

**STATE OF MAINE**  
**SPECIAL EDUCATION DUE PROCESS HEARING**

**August 19, 2005**

**05.060H--Parents v. York School Department**

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: James Schwellenbach, Esq.

HEARING OFFICER: Shari Broder, Esq.

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This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on July 14, 2005, at the offices of Murray, Plumb & Murray in Portland, Maine, and July 25, 2005 at the offices of Drummond, Woodsum & MacMahon in Portland, Maine. In addition to counsel and the hearing officer listed above, those present for the entire proceeding were the parents, Jean Beetz, Director of Special Education for the York School Department ("District"), and Susan Macri, Assistant Director of Special Education. Testifying at the hearing were:

The mother

Gina Brodsky	Student Assistance Counselor
Scott Klenzak, M.D.	Director, Spring Harbor Hospital Adolescent Unit
Susan Macri	Assistant Director of Special Education
Steve Mosley	Assistant Principal
Colleen Quaile	Licensed Mental Health Counselor, Chamberlain School
Alalia Thaler	York High School Guidance Counselor
Denise Williams	LCPC-Counselor

All testimony was taken under oath.

**I. PROCEDURAL BACKGROUND:**

The parents requested this due process hearing on June 8, 2005. The case involves their daughter (henceforth “the student”), whose date of birth is xx/xx/xxxx.

On June 29, 2005, the parties and their counsel attended a prehearing conference. Present were: the mother and father; Richard O’Meara, Esq., counsel for the family; James Schwellenbach, Esq., counsel for the District; Jean Beetz, Director of Special Education; and Shari Broder, Esq., Hearing Officer. Documents and witness lists were exchanged in a timely manner. The parents submitted 67 exhibits comprising 223 pages, and the District submitted 22 documents comprising 87 pages.

Due to a request for extension, the hearing took place, as noted above on July 14 and July 25, 2005. Both parties requested and were granted leave to file written closing arguments, which were submitted on August 4, 2005, and the record closed at that time. The parties mutually consented to the Hearing Officer’s decision being due 15 days thereafter, or August 19, 2005.

**II. ISSUES:**

- a. Did York violate its child find obligation or otherwise delay the student’s referral, evaluation and program in violation of the special education law or regulations?
- b. If so, is the family entitled to compensatory education?
- c. Did York fail to provide FAPE to the student prior to her parents’ withdrawal of her from public school and her enrollment at the Chamberlain School?
- d. If so, is the family entitled to reimbursement for unilaterally placing the student in private school?
- e. Is the family entitled to an order continuing the student’s placement at the Chamberlain School until such time as she is able to transfer successfully to an appropriate and less restrictive placement?

### **III. FINDINGS OF FACT**

1. The student is xx years old. Her family lives in York, Maine, where the student attended public school until January 24, 2005.
2. The student is of average intelligence, and very artistic. Throughout elementary school, she was a good student and loved school. During xx grade at York Middle School, her grades started to decline, and she began experiencing depression regularly. The school nurse became aware that the student had been cutting herself enough to draw blood and burning herself, and called the parents about this. The parents took the student to a counselor for help.
3. In xx grade, the student continued to injure herself, and began seeing a different therapist. In therapy, the student worked on issues to help her in school, but her grades declined nonetheless. As the student reached the end of xx grade, she was nervous about attending high school, but she had a good group of friends for support.
4. The student began attending xx grade in September of 2003. Her sadness increased. P-132. In the spring of xx grade, a very close family friend died, as well as the family dog and cat. Several of the student's close friends moved to other towns, and the student broke up with her boyfriend. The student's grades declined. Although she did well in art and chorus, she failed biology, got a 76 in pre-algebra, an 81 in English and health, and 77 in computers.
5. Gina Brodsky is an adolescent counselor who works as a student assistance counselor at York High School, although she is employed by York Hospital. One of the programs she oversees is the Leadership Resiliency Program (LRP), which is a national, scientifically-based program designed to increase student grade point averages, overall wellbeing, and improve student attendance. Ms. Brodsky co-facilitates this group with Andrea Warren of York Hospital, and decides which students should participate. Participants are in the lower half of the class

academically, but demonstrate leadership potential. When the program was introduced in York High School in the fall of 2004, Ms. Brodsky chose the student to participate because she knew several of her friends had moved recently, and thought that she would benefit from additional support. There were weekly group meetings, and students engaged in other activities, including volunteering and outdoor adventure-based activities. The student fully participated in this program, and had a good relationship with Ms. Brodsky.

6. Nonetheless, early into xx grade, the student's attitude worsened. She had a negative attitude about school, particularly the peer hierarchy, and felt resentment towards kids who easily fit in. The student became obstinate, increasingly talked back to her parents, and began skipping her classes. Around that time, she became friends with a girl who will be henceforth referred to as "XX." The student, who is bisexual, became involved in an exclusive and destructive relationship with XX. The two girls were in math class together. XX encouraged the student to drink alcohol and smoke marijuana, and the student began doing this with xx regularly.

7. On October 1, the student ran away from home and stayed at XX's house. Her parents called the York Police Department, and her father went to xx's house to see whether the student was there. xx's mother lied to the father, and denied the student's presence at her home. The parents also spoke with Gina Brodsky about the student's disappearance, and Ms. Brodsky called XX, who also lied about the student's whereabouts.

8. The student returned home on Sunday, October 3. Because her mother was afraid she would run away again, she kept her out of school that week. Upon the student's return to school, the mother spoke with the Assistant Principal, Steve Mosley, and with Ms. Brodsky. Ms. Brodsky said she would keep an eye on the student, and would let the parents know if she missed class.

Additionally, Ms. Brodsky arranged a mediation session between the student's family and XX's family through Youth Alternatives, which the father reported went very well. P-128.

9. Around that time, the student began seeing Marie Guay, D.O., a psychiatrist. Dr. Guay evaluated the student with "Major Depressive Disorder, recurrent and severe. Rule out ADHD." She also noted suicidal ideation, self-abuse, and possible sexual orientation issues. P-134. Dr. Guay considered the student a very volatile patient who needed to be watched closely. P-135. She began treating the student with medication, and referred her to Denise Williams, LCPC, for therapy. Because the student needed a considerable amount of counseling support, Ms. Williams began seeing her twice a week. Dr. Guay wrote a note reporting that she was treating the student for depression, and that teachers should allow the student additional time for completing her assignments. Ms. Brodsky E-mailed the student's teachers about this. The student's parents also communicated some of the student's problems to her teachers.

10. The student's relationship with xx began to cause additional problems with [sic] at school, as the student began leaving class to meet xx, or skipping class entirely to do so, and the two of them were disruptive in math class. The student was not completing her assignments and was inattentive in class. Although the student's teachers and administrators were in contact regularly with the parents about these issues, by the end of the first quarter in mid-November, the student was failing three of her seven classes. Because it was apparent that the student would be unable to bring up her grades to pass two of her classes that semester, the school recommended that the student drop American Studies and Algebra. After discussing this suggestion with the assistant principal, Mr. Mosley, the parents agreed to it, thus allowing the student to focus on her remaining classes with the hope of passing them. In lieu of classes, the student was assigned additional study halls.

11. Because the student began skipping study hall to spend time with XX, Mr. Mosley recommended that the parents remove the student from school during that time. Consequently, the student only attended class for first period and last period each day.
12. On the night of December 6, 2004, the student's parents brought her to York Hospital because the student had cut herself badly near her wrists. P-103. The student had to be handcuffed to the bed rail for safety. P-104.
13. Ms. Williams told the parents they should refer the student for special education. The mother spoke with Ms. Brodsky about this on December 10. On December 14, Ms. Brodsky and Alalia Thaler, the student's guidance counselor, referred the student to the Pupil Evaluation Team (PET). The special education office received this referral on December 20. At the time, the mother spoke with Susan Macri about special education, and asked about different private schools, and how to go about getting the District to pay for them.
14. Holiday break began on December 22. During the break, the student spent New Year's Eve with XX. The two girls went to First Night Portsmouth, where they met two young men, and arranged to meet them later that night. XX's mother took the girls home, but after the mother went to sleep, the girls left the house and met the men. At the girls' urging, the men brought them alcohol, and took the girls to a hotel, where the girls got drunk. The men ultimately sexually assaulted them. XX's mother caught the girls sneaking back into the house at 5:30 a.m. The student did not tell her mother what had happened to her that night, but attempted to kill herself by taking 50 ibuprofen pills she obtained from xx. S. 71.
15. Assistant Special Education Director Susan Macri was assigned to the student's referral, and scheduled a PET meeting for January 14, 2005. In the interim, the parents were in touch with Ms. Brodsky and Mr. Mosley several times each week.

16. Due to an oversight, the District failed to inform either Ms. Brodsky or Ms. Thaler of the PET meeting. As neither could be there, the meeting was postponed until February 11, 2005. Because the District was concerned about being in violation of the Maine Special Education Regulations, had it delayed beginning the process until then, the District had the parents sign a consent form on January 17, 2005, so that the student's evaluations could be completed before the initial PET meeting.

17. On January 25, the mother found a suicide note the student had written to XX. She then read the student's diary, and learned that the student had been sexually assaulted on New Year's Eve. She also learned about other suicide attempts. The mother called Ms. Williams about this, who advised her to confront the student. When the mother did so, the student became extremely upset. The mother took her to see Dr. Guay, then Ms. Williams, but the student was out of control. Ms. Williams recommended that the student be evaluated for hospitalization. Consequently, the parents brought the student to Spring Harbor Hospital ("Spring Harbor"), where she was admitted.

18. The mother was very upset about the student's condition, and spoke with Ms. Brodsky about the student at length following her admission to the hospital. She also spoke with Mr. Mosley and Ms. Macri, but there was no discussion about how the student's hospitalization would affect the PET meeting and evaluations. Although the District typically tested students while they were hospitalized, Ms. Macri assumed that the student would return to school after a short hospitalization, which was normally what happened with District students who were hospitalized, and she could be evaluated at that time. Consequently, the District did not attempt to evaluate the student at Spring Harbor.

19. While the student was at Spring Harbor, Dr. Klenzak referred Michael Broderick, Ph.D., a licensed psychologist, to perform a psychological evaluation of the student. S. 71-79. Dr. Broderick concluded that the student had Bipolar Disorder. S. 78. He added that the student had a “chronic struggle with self-esteem and there could well be a double depression with an underlying Dysthymic Disorder.” S. 78. Dr. Broderick concluded that what was most important for the student was a stable and consistent environment upon the student’s discharge from the hospital. S. 78. He did not believe the student was a high suicide risk, but thought that she would benefit from a residential treatment program to address her many other needs. S. 78.

20. Although the average stay at Spring Harbor is 7-10 days, the student remained there for two weeks. Dr. Klenzak considered the student to be profoundly depressed, and thought she was one of the most severely depressed patients he had seen in his five years at Spring Harbor. Upon the student’s discharge, Dr. Klenzak wrote that the student had “severe Bipolar Disorder, depressed type and a parent-child relational problem.” S. 68. Given her severe mental illness and fragile state, he recommended that the student not return to public school. S. 68. Dr. Klenzak felt that the student would not be able to make progress there, even with accommodations, and that she needed a residential treatment program with specialized academic programming beyond the capabilities of the public school or home environment. S. 68. The parents researched and considered many different schools, and discussed several options with Dr. Klenzak, who considered the Chamberlain School (“Chamberlain”) very appropriate.<sup>1</sup>

21. On February 9, the student was released from Spring Harbor to the Turner Family Crisis Center (“Turner”) for several days for further evaluation. The mother told Ms. Macri that the

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<sup>1</sup> Dr. Klenzak testified that he felt the student would have had to have been hospitalized again, had she not been placed at Chamberlain upon leaving Turner.

student would only be there temporarily, but Ms. Macri did not know how long this would be. The mother explained that the student needed a long-term residential placement.

22. On February 11, there was a snowstorm forcing the cancellation of school and the PET meeting scheduled for that day. The parents were very concerned about having a placement for the student upon her discharge on February 14, as they feared that if the student returned home, she would run away or kill herself. Dr. Klenzak confirmed that the student was not safe to return home, and needed a residential placement. S. 68. Dr. Guay also reported that it was the opinion of her caregivers and parents that the student needed a therapeutic school environment for her stability and safety, and that she should be referred to a residential facility. P. 66. In an effort to have the PET consider the student's urgent need for a placement before she was discharged from Turner, the parents called Jean Beetz, and requested an emergency PET meeting in the afternoon after the snow had been cleared away. They also E-mailed the PET members at 10:13 a.m. for the same purpose, and emphasized that this situation was an emergency, particularly in light of the student's suicidal ideation. P. 70. In both that E-mail and another sent to Ms. Beetz, the parents explained that the student was going to be released from Turner on Monday, and that the medical staff at Spring Harbor insisted she be transferred to a residential therapeutic school facility as her next placement. P. 69, 70. The parents explained that without a PET meeting that day or on Monday, February 14, they would be forced to unilaterally place the student at Chamberlain, and seek reimbursement from the District. P. 69. The District responded that it could not reschedule the PET meeting until February 15. S. 64, 66.

23. The parents enrolled the student at Chamberlain on February 14. Chamberlain is a therapeutic residential placement where children in grades 6 through 12 have 24 hour a day support and supervision. It enrolls students with needs similar to the student's. There are seven

or eight residences, each with 15-18 students. The student to staff ratio is 4 or 5 to 1. Students attend class there, with larger classes having 14 students, and smaller ones having 5-8. Students earn points for positive behaviors, and are rewarded with more privileges. All students receive at least 45 minutes each week of individual counseling, as well as group counseling.

24. The following day, February 15, the PET met. At that time, there was a lengthy discussion about the student's history of depression and self-injury. P. 60. There was also discussion about why the parents chose to place the student at Chamberlain. P. 62. The PET determined that the student met the criteria to be identified as a student with an emotional disability. P. 62. The District felt that additional assessments were needed to determine the student's educational needs. P.62. The PET agreed to meet again on March 15 to review those assessments.

25. Because the District's evaluator was unable to go to Chamberlain to evaluate the student before the March 15 meeting, the meeting was postponed until April 6, 2005. On Monday, March 14, Susan Macri visited Chamberlain and conducted an observation. She observed the student in class for 45 minutes that day. She thought the facility was beautiful. The class she observed was comprised of the student, four other [sic] male students, and the teacher. The student was not feeling well that day, and had minimal interaction with the teacher and did not participate very much. S. 47. Ms. Macri was concerned that the work was not sufficiently challenging, as the student was given 45 minutes to complete her work, and did so in 10 minutes. S. 47. She observed the teacher to be [sic] negative and sarcastic with a student, and was disturbed by the teacher's behavior. S. 45-47.

26. The District sent Bruce Chemelski, a psychologist, to Chamberlain on April 4 to evaluate the student. Dr. Chemelski confirmed the diagnosis of Bipolar Disorder, and noted that the student's

depression remained in the clinical range. S. 32. He also found the student's anxiety, low self-esteem and attention difficulties to be clinically relevant. S. 32.

27. The PET first met to develop the student's IEP on April 6, 2005. The PET spent a long time working on this, and also met on April 25 and May 11 to complete the task. Staff from Chamberlain participated in these meetings by telephone. Chamberlain staff explained that all staff were trained in therapeutic behavior management, and were likely to interact in a therapeutic way with students. S. 12. The PET agreed that the student needed counseling and a therapeutic setting. S. 12. The District agreed that the student required a residential placement, and recommended Odyssey House, which it felt was more appropriate because it was geographically closer and offered additional family services. S. 13-14. The parents rejected this placement because the student's doctors, including Dr. Klenzak, felt that the student was too fragile for a transition at that point, as it would likely cause a serious setback for her. As Ms. Quaile wrote in an April 21, 2005 letter, the student had adjusted to her program, and developed trusting therapeutic relationships at Chamberlain. P. 19. The student had also developed friendships. P. 19. Ms. Quaile explained that to remove the student at that point would be detrimental to her success. P. 19. Because the student had a history of mistrust and dislike for clinical professionals, but had developed positive attachments at Chamberlain, moving her might affect the student's ability to develop such positive attachments in the future. P. 19. The Clinical Director at Odyssey House told Ms. Macri that he would not advise moving any student who had begun to adapt to a program.

28. The student is happy and doing well at Chamberlain. She has formed good relationships with other students and her therapists. Her parents describe her grades as "pretty good," and she is not having behavioral problems. The parents attend family therapy there periodically.

29. On June 16, the student came home to visit her family and attend her sister's high school graduation. The student was scheduled to remain at home for several weeks. XX learned that the student was home, and tried to contact her. Although the student resisted at first, eventually xx was able to contact her. This caused the student to break down and resume self-injurious behaviors, requiring her to return to Chamberlain early.

#### **IV. DISCUSSION AND CONCLUSIONS**

**Position of the Parents:** The parents believe that the District violated its child find obligations by failing to refer, evaluate and identify the student for special education in a timely manner, in light of her severe depression and declining grades in school. The student's difficulties should have given District personnel reason to suspect that the student may have [sic] a disability requiring special education before the middle of December 2004.

As a result of the District's failure to honor its child find obligation, and delays in evaluating and identifying the student that were caused by the District, the District was unable to uphold its responsibility to offer the student a FAPE, thus forcing the parents to find an appropriate educational placement for the student, and enroll her at the Chamberlain School. By the time the District made an offer of a residential placement on May 11, 2005, the student had already established strong relationships with her therapists and students at Chamberlain. The District's procedural violations resulted in a significant loss of educational opportunities to the student. Consequently, the family is entitled to full reimbursement for the student's placement at Chamberlain.

The weight of the evidence supports a conclusion that the student's placement at Chamberlain is appropriate, and should not be changed at this time. Thus, [sic] Hearing Officer

should order a continuation of this placement until the student is able to transfer successfully to a less restrictive environment.

**Position of the District:** The District argues that the only issue properly before the Hearing Officer is whether the District has met its Child Find duty, and the evidence will support the conclusion that it has. The student was referred to the PET less than four weeks after her grades revealed that she was struggling, and the District complied with the procedural time frames required by law for evaluating and identifying the student.

Because the parents removed the student from the District's schools [sic] and enrolled her in a private school without the consent of the District before the student received special education services, the District was under no legal obligation to develop an IEP for the student. For the same reason, the parents are not entitled to reimbursement for private school tuition or an order for the student's future placement.

#### **A. Jurisdiction of the Hearing Officer**

The District asserts that this hearing hinges on the single issue of whether the District met its child find obligations to the student, and argues that if it has, the Hearing Officer has no jurisdiction to consider the remaining issues. Although the District cites the case of *Greenland Sch. Dist. V. Amy N.*, 358 F.3d 150 (1<sup>st</sup> Cir. 2004) in support of its position, not only are the facts of that case distinguishable from this student's situation, but there is language in that case pointing to a contrary result in circumstances like the one before the Hearing Officer.

In *Greenland*, the student's parents placed her in [sic] private school before the school district had reason to suspect that the student needed special education, and she attended private school for at least six months before her parents raised the issue of special education with the District. In contrast, the student in this hearing had already been referred to the PET and was in

the process of becoming identified as a student with a disability when a crisis intervened, and her parents placed her in a private school because her doctors said she should not return home or to public school. The First Circuit anticipated an exception to its holding for students in such situations when it said:

These threshold requirements are key to this case: tuition reimbursement is only available for children who have previously received “special education and related services” while in the public school system (or perhaps those who at least timely requested such services while the child is in public school).

*Greenland*, 358 F.3d at 159-160. Footnote 7 of this decision notes:

Despite the language of the statute, some legislative history suggests that Congress meant to include children who had requested but not yet received special needs services during their period in public schools. See H.R. Rep. 105-95, at 91-93 . . . That issue does not need to be resolved in this case, as Katie’s parents never requested special education services for Katie while she was at Greenland.

*Greenland*, 358 F.3d at 160.

As the parents noted in their closing memorandum, at least one federal court has affirmed the First Circuit’s parenthetical holding in *Greenland. Carmel Central Sch. Dist. v. V.P.*, 373 F.Supp.2d 402 (S.D. N.Y. 2005).

It would be a very harsh result and inconsistent with the purpose and goals of IDEA to deprive a student in circumstances such as this of the benefits of IDEA, when her parents had to make a decision about an appropriate placement for her while she was in crisis, and before the District had completed the evaluation and identification process.

Thus, the parents’ unilateral placement of the student does not deprive the Hearing Officer of jurisdiction to decide tuition reimbursement issues, despite the fact that the student had not been identified on the date her parents enrolled her at Chamberlain.

## **B. Child find obligation**

There is no dispute that the IDEA places an affirmative, ongoing obligation upon school administrative units to identify and evaluate all children within the jurisdiction suspected of having disabilities and needing special education. 20 U.S.C. §1412(a). This includes students who are suspected of being student [sic] with disabilities and in need of special education, even though they are advancing from grade to grade. Maine Special Education Regulations (MSER), §7.2.

Here, Ms. Brodsky and Ms. Thaler made a referral to the special education office on December 14, 2004, which was received by the Director of Special Education on December 20. The parties disagree about whether this referral satisfies the child find regulations. The parents assert that the District should have suspected that the student had a disability that might [sic] require [sic] special education before that time.

Although the District was not aware of the extent of the student's psychological trauma, it knew: (1) since xx grade, the student had been superficially injuring herself; (2) her grades began to decline and she failed a course during xx grade; (3) she ran away from home on October 1, 2004; (4) she was skipping classes to meet with a friend who was a bad influence on her and the student was not completing her work; (5) in early October, she was seeing a psychiatrist for depression, who reported that the student's illness required that she have additional time to complete assignments; and (6) in mid-November, she was failing three subjects. It is not unusual for a student's grades to drop when adjusting to high school, or for an average student to fail a class during xx year. Additionally, adolescent depression does not necessarily mean that a student requires special education. While those factors alone would not always give reason to suspect the student had a disability, they do rise to that level when

combined with the others [sic] factors. Taking into account that hindsight is 20-20, the District should have suspected that the student had a disability requiring special education some time between early October, when Dr. Guay asked for accommodations for the student, and mid-November, when the student's first quarter grades came out. At that point, the appropriate response would have been to refer the student to the PET, rather than have her drop two important classes, given what the District knew about the student's depression.<sup>2</sup> Although in hindsight, immediate action may have prevented the disputes before the Hearing Officer, the District did not violate its child find obligation by making the referral in mid-December.

### **C. Timing of the student's referral, evaluation and program development**

The Maine Special Education Regulations contain an assortment of time frames in which the District must evaluate, identify and offer an educational program to a student with a disability. Federal regulations provide that a student must be evaluated "within a reasonable period of time" after the parents sign a consent to evaluate. 34 CFR 300.343(b)(i). It is the responsibility of the state to prescribe specific deadlines, and the Maine regulations do so.

MSER §7.7 requires the District to convene a PET within 15 school days of receipt of a referral for the purpose of reviewing existing evaluation data and determining the need for additional evaluations. Although the District scheduled a PET meeting within 15 school days of receipt of the referral, it was postponed almost one month, due to a mistake on the District's part. To compensate for that mistake, the District proceeded directly to the evaluation process. As there was little evaluation data to review at that time,<sup>3</sup> the District had good intentions to move the process along by beginning evaluations without a PET meeting. No violation is found with respect to that requirement.

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<sup>2</sup> The District was not ignoring the student's needs, but was assisting and supporting the parents and student in a number of ways during the fall of 2004, as discussed in the facts set forth above.

<sup>3</sup> The parties apparently were unaware of a psychiatric evaluation done by Dr. Guay in October 2004.

MSER §9.17 requires school units to complete evaluations, make an eligibility determination, and an offer of services in accordance with an IEP within 45 school days of the District's receipt of the consent to evaluate. This regulation further clarifies that a meeting to develop the student's IEP must be conducted within 30 days of the determination of eligibility. Assuming that the District's calculations are correct<sup>4</sup>, the District failed to meet either of those deadlines. A meeting to develop the IEP should have occurred no later than March 17, 2005, and an offer of services in accordance with the IEP should have been made by April 4, 2005. The PET did not meet to begin drafting the IEP until April 6, 2005, and the District did not make an offer of services until May 11, 2005, which was almost five months after the initial referral.

The District argued that those timelines were inapplicable, as the District had no responsibility to develop an IEP after the student was removed from school. For the reasons discussed in section A above, the District had an obligation to develop an IEP for the student, but did not do so in accordance with the deadlines required in the Maine Special Education Regulations.

In the alternative, the District argued that missing the deadlines was harmless error, in light of the parents' intention to keep the student at Chamberlain. It is merely speculative what decisions the parents would have made, had the District made an offer of FAPE within the time frame required by the regulations. Although the parents did not agree with the District's placement decision in May, the student had already been at Chamberlain for three months by that time, which allowed her to develop trust relationships with her teachers, therapists and friends there. The significant disparity between when the District was required to make an offer of FAPE, and when it actually made an offer is not harmless error.

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<sup>4</sup> These are found on pages 25-26 of the District's Post-Hearing Memorandum.

Untimely evaluations expose a school district to remedial actions. *Jose P. v. Ambach*, 533 IDELR 486 (2nd Cir. 1982). In *School Comm. of Town of Burlington v. Dep't of Educ.*, the Supreme Court confirmed the availability of tuition reimbursement as a form of relief to parents who unilaterally place a student in an appropriate private school. 471 U.S. 359, 370-71 (1985). The Supreme Court reasoned, “[r]eimbursement 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.” The remedy in this case is discussed below.

#### **D. Provision of FAPE**

As noted above, the evidence established that the student required a residential therapeutic placement upon her discharge from Turner on February 14, 2005. On February 9, 2005, Dr. Klenzak wrote that due to the student’s severe mental illness and fragile state, he did not recommend that she return to public school, and that she would not be able to heal without residential treatment and specialized academic programming beyond what the public school could provide. S. 68. Although there was other evidence supporting this opinion, there was no evidence to the contrary.<sup>5</sup> Three months later, the District reached this same conclusion when it made an offer of a FAPE to the student. Given the student’s serious illness, however, she could not wait three months. She needed a placement immediately. The District was not prepared to act that quickly, so the parents had no choice but to place their daughter in a suitable environment.

The IDEA provides parents of students with disabilities with a “self-help” remedy when the school district fails to offer them a FAPE in a timely manner. 34 C.F.R. § 300.403(c), *Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), *Florence County School Dist.*

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<sup>5</sup> See Dr. Guay’s letter dated February 15, 2005. S. 59, P. 66, Dr. Broderick’s evaluation, *see fact 19*, S. 78, testimony of Denise Williams.

*Four v. Carter*, 510 U.S. 7 (1993). Parents have a legal right both to place the student in an appropriate private school and to seek reimbursement from the school district for the costs of the student's education. See, e.g., *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1<sup>st</sup> Cir. 2002), citing *Florence County*, 510 U.S. at 13-15.

MSER §12.11 (S) requires parents who place their children in private school and request reimbursement of these expenses from the public school district to provide ten days' notice to the school district. Although the parents did not give the District ten days' notice, the Federal regulations provide for an "emergency" exception whenever compliance with that notice requirement "would likely result in physical or serious emotional harm to the child." 34 C.F.R. § 300.403(e)(2).

There is no doubt that the family falls within this exception. As explained above, the student's treating doctors and therapists agreed that the student needed a residential placement and specialized educational programming. The parents did everything within their power to try to get the PET to make this determination before the student was discharged from Turner. Although at that point, the District had not had the full amount of time allowed in the regulations to evaluate, identify and develop a program for the student, it also did nothing to respond, once the District became aware that the student's situation was an emergency. On February 14, when the student could not return to her former educational placement, the District was unprepared to offer her a FAPE. It offered the student no alternative to the parents' placement, nor did it argue at the hearing that the family had other reasonable options for the student upon her discharge from Turner. The District made several faulty assumptions, based upon its past experience, most notably that the student would be able to return to school immediately after her hospitalization. Based upon this assumption, the District elected not to evaluate the student while she was

hospitalized<sup>6</sup>, nor did it consider any alternatives to the public school, even after the family informed the PET on February 11 that the student needed an immediate residential placement, and that this was an emergency situation. Consequently, the District was simply unprepared to make FAPE available to the student on February 14, 2005.

#### **E. Appropriateness of Chamberlain School**

Both parties cite *Florence County* as setting the standard for private school tuition reimbursement. Under the holding of *Florence County*, parents must demonstrate that the public school did not provide FAPE, and that the private school placement is proper, which means, “education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Florence County*, 510 U.S. at 11. The First Circuit Court of Appeals cited the *Florence County* decision in holding that a residential placement was proper when the school district failed to provide the student with an adequate educational program. *Mrs. B. v. Rome Sch. Comm.*, 247 F.3d 29, 34 n.5 (1<sup>st</sup> Cir. 2001).

As discussed in section D above, the District did not provide a FAPE upon her discharge from her hospitalization. The evidence also establishes that the Chamberlain School is a placement that is appropriate under the IDEA. Dr. Klenzak told the parents that it was a good placement for the student. It provides a strong therapeutic component, appropriate academic courses for the student, close supervision, and programs for managing behaviors and student expectations. The student’s report card, and testimony from Colleen Quaile and the mother supported the evidence that this placement worked well for the student, and that she was making progress in all areas. P-136, P-224.

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<sup>6</sup> There was no dispute that the District could have evaluated the student at Spring Harbor, and had evaluated students while hospitalized previously.

Although Ms. Macri had some reservations about Chamberlain from her observation of the student in one class, the record overall supports a conclusion that Chamberlain is an appropriate placement for the student. This does not mean that Ms. Macri's concerns were not valid, but she had a very limited look at the school, and there was evidence both that her concerns have been addressed, and that Chamberlain overall was meeting the student's needs.

#### **F. Tuition reimbursement**

As the student's placement is appropriate, and the District provided no offer of FAPE until May 11, 2005, the parents are entitled to reimbursement of the costs they have incurred in maintaining the student's placement there since February 14, 2005. The Federal regulations provide: "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 (1999). Thus, the parents are entitled to all costs permitted under IDEA, including family therapy and counseling called for in the student's IEP, and transportation cost necessary to transport the student to Chamberlain and her parents to family therapy.

#### **G. The student's placement for the coming school year**

The remaining issue is whether the parents are entitled to an order continuing the student's placement at Chamberlain for the 2005-2006 school year. For the reasons set forth in section A above, the Hearing Officer rejects the District's argument that there is no jurisdiction to consider this issue.

The District offered little evidence about the Odyssey House and its program, although it appeared to be quite similar to Chamberlain School's program. Chamberlain has the advantage of a campus environment that is favorable to Hampton Beach, where Odyssey House is located,

but Odyssey House is closer to the student's home. This proximity was the District's main argument in favor of moving the student to Odyssey House. That argument, however, is far outweighed by the detrimental effect such a placement change would have on the student. Dr. Klenzak offered compelling testimony against moving the student to a different program at this point in her illness. The student has formed friendships and bonds with her therapists at Chamberlain, and is making progress there. Colleen Quaile, the student's current therapist, explained the student's need for stability, and the adverse impact such a move would have. Even the clinical director at Odyssey House recommended to Ms. Macri that it was unwise to move a student who had begun to form therapeutic bonds from one residential placement to another. Thus, Chamberlain continues to be the appropriate placement for the student.

The District argues that to continue the Chamberlain placement would unfairly reward the parents for unilaterally placing their child in [sic] private school. The District overlooks, however, the fact that the parents did this only because the District was unprepared to make any placement offer when the student desperately needed one, and that this was not caused by the parents, but by a PET meeting cancellation brought about by the District's error, the District's failure to conduct the student's evaluations in a timely manner, other delays caused by weather and faulty assumptions by school personnel.

### **ORDER**

After consideration of the evidence presented during this due process hearing, the Hearing Officer orders as follows:

1. The Hearing Officer has jurisdiction to decide all of the issues raised in this due process hearing.
2. The District did not violate its child find obligation.
3. The District violated the Maine Special Education Regulation §9.17 by failing to hold a meeting to develop the student's IEP within 30 days of the determination of eligibility,

and failing to make an offer of services in accordance with an IEP within 45 school days of the District's receipt of the consent to evaluate.

4. The District is responsible for the cost of the student's program at the Chamberlain School to date, including non-medical care, room and board, and transportation costs allowable under IDEA. The District is ordered to pay to the parents such costs as they have paid to date. The District shall pay directly to the Chamberlain School any such costs currently outstanding, other than transportation costs incurred by the parents, which the District shall pay directly to the parents.

5. The student shall remain at the Chamberlain School at the District's expense until such time as the PET determines that the student can be educated appropriately in a less restrictive setting.

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SHARI B. BRODER. ESQ.  
Hearing Officer