

STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS

DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING

(Case # 10-19)

STUDENT: JOHN DOE

SCHOOL DISTRICT: LINCOLN SCHOOL DISTRICT

**HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.
1035 MAIN STREET
COVENTRY, R.I. 02816
Tel: 821-3537**

**SCHOOL DISTRICT REPRESENTATIVE: MARY ANN CARROLL, ESQ,
362 BROADWAY
PROVIDENCE, R.I. 02909
Tel: 453-2300**

**PARENT'S REPRESENTATIVE: AMY R. TABOR, ESQ.
24 SPRING STREET
PAWTUCKET, R.I. 02860
Tel: 727-1616**

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**PARENTS REPRESENTATIVE: AMY R. TABOR, ESQ.
24 SPRING STREET
PAWTUCKET, R.I. 02860
Tel: 727-1616**

LEXICON

For the purposes of the decision in the within hearing and to ensure confidentiality of the student, the following Lexicon shall be used in this decision:

STUDENT:

MOTHER:

SCHOOL DISTRICT: LINCOLN SCHOOL DEPARTMENT

**HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.
1035 MAIN STREET
COVENTRY, R.I. 02816**

**DISTRICT'S ATTORNEY: MARY ANN CARROLL, ESQ.
362 BROADWAY
PROVIDENCE, R.I. 02909**

**PARENT'S ATTORNEY: AMY R. TABOR, ESQ.
21 SPRING STREET
PAWTUCKET, R.I. 02860**

POSITION OF PARTIES

PARENT: The Student was not making reasonable or meaningful progress in the School District placement and was therefore denied FAPE. The Placement at Greenwood School was appropriate and necessary. The School District is obligated to pay for the out of District placement.

SCHOOL DISTRICT: The School District's IEP of August 28, 2008 was designed to give the Student a free appropriate public education.

ISSUES and SUMMARY of DECISION

ISSUE: Was the IEP of August 8, 2008 designed to afford the Student a free, appropriate, public education for the 2008 – 2009 school year in accordance with the law and the regulations.

DECISION: The IEP of August 28, 2008 did in fact provide an IEP designed for the unique needs of the Student with supports that would provide the Student with an educational benefit from the instruction.

TRAVEL OF THE CASE

Pursuant to Section IX, 7.1.1 of the Regulations of the Board of Regents Governing Children with Disabilities, on September 3, 2010, this Hearing Officer received Notice of Appointment to conduct an impartial due process hearing in this matter.

On September 9, 2010, a notice of appointment was sent to all parties setting forth hearing dates and a date for a pre-hearing conference. The pre-hearing conference was held on October 7, 2010.

Hearings were held on the following dates:

October 20, 2010
October 21, 2010
November 9, 2010
November 29, 2010
December 3, 2010
December 8, 2010
January 10, 2011

The Hearing was concluded on January 10, 2011.

FACTS

The Student is fifteen years old and the Student is entering the eighth grade. The Student was in the North Providence School District for a portion of the first grade. The Student transferred to the Lincoln School District for the remainder of the first grade. The Parents and the School District agreed that the Student should repeat the first grade for the 2002-2003 school year. The Student remained in the Lincoln School System through the sixth grade. The Student lived with the Student's parents and two sisters. The Student attended preschool under the Head Start program and the Student attended kindergarten at the James L. McGuire School in North Providence. The Parents did not notice any problems with the Student while in kindergarten but during the 2001/2002 school year, the first grade a teacher told Parents that the Student was in the wrong placement. (Trans. 10-20-10 P.17,18,19). North Providence did an evaluation as did Lincoln School District when the Student moved to Lincoln. During the Student's public school experience, the Student was diagnosed with a reading disability, disorder of written language, mathematic disorder, mood disorder (NOS), attention deficit, cognitive disorder, Asperger by history and dysgraphia. (Trans. 10-20-10 P. 20-22)

The psychological report from North Providence School District concluded:

“Overall, based on these results, (the Student) should be able to perform academically at somewhat better level than same aged peers. The corresponding academic expectancy, based on the intellectual assessment, would fall at the low second grade level.” (Plaintiff Exh. 1)

The Student was referred for a psychological evaluation because the Student had difficulty remaining focused during group instruction. The Student’s focus wandered from task at hand to playing in his desk, doodling or staring off. (Plaintiff Exh. 1)

When the Student went to North Providence, he was placed in a regular education classroom.

In the Neuro-Psychological Screening of 4-26-02 & 4-29-02 (Plaintiff Exh. 6), the Student’s first grade teacher, Ms. Coisek, reported that she was concerned about the Student’s below grade level performance in academics, including reading, mathematics, writing and maintaining focus during independent and group work. The teacher noted that the Student was constantly off task except when there is a topic of interest to the Student. On the Wechsler Intelligence test the Student’s performance was in the average range for reading and math, in the high average range for spelling and superior range for language. The Student was also found to have inattention, anxious/shy social problems, hyperactivity/impulsivity. The Student was found to be eligible for Special Education services as a student with a Learning Disability.

The first IEP was done by North Providence on January 16, 2002. It was accepted by the Parents. Placement was in the least restricted environment.

On April 1, 2002, Lincoln conducted the first IEP for that District. (Plaintiff Exh. 7) The Parents agreed with that IEP. The Student was going to receive two and a half hours every day by agreement with the IEP Team (Trans. 10-20-10 P. 55) with a resource teacher, Mrs. Marini. The Student was also given Occupational Therapy to help with motor skills.

On May 28, 2002, the Team’s evaluation report recommended that the Student repeat the first grade. (Plaintiff Exh. 8)

On December 6, 2002, there was a referral for evaluation because of difficulties in reading and writing. The IEP Team recommended a neuropsychological evaluation. (Plaintiff Exh. 9) In February 2003, the Student changed rooms to be closer to the resource teacher and eventually a reading specialist was brought in. (Plaintiff Exh. 10) The Team had another review of the Student on June 4, 2003. The Parent was present at all evaluations to date. The Team recommended an outside evaluation at the Child Development Center at Memorial Hospital. (Plaintiff Exh. 11)

IEP Meetings were conducted on June 4, 2003 and June 12, 2003 (Grade 1) (Plaintiff Exh. 14), June 10, 2004 (Grade 2) (Plaintiff Exh. 18), December 2, 2004 and February 3, 2005 (Grade 3) (Plaintiff Exh. 25).

The Parents agreed with and accepted those IEPs. They were all signed by the Parents.

Defendant Exh. 1 is a progress report as of April 1, 2002. The Student was making progress on all his goals. This was a report prepared for the IEP of April, 2002.

Defendant's Exhibit 2 of June 4, 2003, is a progress report for the IEP of June 4th and June 12th, 2003. (Plaintiff Exh. 14) It shows progress on all the Student's goals. Defendant's Exhibit 3, a progress report for the IEP of June 10, 2004 (Plaintiff Exh. 18) and it showed progress on the Student's goals. Defendant's Exhibit 4 for the IEP of December 2, 2004 and February 3, 2005 (Plaintiff Exh. 25) shows progress in all areas.

The IEP of May 12, 2005, (Plaintiff Exh. 26) was not accepted because of placement in a regular education classroom with co-teachers.

The IEP of December 15, 2005 (Plaintiff Exh. 27) was rejected by the Parents because the School District reduced the number of hours the Student would receive special education support in the regular education classroom. (Trans. 10-21-10 P. 61)

The last six weeks of the second grade (2004), while the Student was in the self-contained classroom, Gail L'Esperanza worked with the Student using Orton Gillingham after school hours. (Trans 10-21-10 P. 6) The Mother agreed with the present levels of performance

stated by the Team in the IEP of June 10, 2004. The Parents agreed that the Student be in a self contained classroom for the next school year (Trans. 10-21-10 P. 16 & 19) During the summer of 2004, the Student went to the Hamilton School for six weeks for a reading program.

On the referral for evaluation report of September 13, 2004, Ms. Savageau stated that the Student made outstanding gains in reading. The Mother agreed with the statement. (Trans. 10-21-10 P. 19)

The Student received an evaluation on October 4, 2004 which concluded that the Student was performing in the average range for reading with strength in vocabulary, comprehension and fluency with weakness in decoding. The Student was performing within the average to low average in mathematics with weakness in fluency and in calculations skills. The Student was performing within the low range for written expression, with weakness in fluency, spelling creating a story with a beginning, middle and end. (Plaintiff Exh. 21)

On October 15th and 20th, 2004, there was a Occupational Therapy Evaluation. Neuromuscular and sensorimotor foundations were within functional limits for school tasks. Fine motor foundations were within functional limits but pencil control was weak. It was reported that the Student continued to make slow progress in written output (Plaintiff Exh. 22). The Student was given a Assistive Technology Consultation in October 2, 2004 (Plaintiff Exh. 23).

On November 16, 2004, the School District conducted a team evaluation. (Plaintiff Exh. 24) Part of the report stated that the Student no longer was eligible for special education in reading. The Mother agreed with that conclusion. (Trans. 10-21-10 P. 42)

The IEP of January 25, 2006 (Grade 4) (Plaintiff Exh. 28) may not have been attended by the Mother. (Trans. 10-20-10 P. 63) She disagreed with the number of hours in Special Education. The Mother did attend the IEP of February 10, 2006 (Grade 4) (Plaintiff Exh. 29). The present levels of performance were accepted.

The IEP of March 30, 2006 (Plaintiff Exh. 30) (Grade 4) was accepted by the Parents. The goals in this IEP were written for attainment in a year but at Mother's request the IEP was to reconvene in six months (Plaintiff Exh. 30 P. 13).

In April, 2006, according to an Educational Information Form, the Student lacked focus, tunes out directions, lessons, and neighbors around him. (Plaintiff Exh. 31) As of June 21, 2006, the Student was proficient on the NECAP reading test. (Plaintiff Exh. 34)

In the IEP of June 1, 2006, (4th Grade) the Mother agreed with the levels of performance as written in the IEP. (Trans. 10-21-10 P. 84) The Mother signed the IEP but did not agree with the program because she wanted the Student to have a typing program and she wanted more special education resource. (Trans. 20-21-10 P. 84 & 85) In the summer of 2006, the Student went to Hamilton School for writing.

At the beginning of the fifth grade, the Student was in regular education class. (Trans. 10-21-10 P. 86)

In October, 2006, the Student was not completing his homework and not following directions in school. (Plaintiff Exh. 42)

On April 1, 2006, the Student had a neuropsychological assessment performed by Terry Harrison Goldman, Clinical Neuropsychologist. The Student's cognitive ability was in the average range and his verbal, perceptual reasoning and memory were also in the average range. Verbal concept formation was in the high average range. Assessing vocabulary and understanding social moves was in the average range. Perceptual reasoning was in the average range. Assessing auditory working memory and sequencing of letters and numbers was in the average range. In processing speed, the Student was in the low average to mildly impaired range. In the Visual-Perceptual/Motor examination, the Student was in the 83rd percentile for his age group and the Student scored age equivalent of 11 ½ years. The Student scored in the superior range in visual organizational skills. In memory and recall, the Student was in the superior range for the Student's age group. In Executive functioning, the Student was in the

impaired range. In Academic Achievement, overall, the reading skills were average and math was low average. As to writing output, the Student was below average. The Student's phonological awareness and memory overall was in the average range with memory falling in the impaired range. The Student was diagnosed with dyslexia, auditory processing disorder, written language disorder, and ADHD. Fifteen specific recommendations were made by Ms. Goldman. (Plaintiff Exh. 46) The Student was evaluated at the Groden Center on August, 2006 and September, 2006 by Dr. Kelly H. Pistacchio. The purpose was to clarify the previous diagnosis and for recommendations. The Mother reported concerns with repetitive behavior, tantrums, social skills, intensive interest in topics, eating and sleeping habits and strong fear of bees. The evaluation states that the Student's presentation is consistent with asperger's syndrome. The evaluation profiled eighteen recommendations. (Plaintiff Exh. 47)

On September 25, 2006 and October 16, 2006 (5th Grade) a multidisciplinary evaluation was conducted by Bonnie S. Ravo, speech and language pathologist and Amy Marcille, occupational therapist. In receptive language the Student received a overall language age of 9.3 years. For expression on the one word test the Student had a standard score of 131 or age equivalent to 16.3 years. Overall expressive language quotients were demonstrated to be in the moderately low score. The evaluation made twenty specific recommendations in the area of speech and language and in the area of occupational therapy five specific recommendations were given including continuing occupational therapy. (Plaintiff Exh. 48)

The Parents gave these evaluations to the School District.

On January 2, 2007 (5th Grade) the School District held a team evaluation meeting. (Plaintiff Exh. 49) That evaluation referred to the evaluations of Dr. Pistacchio and of Dr. Goldman and those reports were discussed by the team. The Mother did not disagree with the content of the team evaluation report.

An IEP meeting was held on April 26, 2007 to cover April 26, 2007 to June, 2007. The Mother accepted the IEP but wrote "with concerns he needs more intensive program." (Plaintiff

Exh. 55) This IEP added the following needs: breaks, social skills, great deal of support in written language. The IEP increased special education time, services from the occupational therapist and services from the social worker.

The Mother viewed two self-contained classes for the forth-coming year at the middle school but concluded neither was appropriate for the Student because the children in them were more disabled than the Student or had behavioral problems. (Trans. 10-21-10 P. 142)

An Assistive Technology Evaluation was conducted for the Student on May 2, 2007 (Plaintiff Exh. 56) by Faith M. Paradis who made eleven specific recommendations. The Team meeting of June 14, 2007 reviewed the Assistive Technology Evaluation recommendations. (Plaintiff Exh. 57)

An IEP meeting dated June 14, 2007 (5th and 6th grade) was not signed by the Parent but the Parents did attend as indicated on the first page of that IEP.

The report card for the Student at the end of the fifth grade reported the following: Reading (B-), writing (D), spelling (A-), penmanship (C), mathematics (C+), science (B) and social studies (B+). In effort, speaking, self control and participation the Student's mark was "fair". In homework, listening, independent worker and following directions, the Student received a "poor" grade. In conduct the Student received a "good" mark.

At the end of the June 14, 2007, the Mother requested that the Student be placed at the Wolf School for the sixth grade. (Trans. 10-21-10 P. 152)

As of August 20, 2007, the Parents had legal representation who exchanged letters (Plaintiff Exh. 61A & 61B) with the attorney for the School District concerning the IEP of June 14, 2007. (Plaintiff Exh. 58)

The Student went to the Lincoln Middle School for the sixth grade. (Trans. 11-9-10 P. 13) The Student was placed in Mr. Wall's math class which was a regular sixth grade math class. The Mother requested an IEP meeting which was held on November 11, 2007. (Plaintiff Exh. 63) The Mother signed and agreed to this IEP.

The Student appeared to use the Alph Smart technology successfully. (Plaintiff Exh. 65)

The Parents hired a tutor in March of 2008 to help the Student with homework. (Trans. 11-9-10 P. 35) The tutor was Ruth Argellena.

An IEP was held on April 7, 2008 (6th grade). The Mother attended and she agreed with the IEP and accepted it. The Team was to reconvene in June, 2008. The Team agreed that before trying to make major changes they would await Dr. Holler's evaluation. (Trans. 11-9-10 P. 42)

The Student had a neuropsychological consultation by Dr. Karen Holler and Dr. Sonia Greene on April 14, 2008 and May 2, 2008. Dr. Holler gave several recommendations to help the Student. By June 12, 2008, the Student was one year behind grade level in reading. (Plaintiff Exh. 74)

In May and June of 2008, the Parents had Dr. Jessica Lord, psychologist, evaluate the Student. Dr. Lord observed the Student in the classroom on two occasions, she made several recommendations.

The Mother kept in contact with the Student's teacher by email from November 8, 2007 to June 17, 2008. (Plaintiff Exh. 77)

The IEP of April 7, 2008 was to run until June 17, 2008 but the next IEP was held on August 28, 2008 (Plaintiff Exh. 78) which was to run until June, 2009. On August 8, 2008 there was a Team meeting to discuss the evaluations of Dr. Lord and Dr. Holler. Dr. Lord attended the meeting. (Trans. 11-29-10 P. 71) The Team could not complete an IEP at that meeting and a second meeting was scheduled for August 28, 2008.

The Parents, prior to the August 8, 2008 IEP meeting, felt the Student was not making adequate progress (Trans. 11-9-10 P. 74) so they looked for an alternative placement. They found the Greenwood School in Putney, Vermont that they thought was appropriate.

The Mother attended the IEP of August 28, 2008. She did not agree with much of the IEP as to the levels of performance, needs or goals. (Trans. 11-9-11 P. 75 to 95)

The Mother advised the Team that they were placing the Student in a private school (Greenwood School) in the fall and that the placement should be publicly funded. (Trans. 11-9-11 P.96)

The tuition for the Greenwood School for the 2008-2009 school year was \$55,000.00 but the Student was given financial aid in the amount of \$10,000.00. The Parents paid \$45,640.00 for that year. The Student was accepted back by Greenwood for the second year (2009-2010) and for the third year (2010-2011) without paying the tuition up front. Greenwood agreed to wait for the outcome of this due process hearing. (Trans. 11-9-10 P.104)

Dr. Lord stated that the Student made significant gains and that Greenwood provides the structure and support in all areas of functioning. (Plaintiff Exh. 84)

During cross-examination, Dr. Lord testified that she did not have “first hand knowledge” of the proposed program as found in the August 28, 2010 IEP. (Trans. 12-8-10 P.12)

Dr. Holler and Dr. Greene did a neuropsychological evaluation on July 13, 2009. The evaluation was to assess the Student’s emotional and personality functioning. The Student was at Greenwood School, mood and anxiety problems he had the prior year were resolved. (Plaintiff Exh. 85)

The IEP of June 4, 2003/June 12, 2003, page 5 stated that the Student in nineteen weeks improved from a level of 5 to level 14 in reading while receiving one-on-one reading instruction three times a week. (Plaintiff Exh. 14)

Defendant Exh. 1 is a progress report as of April 1, 2002. The Student was making progress on all his goals. This was a report prepared for the IEP of April, 2002.

Defendant’s Exhibit 5 is a progress report for the IEP of May 12, 2005 (Plaintiff Exh. 26) and it showed progress. Defendant’s Exhibit 6 is a progress report for the IEP of March 30, 2006 (Plaintiff Exh. 38) in which it showed progress and attainment of two goals, legibly write spelling words and use of Alpha Smart. Defendant’s Exhibit 7 shows progress through the year.

This was prepared for the June 14, 2007 IEP. (Plaintiff Exh. 58) Defendant's Exhibit 8 is a progress report for the IEP of April 7, 2008 (Plaintiff Exh. 72). It too showed progress.

Defendant's Exhibit 9, was the Student's report card for the sixth grade which reported language arts (B), physical health (A-), basic reading (A) basic math (B+), science (C) and social studies (A-).

Defendant Exhibit 13 was a sample of the Student's writing. The assignment was give to all 6th graders.

Michelle Shaw's Testimony

The Mother, Michelle Shaw, testified. She is respite for foster children and the husband is a diesel mechanic. She described the Student as having a great heart and honest to a fault. The Student's interest is science and social studies. He obtained information from PBS, the Discovery Channel and the Mother read books to him. (Trans. 10-20-10 P. 15, 16, 17) The Mother observed that the Student while in the first grade could not read, had difficulty forming letters, could not add and had no math facts. (Trans. 10-20-10 P. 28) The Mother's observations were the same as those observed by the Student's teacher in the first grade, Ms. Begin, who provided information for the Education Evaluation of November 29, 2001. (Plaintiff Exh. 2)

The Mother agreed with the IEP of January 16, 2002 of the North Providence School District (Plaintiff Exh. 4) as to strengths, she stated that the Student's vocabulary was much larger than his peers because of watching PBS and the Discovery Channel. (Trans. 10-20-10 P. 33) She helped the Student with homework and she observed his difficulties in writing, reading and mathematics. The Student was unable to complete homework without help (Trans. 10-20-10 P. 44 – 45) The Student would break down and cry.

The Lincoln School District followed the recommendations given in the Neuro-psychological Screening. (Trans. 10-20-10 P. 49)

The first IEP done by Lincoln was dated April 1, 2002 and the parents agreed to it. (Trans. 10-2-20 P. 49)

The Mother stated she was advocating for the Student with his teachers trying to get the teachers to understand some of the Student's issues. (Trans. 10-20-10 P. 50) At the time of this IEP April, 2002 the Mother's opinion was that the Student did not have any decoding ability, could not independently generate one sentence at a time, produce one to two polished pieces of writing, use capital letters, tell time, make change, pay attention for three minutes for writing. (Trans. 10-20-10 P. 51-52-53 & 54) A short term objective in that IEP was to put shoes on. The Mother said that the Student within the year could tie his shoes with OT help but not on the correct feet. (Trans. 10-20-10 P. 87)

It was recommended by the Team that the Student repeat the first grade because the Student did not acquire the level to pass and the Parents agreed. (Trans. 10-20-10 P. 59)

As of December 6, 2002, the date of a referral for evaluation, the Mother was concerned with the lack of consistent progress. (Trans. 10-20-10 P. 65) The Mother agreed with the conclusions of the Team in their review of June 4, 2003. (Plaintiff Exh. 11) The Mother also agreed with the questions to be addressed at the outside evaluation at the Child Development Center. (Trans. 11-20-11 P. 73)

In the IEP of June 4th and June 6th, 2003, the Mother accepted and agreed with the list of modifications and accommodations listed for the Student. (Trans. 10-20-10 P. 84)

In reviewing the June 10, 2004 IEP (2nd grade), the Mother states that the Student was a slow reader (Trans. 10-21-10 P.7), that the Student did not have any friends in his classroom and that the Student's spelling was inconsistent. (Trans. 10-21-10 P.8) The Student could not make change or tell time. (Trans. 10-21-10 P.12) After attending the Hamilton School, the Student read better. (Trans. 10-21-10 P. 17) In September 2004 (3rd grade), the Mother wanted the Student in a self-contained room. (Trans. 10-21-10 P. 17, 19)

The Mother wanted him the self-contained classroom because the Student was making gains in the program but in math and writing the gains were very minimal. (Trans.10-21-10 P. 19) In September 2004, the Mother's opinion was that the Student became less confident in social issues. (Plaintiff Exh. 19) In October of 2004, the Mother reports that the Student did homework extremely slowly (Trans. 10-21-10 P. 27) and that the Student stated he wanted to die. (Trans. 10-21-10 P. 29) The Mother confirmed what the teacher observed in the classroom that the Student was inattentive and stared blankly. (Trans. 10-21-10 P. 32)

The Mother testified that she had a different opinion than some of those found in the November 16, 2004 evaluation (Plaintiff Exh. 24) and then explained that:

“(The Student) at home was different than the classroom. I am not disagreeing with what she (Mrs. Sauvageau) said. What she seen were different and that happened quite often. At home and in the classroom setting he was two different children. Its not that I am disagreeing with what she said” (Trans. 10-21-10- P. 46 L 4-10)

As to the IEP of May 12, 2005, the Mother testified that she circled the “I do not accept the education program outlined” but after a few days she did sign the IEP. She objected to the placement for the fourth grade, which was a regular education classroom with co-teachers. (Trans. 10-21-10 P. 52 L25) They went to mediation over that issue.

The Mother rejected the December 15, 2005 IEP because the number of hours of special education services were reduced. (Trans. 10-21-10 P. 61)

The Mother did not remember attending the IEP of January 25, 2006 (Plaintiff Exh. 28) (Trans. 10-21-10 P. 63) but she did not accept or reject it. (Trans. 10-20-10 P. 64) She did not sign it because the School District reduced the time in Special Education. (Trans. 10-21-10 P. 65)

On February 10, 2006, the IEP (Grade 4) was not accepted by the Parents because they did not agree with the amount of time to be spent in Special Education during the School week

which was 8.5 hours. (Trans. 10-21-10 P. 65) She did agree with the present levels of performance in language arts, in behavior management and in mathematics. (Trans. 10-21-10 P. 65 & 66) At this time, the Mother was concerned with the Student's social behavior.

As to the March 30, 2006 IEP, the Mother testified that the levels of performance for the fourth grade IEPs were almost all the same. (Trans. 10-21-10 P. 68)

The Mothers opinion was that at the end of the fourth grade the Student did not progress in making change (Trans. 10-21-10 P. 68) or in reading a checklist for homework. (Trans. 10-21-10 P. 70) The Students expectations in spelling and recognizing words were low. (Trans. 10-21-10 P. 75)

The Mother testified that in the summer of 2006, the Student went to Hamilton School for writing. She said he made "such good gains in reading." (Trans. 10-21-10 P.86) In December of 2006, the Mother could not get the Student to write. (Trans. 10-21-10 P. 103. The Student became dependant on the Mother. (Trans. 10-21-10 P. 104)

The School District was scoring the Student in the 5th grade by using a rubric and his grades had an asterisk next to them because they were modified scores. They were passing grades for the Student but not actually for other kids. (Trans. 10-21-10 P. 112)

The Mother was concerned about violent pictures being drawn by the Student during the fifth grade (Trans. 10-21-10 P.125) (Plaintiff Exh. 54)

The Mother accepted the IEP of April 26, 2007. (Trans. 10-21-10 P. 139) The Mother claims that the Student never mastered math facts in addition, multiplication and the Student could not make change. (Trans. 10-21-10 P. 132) During this year, the Mother found the Student in the hall with his desk because he was disturbing other children. (Trans. 10-21-10 P. 135) The Mother was concerned about the transition to Middle School and the Student's placement. (Trans. 10-21-10 P. 139)

The Mother testified that contrary to what Mrs. Struble said in her letter of July 2, 2007 (Plaintiff Exh. 60) the Student did not start out in the sixth grade in the placement mentioned in

that letter and the Mother could not remember if there was a certified reading specialist available for the Student. (Trans. 10-21-10 P. 154) (Plaintiff Exh. 60)

On October 29, 2007, the Mother received a Failure/Unsatisfactory Work Report from Mr. Wall, a teacher of math in the regular class. The Mother requested an IEP meeting. (Trans. 11-9-10 P. 15) The Mother stated that the Student tried to do homework at the beginning of the sixth grade but stopped at the end of the sixth grade. (Trans 11-9-10 P. 23) The Mother did not see a lot of the work done by the Student with the AlphaSmart. (Trans. 11-9-10 P.27) In the sixth grade, the Mother observed that the Student could not remember the words he studied for a spelling test. (Trans. 11-9-10 P. 32) The Student would go out when he was suppose to write for the tutor and the Student would return after the tutor left. (Trans 11-9-1- P. 38)

The Mother testified that because of the Student's social, emotional and academic problems and the lack of progress, she had a neuropsychological evaluation done by Dr. Jessica Lord. (Trans 11-9-10 P. 52)

During the time of the August 8, 2008 meeting, the Parents were looking for an alternative placement. The Student's progress was inadequate according to the Mother. (Trans 11-9-10 P. 73)

At the IEP Meeting of August 28, 2008, the Mother informed the team that they were placing the Student in a private school, the Greenwood School. (Trans. 11-9-10 P. 95 & 96)

When the Student went home from Greenwood, the Mother observed that the Student was much happier (Trans. 11-9-10 P. 98) The Student left the Mother a note for the first time. (Plaintiff Exh. 79)

The Mother had no knowledge of the educational standards that are required for each particular grade. (Trans 12-8-10 P. 8)

On cross-examination, the Mother claimed she never saw the June 3, 2003/June 12, 2003 IEP (Plaintiff Exh. 14). Plaintiff Exh. 17 stated that the Student improved tremendously in reading and math. The Mother stated she probably did not read that document fully. (Trans 12-

8-10 P. 19) Concerning the IEP of June 10, 2004 in which it was stated that the Student had made tremendous gains in reading, the Mother who accepted this IEP testified that she did not read every word of the IEP. (Trans 12-8-10 P. 23)

When the Mother was shown Defendant's Exhibit 3 which showed that the Student was making progress, the Mother stated "yes" but "not one A for attainment".

In determining how well the Student was doing in making progress, the Mother compared what the Student could do with what her daughter could do. (Trans. 12-8-10 P.15)

In reviewing the Student's report card for fifth grade (Plaintiff Exh. 59), the Mother did not agree with the mark (C) the Student received in penmanship. She compared the Student's penmanship with her daughter's penmanship. (Trans. 12-8-10 P.38)

The Mother testified that the Student did not tell his teacher the truth when the Student told his teacher that he was "really engrossed" in his video game at night. (Trans. 12-8-10 P. 39)

The Mother stated that although she signed the IEP that did not mean she accepted every word of the IEP. (Trans. 12-8-10 P. 46)

The Mother confirmed that the Student made meaningful progress in reading. (Trans. 12-8-10 P. 64)

Jessica Lord Bean, Phd.

Jessica Lord Bean, PhD., a licensed clinical psychologist, testified on November 29, 2010. Dr. Lord specializes in neurodevelopment disorders which are disorders that impact the development of the brain. She also specializes in autism spectrum disorders. (Trans. 11-20-10 P. 4) Dr. Lord evaluated and observed the Student in 2008 and 2009. (Trans. 11-20-10 P. 5) She evaluated the Student on May, 2008 and June, 2008. (Plaintiff Exh. 76) Dr. Lord referenced all the reports and evaluations she reviewed to render opinions in her evaluation on page two of Plaintiff Exhibit 76.

In reviewing the discrepancy between the teacher's response in T Scores as compared to that of the Mother, Dr. Lord stated:

“It is not necessarily uncommon to have that kind of discrepancy, particularly in a child who in terms of his I.Q. has the solid ability that (The Student) does.”

At the IEP Meeting of August 8, 2008, Dr. Lord recommended an out of district placement. (Trans. 11-9-10 P. 72)

Dr. Lord evaluated the Student on October 5, 2009 during which she made observations for five hours at the Greenwood School. (Plaintiff Exh. 84)

Dr. Lord’s testimony concluded:

“It is my professional opinion that the intensive instruction both academic and social emotional, provided by the environmental at Greenwood has allowed (The Student) to shine and really make gains and to feel much better about himself and so there has been improvement all around.” (Trans. 11-29-10 P.85)

Dr. Lord stated:

“Given the nature and extent of his needs, I do not feel that Lincoln School could adequately address (The Student’s) needs.” (Trans. 11-29-10 P. 89)

Bruce Roscow

Bruce Roscow testified. He is an expert in educational psychology (Trans. 12-3-10 P. 6). His resume’ was introduced. (Plaintiff Exh. 86) He is the academic dean at the Greenwood School. The School is a boarding school for boys ages between 10 and 15 years of age and it is designed as a refuge for boys who are struggling with language based learning. The school is strong in the arts and out door education. (Trans. 12-3-10 P. 7) His responsibility is in assessment. (Trans. 12-3-10 P. 8)

The School has students with the following disabilities:

1. difficulty with rapid sequencing of print and speech

2. higher level processing difficulties
3. difficulty with written language
4. difficulty with executive function
5. difficulty with sensory stimuli
6. symptoms of anxiety

When a student struggles to learn, the student feels stupid. They beat themselves up. They are being torn to pieces and it tears the family apart. (Trans. 12-3-10 P. 19)

The Greenwood School is accredited as a independent special school by the State of Vermont. The school trains the teachers who work there. Many of the teachers live there and are part of the residential staff. (Trans. 12-3-10 P. 22)

Tutorial is the hub of the wheel. Each student's tutorial is going to be individualized. (Trans. 13-3-10 P. 26)

Students with similar needs are placed in the same class. Two to one is the average tutorial size. (Trans. 12-3-10 P. 29) The School provides Occupational Therapy. The needs of the Student are addressed very immediately and specifically.

The Greenwood School is not a school for kids that are on the Autism spectrum and the Student had a diagnosis of Asperger. (Trans. 12-3-10 P. 40)

When the Student started at Greenwood he was very distractible even in a three to one environment. (Trans. 13-3-10 P. 43)

The Student is now a pretty happy kid and he jokes and has friends. (Trans. 13-3-10 P. 47) Concerning organization, the Student is much better than he use to be. (Trans. 12-3-10 P. 51)

The Student today is in a graduate writing group. (Trans. 12-3-10 P. 43) The witness introduced report card documents (Plaintiff Exh. 87 (2008), 88 (2008), 89 (2009)).

Dr. Roscow gave a professional opinion that the Student needed the kind of educational placement as found at the Greenwood School. (Trans. 12-3-10 P. 90)

In the fall of 2008, the first year at the Greenwood School, the tutorial report for the fall on page 1 states that the Student had “some real strengths and solid grounding in spelling. (Plaintiff Exh. 87) On page 3 of that Tutorial it states: “the Student does his homework and comes prepared for class most of the time.” In the term report under social pragmatics it stated: “the Student made good eye contact when conversing, showed he understood what was being said, used appropriate body language, and read gestures and facial expressions.”

Greenwood School is a non-graded school. When asked what grade will the Student be in when he leaves Greenwood, the witness stated “Well, we will circle the wagons and say what is the most appropriate grade for him to go into.” The further response was that it could be the ninth or the tenth grade.

Amy Delfarno

Mrs. Amy Delfarno testified. She has a degree in special education from Rhode Island College and has worked in special education for nine years. She was certified by the State of Rhode Island. (Def. Exh. 10)

She was the Student’s special education teacher and had the Student for small group instruction in reading, written language and math. She co-taught social studies and science in the classroom. (Trans. 1-10-11 P. 7) She stated that the Student liked seeing his friends at school. (Trans. 1-10-11 P. 10)

When the Student went to the Lincoln Middle School the last signed IEP was the one dated April 26, 2007 (Plaintiff Exh. 55) and the June 14, 2007 IEP (Plaintiff Exh. 58) was not signed or accepted. They had to use the April 26, 2007 IEP (Trans. 1-10-11 P. 11) The June 14, 2007 IEP (Plaintiff Exh. 58) was designed for the Middle School. Because of the use of the April 26, 2007 IEP, the Student was placed into a regular education class for math instead of the small group setting with her. (Trans. 1-10-11 P. 10)

The November 7, 2007 IEP (Plaintiff Exh. 63) corrected the math placement problem. (Trans 1-10-11 P. 16. Mrs. Delfarno developed an organizing sheet to help the Student understand what he needed for each class. (Defendant Exh. 12) (Trans. 1-10-11 P. 17)

The Student in the first year made academic gains as well as organizational gains. The Student made gains in math (Trans. 1-10-11 P. 20) Mrs. Delfarno developed with the O.T. teacher a menu of different activities he could choose based on his arousal level.

The Student was able to work independently but needed frequent check-ins and breaks. (Trans. 1-10-11 P. 23) The Student was animated in larger group but in small groups he needed more prompts. (Trans. 1-10-11 P. 24)

The reading specialist in the Lincoln School District evaluated the Student on June 12, 2008. (Plaintiff Exh. 75) Ms. Delfarno stated the results:

“The (Student) was reading on an independent 5th grade level, so the (Student) was one year below grade. The (Student) was in the average range for reading engagement, average for fluency and low average range for comprehension” (Trans. 1-10-11 P. 26)

The Student was able to read all kinds of books. (Trans. 1-10-11 P. 27) The Student was able to complete writing assignments (Trans. 1-10-11 P. 28) All 6th graders had to do a memory map. (Defendant’s Exh. 14) The memory map is a fair indication of the Student’s work. He needed prompting. (Trans 1-10-11 P. 32) The Student did a writing assignment concerning video games. (Defendant’s Exh. 15) In another assignment, the Student had to write down the central topic, the main topic and different facts about the article the student read. (Trans. 1-10-11 P. 35) (Defendant’s Exh. 16) Defendant’s Exhibit 17 was a persuasive paragraph. The Student had to chose a topic and do research on the topic. (Trans. 1-10-11 P. 36) In another assignment, the Student had to read a story and write a sequence of events. (Defendant’s Exh. 18)

In reviewing Plaintiff's Exhibit 79, a sample of the Student's ability to write the witness said:

"I think he is capable of writing more than that. I mean he's often demonstrated that in class."
(Trans. 1-10-11 P. 40)

Ms. Delfarno reviewed and explained the math work of the Student. (Defendant's Exh. 19) The Student used a multiplication chart or a calculator. (Trans. 1-10-11 P. 42) An example of the Student's ability to understand fractions was reviewed. (Defendant's Exh. 20)

Ms. Delfarno also assisted the Student in science and social studies. The Student wanted to take the social studies test in the regular class. (Trans. 1-10-11 P. 46) The Student took a test 6th graders took in the regular class in social studies and he took it in the regular class with the other 6th graders. There were no modifications. (Defendant's Exh. 21) The Student received an 83 for a mark. The Student did a power point presentation on the African rainforest in social studies. (Defendant's Exh. 22) The Student did not need a lot of social coaching in terms of interacting with his peers. (Trans. 1-10-11 P. 50) The Student had friends. (Trans. 1-10-11 P. 52) Homework was difficult. The assignments sent home were ones that he was capable of doing. (Trans. 1-10-11 P. 53) Ms. Delfarno offered to stay after school to have him complete homework. It was difficult in making him accountable for homework. (Trans. 1-10-11 P. 54)

Ms. Delfarno incorporated recommendations in the August 28, 2008 IEP from the evaluations of Dr. Holler. (Trans. 1-10-11 P. 58) She testified that they included: tasks are to be broken down, make reading a pleasure, use graphic organizers, give more strategies to use. (Trans. 1-10-11 P. 59) They added goals and benchmarks to cover math fluency and problem solving. (Trans. 1-10-11 P. 60)

They included goals in that IEP for improving organization and for social and emotional purposes. (Trans. 1-10-11 P. 61)

The occupational therapist wrote the goal using technology which came from Dr. Holler. (Trans. 1-10-11 P. 62)

They incorporated supports services recommended in the evaluations such as visual supports, previewing questions before reading the text, graphic organizers, positive behavior reward system. (Trans. 1-10-11 P. 62) The basis for the August 28, 2008 IEP was the DRA, Dr. Lord's report and Dr. Holler's report. (Trans. 1-10-11 P. 63)

The Student made progress during the 2007-2008 school year (Trans. 1-10-11 P. 64)

The August 28, 2008, IEP (Plaintiff Exh. 78) with its modifications and accommodations did meet the Student's needs (Trans. 1-10-11 P. 64)

Ms. Delfarno testified:

“It was really designed for (The Student) to be successful in that setting. (The Student) had a year at the middle school so a year to adjust. There had been numerous evaluations, so we had quantitative, we had qualitative data from the classroom and I used all of that when compiling this (IEP) and really felt like this was the best assessment of what his baseline was at the time where he was at and where we would like to see him” (Trans. 1-10-11 P. 64)

On cross examination Ms. Delfarno denied telling the Mother not to send the Student with money to buy lunch because he holds up the line. (Trans. 1-10-11 P. 71) The Student's spontaneous writing contained errors. (Trans. 1-10-11 P. 77) The Student did understand the concept of fractions. (Trans. 1-10-11 P. 88) Ms. Delfarno offered to help the Student with the late bus if the Student stayed after school to have her help with homework. (Trans. 1-10-11 P. 97) It was hard to figure out why he did not do homework because he was performing and doing this work in school. (Trans. 1-10-11 P. 99) The Student did not display anxiety or depression in the classroom. (Trans. 1-10-11 P. 126)

The Student curriculum to which the Student was exposed was what every 6th grader was exposed to. Ms. Delfarno stated:

“It may have been to varying degree so (The Student) may not have covered or had the work output of that every 6th grader is exposed to and did make progress but he did have a lot of support in order to do that”
(Trans. 1-10-11 P. 139)

Pamela Mackey

Pamela Mackey testified. She is a 6th grade science teacher at Lincoln Middle School and is certified by the State of Rhode Island. (Defendant Exh. 23) She had the Student in her class during 2007/2008 school year. (Trans. 1-10-11 P. 146) It was a regular education class with between 20 and 25 students. (Trans. 1-10-11 P. 147) The Student got along fine with the other students in the class. (Trans. 1-10-11 P. 147) The Student was accepted by other students. Ms. Mackey did not recall any incident involving the Student and other students. The Student was able to handle class work and at times required modification which Ms. Delfarno would make. (Trans. 1-10-11 P. 148) The Student was able to work independently in her class (Trans. 1-10-11 P. 149) a sample of the Student’s work was identified as Defendant’s Exhibit 24, a length lab, which was not modified at all. The Student received a mark of 79. Defendant’s Exhibit 25 was a metric test. The only modifications were in the number of multiple choices and the Student could type. It was the same test given to all her 6th grade classes. (Trans. 1-10-11 P. 152) The Student scored a 94 on that test.

The final examination given by Ms. Mackey was given to the entire 6th grade which included the Student. There were no modifications and the Student received an A. (Defendant’s Exh. 26)

The Student was able to make progress in her class during 2007/2008. (Trans. 1-10-11 P. 154) She did not have any concerns with the placement of the Student in her classroom. (Trans. 1-10-11 P. 154)

The witness on cross-examination did not recall any incident where the Student was in someone's space. (Trans. 1-10-11 P. 160)

Plaintiff's Exhibit 93, a teacher's report by Ms. Mackey which report had the following information provided by Ms. Mackey about the Student:

1. would rather be alone than with others
2. behaves in ways that seen strange or bizarre
3. avoids eye contact
4. more difficult than other children with changes
5. does not offer comfort to others
6. keep up with the flow of conversation
7. invading someone's space
8. stares or gazes off into space

Loretta Jones

Loretta Jones testified: She is the school social worker for in the Lincoln school district. She has been in the Lincoln Middle School for five years. She has a Bachelor's degree from Providence College and Master's Degree in social work from Rhode Island College. She is certified by the State of Rhode Island. (Defendant's Exh. 27) She serviced the Student in the 2007/2008 school year. The Student was in a social skills group which met every Friday. (Trans. 1-10-11 P. 168) She was familiar with the evaluations of Dr. Holler and Dr. Lord and incorporated the recommendations by them in the August 28, 2008 IEP. (Plaintiff Exh. 78) Social skills training was recommended so she looked to small structured group with same age peers and taught how to respond appropriately with a variety of social demands. (Trans. 1-10-11

P. 173) She took the wording found in Dr. Holler's report for short term objectives – learn a variety of social skills through modeling and role plays and learn a variety of complex social skills through modeling and role plays. (Trans. 1-10-11 P. 174)

When asked about the reports indicating that the Student was anxious or depressed, Ms. Mackey said “In school we did not see the presentation of those behaviors”. (Trans. 1-10-11 P. 174) The Student was not exhibiting signs of depression or anxiety when he was in the school building. She included a goal in the IEP of August 28, 2008 (Plaintiff Exh. 78) that addressed the concerns of Dr. Lord that the Student's internal affect was different than his external presentation. The second goal she included was about assessing the Student's own emotional self regulation and having the Student learn how to self assess. (Trans. 1-10-11 P. 174 & 175)

DECISION:

ISSUE: Was the Parents' unilateral removal of the Student from the Lincoln School District and the placement at the Greenwood School located in the State of Vermont appropriate because the Lincoln School District failed to provide an IEP that was designed to provide FAPE and is the Lincoln School District obligated to reimburse the Parents for tuitions already paid by the Parents and for future tuitions and costs?

There were no procedural issues raised in the Complaint or during the hearing.

Section 300.148 (a) (b) of the Regulations does not allow reimbursement by a School District of the cost of private school or facility placement by the parents unless the School District has failed to provide FAPE in a timely manner.

Section 300.148 (d) places restrictions on such a right. It allows the hearing officer the discretion to reduce or deny reimbursement under certain circumstances. It states:

“At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement

proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten (10) business days (including any holiday that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section; (300.148(d)(i)(ii))”

The Parents did comply with 300.148 (d)(i). The Parents notified the School District verbally of the removal and the placement of the Student at Greenwood School after the August 28, 2008 IEP meeting.

We must now determine whether or not the School District offered an IEP that would provide FAPE for the Student. The last offered IEP was that of August 28, 2008. Present at the IEP were the regular education teacher, local educational agency rep, special education teacher, OTP teacher, social worker, school psychologist, principal, attorney for School District, attorney for the Parents.

The thrust of the Parents argument in support of their complaint is that the Student has failed to make any “reasonable and meaningful” progress in the Lincoln School District. As early as December 6, 2002, the Mother was concerned with the lack of consistent progress. In reviewing the referral evaluation of December 12, 2002 the Mother was concerned about the Student’s progress in reading and writing. (Trans. 10-20-10 P.65 L19) As to the 2006, IEP, according to the Parent, from 2002 to 2006, the Student did not make any progress in identifying simple fractions (Trans. 20-21-10).68 L15) and as of April, 2007, the Student never mastered math facts in addition and multiplication and he could not make change. In the Student’s sixth grade, the Parents had a neuropsychological evaluation done by Dr. Jessica Lord because of the Student’s social, emotional, academic problems and lack of progress. In 2008, the mother believed the Student’s progress was inadequate.

The parents presented testimony and evidence covering the entire educational background of the Student.

The Mother's testimony began with the first grade, 2002, and extended to when the Student was taken out of the Lincoln School District, 2008. The School District objected to the introduction of testimony and evidence that went beyond two years from the complaint. I found it appropriate to accept and review the Student's entire educational record because the issue presented requires it.

The Mothers testimony covered three hundred ninety-three pages and there were ninety-three plaintiff exhibits all of which was supplemented with testimony of expert witnesses.

Clearly, the Parent's intent was to establish that the student failed to make to make any reasonable or meaningful progress through out the Student's education and the IEP's from 2002 to 2008 did not provide a plan that would have the Student achieve reasonable and meaningful progress or attain goals. Further, the removal of the Student was necessary for the Student to make reasonable and meaningful progress and the placement at the Greenwood School was appropriate.

The burden of proof is on the Parents to establish that the School District failed to comply with the law to provide FAPE to the Student. (Schaffer v. West, 546 U.S. 49, 126s. Ct. 528)

Before we address the last IEP of August 28, 2008 offered by the School district, we shall review the history of the Student's education and IEPs prior to August 28, 2008.

The IEP's of 2002, one from North Providence and the other from Lincoln, were approved by the Mother and placement was in the least restrictive environment and during that year the Parents agreed that the Student repeat the first grade. The Parents agreed to and accepted the IEP's of 2002, 2003 and 2004. The Mother accepted the IEP of February 3, 2005. As of December 6, 2002 the Mother reported during the evaluation that she was concerned with the lack of consistent progress. This was just a year into receiving special education services. This demonstrates the Mother's impatience with the special education process but such impatience is expected from loving parents.

During the evaluations of 2003 and 2004, the Mother agreed with the School District's conclusion and did not report concerns with lack of progress. In fact, in the September 13, 2004 evaluation, the Mother reported that the Student had improved tremendously in reading and math. (Plaintiff Exh. 17)

The Mother refused to accept the IEP of May 12, 2005 (Plaintiff Exh. 26) because she objected to the placement in a regular education classroom but later did accept it.

There were four IEP meetings in 2006. The January 25, 2006 and February 10, 2006 IEP's were not signed by the Parent because the time in special education was reduced. The March 30, 2006 IEP was accepted but the Mother required that there be another meeting in June. The goals were written to be attained within a year. The June, 2006 IEP was not accepted because the Mother wanted a typing program and she wanted more special education resource. (Trans. 20-21-10 P. 84 & 85)

In 2007, there were three IEP meetings. The April IEP was accepted with the mother's comment stating she had concerns that the Student needed more intensive program. The June 14, 2007 IEP was not signed but the November 7, 2007 was accepted by the Parents.

As of June 14, 2007, the Parents were represented by counsel. At the June 14, 2007 IEP meeting the Parent for the first time questioned the placement being at the Lincoln School District. The Parents requested placement at the Wolf School and the attorney explained what was offered at the Wolf School. The School District gave an in-depth review of what the School District was offering in that IEP (Plaintiff Exh. 60) and explained why the School District rejected the out of district placement.

The IEP of April 7, 2008 was also accepted by the Mother.

I find that every time the Parents accepted an IEP they accepted and agreed to the Placement provided in that IEP.

Did the Student make progress from 2002 to 2008? The School District provided testimony and evidence that the Student made progress.

The progress report of June 4, 2003 in reading states that in nineteen weeks the Student improved from level five to level fourteen. The Student made progress in reading, written expression, written language, mathematics, focus, behavior, attention, science and social studies (Defendant's Exh. 3) , as did the report of December 2, 2004 and February 3, 2005. (Defendant's Exh. 4) In the progress report dated May 12, 2005 progress was reported in written language and expression as in behavior and Social interaction. (Defendant's Exh. 5) Progress was reported in the report of march 30, 2006 in Language Arts, behavior management, Mathematics and Social although it was pointed out that the Student was inconsistent in efficient use of time and the Student needed teacher help in organizing. Short-term goals were attained in writing legibly and using Alpha Smart. The short-term goal in adding and multiplying math deget numbers was attained. (Defendant Exh. 6) In the November 7, 2007 and April 7, 2008 progress reports, there was progress reported in the language arts, mathematics, behavior management, behavior management and reading fluency. (Defendant's Exh. 7) (Defendant's Exh. 8) In June, 2008 the School District reading specialist evaluated the Student and Mrs. Delfarno explained the results. The Student was reading on an independent fifth grade level, which put the Student one year below grade. The Student was average for reading engagement, average for fluency and low average for comprehension. (Trans. 1-10-11 P.26)

The Student was able to take a social study test in the regular classroom with other sixth graders with no modifications and the Student received a mark of eighty-three. Pamela Makey is the sixth grade teacher and the Student was in her class for the 2007/2008 school year. (Trans 1-10-11 P.146) According to her testimony, the Student was accepted by other students and the Student was able to work independently in her class. A sample of the Student's work, Defendant's Exh. 24, was not modified at all and the Student received a seventy-nine. The final examination which was given to the entire sixth grade included the Student without any modifications. The Student received an A.

The Mother's understanding of the word "progress" was questioned and she said:

“I was confused about the word progress for the many years I had seen that P on the paper and not seen actual progress”
(Trans. 12-8-10 P.68)

“And I was asking for documentation too.....I need to know what he knows because some of the things I’m seeing are not related to the progress you’re telling me his making”
(Trans. 12-8-10 P.68)

What the Parent saw at home concerning the Student was not what the school personnel saw at school. The Mother stated:

“(The Student) at home was different than the classroom. I am not disagreeing with what she said. What she seen were different and that happened quite often. at home and in the classroom setting he was two different children....
(Trans. 10-21-10 P. 46 L4-10)

The Mother measured the Student’s progress by comparing the Student to her daughters. I find such a comparison to be faulty for many reasons.

I find that the Mother’s measurement of progress is the attainment of the goals set in the IEP. When shown Defendant’s Exhibit 3, June 10, 2004 progress report, which reported that the Student was making progress, she said: “ Yes but not one A for attainment.”

The Parents in their brief argue that “the repetition year after year of the same goals, objectives and present levels of performance on a child’s IEP is compelling evidence that those IEPs are deficient and have not been providing FAPE.” Further, the Parents claim that this Student’s IEPs were “recycled” year after year and that is strong evidence the IEPs are deficient and do not provide FAPE.

In the Parent’s Appendices B,C,D and E there are what appears to be much repetition in objectives but I do not find that.

For Grade 3 to Grade 4 there were four IEPs, (6-10-04, 12-2-04, 2-3-05, 5-12-05) The 6-10-04 IEP was to run to 6-19-05, a full year.

I do not find it unusual that the objective for Math is the same for that year. The same can be said for Appendix C for the IEPs from 12-15-05 to 4-26-07. There were four IEPs during that period of time with the same objective for Math-Adding and Subtracting. As to Appendix D, telling time, those that are repetitive occur in a year's time, which is not unusual because it would take that length of time to determine if the objective is met or that progress was made. I also find that the Math Objectives are not the same. In Grade 3 the objective changed as it did in Grade 5. Appendix E does reflect a change from the Grade 3 to Grade 4. Although Grades 4, 5, and 6 have the same objective other evidence does demonstrate progress in that area. In Appendix F., I do find that there were changes in Present Level of Performance – Spelling in Grade 2, 4, and 5 where there is repetitive levels of performance, again it occurs within the same year period. As to Appendix G and H, I do not find that the Present Levels of Performance are all the same and where there are repetitive levels of performance they occur within the same year.

I find that the overall evidence does establish that the Student made progress in written language and expression, in behavior and social interaction, mathematics, reading, focus, science and social studies from 2002 to 2008.

What kind of progress is needed to afford the Student a free, appropriate public education? The Parents position is that the progress must be reasonable and meaningful. I find that progress is meaningful and reasonable when it complies with what the law requires for FAPE.

“A free appropriate public education consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. Board of Education of Hendrick County et al v. Rowley 458 U.S. 176, 1982 at 189.”

Implicit in the congressional purpose of providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. Rowley 458 U.S. at 200

The Court Concluded:

“ We therefore conclude that the basic floor of opportunity provided by Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”
Rowley 458 U.S. at 201

Related services are described in Rowley as speech pathology and audiology, psychological services, physical and occupational therapy, recreation and medical and counseling services except that such medical services shall be for diagnostic and evaluation Purposes only.

“Thus the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside” Rowley 458 U.S. at 192

School Districts need not provide the optimal level of services or even a level that would confer additional benefits since the IEP required by the IDEA represents only a basic floor of opportunity. Fuhrman v. East Hanover Bd. Of Education 993F2d1031, 1037,1040 (3d Cir. 1993

I find that the progress made by the Student from 2002 to April 7, 2008 complies with the law as above provided.

The issue presented requires a review of the last IEP offered on August 28, 2008 in order to determine if it offered FAPE.

Dr. Jessica Lord, a witness called by the Parents and hired by the Parents to evaluate the Student testified.

She attended the August 8, 2008 and recommended an out of district placement. It should be noted that May and June of 2008 she reported that she did the evaluation (Plaintiff

Exh. 76) at the request of the mother for the mother to obtain recommendations to help the Student both at home and at school. Her recommendations were directed at the school and she never recommended an out of district placement at that time. She made reference to the “team” and this could only refer to the IEP Team. However, her description of what the Student needed in the school environment did indirectly describe the kind of environment to be found at the Greenwood School.

Her opinion that the School District could not adequately address the Student’s needs was given a few times.

In arriving at her opinion, she reviewed many reports evaluations and discussion with the classroom teacher as well as observation of the Student. When analyzing whether or not the School District is offering FAPE, it is necessary to review the last IEP offered. She testified on two occasions on direct examination that she did review the Student’s current IEP (Trans. 11-29-10) but under cross examination she said she did not recall reviewing the IEP developed in August, 2010 and she said: “I do not believe so.” (Trans. 12-8-10). She also stated that she did not have first hand knowledge as to the program offered for the Student for the 2008/2009 school year. (Trans. 12-8-10) Since 2002, the following professionals evaluated the Student in various areas and not one of them recommended an out of district placement: Dr. Richard Ferrante, psychologist (2002), Donna M. Dyer, M.A. (AGS, Certified School Psychologist (2004), Terry Harrison-Goldman Ed. D., Clinical Neuropsychologist (2006) Kelly Harrison Pistacchio, Ph. D. Licensed Psychologist (2006), Bonnie S. Ravo M.S., CCC-SLP, Speech/Language Pathologist (2006), Karen Holler, Ph. D. Licensed Clinical Psychologist (2008).

Dr. Lord repeated in her testimony that the Student needed an educational environment like Greenwood School in order to make adequate progress in the Student’s many areas of need. (Trans. 11-29-10)

The Greenwood School is a residential placement that has a structured program twenty four hours a day; the Student’s homework is structured in the evening; the Student’s bedtime is

structured; the Student's activities are structured; free time is also structured; there are no more than five students per teacher; social pragmatic skills are incorporated in all aspects of the Student's life.

I find that the educational environment at Greenwood and the specialized program does maximize the potential of the Student, which I find to be much more than providing adequate progress as described by Dr. Lord.

Progress determination can be very subjective. For the Mother, I find that progress means attainment of goals and for Dr. Lord, I find that progress can only be made in an educational environment that duplicates the Greenwood School.

Dr. Lord was asked if the Greenwood School had allowed the Student to maximize his potential. She responded that Greenwood provided the Student with the support he needed to make progress and the level of support at Greenwood is necessary for the Student to make progress.

In regard to FAPE, I find that Dr. Lord's overall testimony clearly indicates that unless the School District provides the kind of educational services at the Greenwood School it is not providing FAPE. In fact, she never directly testified about whether or not the School District provided FAPE in the last IEP. Dr. Lord never explained what she meant by "adequate progress" as the term would relate to FAPE and the requirements found under the Individuals with Disabilities Education Act.

Did the August 28, 2008 IEP offer the Student FAPE?

Ms. Delfarno incorporated recommendations from the evaluations of Dr. Holler. (Trans 1-10-11 P.58) Ms. Delfarno included in the IEP the recommendations that tasks are broken down, make reading a pleasure, use graphic organizers, provide more strategies to use and add goals and benchmarks to cover math fluency and problem solving.

The IEP included goals for improving organization and for social and emotional purposes. (Trans. 1-10-11 P. 61) The occupational therapist wrote the goal using technology,

which came from Dr. Holler. (Trans. 1-10-11 P. 62) The IEP incorporated support services recommended in evaluations such as visual supports, previewing questions before reading the text, graphic organizers and a positive reward system. (Trans. 1-10-11 P. 62) The basis for the August 28, 2008 IEP was the DRA, Dr. Lord's report and Dr. Holler's report. (Trans. 1-10-11 P. 63) According to Ms. Delfarno, the Student's Special Education Teacher, testified that the IEP with its modifications and accommodations did meet the Student's needs. (1-10-11 P. 64) She said in part: "It was really designed for (the Student) to be successful in that setting...."

Loretta Jones, a social worker, testified that she was familiar with the evaluations of Dr. Holler and Dr. Lord. She incorporated recommendations by them in the August 28, 2008 IEP. She incorporated social skills training so she looked to small structured group with same age peers and taught how to respond appropriately with a variety of social demands. (Trans. 1-10-11 P. 173) She took the wording found in Dr. Holler's report for short term objectives which included teaching a variety of social skills through modeling and role plays and to do the same concerning complex social skills. (Trans 1-10-11 P. 174)

The IEP called for small group reading/written language instruction 45 minutes each day 3-4 days per week outside of regular education class and 1-2 days per week in the regular education class; small group math 45 minutes per day 3-4 days per week outside of regular education class; 1-2 days per week in regular education class; small group structured for social skills .74 hours 1 day per week outside of regular education class; small group structure for occupational therapy .50 hours, one day a week outside of regular education class.

The number of supplemental aids and services program (pages 14 & 15 of the IEP were varied and numerous. They were to be available in both the regular education class and outside of the regular education class. The IEP stated that the Student needed small group setting with minimal distractions, and reduced work requirements in order to achieve his goals. (Page 16 of the August 28, 2008 IEP)

I know the Mother and Father are caring and loving parents but what they expect from the School district is not required under the law.

Rowley, 458 U.S. at 200, 102 S. Ct at 3048.

Districts need not provide the optional level of services or even a level that would confer additional benefits since the IEP required by the IDEA represents only a “basic floor of opportunity”

The fact that the Student may make less progress under the School District’s program is not to be considered because Rowley precludes taking that factor into consideration if the public school alternative confers some education benefit. Carlisle area School vs. Scott, 62F.3d 520, 3rd Cir. 1996.

It is clear that the Student arrived at the Greenwood School with educational skills obtained under the IEP’s formulated over the years at the Lincoln School District. One example is the statement made in the Tutorial Report (Plaintiff Exh. 87) from the Greenwood School, which stated:

“(The Student) has some real strengths and a solid grounding in spelling.”

This statement was made after the Student was at the Greenwood School for only three months. I find that the Student brought with him other educational skills both academically and socially to the Greenwood School from the Lincoln School District.

In reviewing the reports from the Greenwood School, the tutorial report for the Winter of 2009 through the tutorial report for the Spring of 2010 referencing sentence structure, editing/capitalization, spelling/grammar/paragraph development/sequence ideas logically, elaborates ideas/creativity, keyboard skills and assistive technology, I found that after two years none of those categories were mastered. Those five reports (Plaintiff Exh. 88,89,90,91&92) were very repetitive year after year when reporting on all those categories. It states year after

year that “good progress shown” in almost all categories but no mastery or attainment of what they considered to be “mastery” in math. After being at the Greenwood School for two years, the Student never progressed in addition and subtraction or in multiplication math facts.

Those categories were listed on the 2009 fall report as being below average and they remained below average in the reports of spring 2010 and winter of 2010. Just because the Student did not attain the category entitled “Mastery of Subject Matter” at the Greenwood School and never progressed in additional and subtraction and multiplication math facts from 2009 to 2010 does not mean that the Student did receive an educational benefit.

The Student certainly received a “benefit” from his education at the Lincoln School District.

From all the evidence both testimonial and from exhibits, I find that the IEP of August 28, 2008, did in fact provide an IEP designed for the unique needs of the Student with supports that would provide the Student with an educational benefit from the instruction. Board of Education of the Hendrick Hudson Central School District v. Rowley 458 U.S. 176, 179

The IEP of August 28, 2008 also satisfies the law’s requirement, when possible, for mainstreaming which is not satisfied by the Greenwood School. The IDEA created a preference for educating handicapped children with non-handicapped children. Board of Education, Sacramento City Unified School District v. Holland 786 F. Supp. 874. Oberti et al v. Board of Education of the Borough Clemention School District 19IDE LR423.

The Student is not in the least restrictive environment at the Greenwood School. The Greenwood School while conferring benefit upon the Student minimizes the Student’s contact with children without disabilities and thus directly conflicts with the law’s objective of inclusion. Carlisle Area School vs. Scott 62F. 3rd 520, 3rd Cir, 1996. However, because this decision did not have to consider the appropriateness of the Greenwood School, this fact was not considered in rendering this decision and is only dicta.

The Parent's request for reimbursement from the Lincoln School District is hereby denied.

“If the Court ultimately determine that the IEP proposed by the school officials was appropriate, the Parents would be barred from obtaining reimbursement for any interim period in which their Child's placement violated section 1415 (d)(3). This conclusion is supported by the agency's interpretation of the Act's application to private placements by Parents:

(a) If a handicapped child has available a free appropriate public education and Parents choose to place the Child in a private school or facility the public agency is not required by this part to pay for the child's education at the private school or facility.....”

Burlington School 471 U.S. 359

DATE: _____

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