did not rise to the level of a denial of FAPE. (to invalidate IEP based on procedural violations, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents, opportunity to participate in the formulation process, or caused a deprivation educational benefits,); Urban, at 726.
7. The program provided to the Student for the 2005-2006 school year was not reasonably calculated to provide a meaningful educational benefit. There is no one standard for determining what constitutes a meaningful, educational benefit. The Student's capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit to the child. See, e.g. Hall, 774 F.2d at 635. Objective factors such as passing marks and

advancement from grade to grade can be indicators of meaningful educational benefits but are not in and of themselves dispositive. See, e.g., Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1120 (2nd Cir. 1997). Although the Student's academic grades showed he made educational advancement, a review of his IEP goals and objectives show a less than minimal advancements. (Findings of Facts #32 & 38) The district must examine the educational benefits, both academic and nonacademic. The Student's social emotional growth is part of what needs to be examined and is vital in this Student's receiving a meaningful education.

BEHAVIORAL PLAN

8. The BIP has been a point of high contention between the parties. The Parent is of the opinion that the plan is not properly followed and the Board should have a Functional Behavior Assessment (FBA) performed. The functional behavioral assessment is considered to be a problem-solving process for addressing a student's problem behavior. It is a process which searches for an explanation of the purpose behind a problem behavior before developing an intervention. The IDEA fails to define the phrase but utilizes it in 34 CFR 300.520(b)(1)(i). IEP teams need to be able to address the various situational, environmental and behavioral circumstances raised in individual cases. An FBA is generally considered to be an approach that incorporates a variety of techniques and strategies to diagnose the causes and to identify likely interventions intended to address problem behaviors. In other words, an FBA looks beyond the overt topography of the behavior, and focuses, instead, upon identifying biological, social, affective, and environmental factors that initiate, sustain, or end the behavior in question. Source: *An IEP Team's Introduction to Functional Behavior Assessments and Intervention Plans, 2d ed.* See also Independent School District No. 2310, 29 IDELR 330 (SEA MN 1998), stating the general purpose of an FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with a child's education. The process involves some variant of identifying the core or "target" behavior; observing the pupil (perhaps in different environments) and collecting data on the target behavior, antecedents, and consequences; formulating a hypothesis about the cause(s) of the behavior; developing an intervention(s) to test the hypothesis; and collecting data on the effectiveness of the intervention(s) in changing the behavior. The Board had already performed an FBA and had identified antecedents that cause the Student's behavior. (Findings of Facts #8, #10). If the child already has a behavioral intervention plan, the IEP team shall meet to review the plan and its implementation, and, modify the plan and its implementation as necessary, to address the behavior. 34 CFR 300.520(b)(1)(ii). Although the Student had behavioral problems while in his 2005 ESY program and on various occasions throughout his 2005-2006 school year, after the March 2005 modification, the PPT did not modify the BIP based on the Ben Haven's consultants that the current BIP was sufficient. The Board personnel who worked with the Student and the Parent felt that the plan was not appropriate. (Findings of Fact # 13, #14 & #15) It would seem that the people that are with the Student during the school day and see how he reacts to the interventions would know when a BIP is not working.

The use of physical restraints was not in the Student's BIP. Even after the request by TLC that the Parent sign a Physical Restraint policy for the Student, the Board did include the use of physical restraints in the Student's BIP. The Student required physical restraint on two occasions. (Findings of Facts #9 & # 16) The Student's BIP does not have to cover every possible problem. Ake an IEP it does not have to be a "Cadillac" but it should be appropriate and when something goes wrong it needs to be adjusted. This BIP, even the professional who worked with the Student did not find it appropriate. The BIP is not appropriate and needs to be revisited.

2006-2007 SCHOOL YEAR

9. The IDEA also requires that children with disabilities be educated, to the maximum extent appropriate, in the least restrictive environment ("LRE") and are to be removed from regular education only when "the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (34 C.F.R. Section 300.550) In order to meet this requirement, school districts must "...ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." (34 C.F.R. Section 300.551(a)) These alternative placements include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. Section 300.551(b)(1)). Thus, the statutory scheme contemplates that there are situations, as the school district proposes here, where students with disabilities may require an out of district placement if they are to receive FAPE.
10. The Supreme Court has not yet established a standard for evaluating whether a school district has complied with the IDEA's LRE requirement. Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989) and Oberti v. Board of Educ., 995 F.2d 1204 (3rd Cir. 1993) both looked at whether a school district has provided appropriate supplementary aids and services in determining whether a student could be satisfactorily educated in the mainstream. The Daniel R.R./Oberti test for determining whether a school district has complied with the LRE requirement consists of two prongs: 1) whether the student can be educated in a regular classroom with the use of supplemental aids and services, and 2) whether the school district has mainstreamed the student to the maximum extent appropriate (Daniel R.R., 874 F.2d at 1048; Oberti 995 F.2d at 1213; Warton, 217 F. Supp.2d at 274; A.S. v. Norwalk, 183 F. Supp.2d at 542 n.8; Mavis, 839 F. Supp. at 985; Application of a Child with a Disability, Appeal No. 00-093; Application of a Child with a Disability, Appeal No. 98-24). Several factors must be considered at each stage of the inquiry. When determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services, these factors include, but are not limited to: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Oberti, 995 F.2d at 1217-18; see also, Daniel R.R., 874 F.2d at 1048-1049; Mavis,

839 F. Supp. at 987-990; Application of a Child with a Disability, Appeal No. 00-093; Application of a Child with a Disability, Appeal No. 94-21).

11. At the June 12, 2006 PPT, the team recommended that the Student's program should be in a clinical therapeutic diagnostic outpatient program. The IEP team went from an inclusive program to a diagnostic outpatient program. Although the team recommended a psychiatric evaluation of the Student, it was not as IDEA states in a reevaluation to inquire, whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum". 20 U.S.C. §1414(c)(1)(B)(iv). The Board has not shown that a diagnostic placement is the LRE for the Student. In making an LRE determination, Oberti considered the following: 1. whether the school district has made reasonable efforts to accommodate the child in a regular classroom; 2. a comparison of the educational benefits of regular classroom placement with appropriate supplementary aids and services versus the benefits of a more restrictive placement; and 3. the possible negative effects of the child's placement on the other students in the class. A similar analysis can be undertaken here. The first prong of a Daniel R.R./Oberti test clearly has not been met. One of the Yale recommendations was for the Board to consult a child psychologist if the behavior plan was not working. This was not done. (Findings Of Fact # 3) It is clear that the BIP was not appropriate and without a proper BIP the Student cannot succeed in an inclusive program. Clearly the Student has benefited academically in the Board's school but not socially. The Ben Haven consultant testified that the Student needs more than ½ hour each week of direct social skills training. There was no testimony of attempts to incorporate the Yale recommendation of a circle of friends into the Student's program in order to assist in socialization. There was testimony that the Student should eat in the cafeteria but it was not done because the Student did not want it but yet it remains part of his IEP. There are reasonable efforts to accommodate the Student that have not been made. The 2006-2007 Program offered to the Student is not in the LRE.

To the extent a procedural claim raised by the Parents is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL DECISION AND ORDER:

1. The program for the 2005-2006 school year was not appropriate.
2. The behavioral program was not appropriate. The Board shall conduct a PPT within 15 calendar days to revise the BIP. The Ben Haven and the Parent's consultant will be invited to revise and if need be rewrite the Student's BIP.
3. The extended school year for the summer of 2005 was not appropriate.
4. The issue of the 2006 summer program has been resolved by the parties and is not a decision for this hearing officer to make.
5. The program for the 2006-2007 is not appropriate for the reasons stated in Conclusion of Law # 11.
6. The Student is entitled for compensatory education for the summer program of 2005 but only for the two hours each day of the social skills program he did not receive.

7. The Board did commit procedural violations, as stated in the Conclusions of Law. The procedural violations committed do not rise to the level of requiring compensatory education. Only the summer program, as stated above, entitled the Parents to compensatory education.
8. The Board shall conduct a psychiatric evaluation^{4[4]} of the Student and shall invite the evaluator to assist the PPT in creating the Student's IEP for the 2006-2007 school year. This PPT will be conducted within 15 calendar days of the issuance of this decision unless all the parties agree to extend the PPT date.

⁵₁ Hearing Officer's Exhibits are referred to as "HO" followed by the appropriate exhibit number.

⁶₂ Board Exhibits are referred to as "B-" or "BB-" followed by the appropriate exhibit number.

⁷₃ Parent's Exhibits are referred to as "P" followed by the appropriate exhibit number.

⁸₄ The Parties have already done a psychiatric evaluation of the Student. This evaluation is to be used to assist in determining the Student's 2006-2007 program.
