

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Student v. [ ] Board of Education<sup>1</sup>

Appearing on behalf of the Parent<sup>2</sup>: Attorney Nicole Bernabo, Klebanoff & Alfano, P.C., 433 South Main Street, Suite 102, West Hartford, CT 06110

Appearing on behalf of the Board: Attorney Susan Freedman, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

**FINAL DECISION AND ORDER**

ISSUES:

1. Whether the Board offered the Student a free appropriate public education [FAPE] during the 2004-2005 school year.
2. Whether the Board offered the Student a free appropriate public education [FAPE] during the 2005-2006 school year.
3. Whether the Board offered the Student a free appropriate public education [FAPE] during the 2006-2007 school year.
4. If not, whether the Parent's placement of the Student at the Ben Bronz Academy for the 2006-2007 school year is appropriate.
5. Whether the Parent is entitled to compensatory education as a result of the Board's failure to provide FAPE to the Student, including, but not limited to, payment for the placement of the Student at Ben Bronz Academy for the 2006-2007 and 2007-2008 school year.

**SUMMARY:**

The 12-year-old student, with a history of bipolar disorder, and a mixed receptive-expressive language disorder, a reading disorder and an attention deficit/hyperactivity disorder

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<sup>1</sup> The Parent's counsel requested that the identity of the Board of Education not be cited in this decision, and that the name of any Board staff mentioned in this decision not be listed, as disclosure of this information might lead to the identification of the Student. The Board's attorney had no objection to this request.

<sup>2</sup> Any reference to the Parent only refers to the Mother, who is a single parent with sole responsibility and custody of the Student.

(inattentive type) has been eligible for special education and related services since his second grade year. At the conclusion of the Student's fifth grade year, the Board members of the PPT recommended placement at the Board middle school for the Student's sixth grade year. When the PPT convened in June 2006, and during the summer 2006, the Parent notified the Board that she intended to enroll the Student at Ben Bronz Academy, and requested that the Board reimburse her for this placement. This hearing request was submitted to challenge the appropriateness of the Board's program for the Student for the 2004-2005 and 2005-2006 school years, and program offered by the Board for the 2006-2007 school year.

### **PROCEDURAL HISTORY:**

The Board received this hearing request filed on behalf of the Parent on August 7, 2006. [Exhibit H.O.-1] The Board's attorney, and subsequently the Parent's attorney requested postponements of the first two hearing dates scheduled for September 22 and October 17. The first hearing date convened in October 2006, and continued for a total of 21 days of hearing through March 2007. Substantial testimony and exhibits were presented in this hearing, and have been fully considered by the hearing officer.

The Parent's attorney and the Board's attorney submitted requests for extensions of the mailing date of the decision based on assertions that additional hearing dates were required to present their case. These requests were granted.<sup>3</sup> The mailing date was further extended by request of the parties so that they had sufficient time to file final briefs. Briefs were filed on April 27, 2007.<sup>4</sup>

The Parent's witnesses were the Mother; Dr. Vivian Koda, neuropsychologist; and Susan Sharp, education director of Ben Bronz Academy.

The Board's witnesses were the Board elementary school special education teacher [Special Education Teacher]; the Board elementary school social worker [Board Social Worker]; Board school psychologist [School Psychologist]; the Board assistive technology coordinator [AT Coordinator] the Board middle school special education supervisor [Board Supervisor]; the Board middle school special education reading teacher [Reading Teacher]; and the Board fifth grade regular education teacher [Classroom Teacher].

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<sup>3</sup> While the hearing officer had many possible hearing dates which were earlier than the ultimately scheduled hearing dates, the hearing dates were scheduled at the request of counsel.

<sup>4</sup> The length of briefs was limited to 20 pages by agreement of counsel. The Parent's counsel submitted a 21 page brief; the Board's counsel submitted an objection to the extra page in the Parent's brief. At the request of Board's counsel, the final page of the Parent's brief was not considered.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

### **FINDINGS OF FACT:**

1. The Student is 12 years old and currently is attending Ben Bronz Academy. The Student presents with a complex history of disabilities. These disabilities impact his educational needs. [Testimony Mother] It is undisputed that the Student is eligible for special education and related services.
2. The Student has been enrolled in the Board schools since the end of his kindergarten year. [Testimony Mother]
3. The Board school social worker, who provided the Student with direct services from second grade through fifth grade, described the Student as very creative with a great sense of humor. She noted that the Student is kind to other students, respectful and polite, as well as very anxious, fragile, constricted, afraid of failure, afraid to try and very guarded. [Testimony Board Social Worker]
4. In first grade, during the 2001-2002 school year, the Student initially went to school willingly, although he continued to struggle with reading and writing difficulties. After the initial weeks of school, the Student began to have anxiety and separation problems. At that time, the Parent sought psychiatric care for the Student as a result of these issues, as well as the Student's severe temper tantrums and mood swings. The Student went through some difficult medication changes at that time, and after a second psychiatrist prescribed a mood stabilizer, the Student's behavior improved.<sup>5</sup> The second psychiatrist diagnosed the Student with bipolar disorder. [Testimony Mother, Exhibit B-1] Since that time, the Student's bipolar disorder has been well managed through his medication. [Testimony Mother; Exhibits B-1, B-13]
5. In April 2002, the Student was found eligible for 504 accommodations, and the team recommended that a Functional Behavioral Assessment be conducted. At the time of this meeting, the Student was continuing to be evaluated for the effectiveness of his medication for his diagnosed bipolar disorder. [Exhibit B-2]
6. The Student was found eligible for special education in November 2002, in the Student's second grade year under the categories of Other Health Impairment and Specific Learning Disability. [Exhibit B-14, Testimony Mother]<sup>6</sup> At the time the Student was

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<sup>5</sup> The Student had a severe reaction to the antidepressant medication originally prescribed for him. He was upset and having thoughts that he told his Mother that he could not control, "bad thoughts" of hurting his mother with a rope. At this time, the Mother changed the Student's psychiatrist and the Student was placed a different psychotropic medication. From the information the Mother obtained from the psychiatrist, the Student's aggressive thoughts related to his negative response to the Celexa prescription. [Testimony Mother]

<sup>6</sup> As part of this evaluation, the Board retained Dr. James Black to conduct a "psychiatric consultation" of the Student in October 2002. The purpose of this consultation was not for diagnosis, but for Dr. Black to "add his

found eligible for special education, the Parent also shared with the PPT [Planning and Placement Team] a letter from the Student's psychiatrist which confirmed the bipolar mood disorder diagnosis, explained the history of the Student's manic response to the previously prescribed Celexa, and recommended that the Student's disorder not be treated as a conduct disorder by using strict negative reinforcement techniques. The psychiatrist also recommended that the Student undergo neuropsychological testing. The Board members of the PPT rejected the Mother's request for neuropsychological evaluation at the time of the November 2002 PPT. [Testimony Mother; Exhibits B-13, B-14] The Board did not request a hearing at the time that it rejected the Parent's request for the neuropsychological evaluation.

7. In third grade, during the 2003-2004 school year, the Student was doing much better socially, but the Mother did not see any measurable progress in academic performance. During this year, the Student's self image started to deteriorate. [Testimony Mother]
8. In November 2004, in the Student's fourth grade year, the PPT convened to conduct an annual review and plan for the Student's reevaluation to be conducted in November 2005. At this time, the Student's goals included improving reading skills to independently participate in the general curriculum, improving written expression skills to independently participate in the general curriculum, and increasing self confidence in school. According to this Individualized Education Program [IEP], the Student was to receive 5 hours of language arts instruction in the resource/related service room and a ½ hour of service from the social worker for work on social skills. [Exhibit B-17] As of this PPT, the Mother did not receive any written documentation of the Student's academic progress, other than the progress listed in the Student's IEP and report card prior to this PPT. [Testimony Mother]
9. While organization was listed as a concern/need in the Student's IEP, no organizational goals were developed for this school year. [Testimony Mother, Exhibit B-17] While the Mother had requested that the goals and objectives be more measurable and that the

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perception with his expertise." [Testimony School Psychologist] Dr. Black met with the Student briefly, while the Parent and the members of the PPT waited in another room. In his discussion after meeting with the child, and in the written consultation report, Dr. Black questioned the bipolar diagnosis. Instead he related much of the Student's difficulties to "separation anxiety due to his substantial dependence upon his mother." Dr. Black describes the Student as a "somewhat egocentric boy, at least in the context of his relationship with his mother," who "engages in some hostile dependent responses by virtue of becoming provocative and even aggressive." Dr. Black noted that the Student is a bright boy, who is capable of performing very well in school providing his effort is consistent." Dr. Black concluded that the symptoms of the handicapping conditions are the Student's "academic underachievement." He opined that if the Student "engages in school or work avoidant behavior or provocative behavior, those characteristics would arise out of his developing personality, and as such are not symptoms of either of those potentially handicapping conditions." Dr. Black recommended that if the Student engaged in such avoidant behavior, he should be disciplined as any regular education student. Dr. Black also noted that "[o]f greatest importance" is the Student's need for "family oriented psychotherapy to involve his mother." The consulting psychiatrist recommended a negative reinforcement program, and if that didn't work, a self contained classroom setting. The Mother was visibly upset after hearing the report from the consulting psychiatrist after a cursory 10 to 20 minute meeting with the Student. [Testimony Mother, Exhibit B-12] In addition, while he was apparently not an employee of the Board schools, the consulting psychiatrist issued his consultation report on the Board public schools letterhead, which may have been confusing to the Mother.[Exhibit B-12] The consulting psychiatrist's analysis was unhelpful in the planning of the Student's program, and was damaging to the family's relationship with the Board.

Student needed more time for remediation, the other members of the PPT did not agree with that. [Testimony Mother] Furthermore, no data was provided to indicate the Student's reading fluency rate during this school year. [Testimony Mother]

10. The Student's fourth grade year did not progress well. He struggled with long term projects, his reading progress continued to languish and his services were not consistent. Despite the Parent's request that the PPT convene to address her concerns, the team did not address these concerns. [Testimony Mother]
11. During the Student's fourth grade year, the Student was assigned long term projects. These projects were not appropriately monitored by the Board special education teacher and the Student fell behind in these projects and completed the school projects incorrectly. Despite these noted problems with long term assignments, the Student did not have an organizational goal in his IEP. [Testimony Special Education Teacher]
12. During the fourth grade, the Student was administered the Degrees of Reading Power [DRP] assessment. His level of 32 was below the goal of fourth grade, which is 52. [Testimony Special Education Teacher, Exhibit B-35] The Student's Connecticut Mastery Test [CMT] scores for the fourth grade were below basic for reading and writing. The Student mastered no reading or writing content strands in that year's CMT administration. [Testimony Mother, Exhibit P-1]
13. In January 2005, during the Student's fourth grade year, the Mother requested that a PPT meeting be scheduled to discuss problems of implementation of the IEP, including problems with longer class projects. In response to the Mother's request, a PPT meeting was scheduled. That PPT meeting, however, did not take place. [Testimony Mother, Special Education Teacher; Exhibit B-19] Instead, because the Student's regular education teacher, a necessary member of the PPT, could not attend the PPT meeting, the other members met informally and made no modifications to the Student's IEP. [Testimony Mother, Special Education Teacher]<sup>7</sup> This PPT meeting was not rescheduled.
14. The Student's services were not implemented consistently during the 2004-2005 school year. In addition, when the Student needed assistance with homework, the Student's fourth grade teacher assigned the Student a homework buddy to ensure that the homework was written down and work brought home, but that plan was inconsistent. Moreover, the Student reported to his Mother that having the homework buddy assistance made him feel stupid. [Testimony Mother]
15. The Student didn't do well, and didn't make any measurable progress according to the Student's report card for the fourth grade. [Testimony Mother] The special education teacher never wrote an annual report regarding the Student's progress in 4<sup>th</sup> grade. [Testimony Special Education Teacher] The Parent was not provided adequate data and information about the Student's progress during fourth grade.

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<sup>7</sup> The Student's fourth grade teacher was frequently absent for personal and health reasons.

16. During the 2004-2005 school year, the progress on many of the Student's goals and objectives were reported as "O." While "O" was not specified on the IEP document, in other years, O stood for limited progress. [Testimony Mother, Exhibit B-17] Despite this limited progress in reading, the Board special education teacher did not recommend that the PPT reconvene to consider revising the Student's IEP. [Testimony Special Education Teacher] The IEP for the 2004-2005 school year did not list rate and accuracy in the goals, [Testimony Special Education Teacher], and was not sufficiency specific to assess measurable progress.
17. In September 2005, a PPT meeting was scheduled at the Parent's request so that the PPT could reconvene to review the Student's IEP. At this PPT meeting, the Parent noted that while the Student was showing improvement in his confidence, his academic progress continued to be slow. The Parent expressed concern that the current IEP was not specific enough and that the classroom time was not well spent. She requested a specific objective measurement tool be used to assess progress. The Parent was told by the school psychologist that she should be patient about progress. At this PPT meeting no goals and objectives were changed, but the service hours were increased to eight hours to include the Wilson method reading instruction for four days per week. [Testimony Mother; Exhibit B-22] Another reason that the Mother requested this September PPT was to ensure that there was more collaboration between the classroom and the special education teachers during the Student's fifth grade year. One reason for the Parent's concern regarding collaboration was that in the first half of the year, the Student had a substitute special education teacher as the Special Education Teacher was on maternity leave. [Testimony Mother]
18. During the fall 2005, the Student would go to the nurse to avoid classroom work. The Student's classroom teacher noticed that the Student would often say he didn't feel well and requested permission to go to the nurse. Despite this avoidance behavior occurring in the classroom, the Board social worker was not aware that this was occurring. [Testimony Board Social Worker, Exhibit P-40]
19. The Student's triennial evaluation was completed in November and December 2005. [Exhibits B-23, B-24] In the Woodcock Johnson III Tests of Achievement [WJ III], the Student's total achievement score was at the 9<sup>th</sup> percentile, in the low average range. The Student's broad reading score was at the 11<sup>th</sup> percentile and his broad written language cluster score was in the low range at the 4<sup>th</sup> percentile. His broad math cluster and oral language cluster scores were in the average range. [Exhibit B-23] In the Student's intellectual and behavioral evaluations administered by the school psychologist, the Student had a full scale IQ of 106, within the average range. In an analysis of the scores, however, the index scores indicated a range of superior to low average competencies. It was noted that the Student had processing speed measures in the low range of average, significantly lower than his other measured competencies. In terms of behavior, checklist ratings indicated significant concerns that correspond to behavior and adjustment. In addition, both Parent and teacher ratings indicate that the somatization score was in the clinically significant range. [Exhibit B-24] The Mother was very

concerned about the results of the triennial evaluation as they demonstrated that the Student was at a very low level in achievement. [Testimony Mother]

20. Prior to December 23, 2005, the Board social worker did not believe the Student required individual counseling services, nor did she believe the Student required that after that date. She provided those services after the Parent requested them. [Testimony Board Social Worker]
21. The PPT reconvened on December 23, 2005 to review evaluation results and conduct an annual review. At the meeting, the Student's fifth grade teacher reported on the Student's functioning in the classroom, indicating that the Student needed prompting, reminders and follow-up to initiate and sustain work. She noted that written language was difficult for the Student. At this meeting, the Parent noted that she did not believe the testing conducted by the team was adequate, and requested an independent neuropsychological evaluation. The Parent requested implementation of a number of recommendations at this meeting which included: (1) one half hour of consult time between the special education teacher, general education teacher and social worker; (2) a weekly calendar to outline the times that the Student is pulled out of the regular education classroom; (3) a one half hour individual pullout every other week for one to one instruction to address social skills such as eye contact and processing social situations; (4) a functional behavioral assessment of the Student; (5) a procedure in which the social worker or psychologist would accompany the Student during any disciplinary actions; (6) monthly progress meetings between the Parent and staff; (7) goals and objectives based on pre and post data or standardized assessments; (8) outline of the specific process that would be followed to remediate the Student's written language; (9) an assistive technology evaluation to be conducted and a keyboard instruction program to begin immediately; (10) a compacted curriculum and study outlines for science and social studies when the Student was not in the regular education classroom; and (11) the Parent requested the results of the Student's Connecticut Mastery Test. [Exhibit B-26] While the Board members of the PPT considered some of these requests, they refused the neuropsychological evaluation and deferred consideration of other issues until another PPT meeting. [Testimony Mother; Exhibit B-26] The PPT meeting cover page did not indicate the date of the next PPT meeting. [Exhibit B-26]
22. The PPT reconvened on January 17, 2006. At that PPT the Board agreed to an independent neuropsychological evaluation, an assistive technology [AT] evaluation and a functional behavioral assessment [FBA] of the Student. An additional spelling goal was added to the Student's IEP, as well as .5 hours of individual counseling every other week. The PPT was scheduled to reconvene upon conclusion of the FBA and the AT evaluation, as well as to review the neuropsychological evaluation. [Exhibit B-27] Despite the Parent's request, the Student's goals did not have preassessment data, and the Parent could not discern at what level the Student was at in terms of his goals and objectives. In addition, the Student was not receiving his Wilson reading instruction on a consistent basis at this time. [Testimony Mother]

23. The FBA listed two target behaviors to be assessed: (1) that the Student requires adult prompts to begin, continue and complete tasks and (2) that the Student is off task. Frequency of these behaviors was throughout the day, continuous and severe to high intensity. One consequence was to complete work during lunch and recess. No changes to the Student's interventions were planned after the FBA, with the BIP to "continue to provide a highly structured closely monitored program "and to continue" to provide encouragement. The parent component of monthly meetings with the Parent to review progress did not occur. [Exhibit B-28] No meetings were held in April or May. [Testimony Special Education Teacher]
24. The written FBA indicates that it was developed by the Student's fifth grade teacher, the social worker, the Student's special education teacher, and the school psychologist. It is dated March 8, 2006, and notes that the behavioral intervention plan was planned to be reviewed and evaluated on March 30. [Exhibit B-28] The interventions that were planned in the FBA were already being implemented by the team, and they were not working effectively. [Testimony Special Education Teacher] The Parent was not involved in the FBA; her input was not considered. [Testimony Mother] The FBA was not appropriately conducted and did not address other behavioral issues such as somatization. The behavior intervention plan, employing ineffective strategies already provided to the Student, was inappropriate.
25. While Parent signed consent for the assistive technology evaluation in January 2006, the evaluation report was not completed until May 30, 2006, approximately a week before the June 2006 PPT meeting. The AT evaluation recommended that the Student continue to have access to a computer with word prediction software and a talking word processor. It was also recommended that the Student should have access to a portable word processor, and software to enhance reading fluency. A trial with the electronic spelling aid was also suggested. The AT evaluation also listed online software titles for keyboarding programs that the Student could use at home, if he had access to a computer. [Testimony AT Coordinator; Exhibit B-30] The evaluator completed the assistive technology evaluation gradually. She reported to the Parent in March 2006 about the status of the evaluation thus far, and that there was a lapse in the evaluation due to the CMTs. When the Student was tested on the Neo, a portable word processor, the Student typed at a slow rate of 4 to 5 words per minute. [Testimony AT Coordinator]
26. During the assistive technology evaluation, it was noted by the evaluator that the Student's affect was flat; he appeared uninterested and needed teacher redirection to pay attention. When observed in reading instruction, he was self conscious and read slowly. [Testimony AT Coordinator]
27. In fifth grade the Student was exhibiting anxiety related to his inability to read and write, as well as engaging in work refusal. The Board special education teacher reported to the Board social worker that the Student was having high frustration levels in his class in March 2006. [Testimony Board Social Worker] The Student also was having difficulty getting back on track when returning to the classroom. [Testimony Classroom Teacher]

28. The Student's reading continued to be a substantial concern. The Student's Degrees of Reading Power scores declined in 5<sup>th</sup> grade, from a score of 32 in 4<sup>th</sup> grade, to a score of 24 in 5<sup>th</sup> grade. [Testimony Classroom Teacher, Exhibit B-63] Despite this decline, the Student's reading instruction in 5<sup>th</sup> grade was inconsistent, and the Board special education teacher did not complete a written observation regarding the implementation of the reading instruction. [Testimony Special Education Teacher] When the Special Education Teacher returned from maternity leave, the Student was working in Book 2 of the Wilson reading program. At the end of fifth grade, after four years of the Wilson reading program the Student had only reached level 3.3 in the program. [Testimony Special Education Teacher] The Wilson program consists of 12 levels. [Testimony Reading Teacher]
29. Although the Student's writing skills were a concern, nothing in the Student's writing goals addressed remediation of the skills in the writing goal. [Testimony Classroom Teacher, Exhibit B-22] Spelling was a continuing concern for the Student, and the Student did not progress well in this area. [Testimony Mother]
30. Emotionally, the Board social worker noted that fifth grade was a tough year for the Student. [Testimony Board Social Worker] During the Student's fifth grade year, the classroom teacher would note that the Student would shut down in the classroom. Avoidance behavior was also something that the teachers were always noticing about the Student. [Testimony School Psychologist]
31. Despite these continuing problems and concerns, when the PPT reconvened in January 2006, the only IEP objective added was the one that the Parent had requested. [Testimony Board Social Worker, Exhibit B-27]
32. During the second half of fifth grade, the Board special education teacher returned from maternity leave. At that time, the special education teacher noticed that the Student was not progressing well in terms of work production, motivation and work completion. The special education teacher testified that she was concerned about the fact that for a writing prompt based on the subject of *something the Student couldn't live without*, the Student chose a lighter. The teacher was also concerned that the Student was playing a paper and pen game of hangman, with a stick figure with two Xs on its eyes. [Testimony Special Education Teacher] Despite her concerns, the special education teacher made no changes to the Student's program, nor did she request that the PPT convene to address these concerns.
33. After a delay, the Board agreed to provide the neuropsychological evaluation. While the Parent was initially contacted regarding the referral questions for the neuropsychological evaluation, the Board school psychologist finalized these questions without the Parent's input. The two referral questions were (1) what are the effective strategies to provide appropriate compensations, accommodations, modifications and remediation to address the Student's issues and (2) "[i]t is observed in school that there is a high prevalence of violent and destructive ideation in [the Student's] responses to academic and social

expectations. Therefore we request further insight and information if this is indicative of immaturity or emerging issues. Is this a concern to be addressed in school and if so, what interventions/strategies are recommended.” Nothing in the record indicated that the Student was observed with a high prevalence of violent and destructive ideation. Around that time, the Student was upset by a book in class, occasionally was playing swords with a pencil, and on at least one occasion played the word game hangman with a friend. [Testimony Mother, Exhibit P-10]

34. While the Board social worker was involved in the sending these two questions to the evaluator, which identified that the Student was observed with this alleged “high prevalence of violent and destructive ideation,” the Board social worker observed no such behavior, and no one reported it to her. [Testimony Board Social Worker] It is, therefore, troubling that the Board conveyed this inaccurate information to the independent evaluator. Furthermore it is baffling that if the Board felt the Student was exhibiting this alarming ideation, why a PPT was not immediately convened to address it.<sup>8</sup> The only conclusion to draw from this was that the Board social worker and the Board school psychologist were attempting to portray the Student as a much more troubled student than he was actually presenting himself in school. This conclusion is drawn because, if these concerns were valid, the Board should have been convened a PPT to address these concerns through additional goals addressing behavior and increasing counseling services. The Board did not convene a PPT to address these alleged concerns.
35. The neuropsychologist evaluation concluded that the Student had a mixed receptive-expressive language disorder, a reading disorder and attention deficit/hyperactivity disorder, inattentive type. The neuropsychologist noted that the classroom teacher’s Conners’ Teacher Rating Scale-Revised ratings reached the markedly atypical range on the cognitive problems/ inattention and DSM-IV inattentive indices. The classroom teacher had rated the following as very high, occurring frequently: loses things necessary for task for activities; avoids, expresses reluctance about, or has difficulties engaging in tasks that require sustained mental effort; fails to finish things he starts; poor in spelling, not reading to par; fails to give close attention to details; makes careless mistakes; does not follow through on instructions and fails to finish schoolwork; easily distracted by extraneous stimuli; has difficulty organizing task and activities; has difficulty sustaining attention to task or play activities; restless in the squirmy sense; and short attention span. [Exhibit B-29]
36. The neuropsychologist recommended that the Student receive an intensive phonetically based reading and language program, and daily writing support. The neuropsychologist recommended two programs, Kidspiration and Inspiration to assist the Student in learning to write. She noted that until the Student achieves a reasonable degree of mastery in classroom writing, it is unrealistic to expect him to be able to complete written

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<sup>8</sup> In relation to the issue of violent and destructive behavior, after the evaluation, the neuropsychologist was not concerned about that issue. She noted that the Student’s bipolar disorder was being treated, and his learning disabilities were the primary presenting problem. [Testimony Mother]

assignments outside of the classroom environment. The neuropsychologist indicated that the use of a computer is an essential technical component for assisting the Student's academic efforts. She recommended a device such as an Alpha Smart or a laptop that should be incorporated into his classroom activities. The neuropsychologist recommended a software typing program that allows the Student to proceed at a slower pace, and direct individual teaching of typing to help him achieve competency. The neuropsychologist recommended that basic math facts should be presented in both numbers and related graphics, as the Student had difficulty with rote memorization. She recommended a multi-modal treatment strategy be implemented to help the Student combat his distractibility in the classroom environment. [Exhibit B-29]

37. The neuropsychologist recommended modifications including untimed testing, preferential seating and repetition of instructions. She also recommended that the Student be provided with the opportunity to model appropriate social behaviors. [Exhibit B-29]
38. The neuropsychologist concluded that the Student is motivated to succeed and be a good student, and is losing confidence in his ability to do so. She also noted that the Student did not demonstrate any indication of violence to self or others. [Testimony Dr. Koda]
39. The neuropsychologist noted her concern that there is a window of opportunity for dealing with severe learning disabilities, such as the Student's. In a study of students with reading deficits, this window of opportunity is up to fourth grade. As the Student has passed this window of opportunity, it is more difficult to achieve a fluency level and address his reading deficits. [Testimony Dr. Koda] According to Dr. Koda, the Student is not reading at grade level, his reading level is severely impaired and he has extreme difficulty decoding unfamiliar words. [Testimony Dr. Koda]
40. In her review of the records, Dr. Koda noted that there was a lack of pre and post testing of the Student to be able to assess progress while the Student was attending the Board schools. [Testimony Dr. Koda]
41. Just prior to this PPT meeting, the Parent was informed that the Student went from level 2.2 to level 3.3 in the Wilson program during the 2005-2006 school year. There are 12 levels to the Wilson program; the Student only progressed about one level during the school year. [Testimony Mother; Exhibit P2]
42. The other information supplied to the Parent regarding the Student's current level of academic functioning included a DRA level on nonfiction [level not listed] of mid 4<sup>th</sup> grade with increased prompting and fiction where inferential questions needed rewording of mid 4<sup>th</sup> grade level. The Student's Read Naturally fluency levels were that they were currently working on a level 4 with a goal of 110 words per minute. His winter writing prompt was a score of 2; spring prompt was a score of 4. The Student received a 39 percent on the core spelling 3 test; a 61 percent of the core spelling 2 test. [Exhibit P-2]

43. At the end of 5<sup>th</sup> grade, after four years of the Wilson reading program, the Student had reached level 3.3 in the program. [Testimony Special Education Teacher] While initially he used the Neo, by the end of the 5<sup>th</sup> grade year, the Student wasn't using the Neo, the portable word processor. During that year, the classroom teacher testified that it would have been appropriate for the Student to have an organization goal, but he did not have one. [Testimony Classroom Teacher]
44. The PPT convened on June 8, 2006. [Exhibit B-31] The purpose of this PPT was to review the neuropsychological evaluation, the FBA and the AT evaluation. The Board members of the PPT recommended that the Student attend the Board middle school before the goals, services and service hours were developed for the Student. [Testimony Special Education Teacher] The Board members of the PPT discussed specifics about the middle school program, such as that the Student would have regular math class co-taught, and a follow up math special education class, and co-taught English with a follow-up English special education course. They also noted that he would receive resource time during study hall, speech and language time and counseling during an open period, that he would have the Wilson reading program for one period a day, as well as two periods of unified arts per day. The prior written notice does not accurately list the issues discussed at this PPT meeting. The PPT was continued to the following week as the goals and objectives were not finalized at the first PPT meeting on June 8. [Testimony Mother]
45. The PPT reconvened on June 15, 2006. [Exhibit B-32] The Board special education supervisor attended the PPT for the purpose of articulating the middle school plan. No other program other than the program at the middle school was considered by the Board at the PPT meeting. [Testimony Board Supervisor] This middle school program would be a co-taught English, content support, co-taught math, phonemic reading, resource room support, social studies, science and a unified arts class. [Exhibit B-32]
46. Initially the middle school special education reading teacher testified that she did not develop the Student's goals and objectives, as they were written by the Board elementary special education teacher. [Testimony Reading Teacher] The middle school reading teacher testified that the goals as written would be high achievement for the Student, noting that "it's a stretch." [Testimony Reading Teacher]
47. The middle school reading teacher testified that she and the middle school members of the PPT come to the PPT as "receivers of information" and that the elementary teachers have the information that is needed, noting that she "could trip over him and not know him." [Testimony Reading Teacher]
48. The middle school reading teacher had not seen the Student's fifth grade IEP, nor did she weigh in on the appropriateness of the goals for 6<sup>th</sup> grade, as "that's not [her] role." It's the "sending school" that determines the Student's needs, according to the reading teacher. Her role at the IEP was not to develop the IEP, but to say what a program at the middle school would look like. By the time of this June 15 PPT meeting the reading teacher only knew "minimal" information about the Student. While initially under a

different impression, the reading teacher testified that, even though she knew little about the Student, she did write the goals and that they were “absolutely individualized” for students, as she took the goals and objectives on her computer, which are pages and pages long, and printed them out, determining a start point, and a projection on where they were going to be at the end of the year. She didn’t base these goals on the Student’s prior sluggish progress in the Wilson program. Furthermore, she didn’t explain that despite anything in the goals and objectives, she would conduct her own assessment to assess his starting point at the beginning of the school year. On more than one occasion, the reading teacher indicated that her role was to listen to the goals and objectives and set out how the program would look like at the middle school. Beyond this realm, she would do what her supervisor tells her to do, stating she does what she’s told to do, and that parents have a right to look into optional programs. [Testimony Reading Teacher] Her role, according to her testimony is to receive information, and set up a program in the Board school. [Testimony Reading Teacher] She was a passive member of the PPT meeting who did not appropriately individualize the goals and objectives for the Student.

49. At the time of this PPT, the Board social worker did not believe it was necessary for the Board to plan for services to transition to the middle school, stating that once they knew where he was going, the PPT would put the supports in place. [Testimony Board Social Worker]
50. The Parent asked the Board to consider placement at Ben Bronz, and the Board members of the PPT denied this request. They indicated that they felt their program was appropriate and that the Student did not require placement at Ben Bronz. [Testimony Mother]
51. The Mother was very concerned that the IEP for the Board middle school did not have enough time built in for remediation of writing, very concerned that science and social studies would be difficult to access, and that given the history of implementation, the Parent was concerned about the organizational assistance. [Testimony Mother]
52. At the PPT, the reading teacher declined to answer the Parent’s questions regarding the writing program at the middle school, indicating that “it’s not [her] role” to address those questions. [Testimony Reading Teacher]
53. During the fifth grade school year, the Student may have been present at school discussions about transitioning into middle school, and taken a tour of the middle school with his classmates [Testimony Special Education Teacher]. The Student, however, received no individualized transition assistance for transition from the Board elementary school to the larger in size and enrollment middle school, despite his history of significant anxiety and transition issues in his elementary school years<sup>9</sup>. There was no recommendation for any specific steps to take to transition the Student to this new setting in the Student’s IEP, or any written plan to acclimate the Student to the middle school

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<sup>9</sup> During the Student’s elementary school years, the Board provided various incentives and programs to encourage the Student to enter the school building during times of anxiety and separation issues. These incentives included setting up an avocado growing project and a small animal project.

while the Student was in 5<sup>th</sup> grade. No extended school year services were offered to prepare the Student for middle school, and no middle school teachers observed the Student during the 2005-2006 school year. The only mention of the Student's transition into middle school on the Student's IEP was a mere notation that the reason for the meeting was to plan the middle school program. [Testimony Board special education teacher, Exhibit B-32] The Board social worker took no specific steps to address the Student's anxiety about the transition to the middle school, although she was aware of the Student's anxiety and his significant sensitivity to peers. [Testimony Board Social Worker]

54. The Board Supervisor testified that although the Parent didn't decline the middle school program and was merely "considering" the private placement at Ben Bronz Academy, she didn't do anything further in terms of planning for the middle school program after the PPT. She merely offered that the Parent could contact her to schedule a meeting/tour over the summer, which the Parent did. She noted that since she was aware of the Parent's concerns, she would have an extensive transition plan, *in the fall*. [Testimony Board Supervisor] No such plan, extensive or otherwise, was written or proposed in any manner for the Student.
55. The Mother met with the Board special education supervisor for the middle school, and toured the middle school building in July 2006. During that tour, the implementation of the program was discussed. [Testimony Mother] At this tour, the special education coordinator discussed certain steps that would be taken if the Student would be attending the middle school, but these steps were not taken. She testified that she didn't know if the Student was coming to the middle school, and that if they knew he was coming then they would have set up "many more" transition activities in the spring and into the fall, as transition is an extremely important aspect of a student's program. [Testimony Board Supervisor] These steps, however, were merely contemplated and not made part of the Student's IEP, nor planned for this particular student.
56. When discussing whether the Student would require a paraprofessional, rather than addressing that need in the Student's IEP, the special education supervisor testified that they would "juggle" to give that support for the Student if needed. [Testimony Board Supervisor]
57. The Parent asked the Board Supervisor questions about the reading and the writing program. The Board Supervisor was unable to provide that information to the Parent. [Testimony Board Supervisor]
58. After that tour, the Parent still had serious doubts about the program. While the Board special education supervisor attempted to placate the Parent's concerns telling her to not worry, that they can always make changes, the Parent remained concerned. The Parent was concerned that the transition to the middle school program and setting would be difficult, and she didn't want to set the Student up for failure in the progress of his program, and the impact on his self esteem. She submitted a letter to the Board director

of special education indicating that she was placing the Student at Ben Bronz Academy, and requested reimbursement. [Testimony Mother, Exhibit B-33]

59. The Student was enrolled at Ben Bronz Academy, an approved special education school that serves students with specific learning disabilities. The Student's program at Ben Bronz is provided in classes of between two to six students, with comprehensive remedial programs in reading, writing (including spelling) and mathematics, along with grade level content courses. In addition he receives metacognition training, as well as a language based program where the development of effective language skills is infused into his entire curriculum. He also has computer fluencies in the areas of reading, math and typing which he works on both at home and at school. [Testimony Dr. Sharp, Mother]
60. While it was not placed on the prior written notice page of the Student's IEP, the Board rejected the Parent's request that the Student attend Ben Bronz Academy. [Testimony Special Education Teacher, Exhibit B-32]
61. Dr. Koda observed the Student at Ben Bronz Academy. She concluded that the class size at Ben Bronz was certainly appropriate for the Student, given his multiple disabilities and that fact that he is quite inattentive. She also found that the program as provided to the Student at Ben Bronz met her recommendations. The Ben Bronz entire program was a language program carried out in all of his classes. The neuropsychologist indicated that the Board's 2006-2007 proposed IEP for the Student did not appear to be what she would term "intensive," and what she had recommended in her evaluation.[Testimony Dr. Koda]

### **DISCUSSION/CONCLUSIONS OF LAW:**

The Individuals with Disabilities Education Improvement Act of 2004 provides for services to children with disabilities, from birth through age 21. It is undisputed that the Student is eligible for special education and related services.

#### *I. Burden of Proof*

The Supreme Court addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. 49, No. 04-698 (U.S. 2005). In *Schaffer*, the Court noted that states have responsibility generally for establishing fair hearing procedures. The plain text of IDEA is silent in the allocation of the burden of persuasion, as was the Maryland state law at issue in that case. Under those circumstances the Court found that the burden of persuasion/burden of proof falls

upon the party seeking the relief. The Court declined to decide the issue of the burden of proof when states have their own laws or regulations which place the burden on the school district.

In Connecticut, the regulations expressly state that the Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 The Board has not met its burden in this case.

## *II. Free Appropriate Public Education*

The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-207.

Procedural flaws do not automatically require a finding of a denial of a free appropriate public education [FAPE]. Procedural inadequacies resulting in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in formulating the Individualized Education Program [IEP], clearly result in a denial of FAPE. *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072, 38 IDELR 91 (9<sup>th</sup> Cir. 2003), *citing W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F. 2d 1479, 18 IDELR 1019 (9<sup>th</sup> Cir. 1992), *accord, W.A. v. Pascarella*, 153 F. Supp. 2d 144, 35 IDELR 91 (D. Conn 2001)

Congress, in the 1997 reauthorization of the IDEA, heavily stressed the importance of parental participation in the decisional process.<sup>10</sup> The importance of such parental participation

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<sup>10</sup> See, for example, 20 U.S.C. §1400(c)(5)(B) (research and experience have demonstrated that educating children with disabilities is made more effective by "strengthening the role of parents and ensuring that families of such

was reiterated in the IDEA of 2004, wherein Congress noted, that “[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.” See Sec. 601 of the Act.

It is clear that the parents’ right to participate is an essential aspect of IDEA. The failure to provide appropriate and accurate written prior notice thwarted effective parental participation in this case. Moreover, the Parent was not appropriately apprised of Student’s progress despite asking for specific and objective assessments.

While it is undisputed that the Parent received her procedural safeguards and is an attorney, capable of reading and understanding her safeguards, the information the Board provided to the Parent thwarted her ability to have effective participation in the PPT process. Notwithstanding that, the school years at issue also do not meet the second prong of the *Rowley* test.

In determining whether the second prong of *Rowley* is met, the requirement of a free appropriate public education is satisfied by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. *Board of Education v. Rowley*, 458 U.S. at 203

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children have meaningful opportunities to participate...”); 20 U.S.C. §1414(d)(1)(B)(i) (parents shall be members of the IEP Team); 20 U.S.C. §1414(f) (Board shall ensure that parents "are members of any group that makes decisions on the educational placement of their child.").

The IEP should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Hendrick Hudson v. Rowley* 458 U.S. at 204 When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* This standard, however, contemplates more than mere trivial advancement. *Id.*

The record reflects that for the 2004-2005 school year, and the 2005-2006 school year, the Student achieved merely trivial advancement. The programs offered for the 2006-207 school year, as well as for the 2004-2005 and 2005-2006 school years, were not reasonably calculated to confer educational benefits.

In determining whether the IEP was reasonably calculated to confer educational benefits, it must be determined whether the IEP states (1) the child’s present level of educational performance; (2) the annual goals for the child; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *M.S. v. Yonkers*, 231 F. 3d 96 (2<sup>nd</sup> Cir. 2000), citing *Walczak v. Florida Union Free School*, 142 F. 3d 119, 122.

The 2004-2005 IEP contained no organizational goal, although organizational issues were clearly a concern/need of the Student. There was no meaningful data provided to allow the Parent to effectively participate in the drafting and monitoring of the Student’s progress, and to

determine to what extent goals were achieved. There was inconsistency in the provision of the services, and while the Student was making merely “limited” progress on his goals, there was no reconvening of the PPT to consider changes to his program. Moreover, when the Parent requested a PPT meeting and the appropriate members were not present to convene a PPT meeting, no changes were made to the program, and no PPT meeting was rescheduled.

In the 2005-2006 IEP, the Parent again raised concerns that there was a lack of specificity, and lack of objective assessments to assess progress. The triennial evaluations completed in the 2005-2006 school year showed very low achievement scores. During the 2005-2006 school year the Student was exhibiting somatization and flat affect, a high level of frustration, and problems in sustaining work in the classroom. He was exhibiting avoidance behavior and shutting down. Despite these concerns, no PPT meeting was convened to address these behavioral and emotional issues.

The FBA undertaken in the latter half of the school year omitted the Mother, an essential member of a team drafting an FBA, and then failed to make any changes to the Student’s behavioral intervention plan, despite the ongoing emotional and behavioral issues.

The Board’s assistive technology evaluation was not appropriately completed in a timely manner, lasting virtually the entire second half of the year. The assistive technology evaluation was unduly delayed, and therefore denied the Student FAPE. While the Board AT recommended a variety of keyboarding practice online software to the Parent, there was an underlying assumption that a computer was available for the Student, and no discussion on whether a laptop would be needed to be provided to the Student for this keyboarding training. Moreover, by the end of the school year, the Student had abandoned the use of the Neo. The suggestions of online software/websites were not sufficient in terms of providing the Student with the

appropriate keyboarding skills to assist him in accessing his education as recommended by the neuropsychologist.

In terms of reading progress, or lack thereof, the Student's DRP declined in 5<sup>th</sup> grade, and after 4 years of receiving Wilson reading instruction, the Student was only on level 3.3 of a 12 level program.

The Student's writing deficits were also not appropriately addressed, and his spelling continued to be tremendously deficient.

The proposed 2006-2007 IEP included absolutely no steps to address the Student's transition to the new middle school setting, despite the Student's history of anxiety and separation issues. The reading goals were not appropriately individualized, but drafted by a person who had no understanding of the Student's concerns/needs, were too ambitious and not based on the Student's individual strengths and needs.

The Board did not appropriately address the Student's need for assistance with the transition to the middle school in its IEP. The Board did not incorporate transition plans into the IEP, but rather indicated that it would be done. This lack of plans did not ensure that the Student's IEP was reasonably calculated to ensure that the Student's transition to the new setting could not interfere with his ability to obtain a meaningful educational benefit.

The Board's proposed IEP for the 2006-2007 school year was not appropriate. It was not reasonably calculated to enable the Student to obtain education benefit, and it was not appropriately drafted based on the Student's individual needs.

### *III. Reimbursement for Parental Placement*

When it is determined that the Board's program is inappropriate, the parent is entitled to reimbursement if the parent's private school placement is appropriate. *Burlington School*

*Committee v. Department of Education*, 471 U.S. 359 (1985). The Board has asserted that the Parent's proposed placement is too restrictive. As to the restrictive nature of Ben Bronz Academy, parents seeking an alternative placement are not subject to the same mainstreaming requirements as a school board. *M.S. ex rel S.S. v. Board of Education of the City of Yonkers*, 33 IDELR 183 (2<sup>nd</sup> Cir. 2000), citing *Warren G. v. Cumberland County School District*, 190 F. 3d 80, 84 (3d Cir. 1999) (The test for the parents' private placement is that it is appropriate, and not that it is perfect.) Under the appropriate standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), citing *Florence County School District Four v. Carter*, 501 U.S. 7 (1993) Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education. *Id.* The Student would not receive an appropriate education in the program proposed by the Board. The Ben Bronz Academy program was appropriate and addresses the Student's needs. The Parent has proven that this restrictive, non-mainstream environment is required to provide the Student with an appropriate education.

#### *IV. Compensatory Education*

An award of compensatory education is appropriate in this case for the failure to provide the Student with FAPE in the 2004-2005 and 20050-2006 school years. Appropriate relief is the relief designed to ensure that the Student is appropriately educated within the meaning of IDEA. *Parents of Student W. v. Puyallup School District no. 3*, 31 F. 3d 1489 (9<sup>th</sup> Cir. 1994)

“Relief designed to cure deprivations under 20 U.S.C. § 1412(2)(B) must accord with congressional intent. See *Burlington*, 471 U.S. at 370-371, 105 S. Ct. at 2003. In *Burlington*, the Supreme Court held that tuition reimbursement constitutes appropriate relief under the EHA

because it "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-371, 105 S. Ct. at 2003. Furthermore, tuition reimbursement addresses "[a] child's right to a free appropriate public education," and *satisfies the congressional intent to provide relief which remedies the deprivation of that right. Burlington*, 471 U.S. at 370, 105 S. Ct. at 2003, (emphasis in original). *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) extended this rationale to compensatory education. The *Miener* court reasoned that compensatory education, like tuition reimbursement, cures the deprivation of a handicapped child's statutory rights, thus providing a remedy which Congress intended to make available. 800 F.2d at 753; accord *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), vacated and remanded on other grounds sub nom. *Sobol v. Burr*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2d Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1298 (1990) ("We do not believe that Congress intended to provide a right without a remedy"); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (both remedies necessary "to preserve a handicapped child's right to a free education.")

The Student is entitled to compensatory education in the form of an additional year of placement at Ben Bronz Academy, or a similar placement if Ben Bronz Academy is not available for the Student for the 2007-20008 school year.

**FINAL DECISION AND ORDER:**

1. The Board did not offer and did not provide the Student FAPE during the 2004-2005 school year.
2. The Board did not offer and did not provide the Student with FAPE during the 2005-2006 school year.
3. The Board did not offer the Student FAPE for the 2006-2007 school year.
4. The Parent's placement of the Student at Ben Bronz Academy for the 2006-2007 school year is appropriate.
5. The Board shall reimburse the Parent for the Student's placement at Ben Bronz Academy for the 2006-2007 school year.

6. The Student is entitled to compensatory education for the Board's failure to provide the Student FAPE during the 2004-2005 and 2005-2006 school years.
7. The Board shall provide compensatory education to the Student, which shall be placement of the Student at Ben Bronz Academy for the 2007-2008 school year, or a similar placement if Ben Bronz Academy is not available for the Student.