

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Appearing on behalf of the Student/Parents: Attorney David C. Shaw, The Law Offices of David C. Shaw, LLC, 34 Jerome Ave., Suite 210, Bloomfield, CT 06002

Appearing on behalf of the District: Attorney Michael P. McKeon, Sullivan, Schoen, Campane and Connon, LLC, 646 Prospect Ave., Hartford, CT 06105

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the District violated the Student's rights under the IDEA by failing to identify him as a child in need of special education during the 2005-2006, 2006-2007 and 2007-2008 school years, and by failing to provide special education and related services to him.
2. Whether the District has failed to properly test [assess] the Student.
3. Whether the District has failed to properly assess the Student's eligibility for special education and related services.
4. Whether the District has failed to provide the Student with specialized education that meets his individual needs.
5. Whether the Student is eligible for special education and related services.
6. Whether the District shall retain a mutually acceptable independent educational consultant to assist the PPT to develop and implement an appropriate IEP and transition plan.
7. Whether the District shall retain a mutually acceptable private agency to provide research-based instructional services and community based job coaching services necessary to implement the IEP and transition plan.
8. Whether the District shall retain a mutually acceptable consultant on assistive technology to conduct an AT evaluation and implement the recommendations from that evaluation.

9. Whether the District shall provide the Student with compensatory education to compensate the Student for the District's failure to provide special education to him for the past two school years.
10. Whether the District shall be required to reimburse the Parents for the independent evaluations they have conducted, including the ones completed by Dr. Miriam Cherkes-Julkowski, Mr. Meryl Aronin, Ms. Margaret Kardos and Dr. Amy Palmer.
11. Whether the District shall be ordered to preclude the Student from graduating from high school or otherwise terminating his eligibility for special education under the IDEA during the pendency of this hearing, and until any relief obtained through this hearing is fully implemented and any resulting appeals are concluded.

PROCEDURAL HISTORY:

The District received this request for hearing on May 23, 2007 [Exhibit H.O.-1] and a prehearing conference was held on May 31.

This hearing proceeded with testimony on seven hearing dates in June, July and August 2007. A request for extension of the mailing date was granted so that counsel had sufficient time to present their case on dates that were agreed upon by both parties. Two further extensions of time were granted to provide counsel sufficient time to submit briefs and reply briefs.

Briefs were submitted by both parties on September 19, with reply briefs due from both parties on September 24. Counsel for the Student/Parents submitted a Motion to Strike the Board's reply brief which is denied.

The witnesses who appeared on behalf of the Student and the Parents were the Mother; Dr. Miriam Cherkes-Julkowski, educational consultant; Margaret Kardos, occupational therapist and assistive technology practitioner; and Meryl Aronin, speech-language pathologist.

The District's witnesses were Patricia Roszko, District special education department chair; Rebecca (Fredericks) Hoyt, District school psychologist; and Jeffrey Brown, District special education teacher.

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

SUMMARY:

During the 2005-2006 and 2006-2007 school years, the Student and Parents sought a determination that the Student was eligible for special education due to a specific learning disability and other medical issues. The District members of the PPT did not find the Student eligible for special education.

The District claimed that as the Student had satisfied all requirements for graduation during the pendency of the hearing, he was no longer entitled to FAPE; thus any claim that FAPE was deficient became moot upon graduation. The District also claimed that the Student had made appropriate achievement during his education at the District's high school. The Parents and Student brought this action requesting an order of compensatory education, and seeking reimbursement for independent evaluations.

FINDINGS OF FACTS:

1. The Student is 19 years old, and was in his senior year at Joel Barlow High School during the 2006-2007 school year when this hearing was requested. [Testimony Mother, Exhibit P-75, H.O.-1] Joel Barlow High School is the Regional School District No. 9 high school that serves the towns of Easton and Redding. [Exhibit P-36]
2. At the time of the hearing, the District and the Parents/Student agreed that the Student's diploma would not be issued during the pendency of this hearing.
3. In the Student's preschool and elementary school years, the Student was identified as eligible for special education by the Shelton Board of Education. The Student was initially identified as eligible under the category of speech and language impaired, and was subsequently re-classified as learning disabled in 1996. [Testimony Mother; Exhibits P-1-13, P-23]
4. The Student and his family moved from Shelton to Easton in October 2001, when the Student was in 8th grade. Prior to the move, the Student was eligible for special education in Shelton. Easton continued the Student's eligibility for special education. [Testimony Mother; Exhibits P-23, P-24]
5. In the Student's 9th grade year at R.S.D. No. 9 Joel Barlow High School, District staff conducted evaluations of the Student in November and December 2002. [Exhibits P-25, P-27] Subsequent to those evaluations, a Planning and Placement Team [PPT] meeting was held in April 2003, and the Student was determined to be no longer eligible for special education, and was exited from special education. [Exhibit P-36]. The Mother disagreed with the conclusions of the PPT but believed she was not sufficiently qualified to challenge the school professionals' interpretation of the testing results. The Mother was told at the PPT in April 2003 that a 504 classification was more appropriate than a special education classification, and that the Student would get the modifications to instruction and

- support services needed to provide an appropriate program under the 504 classification. She was told, however, that the Student would continue to get the services specified in his prior IEP, but that it would be called a 504 plan. [Testimony Mother]
6. The Parents did not request a hearing to challenge the decision to exit the Student from special education because the District staff assured the Mother that the same support services would be provided under the guise of a 504 plan, and because the family was focusing on issues related to the Father who was experiencing a medical crisis at that time related to a previous spinal cord injury in 1991. [Testimony Mother]
 7. An Individual Education Plan [IEP] has not been proposed for the Student or provided to him since April 2003. [Testimony Mother]
 8. Since at least 2003, the Parents have provided medical documentation to the District about the Student's various medical issues, including inflammatory arthritis, Lyme disease, CNS Lyme disease, pain syndrome, and concussions. [Exhibits P-39, P-41, P-42, P-46, P-48, P-54, P-66, P-84] Although the medical documentation differs as to whether Lyme disease or arthritis or concussions were the cause of the Student's symptoms, the documentation concurred in the conclusion that these medical issues were affecting his educational performance, as well as his ability to attend school.
 9. While the District has acknowledged that the Student has a medical condition that was adversely affecting his educational performance in school, the District never discussed whether the Student qualified for special education as a child with a health impairment that impacts his educational performance. [Testimony Mother]
 10. The Mother was extremely concerned about how the Student was doing in school in November 2005. She saw him struggling in school, having difficulty with school work and developing frustration with and anger over schoolwork. The Mother indicated in a telephone call to Ms. Roszko during the week of December 5th that the Student had a recent diagnosis by a neurologist of chronic CNS Lyme disease¹ that affects cognitive functions such as memory, processing of information, as well as pain, fatigue and other symptoms. She asked for an urgent meeting to discuss and evaluate what was going on, and why his academic difficulties were mounting. The District's special education administrator acknowledges that the Parent called and expressed her concerns about the Student's progress in school in December 2005. [Testimony Mother, Ms. Roszko; Exhibit P-65]
 11. The District scheduled a 504 Meeting on December 13, 2005 to discuss the Mother's concerns about the Student's performance in school. During that

¹ The District did not challenge the CNS Lyme disease diagnosis, nor ever offered to have the Student undergo a medical evaluation regarding the Student's diagnosis at a PPT or Section 504 meeting.

- meeting the Mother brought up her concerns and made the statement that if the team didn't do something to intervene urgently, they were going to lose the Student. She also said she believed that the team was missing something very significant. [Testimony Mother] The documents regarding the 504 Meeting indicate that the Student had achieved the goal in CAPT testing in math and science, but not in reading or writing. The 504 team, including the school psychologist, noted that the Student had a physical or mental impairment (Lyme disease) that substantially limited the Student's memory, his ability to learn and his processing of information. The teacher reports at the time of the meeting noted that the Student was not meeting course responsibilities in English 4, that he was achieving below class expectation in 3-D Model, and that his progress in Flight Tech was "Unsatisfactory". The Student's suspension for alcohol abuse was also noted at the meeting. The 504 minutes indicate that the Student's needs for assistive technology were met. [Exhibit P-58] The Student's assistive technology needs, however, have never been evaluated. [Testimony Mother, Exhibit P-58]
12. During the 504 Meeting the team decided to conduct certain tests/evaluations and asked the Parent to consent to the following tests/evaluations: WISC IV cognitive evaluation by the school psychologist, the Woodcock-Johnson Test of Academic Achievement by the special education teacher, the WRAML test for memory by the school psychologist and the rating scales for emotional/behavioral by the school psychologist. [Exhibit P-58] The Parent did sign the consent form authorizing these four tests/evaluations as requested on a form that indicated that the decision to conduct this "re-evaluation" was made by the "Planning and Placement Team". [Testimony Mother, Exhibit P-58] The school psychologist told the Mother at the meeting that the testing would be conducted in short order and that the testing would be completed within 45 days as was required by the law. She told the Mother that the team would meet by the end of January to discuss how it would address the Student's needs. [Testimony Mother] The District's consent form that the Mother signed specifically stated that a copy of the procedural safeguards *special education* were enclosed, and further noted that a *Planning and Placement Team [PPT]* regarding the Student was held on 12/13/05, and that the team determined that an evaluation be completed. [Exhibit P-58, emphasis added]
 13. A PPT Meeting was not held to discuss Mother's concerns or her request for testing to determine why the Student was struggling in school. [Testimony Mother, Ms. Roszko]
 14. Between December 13, 2005 and May 18, 2006 the Mother called the District many times to find out when the testing would be completed. [Testimony Mother]
 15. The Student has given his Mother permission to advocate for him concerning educational matters. [Exhibits P-60; P-76]

16. The District school psychologist completed selected tests from the Woodcock-Johnson III Test of Cognitive Abilities and the WAIS-III on May 12, 2006, four and a half months after testing was authorized by the Parent. The school psychologist found that the Student's General Intellectual Ability was 93 based on the Woodcock-Johnson III Tests of Cognitive Abilities. Also, based on the Woodcock-Johnson III, she found that the Student's retrieval fluency was a 74 but the school psychologist deemed this score an outlier and it was not used. After discounting the 74, Ms. Hoyt concluded that long-term retrieval was a strength. She noted that there were weaknesses in processing speed and short-term memory and that his behavioral and emotional health is in the clinically significant range for school problems, attention problems, learning problems, emotional symptoms, personal adjustment and adaptive skills. The school psychologist did not offer an opinion in her report as to whether the Student qualified as a student in need of special education. [Exhibit P-61]
17. The Parents did not authorize the school psychologist to conduct the Woodcock-Johnson III Test of Cognitive Abilities or the WAIS-III. The WRAML test for memory authorized by the Parents was not performed. The school psychologist did not complete each test that the Parents had consented to, nor did she administer an IQ test, the WISC IV, as noted on the consent form. [Exhibits P-58; P-61]
18. The math, reading, and writing portions of the Woodcock-Johnson III Tests of Achievement were conducted by a District special educator, Sandra Feranec. The testing was completed on May 22, 2006, five months after the Parent authorized testing. Ms. Feranec found that the Student's standard score on writing samples was 78, the math calculation cluster score was 75 and calculation was at a standard score of 72. Feranec noted that the Student did not complete addition problems with multiple terms, fraction problems, multiplication problems with decimals, and percentage problems. [Exhibit P-64]
19. A 504 Meeting was held on May 18, 2006 to discuss the District's evaluations. [Testimony Mother, Exhibit P-61] The 504 team discussed the fact that the Student had been experiencing considerable problems with attendance, completion of work and grades. He was failing Children's Literature, failing Statistics and Probabilities, failing Resource B, was making unsatisfactory progress in Health/PE, and had missed 24 days of school at the time of the meeting. The 504 team discussed that the Student should drop Children's Literature since he was failing, and use the 8th period to catch up on his other school work. [Exhibit P-61] The Student eventually dropped Children's Literature because he couldn't keep up with the work. [Testimony Mother] The Mother indicated that the Student was missing the English fundamentals and could not do the English. [Exhibit P-61] The Mother expressed concerns that the Student could not express himself in writing. [Testimony Mother] After

- discussing the psychological evaluation, the 504 team decided to reconvene as a PPT to discuss the testing and the Student's difficulties further. [Exhibit P-61]
20. On May 19, 2006, the District issued a Notice of a Planning and Placement Team Meeting to be held on May 30, 2006. The notice indicates that the purpose of the PPT Meeting was to "Reconven[e] from 504 on May 18, 2006." [Exhibit P-62] The PPT Meeting was attended by the school psychologist, but not by Patricia Roszko, the District special education administrator or Sandra Feranec, the special education teacher who conducted the achievement assessment of the Student. Neither a speech and language professional nor an occupational therapist was invited to the meeting. [Exhibit P-64]
 21. The Parent was under the impression that the meeting held on May 30, 2006 was a 504 Meeting, not a PPT Meeting. The letter from the District dated June 16, 2006 indicates that the minutes from the meeting were minutes of a 504 Meeting held on May 30, 2006. [Exhibit P-64] Nonetheless, despite all of the confusion evident in the documents provided to the Student and Parents from the District, the May 30 meeting was a PPT meeting.
 22. The minutes of the May 30, 2006 meeting [Exhibit P-64, p. 3] indicate that the school psychologist attended the PPT, but Ms. Roszko and Ms. Feranec did not attend the meeting. The PPT reviewed some of the testing during the 504 Meeting on May 18th and finished reviewing the testing during the PPT Meeting on May 30, 2006. [Testimony Mother] The minutes of the May 30 meeting [Exhibit P-67, pp. 4 and 6], indicate that the Parent expressed concerns that the Student needs help due to his chronic Lyme disease, and that he was in grave trouble at school. At the time of the PPT meeting the Student was failing Children's Literature, failing Statistics and Probabilities, failing Resource B, was making unsatisfactory progress in Health/PE, and had missed 25 days of school. [Exhibit P-64] The school members of the PPT determined that the Student was not eligible for special education as a child with learning disabilities. The Parents disagreed. [Exhibit P-67] The minutes do not indicate how the determination was made that the Student did not have a specific learning disability. Further, the minutes make it clear that the PPT did not include a speech and language professional or an occupational therapist, and that the team did not discuss whether the Student was eligible for special education under the IDEA categories of Speech and Language Impairment or Other Health Impaired. [Exhibits P-64, P-67]
 23. The Parent's request for an independent neuropsychological examination was denied during the PPT Meeting on May 30, 2006. [Exhibit P-64]. The District did not request a hearing to prove that the evaluations completed by the District were appropriate. [Testimony Mother] The Parent renewed her request for an independent evaluation in a letter to Ms. Roszko dated June 10, 2006. [Exhibit P-65]

24. The District failed to conduct an observation of the Student in his learning environment to document his performance and behavior in the areas of difficulty. [Testimony Ms. Roszko, School Psychologist]
25. The PPT failed to document the basis of making its determination that the Student did not qualify for special education under the IDEA. [Exhibits P-64 , P-67]
26. The PPT failed to complete a multidisciplinary evaluation report, failed to determine whether the Student's level of functioning was due to the lack of appropriate instruction and failed to base its analysis of the Student's ability on a norm-referenced IQ test. [Exhibits P-64, P-67]
27. In a letter dated June 10, 2006 the Parent reminded the school of her concern that the Student had a health condition which affected his cognitive functions such as memory and processing of information as well as pain, fatigue and other symptoms. [Exhibit P-65] The District never called a PPT to discuss whether these health issues and the effect they were having on his educational performance might qualify him for special education. [Testimony Mother]
28. On June 19, 2006, Dr. McAllister wrote a letter stating his opinion on the Student's disability. He stated that the Student has been diagnosed and treated by him for Lyme disease, that many of his neurological, cognitive and emotional difficulties are possibly related to Lyme disease and that he recommended that he undergo a comprehensive neuropsychological evaluation to further his educational goals. [Exhibit P-66]
29. A 504 Meeting was held on June 20, 2006. [Exhibit P-67] The stated purpose of the meeting was to "continue the last meeting (May 30th).” In that meeting Mother reiterated her concern that the Student's health issues were impacting his educational performance, that the Student had not progressed in his educational program and reiterated her request for an independent educational evaluation. The 504 team disagreed with the request for independent evaluation. The parent indicated she would proceed to due process over the issue. The 504 team indicated that the Student would take Alps English for a second time as he dropped the course previously having missed too many classes. The 504 team also agreed to put the Student in a 1:1 special education instruction for a literature based English class. [Exhibit P-67] The 504 team, including the school psychologist, determined that the Student was in much pain due to the Lyme disease and that the pain has spread over his spinal column and effects (sic) his neurological functioning (processing of information, memory). [Exhibit P-67] The 504 team determined as well that the Student's status should be changed from a twelfth to an eleventh grader, due to the loss of credits from the dropped classes. The team continued basically the same accommodations. The impact of these accommodations was minimal. [Testimony Mother]

30. At the time of the 504 Meeting on June 20, 2006, the Student was failing Children's Literature, Resource B, Statistics/Probabilities, was making unsatisfactory progress in Health/PE and had missed 26 days of school. [Exhibit P-67] The Student was withdrawn from Children's Literature because he had no chance of passing. [Testimony Mother]
31. On December 7, 2006 Mother and the Student wrote letters to the District administrator Pat Roszko reiterating their position that the Student should be reclassified from a 504 student to a student who is eligible for special education under the IDEA due to weaknesses in math, written expression and neurological deficits. [Exhibit P-71]
32. On December 22, 2006 the District's Special Education Director issued a Notice of a PPT Meeting to be held on January 11, 2007. The Notice indicated that the purpose of the meeting was to "develop, review or revise the IEP" and to "consider transition needs/services." [Exhibit P-88] The Parents objected to the notice on the ground that the purpose of the meeting – to determine if the Student is eligible for special education – was not identified as a subject of the meeting. [Exhibit P-74]
33. The District did not respond to the Parents' letter. [Testimony Mother] Rather, it issued a revised notice that indicated that one of the purposes of the PPT would be to review evaluation results and determine if the Student is eligible for special education. [Exhibit P-73] The revised notice was never sent to the Parents. [Testimony Mother]
34. The Parents requested an independent evaluation from Dr. Amy Palmer. In that evaluation, Dr. Palmer determined that the Student had a full scale IQ of 96, and that his working memory and processing speed were significantly lower. His complex working memory, sequencing skills, and verbal fluency were in the Impaired to Low Average ranges. He had difficulty remembering initial words that were given during the evaluation. She also concluded that his ability to complete math problems was "impaired" with his performance falling at the first (1st) percentile and consistent with the fourth grade level. She also found he displayed difficulties with subtraction, which require him to borrow, multiplication, long division, fractions, decimals and algebraic equations. Written expression, which required him to write sentences and an essay, was low average. Dr. Palmer also found his responses were consistent with a "double depression" with periods of major depression superimposed on his dysthymia at times. His self concept is very harsh and negative. He is extremely self critical and quite pessimistic about his future. Also, he was withdrawn and introverted towards others. Finally, the neurocognitive testing revealed weaknesses with auditory attention, auditory complex working memory skills, speed of information processing, auditory learning, verbal fluency and mental flexibility. Dr. Palmer recommended, among other things, special education in mathematics. [Exhibit P-76]

35. A PPT Meeting was held on January 11, 2007. [Testimony Mother] The District special educator administrator Ms. Roszko attended, as well as the school psychologist. Dr. Amy Palmer's independent evaluation was discussed at the meeting. [Exhibit P-76] The PPT minutes indicate that the school employees did not agree with Dr. Palmer's conclusion that the Student was eligible for special education because he had average math reasoning skills, achieved proficiency on the math portion of the CAPT, and was missing continuous practice in math. The Mother stated she disagreed with the decision. The minutes state "Patty Roszko discussed the eligibility criteria under RTI. The Barlow team discussed that [the Student's] difficulties are not severely impacting his ability to access his education." The team also indicated they would not reimburse the family for the neuropsychological evaluation. The Prior Written Notice states that the action recommended by the PPT was to "Implement 504". The 2nd Mid-Quarter Progress Report stated that at the time the Student was "in danger of failing" Alps English, that he had missed 16 days of school, and that generally he had a positive attitude toward school, that he was cooperative in class and that his "work shows time, care, and effort." [Exhibit P-76]
36. The Multidisciplinary Evaluation Report prepared by Ms. Roszko, states that the District's eligibility determination included a determination that the District is utilizing an identification process that determines if the child responds to scientific research based intervention as a part of the evaluation procedures. [Exhibit P-75] However, according to the District special education administrator, this box was checked in error as the team based its determination on whether there was a severe discrepancy, not on the RTI model. [Testimony Ms. Roszko]
37. From the Multidisciplinary Evaluation Report prepared by Ms. Roszko, the District's special education administrator, the team concluded that the Student has a disorder of his basic psychological process in the areas of processing speed and working memory. [Exhibit P-75]
38. The Multidisciplinary Evaluation Report indicates that the team found a severe discrepancy between ability and performance in mathematics calculation but inexplicably checked that the criteria for determining eligibility were not met. [Exhibit P-75]
39. The Multidisciplinary Evaluation Report indicates that the team determined that the Student's severe discrepancy was not the result of lack of instruction in reading or math, visual, hearing or motor impairments, mental retardation, emotional disturbance, environmental, cultural or economic disadvantage, limited English proficiency, motivation, or situational trauma. [Exhibit P-75]
40. The Parents requested a hearing on May 23, 2007. In that request the Parents asserted that the District violated the Student's rights under the IDEA by failing to

identify him as a child in need of special education and related services during the 2005-2006, 2006-2007 school years and by failing to provide special education and related services to him during those years. [Exhibit H.O.1]

41. At the time of the hearing, the Student was receiving homebound instruction on the advice of Dr. McAllister because he was having problems most likely associated with Lyme disease that were causing neurological difficulties and impacting his ability to be at school and to function in the school environment. [Testimony Mother] Dr. McAllister indicated that the Student was experiencing difficulties that were interfering with his ability to attend school, including tremor, athetosis, and altered mentation. [Exhibits P-84, P-85] These problems have been exhibited in school for years, but they have become progressively worse within the six month period prior to the hearing. The District granted the Parents' request for homebound instruction. [Testimony Mother]
42. At the time of the hearing, the Student was currently taking a variety of medications administered by his neurologist for his neurological disabilities including Cymbalta, Wellbutrin, Clonidine, Lyrica, and Vicoprofin. Wellbutrin is an antidepressant. Cymbalta is administered for depression and Clonidine, Lyrica, and Bicoprofin are administered for pain. [Testimony Mother]

CONCLUSIONS OF LAW:

The Parents and Student have brought this action in accordance with the Individuals with Disabilities Education Act which provides for special education and related services to children with disabilities, from birth through age 21, seeking compensatory education for the failure of the District to provide a free appropriate public education to the Student during the 2005-2006 and 2006-2007 school years. They also seek reimbursement for evaluations of the Student.

I. Burden of Proof

In Connecticut, the regulations expressly state that the District 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 District has not met its burden in this case.

II. Procedural violations

The Supreme Court 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 District 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 infringing 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 (9th Cir. 2003), citing *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F. 2d 1479, 18 IDELR 1019 (9th Cir. 1992), accord, *W.A. v. Pascarella*, 153 F. Supp. 2d 144, 35 IDELR 91 (D. Conn 2001).

The Student has been denied special education and related services under the IDEA due to the District’s substantial violations of his procedural rights.

The Supreme Court has observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage ... as it did upon the measurement of the resulting IEP against a substantive standard." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982). Consistent with this emphasis, the Second Circuit recently described the inquiry into

whether a school district fulfilled its procedural obligations under the IDEA as focusing on whether the parents had an adequate identification, evaluation and provision of a free appropriate public education to the child. *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2nd Cir. 2005); *see also, Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir.2001)(internal citation omitted).²

The evidence is overwhelming that gross violations of procedural rights occurred. First, a PPT Meeting was not called to discuss the necessity for evaluations as required by the IDEA and Connecticut Regulations § 10-76d-10. The Board is required to convene a PPT at the request of the parents or school personnel whenever the child “may require special education and related services.” 20 U.S.C. § 1414(a)(1); Conn. Reg. § 10-76d-9. The Parent contacted the District in early December 2005 and indicated that an evaluation was urgently needed because the Student was struggling in school, and because he had a recent diagnosis of CNS Lyme disease that was affecting his cognitive functions. District employees were well aware that the Student had excessive absences, that he was not meeting course requirements in three subjects, that he had been suspended for alcohol abuse, and that he had not met goal on CAPT testing in reading and math. Based on these facts, the District had a duty to convene a PPT Meeting and evaluate the Student under 20 U.S.C. § 1412(a)(1) and Conn. Reg. § 10-76d-10. By not calling a PPT Meeting and conducting a thorough evaluation of his educational needs, the District violated the Student’s rights under IDEA.

² (“Substantive harm occurs when the procedural violations in question seriously infringe upon the parents’ opportunity to participate in the IEP process.... In addition, procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA.”)

The District evaluation was woefully delayed for almost half a school year, clearly a violation of the Student's rights. The District's evaluations took five months to complete. This violates the requirement in 20 U.S.C. §1414(a)(1) that evaluations for eligibility must be completed within sixty days of the date the requested testing is approved by the parents.³ This deprived the Student of an educational opportunity and therefore violated his right to FAPE.

Third, the District failed to prove that it complied with requirements relating to informed consent in 20 U.S.C. § 1414(a)(a)(1)(D)(i)(I) and Conn. Reg. § 10-76d-8. The record shows that the District failed to obtain informed consent for the psychological testing it performed. The District requested and obtained written consent from the Parent for the following psychological tests: WISC IV, and WRAML and Behavior Rating Scales. However, the school psychologist actually performed the WAIS-III and Woodcock-Johnson III Test of Cognitive Abilities. This denied the Parents the opportunity to discuss which testing should have been conducted to determine if the Student was a child with a disability and by whom that testing should have been conducted.

Fourth, the District failed to prove that the teams that conducted the evaluations and made the decisions as to eligibility were composed of all appropriate qualified individuals as required by 34 C.F.R. § 300.308. It failed to prove that a speech and language professional was not a necessary member of the PPT in light of the student's

³ The District's attempt at hearing to circumvent this argument by asserting that this was a reevaluation under Section 504 and not an IDEA evaluation is unavailing as the IDEA defines an "evaluation" as one conducted to determine if a child is eligible for services under the IDEA. A "reevaluation" is conducted on children who have been previously determined to be eligible under the IDEA and is plainly inapplicable here. *See*, 34 C.F.R. §300.303.

disabilities. A speech and language professional should have been included because the Student demonstrated a need for speech and language intervention in testing, and because he had a long history of listening problems. [Testimony Mr. Aronin] A speech and language professional's involvement was essential because the Student demonstrated during testing impaired verbal fluency, weaknesses in auditory tension and complex memory skills and weaknesses in auditory learning and auditory processing deficits. [Testimony Dr. Cherkas-Julkowski; Exhibits P-76, P-80] Inclusion of a speech and language professional would have focused the team on such areas as oral expression and listening comprehension that were entirely overlooked by the PPT.

Fifth, the District failed to document the basis for its determination that the Student did not have a specific learning disability. The minutes of the PPT meetings on May 30, 2006 and January 11, 2007 and related documents do not reflect the basis for the PPT decision that the Student did not have a specific learning disability, what observations were conducted of the student in his educational environment, how the educationally relevant medical findings were factored into the decision, how the student's performance in school impacted the decision, how the child's motor impairment affected their decision, and whether the Student participated in a process that assesses the child's response to scientific research-based intervention.

The District's failure to document the basis for its decision is important here and is no mere technicality. The District's witnesses disagreed as to how the decision denying eligibility was made. The District's special education administrator, Ms. Roszko, testified that the PPT used a standard ability score of 95 to determine whether a severe discrepancy between ability and achievement exists. The school psychologist, Ms.

Hoyt, testified that she did not know where this standard score of 95 came from.

Further, the District noted that the discrepancy between ability and achievement was due to motivational factors, even though Ms. Hoyt and Ms. Roszko certified as required by the federal regulations, that motivation was not the reason for the severe discrepancy between ability and performance. Finally, the District witnesses testified that the student's response to research based instruction was not taken into account even though the PPT minutes and the Multidisciplinary Evaluation Report appear to indicate that the Students' response to scientific research-based instruction was taken into account. Finally, documenting whether observations were conducted and how the relevant medical findings were taken into account may well have brought critical information about the Student's performance and impairments to the team that it did not take into account.

These violations of the Student's and Parents' procedural rights denied them a meaningful role in the eligibility determination process, deprived the student of consideration of all information that was relevant to his eligibility, and deprived him of consideration and provision of FAPE.

III. Failure to Properly Evaluate, Identify and Provide FAPE.

The District failed to properly evaluate, identify and provide FAPE to the Student as required by 20 U.S.C. §1412(a)(1)(A); § 10-76d-10; 20 U.S.C. § 1412(a)(4) and Conn. Reg. § 10-76d-14.

The Student would be eligible for special education if, after an evaluation, the Student is found to be a "child with a disability." The term "child with a disability" means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious

emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. Sec. 1401(3), 34 C.F.R. Sec. 300.17(a)(1)

A. Evaluation

The District must conduct an appropriate and comprehensive evaluation of the Student, a full and individual evaluation, in accordance with 20 U.S.C. §1414(a)(1) and 34 C.F.R. Sec. 300.531.

In conducting its evaluation, the District shall ensure that a complete evaluation study is conducted for each child referred. Conn. Agencies Regs. Sec. 10-76d-9(a). The evaluation study shall include reports concerning the child's educational progress, structured observation, and such psychological, medical, developmental and social evaluations as may be appropriate in determining the nature and scope of the child's exceptionality. Conn. Agencies Regs. Sec. 10-76-9(a).

In evaluating the Student, the District must utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the child. 34 C.F.R. Sec. 300.532(b). The Student should be assessed in *all areas of suspected disability*, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 C.F.R. Sec. 300.532(g)[Emphasis added] The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. Sec. 300.532(h)

In interpreting evaluation data, the District shall draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background and adaptive behavior; and ensure that information obtained from these sources is documented and carefully considered. 34 C.F.R. Sec. 300.535

In this case, the District failed to conduct an appropriately comprehensive evaluation, and failed to evaluate in a timely manner. The evaluation did not appropriately address the Student's neurological, health, emotional and speech and language concerns, and included no classroom observation of the Student. Furthermore, the district did not complete every assessment to which the Parents consented, nor did it obtain consent for some of the assessments completed.

The District has an obligation under 20 U.S.C. § 1412(a)(1)(A); § 10-76d-10; 20 U.S.C. § 1412(a)(4) and Conn. Reg. § 10-76d-14 to offer FAPE to any child when there is a request by the child and his parents for evaluation. The District must prove that it offered FAPE by evaluating the student, convening a PPT meeting, determining eligibility, developing an IEP if the student is eligible and determining and offering an appropriate placement. *District of Columbia v. Abramson*, 48 IDELR 96, p. 400 (D.D.C. 2007). The District failed to prove it complied with these requirements.

(1) Specific Learning Disability

The District failed to prove that the Student is not eligible for special education and related services under the IDEA under the category of specific learning disability.

The federal regulations provide that the team may determine that a child has a specific learning disability if the child does not achieve adequately for his or her age or to

meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards: (i) Oral expression, (ii) Listening comprehension, (iii) Written expression, (iv) Basic reading skill, (v) Reading fluency skills, (vi) Reading comprehension, (vii) *Mathematics calculation*, (viii) Mathematics problem solving 34 C.F.R. Sec. 300.309(a)(1). The Connecticut regulations further state that having an identifiable learning disability "means a child who demonstrates a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes as indicated by a diminished ability to listen, speak, read, write, spell or do mathematical reasoning." Conn. Agencies Regs. Sec. 10-76a-2(d)

The District failed to show that the PPT properly determined that the standards in 34 C.F.R. §300.309(a)(1) were met. At hearing the District relied entirely on the testimony of its special education administrator and its school psychologist to reconstruct how the Section 504 and PPT teams arrived at the conclusion that the Student was not eligible. The District was forced to rely on the recollections of its administrative and professional staff because it is unclear from the minutes of the Section 504 Meeting of May 18, 2006 (P-61, p. 2), the minutes of the PPT meeting held on May 30, 2006 (P-67, pp. 4, 6), and the minutes of the January 11, 2007 PPT meeting (P-76) how the PPT arrived at its decision that the Student achieved adequately for his age or met State-approved grade-level standards in one or more of the enumerated areas. Although the District claims the Student has received sufficient credits to graduate, that he had a GPA of 2.06 and achieved proficiency in reading and writing on the CAPT test and goal on the CAPT test

in math by the 11th grade, that is insufficient to show that the Student achieved adequately or met State-approved grade level standards.

First, the District offered no evidence to show that the Student achieved satisfactorily in the areas of oral expression or listening comprehension as required by 34 C.F.R. § 300.309(a)(1). This, together with the fact that a speech and language professional was not involved and testing revealed significant deficiencies in verbal fluency, auditory learning and auditory processing, amounted to a significant oversight.

Second, the Student was performing in an unsatisfactory manner at the time the eligibility determination was made. The minutes of the Section 504 Meeting of May 18, 2005 indicate that the Student had earned a 44 on his most recent test and had completed only 1 of 7 homework assignments in Statistics/Prob, that he was in danger of failing in Children's Literature and was being encouraged by the Section 504 team to drop the course. Further, he had missed 23 days of school up to the date of the Section 504 Meeting.

The decision to deny eligibility was finalized at a PPT meeting on May 30, 2006. At the time of that meeting the Student was failing Children's Literature, Resource B, and Statistics/ Probability, was making "unsatisfactory progress" in Health/PE and had missed 26 days of school. This clearly could not constitute achieving adequately for the child's age under 34 C.F.R. § 300.309(a)(1). At the time the issue of the Student's eligibility was reconsidered on January 11, 2007, the Student was "in danger of failing" Alps English, and had missed sixteen days of school. Further, the Student could not do fractions, decimals, percentages and long division even though he needs these skills to

succeed in life, he was dysfluent in reading, had an extremely slow rate of processing and had severe deficits in working memory.

The fact that the Student was not achieving adequately for his age is even clearer when the nature of the courses he was taking is considered. During the first semester of the 2006-2007 school year the Student took only one academic course – Alps English. The Alps English course was a special education course taught by a special education teacher. All but one of the students in that class were special education or Section 504 students. The rest of his courses--Resource A, one-on-one instruction, and transition--were special education courses taught by special education teachers or in the case of the one-on-one course, instruction was provided by a paraprofessional. During the second semester of the 2006-2007 school year, the Student continued Alps English, general math, one-on-one instruction and graded resource. All of these courses were taught by special education teachers who were not highly qualified. The PPT could not have rationally concluded that passing these special education courses, taught by special education teachers who were not highly qualified, constituted adequate achievement for a child of his age.

Moreover, the Student was not progressing in this pseudo special education program that he was in.⁴ His program was wholly inappropriate. The Student was placed in special education classes, with special education teachers, without the benefits of an IEP to have appropriate goals and objectives and monitor his progress. Further in the placement in this inappropriate pseudo special education program, the Student was

⁴ This is not a Student who was excelling in his school work. Rather, he was struggling in a remedial program that was not addressing his educational needs.

not given the benefit of PPT meetings, an individualized education program, monitoring of progress on goals, and other procedural safeguards.

During the 2005-2006 school year the Student took the following courses: 3-D Model, Applied Chemistry, Children's Literature, Flight Tech, Res. A, Sculpture and Stat/Prob. All of these courses were taught by special education teachers who were not highly qualified. His one-on-one instruction was taught by a paraprofessional rather than a teacher. The Student did not complete Stat/Prob and received an F in Children's Literature. The only academic course the Student passed in 2005-2006 was Applied Chemistry, a hands-on one-semester course. Again, the team could not have rationally concluded that passing largely special education classes taught by special education teachers constituted adequate achievement for a child of his age.

Third, the record does not support the Student achieved satisfactorily for state-approved grade-level standards. Achieving in the proficient range is not sufficient.

Further, the Student's scores in math calculation have declined from 84 to 72 over the course of his high school career, and he has consistently failed to master objectives for decimals, percents and fractions. The Student still cannot do fractions, decimals, percentages or long division though he will need these skills in adulthood. The Student's sentences are incomplete, awkward, and run-on using simple constructions, and sometimes don't mean anything.

The Student's performance on CAPT testing is insufficient to show that he has achieved adequately for his age or met State-approved grade level standards in the areas listed in 34 C.F.R. § 300.309(a).

The District has also failed to prove that the Student has not met the second prong of the eligibility test set out at 34 C.F.R. §300.309(a)(2)(i) and (ii). To prevail, the District would have to prove that the Student has made sufficient progress to meet age or State-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention *or* the child exhibits a pattern of strengths and weaknesses in performance, achievement or both, relative to age, State-approved grade-level standards or intellectual development that is relevant to identification of a specific learning disability.

The District's proof on this issue is not persuasive as its relevant documentation and testimony are not credible. The District's Department Chair of Special Education, Patricia Roszko, and Rebecca Hoyt, the school psychologist, certified on the Multidisciplinary Evaluation Report that the District "is utilizing an identification process that determines if the child responds to scientific, research based intervention as a part of the evaluation procedures." The form indicates that by signing the form Roszko and Hoyt certified that this information was correct. [Exhibit P-75, *see also*, 34 C.F.R. § 300.311 (requiring a written certification by each team member that the report reflects his or her conclusion).⁵

The Student's course load could not be construed as scientific or research based. Moreover, Ms. Roszko testified at the hearing that the RTI criterion was not used and that she checked the box on Multidisciplinary Evaluation Report, indicating that the PPT used the RTI approach to determine eligibility, in error.

⁵ This certification appears to be consistent with the minutes of the January 11, 2007 PPT meeting which state that "Patty Roszko discussed the eligibility criteria under RTI." P76, p. 4.

Ms. Roszko also testified that her certification that the District had not used a severe discrepancy model was also incorrect. The Multidisciplinary Evaluation Report indicates that testing revealed a severe discrepancy between ability and achievement in the area of mathematics calculation. However, Ms. Roszko also checked the box indicating that the criteria for determining a severe discrepancy was not met. The only explanation for this contradictory information is that “[t]he Barlow team discussed that [the Student’s] difficulties are not severely impacting his ability to access his education.” [Exhibit P-76] This is not an acceptable explanation for the District’s decision or for denying eligibility.

The Board’s decision to deny eligibility is flawed in several additional respects. First, as previously mentioned, the school failed to determine whether the Student qualified for special education based on deficits in oral expression and listening comprehension, two areas specifically identified as essential elements of the analysis by the federal regulations despite clear and unmistakable indicators in the testing data that speech and language deficits were present.

Second, there are discrepancies as to how the presence or absence of a severe discrepancy was calculated. As the PPT minutes fail to explain how the determination was made and the evaluations of the District’s staff are silent on the issue, the District attempted to prove its case by asking its staff to reconstruct discussions that occurred during the PPT meetings. Ms. Roszko testified that the PPT based its decision on Ms. Hoyt’s determination that the Student had a full scale ability score of 95. Ms. Hoyt testified, however, that she had no idea where Ms. Roszko got this number from, and that the appropriate full scale ability score was 93. Ms. Hoyt’s determination that 93 was the

proper measure of the Student's ability was based on the Woodcock-Johnson Test of Cognitive Abilities. This is not an IQ test and was not a test authorized by the Parents. The use of this test to determine whether a severe discrepancy between ability and achievement existed is unacceptable.

Third, while it is unclear from the District's documentation and proof, it appears the PPT used a full scale IQ of 93, 95 or 96 to determine whether a severe discrepancy between ability and achievement existed during the PPT meetings on May 30, 2006 and January 11, 2007.⁶

Fourth, the District based its determination on testing that did not include observations of the Student's performance in the educational environment. An appropriate evaluation must include an observation of the child's academic performance in his academic environment. By failing to conduct such an observation, the PPT had inadequate information about how the Student functioned in school and inadequate information upon which to determine that the criteria for eligibility under SLD were not met.

Fifth, the District's witnesses agreed that there was a severe discrepancy in the area of math calculation skills. The District witnesses appeared to dismiss this severe discrepancy as insignificant on the ground that the Student was not permitted to use a calculator during testing. It is inappropriate to disregard the math calculation skills score

⁶ However, testing conducted by Ms. Hoyt reflects a twenty point spread. Dr. Palmer's testing on November 2006 reveals a twenty-three point spread. It was inappropriate for Ms. Hoyt and the PPT to base its determination on a full scale standard intelligence score in these circumstances. This conclusion is consistent with the Guidelines for Identifying Children with Learning Disabilities and the DSM-IV-TR which indicate where there is significant scatter in subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning ability.

as achievement testing is designed to measure whether the child can calculate, not whether he can use a calculator. [Testimony Dr. Cherkes-Julkowski]

Sixth, the District failed to administer appropriate measures of reading fluency. The Woodcock-Johnson III administered by Ms. Feranec, did not assess the Student's oral reading skills. The Student exhibits significant deficits in reading fluency skills when appropriate testing is administered.

The District attempted to argue that the Student's poor performance in school was due to poor motivation and/or drug use. Nothing in the record, including the testimony by the District's witnesses, supports such a conclusion.

The Student exhibits a severe discrepancy between ability and achievement; he has a specific learning disability and is eligible for special education services.⁷

The record reflects that the Student has an average IQ, and that his standard score in math calculation on the testing performed by Ms. Feranec was 72. The testing of Dr. Palmer also revealed a very deficient math calculation score of 64. The District's own testing established that the Student's math calculation score of 72 was in the 3rd percentile. [Exhibit P-64]

Severe discrepancies were also evident in the areas of writing samples and retrieval fluency. The Student's standard score on writing samples was 78, more than fifteen points below measured ability. [Exhibit P-64] Further, severe discrepancies were shown to exist in math fluency (81) from Ms. Feranec's testing [Exhibit P-64], and in cognitive efficiency (78), visual matching (79) and retrieval fluency (74) from the school

⁷ Ability is measured by an IQ score; achievement is measured by achievement testing in the areas of oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, math calculation and math problem solving.

psychologist's testing [Exhibit P-61]⁸. Dr. Cherkes-Julkowski documented dysfunction in the additional areas of reading fluency, site work efficiency and phonemic decoding efficiency. These are severe deficiencies in basic psychological processes involving the understanding or use of language that the District acknowledged in testing, but dismissed without explanation at the PPT meetings. These deficiencies should have resulted in a finding of eligibility under 34 C.F.R. § 300.8.

The third part of the test for establishing that a child has a specific learning disability is set out in 34 C.F.R. § 300.309(a)(3). Under this provision, the PPT must determine that the child's deficits are not primarily the result of a visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. The District offered no evidence that any of these exclusionary factors applied, and the Board's special education administrator and school psychologist certified by signing the Multidisciplinary Evaluation Report, P-75, that the severe discrepancies were not due to any of these factors.

Finally the District offered no testimony that the severe discrepancies were due to lack of appropriate instruction in reading or math. The District offered no evidence to show that the District had considered such data or that such data existed. Indeed, the uncontroverted expert testimony at hearing was that the Section 504 and instructional program offered by the District failed to address the Student's deficits.

(2) Speech and Language Impairment

Under 34 C.F.R. § 300.8(c)(11), a student qualifies for services under the IDEA if he has a –

⁸ The District acknowledged that the Student exhibited a disorder in the following basic psychological processes in P-75, p. 2: processing speed and working memory.

[C]ommunication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

34 CFR § 300.8(c)(11).

The student and Parents proved that the PPT did not consider whether the Student qualified for special education services under the category of speech and language impairment, despite the fact that the District's testing showed that he has severe deficits in retrieval fluency and processing speed, and Dr. Palmer's testing established that he has impaired verbal fluency, weaknesses in auditory tension and auditory complex memory skills, weaknesses in auditory learning and auditory processing deficits. All of these findings indicate language impairment issues and provided notice to the PPT that it should have evaluated the Student in this area. Meryl Aronin, the speech and language pathologist testified that the Student has many speech and language impairments including a very significant language impairment in the area of understanding the relationship of language in the context of sentences, a disability in semantics that is two standard deviations below the norm, a significant deficit in the ability to apply language to different situations and a significant gap in the communication skills he needs to converse as an eighteen year old. The Student scored in the 5th percentile in Listening Comprehension, in the 12th percentile in Interpreting Intents and the 9th percentile in speaking grammar.

Mr. Aronin also found that the Student has low muscle tone in his lips and tongue, that he has a left-sided weakness and a tremor on the left side of his face, that the movement of his tongue is restricted, and that he has a tremor and deviation in his soft pallet.

The student qualifies for services under the IDEA under the category of speech and language impairment because these deficits adversely affected the Student's educational performance.

(3) Other Health Impaired

34 C.F.R. § 300.8(c)(9) provides that

- (i) Other health impairment means having limited strength, vitality, or alertness, ...that results in limited alertness with respect to the educational environment, that—
- (ii) Adversely affects a child's educational performance.

The Student was eligible for special education under the IDEA under the category of Other Health Impairment due to the fact that he has Lyme disease, arthritis, and brain injury caused by a concussion, and that working memory and the ability to attend and concentrate in school are affected. He also suffers from severe pain and fatigue. These conditions impact the Student's ability to benefit from special education in that they affect his ability to attend in class.

The District staff was well aware of these disabilities as they had been documented in numerous physician notes, Section 504 meeting minutes and letters from the Parent. However, the PPT documents reflect no analysis as to whether the Student is eligible for services under the IDEA under the category of OHI. The PPT should have considered whether the Student is eligible for special education under the IDEA under the category of OHI, but did not.⁹

IV. Remedy for failure to identify and provide FAPE

Under IDEA a child with a disability is eligible for services if the child needs special education by reason of his disability. 20 U.S.C. § 1401(3) The District failed to

⁹ In addition, the PPT failed to consider whether the Student was eligible under SED, in light of the depression noted by Dr. Palmer.

provide FAPE to the Student for the 2005-2006 and 2006-2007 school year. Therefore, the Student is entitled to an award of compensatory education.

The District claims that at this time, the Student has graduated, although his diploma has been not been issued to the Student during the pendency of the hearing. The District further claims that the Student has satisfied the graduation requirements for Joel Barlow High School. Contrary to the District's argument, however, graduation from high school is not a per se indication that the Student has received FAPE. *San Dieguito Union High School district v. Guray-Jacobs*, 44 IDELR 189 (S.D. Calif. 2005). The District's argument fails to appreciate the distinction between a student's right to receive educational services pursuant to the IDEA, which would terminate upon a student's graduation from high school, and a student's right to a remedy for a school district's failure to provide those services during the student's education in the district, which survives a student's graduation from high school. *Id.* This Student is eligible for compensatory education based on the failure to provide the Student with FAPE, including the myriad procedural violations set forth in this decision.

The compensatory education includes several components.

The Student has a pressing need for a transition plan because he does not have functional skills. He does not have functional skills in math or reading fluency, and he does not have functional communication skills in many ways according to the most recent speech and language evaluation. It is also not clear what direction he should be heading in terms of career development. The compensatory education must include a transition plan and services.

An appropriate special education program must be developed and implemented that also addresses the Student's dysfunctions in math, writing and reading and addresses strategies to help the Student cope with his working memory deficits. This should be addressed by an appropriate transition plan that is developed by the PPT with the mutually acceptable independent educational consultant and implemented by a mutually acceptable private agency, in conjunction with the mutually acceptable independent educational consultant. This instruction should take place in the work and school postsecondary program specified in the Student's transition plan.

The Student's transition plan and IEP must address his need for instruction to prepare him for competitive employment. He needs to be placed in internships with adequate support services so that he can be successful and taught the social and behavioral skills he needs to be successful in those environments. He also needs continued instruction in independent living and community participation and in the postsecondary areas of math, writing and reading to address his learning deficits. He should also be provided instruction in identifying and pursuing postsecondary education alternatives. He will also need to be taught organizational and study skills, and assistive technology support to compensate for the learning deficits that cannot be remedied.

The Student requires speech therapy with a focus on pragmatic skills to improve social communication skills, oral motor/speech intervention to improve speech intelligibility and further development of language comprehension skills.

The Student was improperly denied a free appropriate public education during the 2005-2006 and 2006-2007 school years, and shall be provided two years of compensatory education as set forth in the order.

V. The District is Responsible for the Student's Independent Evaluation

34 CFR § 300.502 and Conn. Reg. § 10-76d-9(c) provide that parents have a right to an independent educational evaluation if they disagree with the evaluations of the District. Here the Parents disagreed with the evaluations of the District's special educator and school psychologist and requested an independent examination. Their request was denied during the PPT Meeting on May 30, 2006. The District did not request a hearing to prove that the evaluations completed by the District were appropriate. The Parent renewed her request for an independent evaluation in a letter to Ms. Roszko dated June 10, 2006. The District did not respond or request a hearing.

34 CFR 300.502(b)(2) provides that if the parent requests an independent evaluation at public expense the District must either file a due process complaint to prove that its evaluation is appropriate, or ensure that the independent evaluation is provided at public expense. Since the District failed to request a hearing, it must pay for the independent evaluation of the Parents. The District must pay for the independent evaluations requested by the Parents in the areas of special education, psychology, and to address questions addressed by the Board's evaluations. *See, In re: Solanco School Dist.*, 26 IDELR 896 (Penn. SEA 1997); *In re Grapevine Colleville Independent School Dist.*, 28 IDELR 1276 (Texas SEA 1998). Therefore, the District shall pay for the evaluations conducted by Dr. Palmer, Dr. Cherkes-Julkowski, Ms. Kardos and Mr. Aronin.

FINAL DECISION AND ORDER:

1. The District violated the Student's rights under the IDEA by failing to identify him as a child in need of special education under the IDEA category of Specific Learning Disability, Speech and Language Impairment or Other Health Impaired during the 2005-2006 and 2006-2007 school years, and by failing to provide the Student with special education and related services.¹⁰
2. The District failed to properly test [assess] the Student.
3. The District failed to properly assess the Student's eligibility for special education and related services.
4. The District failed to provide the Student with specialized education that met his individual needs.
5. The Student was eligible for special education and related services during the 2005-2006 and 2006-2007 school years.
6. The District shall provide the Student with compensatory education to compensate the Student for the District's failure to provide special education to him for the past two school years. This compensatory education shall include the development and implementation of an appropriate IEP, including an appropriate transition plan that comports with the requirements of the IDEA and State Guidelines entitled *A Training Guide to Implementing Comprehensive Transition Services for Youth with Disabilities*.
7. The District shall retain a mutually acceptable independent educational consultant to assist the PPT to develop and implement an appropriate IEP and transition plan for the two years of compensatory education that the Student shall be provided.
8. The District shall retain a mutually acceptable private agency to provide researched based instructional services and community based job coaching services necessary to implement the IEP and transition plan for the two years of compensatory education that the Student shall be provided.
9. The District shall retain a mutually acceptable consultant on assistive technology to conduct an AT evaluation and implement the recommendations from that evaluation for the two years of compensatory education that the Student shall be provided.
10. The District shall be required to reimburse the Parents for the independent evaluations by Dr. Miriam Cherkes-Julkowski, Mr. Meryl Aronin, Ms. Margaret Kardos and Dr. Amy Palmer.
11. The District shall not terminate the Student's eligibility for compensatory education during the two year period when the Student shall be provided the compensatory education.

¹⁰ The record reflects that the Student had satisfied the requirements for graduation from Joel Barlow High School. No authority was provided to allow this hearing officer to find that such a decision was invalid. Therefore, no finding is made as to whether the District violated the Student's rights by failing to identify and provide special education for the 2007-2008 school year. Nevertheless, the Student shall receive compensatory education during the 2007-2008 and 2008-2009 school years in accordance with this decision.