STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Newtown Board of Education

Appearing on behalf of the Student:	Attorney Nora A. Belanger Law Office of Nora A. Belanger 10 Wall Street Norwalk, CT 06850
Appearing on behalf of the Board of Education:	Attorney Michelle Laubin Bercham, Moses and Devlin, P.C. 75 Broad Street Milford, CT 06460
Appearing before:	Attorney Christine B. Spak Hearing Officer

FINAL DECISION

ISSUES:

1. Did the Newtown Board of Education (hereinafter the Board) fail to provide a free, appropriate public education for the 2005-06 and 2006-07 school years, including related services and extended school year services for 2006 and 2007?
2. Did the Board propose an appropriate program for the 2007-08 school year, including related services and extended school year services for 2008?
3. If not, did the placement at the Foundation School (hereinafter, Foundation) provide the Student with an appropriate program to meet her needs?
4. Has the Board violated the Student's procedural safeguards, including exclusion of the Parents from the decision making process?
5. If so, is the Board responsible for the evaluations provided by the Parents, payment for tuition at Foundation from 4/07 through the extended school year 2008, as well as related services and private therapies, and/or compensatory education?

SUMMARY:

The Student is a child with significant disabilities who had received services through the Birth to Three Program and was deemed eligible for special education and related services by the Board from the Newtown Public Schools in June of 2001 when she was three years old. At the time of the hearing the Student was nine years old and she has very limited verbalizations as well as motor and other issues, including issues of toileting. The Parents maintain that with proper instruction her ability to speak and ability to learn activities of daily living can improve significantly. The Board maintains they have provided proper evaluation and instruction and the

Student's main form of communication should focus on methods other than speech such as augmentative devices.

The Parents requested Foundation School and the Board denied the request. The Parents filed a request for a due process hearing March 19, 2007 and enrolled the Student at Foundation School on April 30, 2007, where she remains enrolled.

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. S&H Computer Systems, Inc., 605 F. Supp. 816, (March 6, 1985)* and *Bonnie Ann F. v. Callallen Independent School District*, 835 F.Supp.340 (S.D.Tex. 1993).

PROCEDURAL SUMMARY:

This matter is before the Hearing Officer pursuant to the Parents' request for a Due Process Hearing on March 19, 2007. A prehearing conference was held on March 26, 2007. Both parties were represented by counsel and hearing dates were selected. The parties appeared on the following hearing dates: 5/1, 5/16, 6/4, 6/15, 6/22, 6/25, 7/2, 7/9, 7/10, 7/12, 7/16, 7/17, 7/18, 7/19, 7/23, 7/24 and 7/26. Witnesses called by the Parents' included the Mother, Dr. Nancy Schwartz (privately retained speech and language pathologist), Dr. Adrienne Smaller (privately retained psychologist) and Toni Giannone (Director of the Foundation School). Witnesses called by the Board included Lynette Daria **(**Board speech pathologist**)**, Suzanne Grossman (Board speech pathologist), Kerri Sommer (Board special education teacher), Marianne Young (Board special education teacher), Dr. Sheila Blachman (Board inclusion facilitator), Connie Sullivan (Board regular education teacher), Gretchen Pettinico (Board physical therapist), Diane Day (Board occupational therapist), Phoebe Tucker (Board speech/language consultant), Allison Kirby (Board speech pathologist), Art Carey (educational consultant for the State Department of Education), Dr. Ana Paula Machado (Board physician), Jan Calabro (Board Supervisor of Special Education), and Dr. Michael Regan (Board Director of Pupil Services).

The issues addressed during the Due Process Hearing were raised at PPT meetings on 2/8/07, 5/2/07, and 5/7/07. The Board has not raised a challenge to the sufficiency of the Parents' Due Process Hearing request and there is no claim by either party that the prehearing resolution meeting requirements were not pursued. The hearing ended on July 26, 2006. The Hearing Officer directed the parties to submit their respective post hearing briefs by 8/8/07, however, an extension was granted until 8/14/07 for post hearing briefs, with reply briefs due by 8/17/07. The date for mailing of the final decision is August 23, 2007.

FINDINGS OF FACT:

1. The Student is a nine (9) year old girl who has attended the Newtown Public Schools since the age of three (3) years. She has a medical diagnosis of partial agenesis of the corpus callosum, developmental delay, and ventricular dilatation. (B-3; B-13).

2. When the Student was nine months old, an MRI was performed and Dr. Laura Ment, a pediatric neurologist at Yale-New Haven Hospital, diagnosed the Student with a thin corpus collosum. The corpus collosum works as a bridge to connect the left and right hemispheres of the brain. The signals in the Student's brain do not always cross and without therapy, a path for the signals to cross the corpus collosum cannot be created. As a result of this neurological condition, the Student has developmental delays and motor planning issues which affect her speech, as well as fine and gross motor skills. (Testimony of Mother.)

4. The Student has multiple disabilities including significant speech apraxia, oral motor apraxia, attention deficit disorder, language comprehension deficits, intellectual impairment, dysarthria, hearing loss, oral motor planning issues, feeding issues, fine motor and gross motor planning issues, as well as enuresis and encorpresis. Speech apraxia is a primary diagnosis and it is difficult to accurately determine cognitive functioning at this time because of the Student's inability to communicate. (Testimony of Schwartz, Smaller and Mother.)

5. The Student received services from the age of nine (9) months until the age of three (3) years from the Birth to Three system in Connecticut, following a finding of global developmental delays. (B-1, B-8, B-11).

6. The Student was also diagnosed at the age of 15 months with mild oral and pharyngeal dysphagia, including an immature swallowing pattern with a history of silent aspiration. (B-4). The evaluations indicated, however, that the Student was able to sufficiently protect her airways to avoid choking and contracting pneumonia. (B-5; S. Grossman). The Student received medically-based feeding therapy with speech and language pathologist Pat Joy during her early years to address these issues. (B-8, page 6 of 7; B-12). Subsequent medical evaluation known as a modified barium swallow performed in 2000 showed no aspiration and substantial improvement in swallowing. (B-9; B-10).

7. In February 2001, the Student transitioned from Birth to Three to the Newtown Public Schools and was found eligible for special education services on the basis of the information contained in the reports presented by Birth to Three, including her medical diagnoses. (B-15). The Student's mother ("the Parent") signed the evaluation consent form on February 27, 2001 indicating her agreement that no further evaluations were needed at that time in order to make the eligibility determination and develop an appropriate special education program for the Student. (B-15). With the help of the Birth to Three staff who had previously worked with the Student, the staff in the Newtown Public Schools developed an IEP for the Student. (B-19). The Parent provided consent for the initial placement in special education. (B-20). The Parent felt the speech and language services and the occupational therapy services in the Birth to Three program were particularly effective in that they worked together and she always wanted the Student to have more of both once the Student entered the Board's program. (Mother.)

8. During the 2001-2002 and 2002-2003 school years, the Student received special education programming in the Board's preschool program for children with special needs, including special education instruction, and related services of speech and language therapy, occupational therapy and physical therapy. At no time during this period did the Parents indicate disagreement with the programs provided or request review of those programs by exercising

their procedural safeguards. (B-19; B-22; Parent). During the 2001-2002 school year, the Student received 1.5 hours per week of speech and language therapy. (B-19, page 16 of 18). During the 2002-2003 school year, the Student received 1.0 hour per week of speech and language therapy. (B-22). The Parents participated in the Planning and Placement Team (PPT) meetings to develop these programs and did not express disagreement with the services offered. Id.

9. In preschool, the Student was taught sign language by the staff. She learned approximately 22 signs, which she used to communicate. The Parents took a private sign language class so as to generalize sign language skills at home. Speech goals in preschool included verbalization and progress in emerging verbalization skills was noted. Speech included a few words, approximations of words and babbling, which is a precursor of verbal speech. Strategies were used such as visual supports, physical manipulation, and motokinesthetic methods. (Mother; Smaller; B-22, P-3.)

10. The Student was informally diagnosed with apraxia when she was four by a private speech and language therapist. A formal written diagnosis confirming apraxia was made by Dr. Nancy Schwartz in January of 2007. Although almost all the Board witnesses disagree or do not know much about apraxia, speech apraxia is a primary diagnosis and it is difficult to determine cognitive functioning at this time because of the Student's inability to communicate. (Schwartz.)

11. The school never diagnosed the Student with apraxia despite the fact the Parents went to great lengths to alert staff of their daughter's disability. The Parents invited staff to workshops on apraxia, to private speech sessions, provided videotaped sessions with the private therapist for training and modeling, directed to resources on apraxia including websites and books, and encouraged them to speak with the private therapist. Though the Board never told the Parents they disagreed with the Parents that the Student had apraxia, they chose not evaluate or diagnose her with this disability, and instead classified her as having an intellectual disability. This information was never shared with the Parents. Ms. Summer, her special education teacher from kindergarten through grade two, testified that she was not familiar with the disabilities of apraxia or dysarthria and did not know enough about them to determine whether the Student had them. Staff testified to knowledge of motor planning issues that affected the Student's speech and motor skills. (Sommer; Mother; P-25, P-50.)

12. The Student was initially identified as eligible for special education services under the category of Developmental Delay. (B-15; B-19; B-22). The category of Developmental Delay in Connecticut is permissible to use only with students between the ages of three and five. Once the student is over the age of six years, another category must be chosen. In this case, upon turning six years of age, at the PPT which convened on June 16, 2003 to plan for the Student's kindergarten year, the PPT, including the Parents, chose the eligibility category of Neurological Impairment based upon the available information cited above. (B-25). In changing the eligibility category from Developmental Delay to Neurological Impairment, the PPT including the Parents determined that no additional evaluations were needed in order to make this determination. Id.

13. The IEP for the 2003-2004 school year was developed jointly by the preschool staff who had worked with the Student during the previous two years, and the kindergarten staff at Sandy

Hook Elementary School, where the Student would be attending kindergarten, and the Parents. (B-25). The Student's IEP again called for 1.5 hours per week of speech and language therapy. (B-25). At no time during the 2003-2004 school year did the Parents request a due process hearing to challenge the level of speech and language services offered to the Student. (Parent).

14. The IEP developed for the Student's kindergarten year initially called for the Student to participate in the standard half-day kindergarten program with 7.5 hours per week of time with non-disabled peers and related services of speech and language therapy, occupational therapy and physical therapy. (B-25). This was modified at Parent request to provide the Student with a full-day program allowing the Student to participate in the entire half-day kindergarten program with her peers, and have additional special education and related services after her peers went home for the day. (B-29). The Student spent 9.5 hours per week with non-disabled peers, participating in special area classes, recess, lunch, and academic instruction as deemed appropriate. (B-29). Although the speech and language therapy was written in the IEP as a total of 105 sessions over the course of the school year, the speech and language pathologist explained that this was implemented as 1.5 hours per week or 3 half-hour sessions per week. (B-29; A. Kirby).

15. In April 2004, after the Student had received special education services in the Newtown Public Schools for three (3) years, the PPT recommended a triennial evaluation to re-determine the Student's eligibility for services. (B-32). This recommendation also coincided with the decision on the part of the State of Connecticut to discontinue use of the Neurological Impairment eligibility category, under which the Student had previously qualified. (Dr. Regan). The Parents participated in the development of the evaluation plan and provided written consent for the triennial evaluation to be conducted by the Board. (B-32). As part of the triennial evaluation in 2004, the Student was evaluated in all domains, including academic, cognitive, speech and language, fine motor, gross motor, and functional skills. (B-33; B-34; B-38; B-39; B-40).

16. Also as part of the triennial evaluation in 2004, the Board's speech and language pathologist conducted an evaluation of the Student's speech and language skills. The speech and language pathologist indicated that while the Student vocalized many babbling sounds, she used few words functionally and instead communicated using a variety of gestures, signs, vocalizations, and word approximations, and used a picture exchange communication system (PECS). Her spontaneous signs used at the time of the evaluation were help, open, all done, my turn, baby and eat. With prompting she could make other signs; however, her fine motor difficulties limited her ability to use signs that required precise finger/hand coordination. Her words and word approximations at that time included "mommy", "daddy", "uh" for up, as well as consonant sounds for "b", "d" and "m" used in context to indicate "bye", "done", and "me" or "more". The speech and language pathologist recommended the use of a total communication approach, encompassing the use of verbal speech, sign and pictures or PECS. (B-39; A. Kirby).

17. The Student also demonstrated delays in the area of fine motor skills and activities of daily living, as demonstrated by the occupational therapy evaluation conducted in 2004. She was able to scribble and imitate a vertical line with a writing utensil but was not able to imitate a horizontal line, circle or cross. While able to stack 6 blocks, she was not able to imitate a train or

bridge with blocks. The occupational therapist described the Student as having decreased strength in her intrinsic hand musculature, making fine motor tasks more difficult for her. She was able to snip paper with modified scissors only with hand over hand assistance. Her overall hand function was in the range of a 24-30 month old child. The Student was observed eating lunch in the school cafeteria and was able to do so without problems, with reminders to continue eating and wipe her mouth when needed. At the time of the 2004 evaluation, the Student was not restricted in her ability to eat food from the school cafeteria with supervision by an adult. She was delayed in her dressing skills including zipping up her coat, fastening and unfastening clothing, and putting on socks and shoes. (B-40; D. Day).

18. The Student's delays in the area of gross motor skills were also assessed by the Board's physical therapist in 2004. The Student received physical therapy services to address difficulties with safely maneuvering within the physical space of the classroom and the school. At that time, she was frequently tripping, stumbling or falling due to difficulties avoiding objects in her path. She demonstrated generally low muscle tone, decreased balance, difficulty maintaining pace with her peers when moving from place to place in the school as a group, and difficulty with safely ascending and descending stairs and using playground equipment. (B-33).

19. The Student's academic skills were also assessed in the 2004 evaluation by the special education teacher working with the Student at that time. On the Brigance Diagnostic Inventory of Early Development II, the Student was credited with 22 correct responses of a possible 260 skills. There was progress in the Student's ability to attend and focus on the task requested, following directions, adjustment to new routines, and communication with peers and adults. (B-34; K. Sommer).

20. The Board changed the Student's eligibility designation to intellectual disability at the May 21, 2004 PPT .B-37. The Parents were told this designation would enable their daughter to receive more services. The Parents were never told by the team what the term meant. The Parents wanted to know what the term meant. The Student's special education teacher from kindergarten thru second grade was Kerri Sommer, fka Kerri Colorusso. She participated in this PPT. The Parents wanted to know if 'intellectually disabled' meant 'mentally retarded' and the mother asked Ms. Sommer. Ms. Sommer testified that if she was asked she could not have answered the mother because she (Ms. Sommer) would have to have researched it. The Parents were instead referred to the State Department of Education (SDE) to find out. Only after emailing the SDE, did the Parents learn that it meant that their child was mentally retarded. (Sommer; Mother, B-37, B-55, B-71, B-111.)

21. The IEP developed for the Student for the 2004-2005 school year, with the participation of the Parent, provided for the Student to attend 1st grade at Sandy Hook Elementary School with special education supports and related services. The IEP called for the Student to receive 26.5 hours per week of special education support in a combination of the regular education classroom and resource room, 1.5 hours per week of speech and language services in addition to a half-hour per week consultation from the speech pathologist, 1.0 hour per week physical therapy, and 1.0 hour per week occupational therapy. The Student would be with non-disabled peers 24 hours per week. (B-45). The Student was provided with a full-time paraprofessional. (B-49).

22. The Student was in the regular education classroom for 9 ½ hours in kindergarten (2003-2004), 24 hours per week in first grade (2004-05), the majority of her week in second grade (2005-06) and 27 hours a week in third grade (2006-2007). Although there was some dispute between the parties and between the Board witnesses and the Board documentation regarding the exact amount of time spent in a regular education setting, it is clear that the Student spent most of her day in the regular education environment in every year beginning in first grade. An aide was modifying her work in the general education classroom. Even when her toileting and behavior problems, such as hitting, worsened during second grade the Student continued to spend the majority of her time in the regular education classroom. (Sommer.)

23. Progress reports from the 2004-2005 school year indicate that the Student made some progress during that year. The Student improved her fine motor skills in several areas, increasing her hand strength and learning to imitate additional letters upon request. (B-53; Day). She improved her gross motor skills as well, learning to safely navigate playground equipment and improving her balance, learning to catch and throw a ball and imitate gross motor directions. (B-54; Pettinico). Her special education teacher took special note of the progress she made in the regular education classroom and her ability to model her typical peers, noting that she learned to walk in line with her peers, sit appropriately and pay attention to instruction during morning meeting and instructional time. Her special education teacher was able to use peers as motivation and reinforcement for the Student, since she was eager to work in order to spend time with her peers but Ms. Sommer stated that the Student was better able to focus in a small group environment that had fewer physical distractions and this was not the regular education classroom which had many colorful displays such as students' work, and the high activity level of a typical first grade classroom. (B-56; Sommer.)

24. In the area of speech and language, during the 2004-2005 school year, the Board's speech and language pathologist worked with the Student on goals and objectives in the areas of sign, verbal language, and use of a picture exchange communication system. The Student made little progress in learning to use verbal speech. (B-45, Daria). The Board staff correctly realized that the Student appeared frustrated at times because she was not able to communicate her needs effectively (B-45; L. Daria, K. Sommer). But instead of increasing services, changing methodology or seeking the advice of a consultant with expertise working with children with apraxia, this Board dropped the speech and signing goals from the Student's IEP and slashed her hours of speech and language service. (B-45, Daria) The Student was only six years old when this Board decided to stop trying to teach her to speak. They recommended that the Student begin learning to use an augmentative alternative communication (AAC) device not in addition to learning to speak, but instead of learning to speak.. (B-45, Daria).

25. The most divisive issue between the parties concerns speech and language. The Parents believe their daughter can learn to speak given the proper amount and type of intervention and the Board believes she cannot. The Board believes she needs to learn to use an augmentative communication device (AAC) in order to communicate. Ms. Daria was the Student's speech and language therapist in school for three years, beginning in first grade (2004-2005) and continuing into the 2006-2007 school year until the Student was unilaterally placed at Foundation School on April 30, 2007. Ms. Daria had been employed by the Board as a speech and language therapist for eighteen years. She had a great deal of experience with a wide variety of speech disorders

but not with apraxia. She agreed that it is the responsibility of a speech and language therapist to diagnose apraxia. She had had only one other student in her 18 years of Board experience that might have had apraxia but was not so diagnosed. She did not know if apraxia was a rare disorder. In spite of her inexperience with apraxia she did not agree that the Student had apraxia. She believed the Student would not be able to learn to speak and she believed the reason was the Student's intellectual ability.

26. So while at the end of kindergarten, Allison Kirby, the Board's kindergarten speech and language therapist felt the Student would continue to benefit from verbalization and sign language goals. (B-39) A year later these goals were dropped entirely from the Student's IEP on Ms. Daria's recommendation. These goals were dropped without there even being a narrative progress report from Ms. Daria. Ms. Daria testified that the Student was not making progress on her goals and she couldn't continue to drill on something the Student wasn't progressing on. Daria. An examination of the IEP for the Student's first grade year and the testimony of Ms. Daria establishes that during first grade the Student had three half hour sessions with Ms. Daria during which "5-10 minutes" a session was spent on the Student's verbalization goals for reasons that there were other goals to work on and the 5-10 minutes was what the Student could tolerate. (Daria 7/12/07 pp. 299-302.) Ms. Daria testified that typically there were about 28 weeks of service a school year, allowing for missed sessions that occur for reason of teacher or student absences. So assuming the Student tolerated the full ten minutes every session, it means Ms. Daria spent at most fourteen hours during the first grade year working on verbalization goals, and perhaps as little as seven hours if the sessions lasted only five minutes in. Based on no more than fourteen hours of intervention Ms. Daria recommended abandoning the goal of speech rather than increasing the effort or changing the methodology in this young child, and the team went along with it. (Daria, Sommer.) The Parents, never wavered from wanting their daughter to learn to speak and they repeatedly expressed this to Board staff. They thought the Board agreed with them because the Parents were repeatedly assured that speech was always being worked on in various school settings. This was not happening. Ms. Daria was in charge of the Student's speech and language program for three years and she was responsible for making sure it was integrated into the regular education setting where the Student was spending most of her day. This is what the consultation time in the IEP was for. Yet even during the 2004-2005 school year when the speech goals were still in the IEP, Ms. Daria, when asked on direct examination "And what about encouraging [the Student] to make vocalizations working on those consonant sounds that you described, was that carried over into other parts of [the Student's] day as well?" testified "I don't know." (Daria July 12, 2007 at 229). The Parents, who were part of the team, still trusted Ms. Daria, Ms. Sommers and other of the staff at this point and therefore did not understand the import of the change in goals and hours of service; they believed what they were being told because they did not know it was not true. It was not until January of 2007 that the Parents learned that Ms. Daria believed the Student would never learn to speak. (Mother, Daria, Sommers.)

27. When the PPT convened on June 7, 2005 to developed an IEP for the Student for the 2005-2006 school year the team recommended that the Student learn to use an AAC device called a GoTalk. (Ms. Daria) A reduction to one-half hour per week of direct speech and language therapy focused on learning to use the AAC device and one-half hour per week consult to the team, and did not recommend continuation of the verbal and sign language goals and

objectives. (B-63 Daria). The team recommended a continuation of the previous year's inclusive educational plan with a placement in a regular 2nd grade classroom with supplementary aids and services for the 2005-2006 school year, including the support of a paraprofessional aide 30 hours per week, special education direct instruction in a separate setting 2.5 hours per week, physical therapy (PT) 1.0 hour per week, occupational therapy (OT) 1.0 hour per week, speech therapy 0.5 hour per week, and time with non-disabled peers 17 hours per week. (B-55, 19; K. Sommer).

28. The GoTalk was a simple static display device showing a number of picture icons and overlays that could be changed to display a new set of pictures for a new situation. When the picture icon was pushed by the Student, the device would speak audibly to label the picture selected. The pictures were essentially the same pictures that had been used with the Student as part of the PECS system in previous years. (L. Daria, A. Kirby). Replacing verbalization, PECs, signing and gestures with the AAC device was contrary to the Board's recommendations that she required a total communication approach. Ms. Sommer was unaware of why another AAC device was introduced, since the Student had failed to master a simpler AAC device the prior year. Ms. Sommer never questioned the speech pathologist's expertise regarding the decision and that she never consulted the Parents regarding this decision. The Parents found the AAC cumbersome and some Board staff found it cumbersome in some settings so it was rarely used at home, recess or to communicate with other children. (Parent; Pettinico; Daria,; Sommer; P-50).

29. Dr. Sheila Blachman, inclusion facilitator for the Student for the past two years, was unaware of the number of hours the Student was included in the general education environment, never consulted or trained staff, and did not observe the Student in the general education classroom setting during the 2006-07 year. She had spent a total of 30 hours over a two year period (2.5 days per year) consulting on Student, mostly for the purpose of the ABLLS. She attended PPTs only during the 2006-07 school year, and had never introduced herself to the Parents or informed them of her role with their child. Despite her lack of familiarity with the Student, she conducted the ABLLS test. She chose not to include the speech pathologist, despite the fact the Student has significant speech and language needs and that the ABLLS was being used to drive speech and language goals. (Blachman; Sullivan; Sommer; B-55, B-71.)

30. In January 2006, the Parents purchased a home in another part of the district and the Student's neighborhood school changed from Sandy Hook School to Hawley School. The Parent was so pleased with the program that the Student was receiving in the Board's school that she petitioned the special education director to allow the Student to remain in her current program for the rest of the year instead of moving to the new school on the other side of town, saying, "We could NEVER [move the Student] – she loves Sandy Hook Elementary School and their entire staff (particularly Mrs. DiDonato and Keri Sommer)!" (B-59). Upon learning that it would be possible for the Student to remain in her current program in the Board's school, the Parent proudly wrote an e-mail to the child's entire teaching team, telling them of the "great news" that she could remain, and stating that she thought she could "speak for everyone and say that it would be in [the Student's] best interest to stay at SHS." (B-60). All of this was when the Parents still trusted the Board staff which was before the Parents learned they were not being told

the truth about the Student's program, particularly the speech and language part of the program. (Testimony of Mother.)

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31. Starting in 2005, the ABLLS test was performed by staff members without the Parents' knowledge or input. The PPT was convened on February 2, 2006 to review and revise the Student's IEP using the information gained through the use of the ABLLS assessment, and to review the Parent's request for the Student to remain at Sandy Hook School. (B-63; Blachman.) The new goals and objectives developed based upon the information gained through the use of the ABLLS assessment were presented at this PPT meeting. The ABLLS is not listed as an evaluative basis for the present level of performance on the IEP, nor was it mentioned in progress reports. The Parents were unaware and uninformed that the ABLLS was driving IEP goals and objectives and had never seen any narrative report or grid showing results until May, 07. No report regarding the ABLLS was ever written prior to 5/07. The Parents disagreed with the progress stated in the Board's narrative report and asked for raw data to support the Board's conclusions. The Board promised the requested data at the 5/7/07 PPT, but it was never provided. The Board later refused to provide the data or work samples from the ABLLS, unless the Parents met with staff. When Parents arrived for the scheduled meeting, they were informed the meeting was cancelled. The inclusion facilitator Blachman testified that although she took notes which were used to write the ABLLS report, she would not share them because they were "internal documents" and "personal files." Ms. Blachman admitted these notes were shared orally with other teachers, that goals and objectives were driven by these results, and that the IEP changed considerably as a result. She testified Parents were not involved in the development of the IEP based on the ABLLS. She was not surprised to hear the Parents had no knowledge of the test because this was not something necessarily shared with parents. Despite three FERPA requests for the raw data, and promises to provide data at the PPT, the Parents only received a blank ABLLS test booklet with the Student's name on it with not one word in the notes or comments section. To date, the Parents have never seen the data requested which drove their daughter's IEP goals. (Young; T.Blachman; Mother; P-66, P-68, P-69, P-70, P-72, P-73, P-74, P-75, P-76, B-105.)

32. The Parents continued to raise their concerns in writing and orally, including at PPTs, that they wanted their daughter to be taught to speak. During the 2005-2006 school year they requested something more "state of the art" to supplement the Student's verbal language development. As a result their request, in May of 2006, Phoebe Tucker, a speech and language pathologist hired by the Board performed an Augmentative Alternate Communication Evaluation. Id.

33. In the one hour and forty minutes that she observed the Student it was apparent to Ms. Tucker that the Student had apraxia, and that the Student was functioning at the preschool level. The Board's occupational therapist agreed that the Student had apraxia. (Tucker; Day; B-63, B-67.)

34. Ms. Tucker noted in her evaluation that sign language was observed to facilitate communication as well as the Student's understanding. As a result of her assessment, Ms. Tucker recommended that the Student progress to a dynamic display AAC device such as the Springboard. She observed that the Student could continue to use sign language as well and that

sign language facilitated the Student's understanding of directions during the testing; however, she expected the staff primarily to teach the Student to use the Springboard. However, Ms. Tucker never contacted the Parents for their input and gleaned all of her information for her report from staff members and some documents. During testing, the Student used a total of 10 to 20 signals. She stated in her report that that staff should "learn" 20-30 signs. Ms. Tucker included in her report a chart for the staff to use and suggested a follow up consultation. Despite her recommendations and the fact the Student's preferred method of communication was signing the staff was not taught sign language and some were not even familiar with the signs the Student was using. Ms. Tucker testified that "fingertips are always with you, technology is not always there," a reference to the fact that the AAC devices can be cumbersome. (B-67, Tucker; Sullivan; Daria; Young; Mother; P-14, P-88.)

35. Physical therapy reported that the Student made some progress in that she was now able to safely navigate her school environment without bumping into things, falling, or tripping. (B-69; Pettinico.)

36. In the academic setting, with appropriate positive reinforcement in the form of social praise, encouragement, and reinforcement, the Student improved in her ability to attend and focus for sessions up to 30 minutes in length. (B-70; Sommer.)

37. At the annual review on May 19, 2006 the school-based team continued to recommend direct instruction by a special education teacher 2.5 hours per week with reinforcement and generalization of skills in regular education science, social studies, lunch, recess, specials such as art, music and physical education, and appropriate academic instruction. The team continued to recommend that the Student have the support of a paraprofessional aide 27 hours per week, and that she receive 1.0 hour per week of speech and language therapy, 1.0 hour per week of occupational therapy, and 1.0 hour per week of physical therapy. The team again agreed to allow the Student to continue in attendance at Sandy Hook School during the 2006-2007 school year at Parent request, even though the family had moved and Sandy Hook School was no longer the Student's home school. The mother explained that she did not feel the Student was making appropriate progress in the regular education setting in that the Student was and always had been a very social child and did not need the socialization benefits of the regular education setting. The Student did more intensive focus on skills. The Parents wanted the Student in regular education as little as possible and when told that couldn't be done because of the law, offered to sign a letter or waiver if it would get their daughter out of the regular education setting. The PPT, not considering the Parents concerns, placed the Student in the regular education setting for 27 hours a week. (B-71; Mother, Sommer, Blachman.)

38. Extended school year (ESY) services were also offered for the summer of 2006, consisting of a primary grade academic support program to maintain the Student's skills with respect to IEP goals 1 through 13, 2.5 hour per day, 4 days per week during the month of July 2006. This team felt that the area which she was most likely to regress were the academic skill areas. The speech pathologist did not recommend direct services in the area of speech therapy because she did not feel those services were not needed in order for the Student to maintain her skill levels. (B-71; Sommer, Daria). The OT and PT each testified that they did not recommend OT and PT services to continue during the summer because there was not a likelihood of

significant regression in the fine motor and gross motor skill areas such that the Student required continued services in those areas. (Day, Pettinico). Ms. Sommer testified, and the Parents corroborated, that the Student did not receive OT or PT during the summer of 2006. Dr. Schwartz who has extensive experience with apraxia and therefore was a very reliable and credible witness testified that the lack of speech services during the summer would result in significant regression and stated the Student requires 12 month programming. (Schwartz; Smaller, Mother; Day; Sommer; P-8, B-71, B-111.)

39. ESY for 2006 and 2007 was not appropriate because there were no speech services for the summer of 2006 and none proposed for 2007.

40. The Student's special education teacher for 2006-07, Ms. Young, was teaching for the first time in public school, had no certification when she started, and currently only has provisional certification in the State of Connecticut. (Young; P-35; P-55.)
In December 2006, the Parents requested a PPT to express dissatisfaction with the program particularly to address sign language and verbalization goals in the IEP. (B-73; P-50, 107, 112 of 198; Parent, M. Young, L. Daria, S. Blachman)

41. At the PPT meeting on January 4, 2007, both Parents attended and participated. They noted that they had observed the Student using more language in the home, and they requested that the school add sign language and verbalization goals to the IEP. Board staff agreed to this request in part and added a goal to the IEP to teach the Student more sign language. Board staff did not agree that focusing on verbal language was likely to yield positive results given past experience and did not agree to add verbalization goals at this PPT meeting, preferring to focus on the use of the Springboard AAC device and this is when the Parents first learn the Board was not committed to teaching their daughter to speak, as they had been led to believe. While the Parents were advocating for the staff to stop using the AAC device with the Student altogether to focus on verbal and sign language, Board staff continued to maintain that this was not appropriate, and that they would continue to use the AAC device in school while teaching sign and continuing to encourage the Student to use verbal language. (B-75; B-77; Daria; Mother.)

42. The Parent also requested at the January 4, 2007 PPT meeting that the speech pathologist use oral-motor intervention as part of the school-based therapy, which request was refused on the grounds that such therapy was not required in order to provide a free appropriate public education. (B-75; L. Daria). The Parent further requested that the Board provide a behavioral consultation concerning toilet training, since she felt that toilet training had been neglected in the Student's program and the Student was still not toilet trained. The Board agreed to provide such a consultation, and subsequently provided a consultation by Jan Calabro on this issue. (B-75; Blachman, Young, Calabro.)

43. Also at the January 4, 2007 PPT meeting, the PPT including the Parents planned the Student's triennial evaluation which was due in May of 2007. The triennial evaluation plan consisted of a full battery of cognitive, achievement, fine motor, gross motor, and expressive and receptive language testing by a speech and language pathologist. (B-75, 6 of 6). At no time during the PPT meeting did the Parents disclose that they were in the process of having the Student evaluated by an outside speech and language pathologist or an outside psychologist,

even though these evaluations were clearly in progress at the time of this PPT meeting. They no longer had a reason to trust the Board staff. (B-75; B-77; B-78; B-81; Daria, Young, Blachman, Mother, Giannone, Schwartz, Smaller.)

44. Following the January 4, 2007 PPT meeting, on January 12, 2007, the Board's speech pathologist approached the Parents about training them to use the Springboard device at home with the Student, but the Parents stated that they were not interested in such training and refused to schedule the training. The reason they did this is because the Springboard had been in district and being used with the Student since September 2006 and the Parent had asked to use it more than once and had been refused for no good reason, and they continued to want their daughter to be taught to speak, rather than rely on an AAC. (P-50, 139 of 198; L. Daria.)

45. In January 2007 Dr. Nancy Schwartz performed an independent speech evaluation. Dr. Schwartz has a Ph.D. in speech and has practiced for 30 years. In the past five years, she has worked with at least nine different school boards. Approximately 1/3 of her patients have apraxia or oral motor disabilities. Six (6) speech and language pathologists testified in this case, two (2) for the Parents (Nancy Schwartz and Toni Giannone) and four (4) for the Board (Allison Kirby, Lynette Daria, Phoebe Tucker and Suzanne Grossman). Each had a different opinion as to the Student's probable diagnosis in the arena of speech and language disorders. Dr. Schwartz was the most experienced in treating children like this Student and she was by far the most expert in apraxia. She was a highly credible witness and her testimony weighed heavily in this decision. This Student has not had proper programming and with proper intervention The Student is definitely capable of learning to speak. (Schwartz, Mother; P-25, P-59.)

46. Dr. Schwartz testified that she diagnosed the Student with verbal apraxia, oral motor apraxia, speech dysarthria, and a receptive language disorder. She explained that apraxia is the inability to motor plan for speech and that dysarthria refers to weak muscle tone in the muscles used for speech and was the cause of drooling. The Student's lack of verbal speech affects her educationally in that it is difficult to socialize with peers, hard to participate because she cannot ask questions or speak, and drooling affects social acceptance. (Schwartz, P-25.)

47. At the time of the evaluation by Dr. Schwartz, the Student was below a two year old level in speech according to the Kaufman Speech Praxis. Comprehension was also below the two year level and the Student could not understand two word combinations consistently. Because her speech is not appropriate for a nine year old, and she has attention difficulties, it is difficult for her to be involved in general education. Although the Student may have impaired cognitive ability, there are children with similar IQs who can produce much more language. Speech apraxia is separate from intellectual deficit. The Student's limited comprehension at this point in time may be a reflection that she has not been taught how to understand words in combination or vocabulary. Based on a review of previous IEPs, Dr. Schwartz saw limited goals related to combination of words and comprehension. (Schwartz; P-25.)

48. At this point in time, academic and non-functional imitation or matching skills should not be components of the Student's program. An appropriate educational placement for the Student should include intensive functional speech intervention, as well as receptive language intervention at the basic levels. (Schwartz, Smaller; P-28.)

49. Dr. Schwartz testified that children with speech apraxia have difficulty with motor planning. The Student must be specifically taught how to motor plan for speech sounds and is unable to imitate speech from peers. By the end of the sessions with Dr. Schwartz, she was able to say seven additional words. (Schwartz)

50. Dr. Schwartz suggested the Student could learn a core vocabulary of words that can be used for direct commenting and requesting. Though the Student is not too old to learn how to speak, the sooner the child learns to speak, the more the impact of speech apraxia can be eliminated. A total approach to communication is needed and should encompass support to vocalize and could include a device if needed; it shouldn't be a choice between one vs. the other. (Schwartz; P-25.)

51. Oral motor planning issues were noted, as evidenced by drooling and difficulty swallowing. She cannot adequately chew her food for swallowing, thereby creating a serious safety concern. Careful monitoring for feeding is required. (Schwartz)

52. Dr. Schwartz recommended direct 1:1 speech therapy two hours per day to address the verbal apraxia and receptive language, plus speech drills three times a day for 10 minutes. Communication among team members, built in consult time, and daily data collection for speech and language are all important. Consistency is pivotal. Data collection is imperative in order to determine what methodology works. Foundation School can provide the necessary level of services for children at the Student's level of functioning. (Schwartz; P-25.)

53. The goals and objectives recommended could not be implemented in the regular classroom. Direct manipulation for every new word is the only way sounds can be established and cannot occur in the classroom. (Schwartz)

54. No progress in expressive language has occurred since May of 2006, based on a comparison of Dr. Schwartz' results with those of the Board evaluator, Ms. Tucker. Receptively, the Student cannot access the curriculum because she currently understands at a two word comprehension level, which is further compromised by a limited range of vocabulary. (Dr. Schwartz.)

55. Staff testified that in the 2006-07 school year, the Student had not mastered 1:1 correspondence, identifying numbers and letters of the alphabet, or tracing her name. Many goals and objectives have been carried over year after year. The Student required constant prompting, both verbal and physical, and could not work independently. The Student was not able to master the ability to attend in a small or large group without disruptive behavior. (Young; B-71, B-111.)

56. The 2006-07 IEP contained 19 goals and 55 objectives. These goals and objectives were only carried over to the regular education classroom (where the Student spent over 80% of her time) only when both Ms. Young and regular education teacher felt the activity and materials were appropriate. Despite the fact that staff testified that she was better able to focus in a 1:1 environment with few distractions, the majority of her IEP goals were to be carried out in the general education classroom. As for addressing the IEP goals and objectives in the special education classroom, Ms. Young testified that she rotated the objectives she was working on in

the ½ hour per day of special education instruction because it was obvious she could not get to every goal and objective on a daily basis. (Young; Day; B-71.)

57. Dr. Adrienne Smaller performed an independent psychological evaluation and observation in January of 2007 to determine the Student's current level of cognitive and adaptive functioning. Her evaluation included the Kaufman Assessment Battery for Children, Kaufman Test of Educational Achievement, Developmental Test of Visual Motor Integration (VMI) and the Vineland Adaptive Behavior Scales. (Dr. Smaller; P-28)

58. The Student's attention was greatly compromised and she had great difficulty understanding verbal directions and learning from imitation. Her intellectual abilities were assessed by the Kaufman Assessment Battery for Children in the lower extreme, <.1 percentile rank. However, because she is so compromised by verbal and global apraxia, it is difficult to determine her intellectual ability. On the Vineland Adaptive Behavior Scales, the Student was a percentile rank of <.1 on all domains, and her standard score had dropped from the Board's Vineland standard score from 2004. Her Maladaptive Behavior Index was elevated for both internalizing and externalizing behavior. The Developmental Test of Visual Motor Integration ("VMI") assessed her graphomotor skills at the two year, two month age equivalency. (Smaller; P-28.)

59. In her January 25, 2007 observation at Sandy Hook School, Dr. Smaller noted that the Student had an aide with her at all times. While her class worked on mathematical calculations involving four digit numbers, the Student unsuccessfully tried to identify the number 8 on an AAC device with the help of her aide. She required prompting at every juncture. At no time did the staff ask the Student for a bathroom break, and Dr. Smaller was informed by staff that the Student asks independently for bathroom breaks. Dr. Smaller noted that the Student appeared more comfortable in 1:1 settings of therapy. By contrast, she appeared to stare blankly while in the general education classroom, was distracted by noise and movement within the classroom, and was unable to access the curriculum. She seemed confused by the SpringBoard and the accompanying worksheet when asked to identify the letters L, S and H. The content of therapies offered was not appropriate to address her language disorder. (Smaller)

60. The majority of the Student's instruction was provided by her aide; despite the fact the Student requires a highly skilled program to address verbal and oral apraxia, language, and motor skills. (Smaller)

61. Dr. Smaller concluded that "(g)iven the lack of progress since kindergarten, the lack of daily living skills incorporated into the program and the fact that the Student has only learned a few words and a few signs, it is evident that the Student's program is not appropriate to address her highly complicated learning profile." The Student's severe deficits need to be addressed in a highly specialized program, such as that at Foundation School, so she may learn to communicate verbally and that her presence in the general education classroom has not served her well. (Smaller)

62. The Student has been unable to develop friendships with peers. In six years of being in general area classes, the Student has never had a play date and was not invited to birthday parties. Despite the fact staff provided contact information to both the students and their parents

after she left, no one from the school has ever contacted the Student or her Parents. (Mother; Smaller;Sullivan)

63. The Student's current goals in her IEP are written to physically include her in the general education classroom and emphasize the use of the AAC device. The IEP goals need to be rewritten to emphasize her deficits caused by her diagnosis of verbal apraxia and oral apraxia, as well as her severe language disorder. The goals need to address toileting, drooling, dressing, and eating to teach basic living skills and that any academics that are included must have relevancy and function in her daily life. (Smaller)

64. The Student's deficits in language, motor planning, visual/spatial problem solving, cognitive skills, academic skills, fine/gross motor skills and daily living skills were determined to be quite severe. After almost four years in the Board's program the Student has not been taught a communication system that is reliable and convenient and that the use of the AAC device adds another distraction and level of frustration to the Student's attempts to communicate. (Giannone; Smaller)

65. Given the Student's severe deficits, the least restrictive environment is a highly intensive and intrusive language based program that addresses all of the deficits in a 1:1, highly structured and consistent setting. Staff trained in teaching children with severe language, attention, and sensory sensitivities is required. Dr. Smaller agreed with Dr. Schwartz that the Student requires speech/language therapy five days a week in order to address her apraxia. She also recommended a home based program, an extended school year, and a new IEP to address her needs in the area of speech and language, communication, socialization, academics, and physical and occupational therapy. (Smaller)

66. At a PPT held on 2/8/07, the evaluations by Dr. Schwartz and Dr. Smaller were discussed, but recommendations were not incorporated into the IEP. In particular, the Parents raised concerns that the program failed to appropriately address oral verbal speech goals and objectives, necessary frequency of intervention, and did not provide for adequate training of speech staff. In addition, the Board offered no one trained in apraxia or the PROMPT method to work with the Student. (P-31, P-32, P-52.)

67. The Board corroborated the Parent's testimony that there is no data for verbalization of speech for the past two years. The speech pathologist testified that she did not take any verbalization data for the entire 2006-07 school year and only recorded data for the Springboard. She told the Parent she did not have data and later testified she had destroyed data for both the 04-05 and 05-06 school years. There is no data or narrative progress reports to evidence progress in the school program during the past two years. (Daria; T.Grossman)

68. Toileting issues were a persistent problem which the Board failed to address with either IEP goals or a toileting plan. Although the Student did quite well with toileting in first grade, there was a steady regression in toileting, culminating in constant accidents at school from 2nd grade until the time she left Sandy Hook School. The Student lost time accessing her education due to the constant toileting accidents. (Mother; Sommer.)

69. During the 2005-06 school year, the staff contacted the Parent frequently seeking advice regarding the toileting concerns. Toileting accidents occurred frequently, at times daily, and staff requested that the Student wear diapers at recess and during a field trip to which the Parents vehemently refused. Ms. Sommer testified that there were times when she was unable to teach skills for a whole week during special education time because she was too busy cleaning the Student after toileting accidents. (Parent; Sommer; P- 50.)

70. In 2nd grade, when the toileting accidents escalated, the majority of the Student's day was in the general education classroom of 22 children. Ms. Sommer testified that, when the Student had an accident, her soiled clothes were placed in a bag in her backpack and the other children reacted negatively to the unpleasant odor. On 9/12/05, Ms. Sommer sent an email to Ms. Calabro, copying the Parents, stating: "…I am concerned about [Student's] behavior. We are having daily BM accidents and she is defiant with any demands. Her reaction is usually noncompliance through yelling, screaming and hitting. Academics have not been the focus since school has started and I am concerned about her progress as well as her inclusion in 2nd grade. I spoke with both parents today and they are looking for suggestions as well. I have tried some motivational strategies with the bathroom, but I could really use some assistance…." (Sommer, pp. 57-58, 140 (7/18/07); Parent, pp. 156-157 (5/1/07); P-80; B-71.)

71. The Board agreed to hire a behaviorist to address the toileting problem in June of 2004; however, no behaviorist was hired. It was only after a PPT held on 2/8/07, two years and 8 months later, that Jan Calabro, Supervisor of Special Education, was designated to address the problem. Pursuant to an FOIA request, the Parents discovered Ms. Calabro is not a board certified behavior analyst. Ms. Calabro testified that she tried a number of techniques, beginning with a plan to have the Student find a way to communicate that she had to go to the bathroom. Ironically, at this point in time, the Student's sole communication method in place was an ineffective AAC device. Ms. Calabro stated that if the Student could communicate her need to go to the bathroom, she might not have the accidents. (Parent; Calabro; B-45.)

72. At the request of the Board, the Parent recorded toileting data from home for two weeks, yet the Board never provided requested data to the Parent on toileting. Despite the Parents' cooperation and requests for data, they never saw a toileting plan and first learned that a toileting plan existed after testifying at the due process hearing on 5/16/07. (Mother; B-92.)

73. Since her placement at Foundation, the Student has not had a toileting problem. Foundation resolved the issue within the first week by trip training (which was recommended by the Parent and dismissed by the Board). Foundation supplemented this with methods of communication for the Student, including a clicker with an icon that she could press, and sign language. A separate clicker was sent home for generalization and carryover purposes. (Mother; Giannone.)

74. A PPT meeting was conducted on February 8, 2007 to review the Student's IEP and the evaluations completed by Nancy Schwartz and Adrienne Smaller. Although the Board's staff requested an opportunity to speak to the evaluators regarding their reports, consent for this communication was not given by the Parents, who no longer had reason to trust the Board staff. (Mother, B-85; B-88). The Parents also presented the results of a modified barium swallow report from Danbury Hospital, and claimed based on this report that the Student was aspirating

food and therefore required a feeding plan in school. This verbal report by the Parents was clearly at odds with the written report presented, which indicated that although the Student had a disordered swallow, aspiration was not noted. (B-80; Parent, Grossman). Board staff therefore requested an opportunity to speak to the speech pathologist from Danbury Hospital to determine the appropriate response. (B-85, ; Dr. Regan). The Parent agreed only to allow written communication with the evaluators, which was cumbersome and not appropriate.

75. Also at the February 8, 2007 PPT meeting, Board staff reported on the progress the Student had made during the first half of the 2006-2007 school year, and recommended new goals and objectives were appropriate to respond to the progress that she had made. (B-82; B-83; B-84; B-85, 10-27 of 34; Blachman, Young). In response to the Parents' request for increased emphasis on verbalization based on the Schwartz report, Board staff agreed to increase the emphasis on verbalization in the IEP, and added several goals and objectives to the IEP to address this, in addition to the sign language goals and goals for use of the AAC device already in the IEP. *See*, B-85, 14, 18 of 34. Board staff also agreed to increase speech and language services from 1.0 hour per week to 2.5 hours per week (30 minutes per day), in order to give the Student daily work on verbalization with a speech pathologist. (B-85, 30 of 24; Daria.)

76. In view of the fact that outside evaluations had been conducted in some of the areas previously specified in the triennial evaluation plan, Board staff also revised the triennial evaluation plan at the February 8, 2007 PPT meeting. The Board proposed conducting a curriculum-based assessment, observation and criterion-referenced tests of academic achievement, occupational and physical therapy evaluations, speech and language evaluations of expressive and receptive language. The Parents revoked their consent for these evaluations. (B-85, 34 of 34; Parent, Dr. Regan.)

77. Consent for the requested triennial evaluation was not provided by the Parent until April 5, 2007, and the Student was withdrawn from school on April 30, 2007. (B-100; Parent). Given the limited time available (approximately two weeks not including the one-week school vacation in April), it was not reasonable to expect the Board staff to complete the evaluations before the Student was withdrawn. (M. Young, D. Day, G. Pettinico, L. Daria). Given the conditions placed on the Board that testing would have to be conducted outside of the Student's regular school day at Foundation School (after 3:00 p.m.) which is after the contractual day for Board staff, the Board argued it was not possible for the Board to complete the triennial evaluation of the Student after she was withdrawn from school on April 30, 2007. (Dr. Regan). However, a number of the days of this hearing were conducted beginning at 5 or 6 o'clock and running past 10:00 p.m. and Board staff testified during those hours, so it is not clear why they can participate after hours in due process but not in an aspect of the child's education.

78. Also at the February 8, 2007 PPT meeting, the Parents raised concerns about the Student's toilet training status, and stated that the Student was having more accidents at home at that time. (B-85, 2 of 34). Board staff requested consultation from Jan Calabro, the Board's Supervisor of Special Education, who has a background in Applied Behavioral Analysis (ABA) and teaching toileting and other skills to children with developmental delays. Mrs. Calabro directed the school-based team to collect data at home and school regarding the Student's toileting accidents, identify possible reasons for the accidents, and then she analyzed the data and

developed a Toilet Training Program for the Student. (B-92; J. Calabro). The program included both a plan for positive reinforcement of appropriate use of the toilet, as well as an over-correction procedure for toileting accidents. The reinforcement procedure was used following the development of the plan, with good results until the Student was withdrawn from the school. Id. The Parents were clearly involved in the development of this plan, since they collected data at home and were involved in selecting the reinforcers of ice cream and cottage cheese used with the Student to reinforce her behavior. (P-37; P-50, 174-175 of 198; P-50, 186-188 of 198; M. Young, J. Calabro).

79. Following the February 8, 2007 PPT meeting, the development of a feeding plan for the Student in response to the modified barium swallow report was delayed by the failure of the Parents to give consent for the Board to clarify the recommendations with the appropriate medical individuals, instead insisting on being present for the conversation so that it could be tape-recorded. (B-88; B-89; B-93; B-95; B-96; B-98). The release permitting unfettered communication between Dr. Machado and Dr. Rothschild was provided on April 5, 2007. (B-101).

80. Promptly upon obtaining permission, Dr. Machado immediately contacted Dr. Rothschild to obtain clarification of her recommendations. (Dr. Machado). The Individual Health Care Plan developed by the Board dated April 12, 2007 is the result of that consultation and is appropriate to meet the Student's needs in school. (B-104; Dr. Machado). Although the Parents argued that the Student required supervision from a nurse or certified educational staff during lunch and other snack times, this is not medically required. The supervision of a trained paraprofessional is adequate to meet the Student's needs. Id.

81. The annual review PPT meeting was held over two dates on May 2 and May 7, 2007, and goals and objectives were proposed for the 2007-2008 school year. In some areas such as speech and academic skills, it was not necessary for the staff to propose new goals and objectives, because new goals had just been proposed in February 2007. Some modifications were made to the academic goals and objectives as recommended in the teacher's progress report, to "raise the bar" and add new skills to the Student's repertoire. (B-109; B-112, 7-26 of 45; L. Daria, M. Young). Other members of the team proposed new goals and objectives because their goals had last been revised at the previous annual review in May 2006. (B-112, 27-32; G. Pettinico, D. Day). The IEP was recommended to continue until February 2008, when another review would take place to update the goals that had been put into place in February 2007. (B-112, 36 of 45).

82. The IEP proposed for the Student for the 2007-2008 school year calls for the Student to participate in a regular 4th grade classroom for science, social studies, lunch, recess, specials and appropriate academic instruction up to 24 hours per week with special education support, and 2.5 hours per week of individualized academic instruction with the certified special education teacher for reading, math and writing in a small group setting in the resource room. (B-112; M. Young, S. Blachman, C. Sullivan). It was proposed that the Student continue to receive 2.5 hours per week speech and language services, delivered 30 minutes per day by the speech pathologist, with carryover throughout the Student's day by the paraprofessional and certified special education and regular education staff. (B-112, Daria). It was proposed that the Student continue to receive 1.0 hour per week occupational therapy services in a related services room,

as well as 1.0 hour per week physical therapy services in a related services room. (B-112; Day, Pettinico).

83. An extended school year program was also discussed at the annual review PPT and proposed by the Board, consisting of the Primary Academic Support program, 10.0 hours per week in a small group setting provided by a special education teacher and supported by the Student's individual paraprofessional. (B-112)

84. The status of the Student's triennial evaluation was also discussed at the annual review PPT meeting. The school-based members of the PPT agreed that the Student continued to be eligible for special education services under the category of intellectual disability. They explained that the OT, PT and speech and language evaluations recommended as part of the triennial evaluation had not yet been completed and offered to go to Foundation School to complete that testing. The Parents refused this offer and stated that they would make the Student available at Sandy Hook School for the testing; however, this did not occur, since the Parents did not make the Student available during regular school hours. This information was not required in order to determine that the Student continued to be eligible for special education services or that the appropriate eligibility category was intellectual disability. (B-112; P-71; Dr. Regan.)

85. Foundation School conducted their own meeting for the Student on June 11, 2007 which they characterized as a legally constituted Planning and Placement Team (PPT) meeting to develop an IEP for the Student and to consider the Student's eligibility category. At this meeting, the Foundation School staff purported to change the Student's eligibility category from intellectually disabled to Speech and Language Impaired. (P-78; Giannone). Foundation School had no authority granted by the State Department of Education to either convene a PPT meeting or change the Student's eligibility category. Therefore, the Student's eligibility category remains Intellectually Disabled for purposes of this hearing. (A. Carey). The meeting conducted by Foundation School was not attended by any representative of the Board and was not a legally constituted PPT meeting. (B-116; A. Carey).

86. The Student has attended the Foundation School since April 30, 2007, where she was placed unilaterally by the Parents. She has received speech and language therapy 15 hours per week out of a 30 hour per week program, which is contrary to any recommendations previously made for the Student, including by the independent evaluator retained by the Parents, Nancy Schwartz, but is closer to what Dr. Schwartz recommended than the Board's program was. She has no access to the regular education setting, curriculum, or typical peers while at Foundation School. (Giannone).

87. The staff was not provided adequate training in apraxia, PECs, sign language, PROMPT method, or inclusion the entire time the Student attended the district. Marianne Young, the special education teacher and case manager for 3rd grade, testified that she used ABA as a model to guide her teaching, following her predecessor who worked with the Student. ABA is contraindicated for students with apraxia. (Sommer; Young; Grossman; Daria; Giannone; B-111.)

88. The Student cannot imitate sounds due to severe speech apraxia and requires physical cues and manipulation of her face to change sounds. She had not learned any new words in school since preschool, with verbal speech consisting of a few words used appropriately and additional approximations. However, during the 2006-07 school year the Student learned new words in her home setting, including the names of family members, in the absence of verbalization goals in her IEP. She has always understood language far better than she could express it. This is demonstrated by the types of imaginary play she preferred to engage in. The Student liked to pretend to be a waitress taking down orders and she liked to pretend she was reading a book during which exercises she makes vocalizations. Ms. Sullivan testified that the Student learned, without being taught, the names of three classmates in the fall of 2006. (Schwartz; Mother; Sullivan; Young; Sommer; P-25, B-55.)

89. Ms. Day testified that she never worked on oral motor feeding issues, though that would be one of her responsibilities. She admitted the Student had not mastered many of the OT goals and that they remained the same for three years. Appropriate daily living skills were not in the IEP until 2007, and the Student never learned to write, open a jar, button her clothing or turn a doorknob. Yet, incredulously, the OT testified that increasing OT services beyond the one hour per week, or offering OT over the summer, would not promote progress. The OT did not provide formal strategies to be used by staff for generalization purposes, and most strategies could not easily be generalized into the general education environment. (Day; Blachman; Smaller; Sullivan.)

90. Ms. Sommer, who was the Student's special education teacher for three years (K-2) acknowledged she knew it was the Parents' priority for their daughter to learn to communicate through oral speech and to have a functional system of communication. The Parent testified she has lost nearly three years in the district, where a unilateral decision was made to abandon verbalization and sign language goals in grades two and three, choosing instead to train her in assistive technology devices. (Mother; Sullivan; Daria; Sommer; B-45, B-55, B-71, B-111, P-24.)

CONCLUSIONS OF LAW:

There is no dispute that during all times at issue here the Student was entitled to receive a free and appropriate public education ("FAPE"), including related services, through the Board pursuant to the IDEA, 20 U.S.C. Secs.1401 *et seq.*, and its implementing regulations codified at 34 C.F.R. Secs. 300 *et seq.*, and under Connecticut's special education laws, Conn. Gen. Stat. Secs. 10-76. *See, e.g.*, B-15, B-18, B-19, B-21, B-22, B-24.

1. The Act defines FAPE as special education and related services which:

> "(A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under Sec. 614(d).” 20 U.S.C. Section 1401(8).

2. Special education is “specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability....” 20 U.S. C. 14010 (25). Special education is to be provided in different settings, including the child’s home. 20 U.S.C. §1401 (29).

3. Connecticut regulations provide that “the public agency has the burden of proving the appropriateness of the child’s program or placement or of the program or placement proposed by the public agency.” Conn. Reg. 10-67h-14. The Supreme Court’s decision in *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct 528 (2005) has not altered the Board’s obligation to establish the appropriateness of the program or services it has offered.

4. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al. v. Rowley,* 458 U.S. 176 (1982), 102 S.Ct.3034. The first prong requires determining if the board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.

5. Addressing the *first* prong of the *Rowley* inquiry, the initial procedural inquiry is not a formality. As the Supreme Court noted in *Rowley*, Congress’s emphasis in IDEA “upon full participation of concerned parties throughout the development of the IEP,” together with the requirement for federal approval of state and local plans, reflects a “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.” 458 US at 206 *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2nd Cir. 1998) The procedural guidelines of IDEA are designed to guarantee that the education of each child with disabilities is tailored to meet the child's unique needs and abilities. 20 U.S.C. Secs. 1412 and 1415. These procedural guarantees are procedural safeguards against arbitrary or erroneous decision-making. *Daniel R.R. v. State Board of Education,* 874 F.2d 1036, 1041(5th Cir. 1989). Compliance with the IDEA’s procedural requirements is the responsibility of the board and not the parents. *Unified Sch. Dist. v. Dept. of Ed.*, 64 Conn. App. 273, 285 (2001). However, a procedural violation of the IDEA does not, in and of itself, warrant a change in the child’s educational placement. In order to conclude that procedural violations resulted in a denial of a free appropriate public education, the parent must show that the procedural errors resulted in a loss of educational opportunity. *See, Burke County Bd. of Educ. V Denton,* 895 F.2d 973, 982 (4th Cir. 1999); *Evans v. District No. 17 of Douglas County Nebraska,* 841 F.2d 824, 830 (8th Cir. 1988). When a procedural violation is alleged, a hearing officer may find that a student did not receive FAPE if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child, or caused a deprivation of educational benefit. 34 CFR §300.513(a)(2) (i-iii); *See*, *Burke County Bd. of Ed. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1999); *Evans v.*

District No. 17, 841 F.2d 824, 830 (8th Cir. 1988). Procedural flaws do not automatically require the Hearing Officer to find that a denial of FAPE has occurred, instead the hearing officer must determine if the procedural inadequacies resulted in the "loss of educational opportunities or seriously infringed upon the parents' opportunity to participate in formulating the [IEP]...." *Shapiro v. Paradise Valley United Sch. Dist. No. 69,* 317 F.3d 1072 (9th Cir. 2003). Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of IDEA. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist*, 267 F.3d 877 (9th Cir. 2001). An IEP addresses the unique needs of the child and cannot be developed if those people most familiar with the child's needs are not involved or fully informed. *Id.*

6. Procedural safeguards are set forth in 20 U.S.C. §1415 and 34 CFR §§500-536 and include: the right for parents to participate in all meetings (CFR §300.501(b); the right for parental involvement in placement decisions (CFR §300.501(c)); the right of parents to examine all educational records; the right for parents to obtain an independent educational evaluation (IEE) of their child (§300.502(b); the requirement for boards to consider evaluations provided by parents at private expense in the deciding FAPE (CRF §300.502(c)). IDEA expects strong parental input at PPT meetings, *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 86 (3d Cir. 1993). The IEP is to be collaborative developed by the parents of the student, educators and other specialists. *Honig v. Doe* 484 U.S. 305, 311 (1988). Failure by the board to develop an IEP in accordance with procedures mandated by IDEA, in and of itself, can be deemed a denial of FAPE. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir.2001).

7. The purpose of IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. §1400(d) (1). The Student did not have an effective means of communication, could not trace her name, had difficulty sitting in group settings, and could not read, write or do arithmetic. Despite her profound disabilities, over 80% of her time was spent in a regular education classroom where her work was modified 100% and the bulk of instruction was delivered by an untrained aide. She required constant physical and verbal prompting. She was only offered special education ½ hour per day. OT and PT were only offered one hour per week, despite lack of progress, and the inability to motor plan. Staff was unaware and lacked knowledge of the Student's disabilities and implementing strategies contraindicated for apraxic children.

8. The first prong of *Rowley*, whether the Board complied with procedural requirements of IDEA was not met. Procedural violations were persistent and insidious, resulting in a *per se* denial of FAPE. The procedural violations significantly impeded the child's right to FAPE, the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE, and caused a deprivation of educational benefit. Testimony elicited during the fifteen day hearing was replete with procedural violations, as follows: a) failure to notify of or seek consent for evaluations (ABLLS on three occasions beginning in 2005); b) failure to follow test protocol for ABLLS, including the fact that the speech pathologist and Parents were not involved, and the evaluator was not familiar with child; c) failure to provide test results in a timely manner (ABLLS from 2005 never disclosed until 5/07 PPT and never disclosed Tucker evaluation or

have a PPT for 8 months); d) failure to allow the Parent to be part of evaluation and placement decisions by failing to inform the Parent that staff disagreed with their assertion that the child had apraxia; e) failure to involve Parent in decision making process by making unilateral decision the Student was intellectually disabled and would not learn to speak, a decision that was not based on adequate evaluations or testing; f) refusal of the Board to explain what "ID" meant and basis of "ID" determination (Parents had to call CT SDE to find out what "ID" meant); g) failure to involve Parents in decision making process when removing sign language and verbalization goals from Student's IEP, despite Parents repeated requests for verbal speech and sign language; h) failure to consider information provided by the Parents in hundreds of emails about suggested strategies (toileting), resources, videotapes and invitations to private therapy sessions and seminars i) failure to provide data to Parents despite three FERPA requests, FOIA request, and verbal and written requests for data (Board testified data "destroyed", data "personal files", data "internal documents"; data "too complicated" and would not let Parents see it unless they had a meeting; j) failure to consider private evaluations (dismissed recommendations made by experts and some staff members even questioned diagnosis); k) failure to include Parent in conversation between the school and private medical doctor regarding safety issue of choking and health plan; l) failure to develop FBA despite repeated parental and staff concerns regarding behavioral issues; m) failure to effectively communicate with Parent during 2004-05 and 2005-06 school years (Parent only knew about toileting accidents when received soiled cloths in backpack); n) inadequate communication system in 2006-07 despite parental request for daily and more specific communication; aides no longer allowed to communicate with Parents or bring Student to the office for pickup; and failure of Board therapists to attend parent meetings other than one meeting on 11/04 by Ms. Daria.

9. Central among the procedural safeguards is the process of developing an IEP. 20 U.S.C. §1401(a) (18) (D); Rowley, 458 U.S. at 181-182. The IEP is so critical to IDEA that it has been termed the "key operative feature of the Federal Act." *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790 (1986). A "full and individual evaluation" of the child's educational needs is to be conducted before the initial placement of a child with disabilities is made. 34 CFR 300.531. IDEA requires schools to "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" about the child. The information from the evaluations is to be used to determine the content of the child's IEP and to help the child make progress in the general education curriculum." 20 U.S.C. §1414(b)(2)(A). Children are to be assessed "in all areas of suspected disability" and the assessments shall provide relevant information to determine the child's educational needs. 20 U.S.C. §1414(b) (3). In addition to the requirement to evaluate the child, IDEA regulations mandate additional procedures that must be followed to determine placement decisions. In interpretation of evaluation data for placement purposes, the LEA must obtain information from a variety of sources including aptitude and achievement tests, teacher recommendations, physical condition, and adaptive behavior; ensure the information obtained is documented and carefully considered; ensure placement decisions are made by a group of persons which includes persons knowledgeable of the child, the meaning of the evaluation data, and placement options, and ensure placement conforms with LRE. §§300.550-554, 34 C.F.R. 300.533.

10. The Board failed to comply with mandated IDEA procedures regarding assessment and strategies necessary to gather information to develop an IEP, thereby denying the Student FAPE. The Student's disabilities were never properly identified in the five years that she was attended the district schools, despite the fact the Parents repeatedly told the staff their daughter was apraxic and she was not making meaningful progress. Testimony proved the Board continued to refuse to recognize the Student's disabilities of apraxia, dysarthria, and global apraxia, instead concluding the Student was intellectually disabled and could not learn to speak or sign. There were no cognitive evaluation results which formed a basis for their decision to change her disability designation to intellectual disability. No evaluations were done by the Board between 2004 and 2007, except for the AAC evaluation and the ABLLS, which was not administered according to protocol and was not accompanied by any data or timely reports. Goals and objectives were driven by test results from the ABLLS, which was never shared with the Parents. There has been no evaluation by the Board regarding cognitive, adaptive, achievement, social, communication, speech (other than AAC evaluation), occupational or physical therapy since the triennial in spring of 2004; despite mounting concerns beginning in the 2005-06 school year by staff and Parents regarding failure to progress, appropriate level of inclusion, and regression in the areas of communication, behavior and functional skills, such as toileting. The unilateral decision that she was "intellectually disabled" heavily impacted programming by lowering expectations in the IEP, and determining she would never learn to speak. Once the school decided that the Student was intellectually disabled, they failed to program or provide services for her co-existing disabilities, including oral motor and verbal apraxia. Despite the absence of formal or informal evaluations, the school team failed to consider that her lack of progress may have been due to her severe language impairment as opposed to a cognitive disability. Throughout the hearing, the Board was unable to reconcile the fact that if they believed she was significantly impacted by her cognitive ability why did she spend 80% of her day in general education where her goals were mostly pre-academic, as opposed to functional. There was testimony that many of the strategies in PT and OT would be difficult to carry over into the regular class environment. There was no evidence that any strategies were being generalized at school or at home. Despite ongoing behavioral issues regarding toileting, attention, and oral motor needs that impacted health and safety, the Board refused to develop a functional behavior plan or seek input from a BCBA. Instead the Board blamed the Student for toileting as a means to avoid work, and would not implement sign language or verbalization goals to enable the Student to communicate her needs. The Board unilaterally chose to relay on an AAC device which was ineffective, despite the Parents persistent requests to teach the Student to speak and sign.

11. The IEP must set forth goals and objectives which provide a mechanism to determine whether the placement and services are enabling the child to make educational progress. 20 U.S.C. §1401 (a) (20). Connecticut courts have determined that in order for an IEP to be found appropriate, it must provide more than mere trivial advancement, it must be one that is "...likely to produce progress not regression." *Mrs. B. V. Milford B.O.E.*, 103 F.2d 1114, 1121 (2d Cir. 1997). The benefit to be conferred under IDEA requires more than a trivial educational benefit. *Polk v. Central Susquehanna*, 853 F.2d 171, 180 (3d Cir. 1988). In determining whether the IEP was reasonably calculated to confer meaningful benefit, it must be determined if the IEP states: 1) the child's present level of educational performance, 2) contains annual goals and objectives, 3)lists the specific educational services that will be provided and the extent the

student will participate in the regular education program, 4) transition services if appropriate, 5) the projected date and duration for the proposed services and 6) objective criteria and evaluation procedures, including a schedule for determining at least an annual basis whether instructional objectives are being achieved. *M.S. ex rel S.S. v. Bd. of Ed. of City of Yonkers,* 231 F.3d 96 (2d Cir. 2000) (citing *Walczak,* 143 F. 3d at 122). Connecticut state regulations contain comparable requirements that are enumerated in RCSA §10-76d-11(c). 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, Hall v. Vance County Bd. of Ed.,* 774 F.2d 629, 635 (1985). 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, Mrs. B. v. Milford Bd. of Ed.,*103 F.3d 1120 (2nd Cir. 1997).

12. The second prong of *Rowley* requiring the IEP to be reasonably calculated to enable the child to receive some educational benefit was also not satisfied. *Id.* In the instant case, the majority of goals and objectives were carried over from year to year due to lack of progress and regression. Because there were so many goals and objectives and because the Student spent over 80% of her time in the general education area, many of the goals and objectives could not be adequately addressed. Evaluation and progress measurement procedures were nonexistent. There were no procedures in place by the pupil personnel to insure that data was being collected, that timely evaluations were taking place or to insure that staff was accountable for documenting progress and monitoring instructional strategies and the appropriateness of the environment. Report cards were left blank for all academic areas, and she was given marks only for work habits. There were no quantitative measures of performance in either 2005-06 or 2006-07. The Student had not received appropriate duration or frequency of speech for her disability and did not receive speech services for ESY 2006. Likewise, she had not received appropriate frequency of services in OT and PT, and did not receive OT or PT for ESY 2006 or 2007. There was no attempt to provide any strategies, such as OT adaptive materials, or lists of verbalizations practiced, to the Parents to use at home. There was never a toileting or behavioral plan, despite clear evidence of regression in toileting, as well as persistent behavioral issues, which prevented the Student from accessing her education. There was no coordinated effort by the administration to effectuate communication between staff members. There was no integration of services, consulting time, or communication between staff members noted in the IEP. Documentation was devoid of any strategies used for students with apraxia, despite the fact that the Parent had been offering assistance and communicating strategies for years. For all the reasons set forth, the IEP was not reasonably calculated to enable the Student to receive meaningful educational benefit.

13. If the Board proposes to change or refuses to change the identification, evaluation, or educational placement of a child, the Board must provide the Parent with written notice. 20 U.S.C. §1415(b)(3). Prior written notice was not provided when the Board changed the Student's disability determination in 5/04 and refused to inform the Parents of the reason for the change, or the basis of the Board's decision (misleading the Parents that the purpose was for the Student to receive more services.) Prior written notice was also not provided when the Parents requested their child be included as little as possible because they wanted more special education time.

14. Generally, an extended school year ("ESY") program is provided for a student in order to prevent the amount of gains achieved by a student from being jeopardized *Student v. Preston B.O.E.*, CT DOE Case No. 06-109, p. 10 (12/27/06)*; M.M. by D.M. & E.M. v. Sch. Dist. of Greenville County*, 37 IDELR 183 (4th Cir. 2002); *J.H. by J.D. & S.S. v. Henrico County Sch. Bd*., 38 IDELR 261 (4th Cir. 2003). An ESY program cannot be arbitrarily limited by the Board. *Id*.; 34 CFR §300.309 (a)(3)(ii). There were occupational or physical therapy services offered in extended school years 2005 and 2006. ESY 2006 speech services were not offered during the summer, despite the fact expert testimony noted significant regression could occur. The Student did not participate with typical peers in ESY programs, which was inconsistent with the Board's decision that she participate in general education classes more than 80% of her time during the school year. There was no discussion at a PPT and no IEP sent to the Parents regarding the extended school year 2007, indeed, it was never included in the IEP sent to the Parents five days after the 5/ 07 meeting. Any later documentation added to the document was based on a unilateral decision, not a team decision that included the Parents.

15. If the Student's program requires so much alteration that it no longer resembles the general education program, it is no longer appropriate. *Student v. Suffield B.O.E.,* CT DOE Case No. 05-166, p. 23 (10/12/05) (citing *Jay Sch. Dist. v. Me. Ed. Agency*, 39 IDELR 259 (Me. 2002). The fact finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testified that the IEP [was] appropriate. (citation omitted)", *Waterbury B.O.E. v. Student*, CT DOE Case No. 04-370, p. 71 (8/2/05). Testimony was elicited that the Student spent more than 80% of her time in the third grade classroom of 22 children and her work had to be modified 100% and the focus in the general education room was on social skills. She could not work independently and had to be prompted both physically and verbally by an aide. Additionally, reinforcers were constantly used and she had no effective means of communication. She could not sit in small or large groups, did not know her alphabet or numbers, had difficulty tracing a line, and was never invited on a play date or to a birthday party by any of her peers. She had frequent toileting and behavioral issues that were never remediated or adequately addressed with a FBA. She received only ½ hour per day of special education instruction, which could not adequately address all her goals and objectives set forth in her IEP.

16. Unilateral actions by the board regarding placement prevent parents from "meaningful participation" in educational decision-making for their child. 20 U.S.C. §1414(e). The Board unilaterally eliminated verbalization goals and objectives from the IEP, unilaterally decided she had an intellectual disability, unilaterally performed testing and failed to share it with the Parents, unilaterally developed a safety plan in 5/07, and unilaterally developed an ESY program for 2007. The Parents requested that their daughter have additional special education services and as little inclusion as possible. Requested speech services were denied.

17. IDEA provides that:

> [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or removal of children with disabilities from the regular educational environment occurs only

> when the nature or 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. 20 U.S.C. §1412(a) (5) (A).

A child may only be removed from the regular educational setting if the nature or severity of the disability is such that the child cannot be educated in regular classes, even with the use of supplementary aids and services. 20 U.S.C. §1412 (a)(5). However, the mainstreaming requirement in IDEA is a presumption, and not an inflexible mandate. *Doe v. Arlington County Sch. Bd.*, 41 F. Supp. 2d 599, 603 (E.D. Va.1999). Both *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036 (5th Cir. 1989) and *Oberti v. Bd. of Ed.*, 995 F.2d 1204 (3d Cir. 1993) looked at whether a school board 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 board 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 board has mainstreamed the student to the maximum extent appropriate. *Daniel R.R.*, 874 F.2d at 1048; *Oberti* 995 F.2d at 1213. When determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services, factors to be considered are: "(1) whether the school board 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. The Student was regressing in all adaptive areas based on the Vineland performed in 2004 and again in 2007. According to evaluations, she had not gained in the area of receptive or expressive communication. She was overwhelmed and disruptive in the general education environment where work had to be modified 100%. She required constant prompting to complete any work and could not perform any skill independently or generalize skills. She had no effective system of communication, thus could not access her education. She required intensive teaching by a qualified professional yet received only ½ hour per day of special education, the remainder of instruction from an aide. She had not made any social connection outside of school with any typical classmate and no one contacted her when she left. Experts unequivocally stated that the Student had not progressed in the program in Newtown and that the program was not appropriate to meet her needs.

18. The requirements for special education teachers are new and track the highly qualified teacher requirements of the No Child Left Behind Act. 20 U.S.C. §1412 (a)(14). Under the new provisions of IDEA 2004, states are required to take measurable steps “to recruit, hire, train, and retain highly qualified personnel to provide special education and related services.” 20 U.S.C. §1412 (c)(14). 20 U.S.C. §1401(10)(B)(i) sets forth the qualifications for special education teachers as follows:

> the teacher has obtained full State certification as a Special Education teacher (including certification obtained through alternative routes to certification), or passed the State Special Education teacher licensing examination, and holds a license to teach in the State as a Special Education teacher...the teacher has not

> had special education certification requirements waived on an emergency, temporary, or provisional basis; and the teacher holds at least a bachelor's degree." Parents of students who attend schools that receive Title I funds must be notified by the school if their child is taught for 4 weeks or more by a teacher who is not highly qualified. (See Commentary in the Federal Register, page 466983). "Highly qualified teacher" is defined in Title IX of No Child Left Behind at 20 U.S.C. §7801(23). See also 20 U.S.C. §6311 (b)(1). Special educators must meet the educational requirements for highly qualified teachers.

According to No Child Left Behind ("NCLB), a "highly qualified teacher" has full State certification (no waivers), holds a license to teach, and meets State requirements. 20 U.S.C. §6367(6). (CK FACTS) According to testimony and FOIA documents in the file, the third grade Ms. Young did not have full State certification, only provisionally certification. Staff lacked training in apraxia, PECS, PROMPT, sign language, and motor planning. Staff did not understand the nature and extent of the Student's disabilities including thinning of the corpus collosum and apraxia. Instead, staff labeled her "intellectually disabled" resulting in a widespread bias by staff to lower expectations. They were unaware of the ramifications of thinning of the corpus collosum and because of lack of training determined she was intellectually disabled and would never learn to speak. The Student spent approximately 27 hours per week in the regular education classroom, according to the IEPs for 2005-06 and 2006-07 with instruction from an aide. The position of aide or "educational assistant" requires no specific educational or qualifications.

19. Parents, who unilaterally place their children in private educational settings without the consent of school officials, do so at their own financial risk. *Burlington Sch. Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359, 373-374 (1985); *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993). Whether the parents are entitled to be reimbursed for the costs of private placement turns on two distinct questions. The first question is whether the challenged IEP was adequate to provide the child with a free appropriate public education, and the second question is whether the private educational services obtained by the parents were appropriate to the child's needs. *Student v. Greenwich B.O.E.,* CT DOE Case No. 06-005, p. 18 (6/16/06) (citing *M.C. v. Voluntown Bd. of Ed*., 226 F.3d 60, 66 (2d Cir. 2000). Once the hearing officer determines the IEP was inappropriate to provide a free appropriate public education, the burden shifts to the parents to prove that the placement they selected is appropriate. *Student v. Greenwich B.O.E.*, at 18; (citing 471 U.S. at 370; *Tatro v. State of Tex.*, 703 F.2d 823 (5th Cir. 1983), *aff'd.* 468 U.S. 883 (1984); *M.S. ex rel. S. S. v. Bd. of Ed. City of Yonkers*, 231 F.3d 96, 104 (2d Cir.2000). The unilateral placement selected does not have to meet the standards of least restrictive environment, nor does the private placement have to have certified special education staff. 34 CFR 30.403(c); *Student v. Greenwich B.O.E.*, CT Case No. 06-005 at 18; 231 F.2d at 105; 190 F.3d at 84. The Parents placed the Student at the Foundation School after concurrence from each of the private evaluators as to the appropriateness of the placement. An observation of the Student was obtained by the Foundation School before acceptance. Foundation is appropriate in that it has small classes with 1:1 instruction by certified special education teachers, three hours per day of speech services, occupational therapy services, behavioral supports, and sensory strategies throughout the day. There is daily supervision by the Director, who is a speech pathologist trained in apraxia, to monitor effectiveness of instruction and coordinate strategies

between staff. This is in direct contrast to lack of supervision of staff and lack of accountability procedures in Newtown. The Student is provided with a behavior plan, a toileting plan and a feeding plan. Toileting and behavioral incidents (except for focus) have not occurred since the Student has attended Foundation. Foundation School is an approved special education school in Connecticut which specializes in communication disorders. Foundation School meets Connecticut State Department of Education's standards for certification as an approved private special education and school and employs certified special education staff.

20. If the parent removes the child from a public school program and places the child into a private program, the parent may be reimbursed for the costs of the private program if a hearing officer or court determines that the public school did not offer FAPE "in a timely manner." 20 U.S.C.§1412(a)(10)(C) . In the case at hand, the Parents challenged the adequacy of the IEP based on a lack of progress and a refusal by the Board to take any of the recommendations from the independent evaluators. The IEP remained essentially unchanged from the IEP in February that the Parents rejected as inappropriate, which had resulted in five years of lack of progress and failure to address her language disability. There continued to be reluctance by staff to acknowledge her language disorder and a continued reliance solely on her intellectual disability as a factor in programming for her. As of 5/7/07, there was still no offer to provide staff with training in apraxia.

21. Before a move from public to private placement, specific steps must be taken which include: at most recent IEP meeting before remove child must: 1) state your concerns, 2) state your intent to enroll your child in a private program at public expense OR 3)10 business days before you remove your child from the public school program, must write a letter to the school that states: a) specific concerns, in detail, about the inadequacy of the school's IEP and/or placement; basis for rejecting the IEP; why child will be damaged if placed in the school's proposed program; statement of intent to enroll child in private program at public expense. 20 U.S.C. §1412 (a)(10)(C). The Parents made a unilateral placement only after attending numerous PPTs on 1/7, 2/07 and 5/07 and placed the district on notice that their experts unequivocally stated that the placement was inappropriate and that the Student required an intensive program at Foundation School to address her needs. The Parents provided addendums to each of the three PPT meetings, enumerating their concerns. When the school Board refused to address the Parents concerns or accept any of the recommendations of the experts, the Parents gave the Board 10 days notice stating they had no choice but to place the Student at the Foundation School, an approved special education school in Connecticut that specifically addresses communication disorders.

22. Hearing officers have the authority to provide compensatory education as an equitable remedy for denial of FAPE. *Student v. Greenwich B.O.E.*, CT DOE Case No. 06-005 at 19; *Inquiry of Kohn*, 17 EHLR 522 (OSEP) (2/13/91) (citing with approval *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Burr v. Ambach,* 863 F.2d 1071 (2d Cir. 1988), *vacated,* 492 U.S. 902, *reaff'd*, 888 F.2d 258 (2d Cir. 1989). Compensatory education has been recognized as an available remedy under IDEA for failure of the Board to provide FAPE. *See*, *K.P. v. Juzwic*, 891 F.Supp. 703 (D.Conn. 1995); *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990). In this case, due to the egregious nature of the unilateral decision to deny the Student appropriate speech services, the Parents are requesting

compensatory education for two years of lost time. In addition to the failure to address her disability of apraxia and absence of appropriate speech services, there are gross procedural violations including an exclusion of the Parents from the team process in that although the Parent was in attendance, she was not being told the truth and therefore could could not fully participate in the IEP process as IDEA anticipates. Ms. Sommer, the special education teacher who taught the child for three years wouldn't even tell the mother that 'intellectually disabled' did indeed mean 'mentally retarded'. More damaging and more pervasive was that the staff (Daria, Sommer and others) jointly and individually misled the Parents as to what was actually being done to teach their daughter to speak. The lost window of opportunity for this child to learn to speak is enormous.

23. Due process hearing officers are required as a matter of course to evaluate the credibility of witnesses and the claims of the parties. *See Student v. Newtown B.O.E,* CT DOE Case No. 01-168, p. 16 (5/20/01); *Student v. Groton B.O.E.*, CT DOE Case No. 05-315, p. 7 (1/31/06). Credibility of Board witnesses was consistently called into question as replete with contradictions and inconsistencies and although they mostly seemed well-intentioned in their conviction that she could not learn to speak and should learn to use an AAC for her own good, their reliability was likewise a concern in that they were so unfamiliar and inexperienced in the education of students with apraxia that they were drafting plans without the education and training in apraxia to do so properly. (Sommer, Daria, Blachman, Young).

FINAL DECISION AND ORDER

1. The Board's IEP, program and placement for the 2005-06, 2006-07, and 2007-2008 school years, as well as ESY for 2006 and 2007, were not appropriate for the Student's needs.
2. The Board violated the Student's procedural safeguards thereby denying FAPE.
3. The program selected by the Parents, the Foundation School, was appropriate for the Student's needs.
4. The Board is responsible for reimbursement of evaluations, services privately obtained, and unilateral placement at Foundation.
5. The Board shall be responsible for payment for the Foundation School for the 2007-08 and the extended school year 2008, including transportation.
6. The Parents are entitled to receive an award for compensatory education for two additional years to remedy the Board's violations of the Parent and Student's rights and this shall take the form of two school years of placement, including summers, at a school such as Foundation School, appropriate to meet the Student's needs as set forth in this Final Decision.