

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

April 6, 2018

18.040H and 18.058H— Parents v. Cape Elizabeth School Department

REPRESENTING THE PARENTS: Richard O’Meara, Esq.

REPRESENTING THE DISTRICT: Hannah King, Esq., Isabel Ekman, Esq.

HEARING OFFICER: Shari Broder, Esq.

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 January 3, 9, 10 and 26, and February 2, 7, and 27, 2018 at the offices of the Drummond Woodsum in Portland, ME. Those present for the entire proceeding were the Mother, the Father, Attorney O’Meara, Jessica Clark, director of special services, Attorneys King and Ekman, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Bobbi Carter, LCSW	Clinical Director, Vista Sage
Carlyn Daubs, Ph.D.	Psychologist
Shalene Pierce, LCSW	Primary Therapist, Trails North Carolina
Elizabeth Murphy-Lewis, LCSW	Social Worker, Cape Elizabeth High School
Tim Grayson	Education Director, Vista Sage
Jeffrey Shedd	Principal, Cape Elizabeth High School
Jessica Clark	Director of Special Services
Heather Blier, Ph. D	Clinical Psychologist
Alina Perez, Ph.D.	District School Psychologist

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On November 1, 2017, the Parents filed this hearing request on behalf of their daughter (“Student”). On December 18, 2017, a prehearing conference was held at the offices of Drummond Woodsum in Portland, Maine. Participating in the conference were: the Parents;

Richard O'Meara, Esq., counsel to the Parents and Student; Hannah King, Esq., and Isabel Ekman, Esq., counsel to the Cape Elizabeth School Department ("District" or "Cape"); Jessica Clark, director of special services; and Shari Broder, hearing officer.

There was some difficulty obtaining documents from the Student's out-of-state providers and placements. The District objected to Carlyn Daubs testifying because she was not on the original witness list and did not produce certain documents to which she referred in her report and in her testimony. The District also objected to Shalene Pierce's testimony and the fact that she had not produced the notes she had about her work with the Student and that she used in her testimony, thereby making the notes unavailable to District counsel for cross-examination. The District requested family therapy notes and records from Trails Carolina, and these were not produced, nor were there academic records or updated records from Vista Sage. Although the District had legitimate concerns about the failure of these out-of-state providers to produce records, I had no ability to require production of the documents from out-of-state entities. I allowed the Parents' witnesses to testify, although I recognized that this failure to produce documents impaired the District's ability to cross-examine Carlyn Daubs and Shalene Pierce. The Parents submitted approximately 532 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1950 pages of exhibits (herein referenced as S, SA, SB, SC-#, etc.).

As noted above, the hearing took place over the course of seven days. There were postponements of two hearing dates because of severe winter weather. Both parties requested to keep the hearing record open until March 19, 2018 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 78-page closing argument and the Parents submitted a 74-page closing argument. The record closed upon receipt of these documents on

March 19, 2018. The parties further agreed that the hearing officer's decision would be due on April 6, 2018.

II. ISSUES:

1. Did the District violate its child find or evaluation and identification obligations under the Individuals with Disabilities Education Act (IDEA) with respect to the Student between September 2016 and October 2017?
2. Did the District violate the IDEA by failing to provide the Parents with notice of their procedural safeguards?
3. If the hearing officer determines that the District violated the IDEA, what remedies are appropriate?
4. Should the Parents be required to provide unqualified consent for the District to fully evaluate the Student and to consult with the Student's providers at Trails Carolina, Spring Harbor Hospital, and Vista Sage for the purpose of developing an appropriate IEP for the Student?

These issues are addressed below.

III FINDINGS OF FACT

1. The Student is [REDACTED] years old (DOB: [REDACTED]) and grew up in Cape Elizabeth, Maine. She is the daughter of the Mother and the Father. The Student attended public school in the District from kindergarten and into eleventh grade (2016-17).
2. The Student is the third child of her Parents in a family of four daughters. She has one sister who is three years younger and two who are older. One of her older sisters attends [REDACTED] [REDACTED] (henceforth referred to as "Daughter B") and the other attends [REDACTED] (henceforth referred to as "Daughter A"). Both are very high achieving and the Parents described them as "more academically successful" than the Student. [S-8] The Student's younger sister (henceforth referred to as "Daughter C") attends public school in the District.
3. The Student was a good student and did well through middle school. At home, however, she became more oppositional as she moved through adolescence. She was more interested in art

and loved music. She played guitar, piano, ukulele and flute. [S-8-9, testimony of Father] Her parents, however, expected her to perform academically at a higher level. They felt that she was not self-motivated, and that she did not comply with their appeals to work harder. [S-8, testimony of Father, Mother]

4. The Student began attending Cape Elizabeth High School (“CEHS”) in the fall of 2014. Throughout her educational career there, the administrators, teachers and staff found the Student to be a bright young woman who was hardworking, did well socially, had a good group of peers, and was sweet and respectful to both classmates and adults. [Testimony of J. Shedd, E. Murphy-Lewis, S-3] In 9th and 10th grade, she was among the stronger students and took challenging classes, most of which were honors level. [Testimony of J. Shedd] She appeared well-adjusted and the school had no issues with her.
5. At home, however, the Student had a great deal of conflict with her parents, particularly the Mother. On a number of occasions when the Student was noncompliant, the Parents called Sweetser Crisis Assessment (“Sweetser”). For example, on January 26, 2015, the Parents brought the Student to Sweetser for a crisis assessment due to what they characterized as the Student’s “increasing irritability, oppositional behaviors and moodiness.” They reported that the Student has always been moody and insistent upon having her own way, but now it was impacting the Parents’ marriage and family relationships. [S-H-1] The Student reported that she got along much better with her Father, but that her Mother did not like her or was jealous of her. She did not understand why she was taken to Sweetser, but believed it was “because her Mother did not like how she cleaned her room.” The Student further explained that she “is so different from the rest of the family that she does not feel like she fits in.” She said she was not depressed at all and had no suicidal or homicidal ideation. Her mood was calm and in control. Because the Student was not unsafe at home and did not need a higher level of

care, Sweetser did not admit her. [S-H-1] The Sweetser staff did, however, work with the Parents on parenting techniques, provided supportive counseling and explained Dialectical Behavioral Therapy (DBT) to them. [*Id.*]

6. On January 28, the Student had a visit with psychiatrist Angela Liess, MD. Dr. Liess reported, “Parents considering asking [the Student] to leave the home and attend boarding school due to ongoing behavioral outbursts and recent escalating behaviors.” She diagnosed the Student with ADD with hyperactivity and Mood Disorder, NOS, and prescribed Lamictal for the latter. Dr. Liess noted no self-harming behavior on the Student’s behalf. [S-G-83-84]
7. During February of 2015, the Student told the Mother that she was being teased by members of the senior class after she received a valentine candy gram from a popular senior boy. [Testimony of Father] Some popular senior boys also made “an obnoxious video” and sent it to the Student on Snapchat. [Testimony of J. Shedd] Sometime thereafter, the Parents asked to meet with the principal, Jeffrey Shedd, to talk about this incident of bullying and harassment towards the Student. Because the boys were “high status socially,” it raised Principal Shedd’s concern, and he decided to investigate by speaking with the Student, some of her friends, and some of the senior boys involved. When Principal Shedd spoke with the Student, he found her to be “highly credible, very reasonable and very sweet.” She said she just wanted the boys to stop and she did not want to be the focus of their attention. When Principal Shedd asked her whether she had a social media relationship with the boy, she told him that she did not, but in fact, they were connected on Snapchat. [Testimony of J. Shedd] Principal Shedd thought that in a situation like this, it would have been more unusual for the Student not to lie to him about it, especially as it was her first meeting ever with the principal. Principal Shedd said it was actually atypical for a student to tell him the 100% truth. [*Id.*]

8. Following his investigation, Principal Shedd met with the Parents again and told them what he had discovered and how he had handled the matter. He explained that the Student's story about the teasing had been accurate, except that she initially told him that she did not have a social media relationship with the boy who sent the candy gram, but she actually did.

Principal Shedd said that although the kids could make some bad choices, as they did here, they were not malicious. He was confident that the problem was resolved and confirmed with the Student that the teasing had stopped. The Student was very concerned that her parents would find out that she lied about Snapchat, and when Principal Shedd told them, they "expressed serious concerns about the lie" and told him they were seriously considering taking the Student out of CEHS. Although Principal Shedd explained that this was normal adolescent behavior, the Parents saw the lie as part of a pattern of misbehavior and bad judgment that the Student had been showing at home for a long time. [Testimony of Father] During this meeting, one of the Parents referred to the Student as a pathological liar, which Principal Shedd found astounding. Then the Mother called the Student "a monster," which the Principal found even more astounding. In his many years as an educator, he had never heard a parent refer to a child that way. That description was "as far as he could imagine from the [Student] he and her teachers knew." [Testimony of J. Shedd]

9. Despite doing very well at CEHS, the Parents told the Student that if she was going to continue to lie and be oppositional, they would send her to school elsewhere. They decided to place the Student at the Hyde School ("Hyde") in Bath, Maine in April of 2015 because they were feeling particularly challenged by her. [Testimony of Father] Her guidance counselor, Brandi Lapointe, provided a reference for the Student, reporting that she "is taking all honors classes and French III, which is the most challenging academic program we have for 9th

graders. She is doing great!” and that she “only heard wonderful things about [the Student]” and that “teachers and students really liked her.” [S-3]

10. The Student attended Hyde from April 7 through May 15. The Parents, however, were disappointed in Hyde, and did not think it was what the Student needed. The students there had more behavioral problems than the Student, and the Parents thought she was “getting away with a lot” there. The Student thought going to Hyde was traumatic and difficult, as she thought people were judging her negatively because of it. Additionally, because she was very artistic, she did not fit in there. [Testimony of E. Murphy-Lewis, S-F-56] She agreed to adhere to family rules if the Parents brought her back to CEHS and returned for the last month of 9th grade. [Testimony of Father] Her grades were good, earning an unweighted average of 91.85. [S-2]

11. In September 2015, the Student began her sophomore year at CEHS. She took a challenging workload, with mostly honors level classes and Advanced Placement Statistics. [Testimony of J. Shedd]

12. On several occasions when the Student would not comply with the Parents’ orders, the Mother called the Cape Elizabeth police. November 6, 2015 was one such occasion. That morning, the Student told the Mother that she was feeling too ill to attend school. [Testimony of Mother, Father] The Father was away, and the Mother had to go to Cape Cod for work, and she did not want the Student staying home alone. [Testimony of Mother] The Mother also did not believe that the Student was sick, and brought her to school, telling her she could “spend the day in the nurse’s office” if she needed to. The two fought on the ride to school, and when they arrived at CEHS, the Student refused to exit the vehicle, as she wanted to calm down before entering the building. The Mother then called the police. When Officer David Galvin and Sgt. Kevin Kennedy arrived, the Student and the Mother were parked in

front of the CEHS building, directly behind a school bus filled with Model United Nations students, all of whom witnessed the incident. [Testimony of E. Murphy-Lewis] Officer Galvan wrote in his report that the Student was feeling ill and the Mother did not believe her. The Mother told Officer Galvan that the Student “has severe behavioral issues and is lying about feeling ill.” Officer Galvan convinced the Student to go to the nurse’s office and be seen, which she did. He advised her to seek out a school counselor that day, and “if she has issues at home with her mother to give us a call.” The Mother then told Officer Galvan that she was struggling with the Student, and due to the Student’s “escalating behavior we will probably get to know them very well.” [S-I-2] The Father described this as a “really difficult day in their family’s life.” The nurse referred the Student to Elizabeth Murphy-Lewis, a new school social worker at CEHS, to process the incident. The Student developed a trusting and therapeutic relationship with Ms. Murphy-Lewis, who supported and helped the Student during the rest of her time at CEHS. [Testimony of E. Murphy-Lewis, Father, Mother] That day, Ms. Murphy-Lewis reached out to the Parents to introduce herself and explained, “My role is to be supportive to students as well as their families, so please feel free to email me with any questions or concerns you may have.” [Testimony of E. Murphy-Lewis, S-A-8]

- 13.** Ms. Murphy-Lewis described the Student as a very hurt young woman who was sad and struggling to know who she could trust. Ms. Murphy-Lewis spoke with the Principal and Vice Principal, Nate Carpenter, as well as the Student’s teachers. All reported that the Student was doing well, and her grades reflected this, so Ms. Murphy-Lewis did not see any reason to make a special education referral. She knew the Student was struggling because of her relationship with her Mother. [Testimony of E. Murphy-Lewis] The Student admitted that she did not feel the same way about school as her two older sisters who were high achievers and sought excellence. The Student did not care about her grades as much and she was fine

with getting grades that were less than perfect, but this did not fit with her Parents' expectations, and she felt that she was being negatively judged by them because of it. Both the Student and the Vice Principal were concerned that the Parents were looking at Power School too much because they were concerned that the Student was not completing her assignments. Mr. Carpenter spoke with the Parents and suggested that they do not need to be so worried about this, as the Student was getting her work done. Ms. Murphy-Lewis thought that, despite everything the Student was going through with her family, she was doing quite well. Ms. Murphy-Lewis had worked with other students who could not have done as well under such stressful circumstances. [*Id.*]

- 14.** The day after the incident with the police, the Parents brought the Student to Sweetser again. They reported coming there due to the Student's increasing oppositional behaviors at home. That day, the Student and the Mother argued about school, and the Student said that she would rather be dead than deal with her family. She then tried to open the car door to get out into traffic. Although the Student had no history of self-harming behaviors, and denied any intention to harm herself, she said she was miserable at home, and that she felt like she could not meet her family's standards. Melissa Etsy, who completed the Student's assessment, reported that the Student denied any suicidal or homicidal ideation. She noted that the Student did "not have any psychosis or delusions. She is fully oriented." Etsy recommended that the Student return home under the supervision of her family and return to Sweetser the next day to reassess the level of care needed. [S-H-6, 202] Sweetser recommended that a therapist come to the family's home to observe, but this never occurred. The family began attending family therapy with Tom Fitzgerald on November 23, 2015. S-F-13-94] At the second session, Mr. Fitzgerald recorded in his notes, "The focus in this family is on grades and mom picks a lot up around household chores." [S-F-55]

- 15.** On January 18, 2016, the Parents again involved Sweetser in another crisis assessment because the Student “has been oppositional all day.” The Father reported that the Student was out of control and became physically aggressive to him and hit him for the first time. [Testimony of Father, S-H-12] The Student denied hitting her father, reporting that she was just shoving him because he was “getting physical.” The Parents reported that the incident began when they attempted to check the Student’s PSAT scores, and she refused to provide her password. She was stressed about midterms that week and although she scored in the top third percentile, she was embarrassed and afraid to show her mother her scores. [S-H-12, testimony of J. Shedd] The Parents reported having backed off from expecting the Student to get good grades at the recommendation of “providers,” but the Student said she still felt pressure and disapproval. [S-H-12] She explained that name-calling and cursing were how she learned to argue from her parents, but the Parents reported that the Student used harsher curse words than they did and was disrespectful. The argument was primarily between the Mother and Student, and both were emotional and angry. The Father felt that the Student was trying to split the Parents. [Testimony of Father] Once again, the Student met the criteria to remain at home and was scheduled to see the family counselor, Mr. Fitzgerald, the next day. [S-H-12] The family had a lot of support from Mr. Fitzgerald. [Testimony of Father]
- 16.** The family’s next session with Mr. Fitzgerald was on January 22. His notes state, “Family said a lot of disrespectful language happening. [Daughter C] scare [sic] of all the heated yelling. A lot of anxiety around school stuff for all the kids.” [S-F-61] About the sessions during the next two months, Mr. Fitzgerald wrote:

January 28: “Trying to put [Father] into a more interactive role and getting him and [Mother] to work better as a team. [Daughter C] said mom can be verbally explosive and puts the house on edge. [Daughter A] is quiet but seems to support siblings in their complaint about mom.” [S-F-62]

February 1: “The kids also complained about the high standards mom set for them. They also said [the Student] is very bright and not living up to what she could do.” [S-F-63]

February 4: “Complain that [the Student] goes from 0 to 100 in a flash and often not predictable. Everyone says they bite their tongue when things get stressful around [sic] [the Student] upset.” [S-F-64]

March 3: “[The Student] destroyed her room. Talked about consequences and how clear the rules are at home [the Student] not caring about family and told me that they had to call Sweetser one year ago. Trying to help family calm down. A lot of pain and frustration for everyone.” [S-F-68]

March 7: “Family exhausted from fighting. Looking for a way for everyone to feel safe. Trying to get the parents working together and not blaming each other.” [S-F-69]

17. On March 12, 2016, the Cape Elizabeth police were again dispatched to the family home after a disagreement between the Student and the Parents escalated. The Student was trying to leave the house to visit her friends, but the Father wanted her to finish cleaning her room, but she “apparently refused.” [S-I-5] The Father restrained her by holding her arms and forced her into her room upstairs. [S-H-37] The Student then attempted to open a second story window to leave. [Testimony of Father] Tonya Thurlow from Sweetser arrived and found the Student in her room crying and saying that her parents were abusive and kept her trapped in her room and in the house. The Parents told Ms. Thurlow that they were frustrated, that the Student holds them hostage and that she is a “fucking monster.” [S-H-37] The Mother was defensive and upset, and said that sending the Student to a friend’s house to de-escalate the situation was not an option, that she needed to go away and not burden other families. The Parents were set on sending the Student to a crisis stabilization unit (“CSU”), but the Student did not want to go, and was frustrated that her parents persisted with trying to send her to one. There was a dance that night and she insisted she would be attending it. Although Ms. Thurlow discussed the potential of allowing the Student to stay with a friend for the weekend, the Parents were not open to this. [S-H-17, 37] Ms. Thurlow told the

Parents that she did not feel the Student met the criteria for an emergency admission. [S-H-22, 37, 41, S-I-5] The Parents became upset and told Ms. Thurlow that they could not handle the Student any longer. Ms. Thurlow said she would go back to her office and try to get an exception to get the Student into Sweetser. Ms. Thurlow's intake forms, as well as other Sweetser forms, noted that the Mother suffered from depression and emotional dysregulation, and the Father was "high Stress." [S-H- 8, 14, 39]

- 18.** The Parents told Cape police, Sgt. Kennedy and Officer Vanasse, that the Student was failing classes, although there was no evidence to support this. At no time was the Student in danger of failing any of her classes through the end of her sophomore year. [S-I-5, S-21, testimony of J. Shedd] The Parents also said the Student was verbally abusive to them and they no longer could live with her in their home. The Student told Officer Vanasse that she did not wish to harm herself, and although she hated her parents, she would not harm them. She kept repeating that she just wanted to leave the house and live with friends. When she overheard the Parents speaking to a caseworker about finding a spot for her at Sweetser, the Student became extremely upset. [S-I-5] The Student told the police that no one listened to her, and that she did not want to be part of this family anymore, that the home was dysfunctional, and her parents will not work toward solving the problem. She felt that her parents blamed her for all of the problems. The police were able to persuade the Student to go to the hospital, and she was transported to Maine Medical Center ("Maine Med") by ambulance without incident. [S-I-7-8] At that time, Sgt. Kennedy explained that the Student did not appear to be a threat to herself or others, and the police could only keep the peace. [S-I-6]
- 19.** When the Student arrived at the Maine Med emergency room ("ER"), a Sweetser clinician was there. Sweetser had received a call from Maine Med and the Father, although the reason specified was that the family therapist told the Father that he needed to be clear with

boundary setting. Ms. Thurlow arrived at the ER to reassess, and the Student appeared calm and collected. The Student reported her frustration with her parents persisting on sending her into a CSU. She said that she did well in school but felt that her parents did not think it was good enough if it was not “100.” The assessment said that the Student refused to participate in family therapy anymore, and was reportedly disrespectful and rude to Mr. Fitzgerald the previous week, but Mr. Fitzgerald told Ms. Murphy-Lewis that he had asked the Student not to participate in family therapy any longer. [S-H-30, 34, testimony of E. Murphy-Lewis] Ms. Thurlow told the Father that the Student reported feeling disconnected from the family and recommended a potentially less aggressive approach. She also recommended case management services. The Father reported feeling stuck between his wife and his child, and that the Student varied from familial norms. It was ultimately determined that the Student and Father would get a hotel room for the evening, as her Parents did not permit her to return home. [Testimony of Father, S-H-18]

20. The Student stayed with a friend’s family for a day or two, then felt bad burdening her friend’s family because her father was a single dad, and she wanted to come home and sleep in her own bed. When she arrived home on the evening of March 14, the Mother called the police and said the Student was at the residence but should not be there. [S-I-10] The Student was in an unheated office that did not have access to the rest of the house. Sgt. Kennedy and Officer Davis arrived. The Mother told the police that the Student was a threat to them, although she had not made any threatening remarks that evening.¹ The Parents were adamant that the Student could not come into the house, but said she should go to the hospital or a

¹The Mother also said that the Student had been diagnosed with oppositional defiant disorder, although there was no evidence in the record to support this. This was one example of many statements in the hearing record made by the Mother to the police, Sweetser and health care providers about the Student that were not supported by anything in the hearing record.

friend's house. The police spoke with the Student, who appeared calm and collected. She did not want to go to either place. Her friend arrived on the scene to attempt to convince the Student to come to her house, but the Student kept saying that she could not. While the Student and her friend were speaking with the police, the Mother "would come outside and begin arguing with [the Student]." Officer Davis told the Mother to go inside because she was not helping the situation. The Student then became emotional and started crying that she had nowhere to go. Eventually, the police convinced the Student to go to either her friend's house or Maine Med. The Student chose Maine Med, but was denied inpatient admission because she did not meet the criteria. Ultimately, she and the Father agreed that she could return home that night. [S-H-44] Officer Davis also made a referral to the Department of Health and Human Services about the issues between the Student and her Parents. [S-I-10-11]

- 21.** The Parents were in regular communication with Ms. Murphy-Lewis about the Student, and thought that she was very dedicated to helping the Student. [Testimony of Father, Mother] The conversations were mostly about the Student's behavior, with the Parents describing how challenging the Student could be. The Parents expressed great difficulty about the Student's behavior and used extreme language, including calling her a monster who was single-handedly destroying the family. This was not consistent with the Student Ms. Murphy-Lewis knew. [Testimony of E. Murphy-Lewis] Ms. Murphy-Lewis saw the Student as someone who made an effort to make school a priority, and tried to maintain decorum during the school day, despite her stressful life at home. She did not meet with the Student and the Parents together because the situation was far too elevated and the discord was too much, but they were each essentially telling her the same thing about what was going on at home and in their relationship. [Testimony of Ms. Murphy-Lewis]

22. On March 17, 19 and 21, 2016, the family had therapy sessions with Mr. Fitzpatrick. His notes state that Daughter A said the Mother was not capable because of her depression, but the Mother denied this. The Father said that the Mother was making the Student a scapegoat for all her high expectations. He wanted their children to have more freedom so that the tension would ease up. The Mother said she wanted the Student placed in a facility, and felt frustrated with the lack of support of her parenting. [S-F-70-72] The Parents had differences of opinion about how to raise their children and disagreed about the appropriate level of permissiveness. The Father thought they should try being more permissive, but the Mother disagreed. This was a significant development in their ability to parent the Student. [Testimony of Father] Around this time, Ms. Murphy-Lewis and Jackie Bromage, another CEHS social worker, emailed the Student's teachers to let them know that she was facing challenges at home that impeded her ability to fully engage with her schoolwork. [S-A-17-18] Ms. Murphy-Lewis also spoke with Mr. Fitzgerald twice. Mr. Fitzgerald told her that family members were afraid to speak their minds around the Student because she could escalate quickly. [Testimony of E. Murphy-Lewis]

23. At the Parent's request, the Student's therapists recommended² that the Student have a psychological assessment of her personality and mental status with psychologist Francois Paradis, Ed.D., in light of all the family turmoil. Dr. Paradis did not confer with Mr. Fitzgerald as part of her evaluation. She evaluated the Student on March 21 and 26, 2016. [S-D-5] In her interview with the Parents, they described the Student as having no self-motivation and reported that she likewise was not motivated by the Parents' appeals. The Student said she was more interested in art and music than academics, but she liked school

² Tom Fitzgerald and Katarina Hartman made the recommendation. Ms. Hartman was briefly the Student's therapist.

and completed her homework. The Parents were concerned that her grades were slipping. [S-D-6] Dr. Paradis administered the Connors 3rd Edition, an assessment tool to obtain observations from Parents, the Student, and her teachers. It rated such things as inattention, hyperactivity, impulsivity, learning problems, and peer relations. On every measure, the teacher scored the Student as “average.” The Student also scored herself as “average” on every measure except Family Relations, which were “very elevated.” The Parents, however, rated the Student as “very elevated” on Aggression, Oppositional Defiant Disorder, and Conduct Disorder. [S-D-8] There was no indication of any learning problems on any ratings, and nothing on any of the tests that supported a diagnosis of attention problems or ADHD.³

Dr. Paradis concluded that the Student was a normal teenager “who is in conflict with her parents’ strict rules and their high expectations for her.” The Student was struggling to be her own person and to be able to express herself without recrimination. Dr. Paradis concluded:

Overall, she is successful socially and academically, but recently has been struggling to stay focused on her school work because of the family discord. The only area of difficulty she has is within the family; it is the only place she displays any negative emotions or behaviors. Her anger outbursts appear to be triggered by demands from parents that do not align with her sense of self, and she fights to maintain her integrity as a person. Her parents seem to have pathologized what in most homes would be considered normal teenage behavior or rebellion.

The Father thought these conclusions had some merit. [Testimony of Father] Dr. Paradis diagnosed the Student with Adjustment Disorder with disturbance of mood and conduct, and Generalized Anxiety Disorder (“GAD”). [S-D-12-13] Her recommendations included individual therapy for the Student and continued family therapy. She also encouraged the

³ At some point, the Student was prescribed Focalin and Intuniv for ADHD, Lamictil for mood and Wellbutrin for focus by Dr. Leiss. The Student told Dr. Paradis that she had not taken these medications since February and took them erratically before then. Her Parents saw no improvement with the medications. [S-D-6] In light of the results of Dr. Paradis’s testing, the medications for attention and focus appeared unnecessary.

Parents to seek couples' therapy to strengthen their bond so they could co-parent effectively and to enroll in a parenting class or support group for parenting difficult adolescents. [S-D-13] The Parents chose not to share the results of this evaluation with the District or with the Student because there was a lot of difficulty and discord between them about the results.

[Testimony of Father, E. Murphy-Lewis]

24. Ms. Murphy-Lewis corresponded with the Parents about finding a therapist for the Student.

She told the Parents it would be very empowering for the Student to choose her own therapist and that the process needed to be one that limited the potential for power struggles. She consulted with Mr. Fitzgerald, who said he was comfortable with Ms. Murphy-Lewis's recommendations. [S-A-26] Ms. Murphy-Lewis was impressed that, under the circumstances, the Student had the composure to do what she needed in school. Ms. Murphy-Lewis explained that many, many students have anxiety, but this does not mean that they required a special education referral. The Student felt alienated by her own family and that they were blaming her, at age 15, for their marital problems and the breakup of their marriage. Yet Ms. Murphy-Lewis saw the Student as very strong and resilient, but sad a lot of the time. [Testimony of E. Murphy-Lewis]

25. On May 21, 2016, the Father called Sweetser again to report that the Student had become dysregulated and volatile when he took away her iPad and phone. [Testimony of Father, S-H-52, 132] The Student locked herself in her bedroom with a bottle of Tylenol "to get a rise out of" her Parents, although she did not take any of them. She denied having an intention to end her life. [S-H-64] The Father was transporting the Student to the ER when she became upset and jumped out of the car at an intersection in South Portland. At that point, the Father contacted the police, who found the Student and transported her to Maine Med for an evaluation. [Testimony of Father, S-H-51]

- 26.** When the Student arrived at Maine Med, she was assessed by a Sweetser worker named Jessica Diamond. Ms. Diamond's notes state that the Student "reports that her parents identify her as a problem child, which may or may not be appropriate or accurate." She reported that she used to be closer with her father but now feels that her father has "turned on me," and become compliant with the Mother's wishes to punish her. [S-H-55] Following this incident, the Parents refused to allow the Student to return home. [S-H-140] Ms. Thurlow became involved again on Sweetser's behalf and discussed an inpatient placement for the Student, which the Student adamantly did not want. Ms. Thurlow recorded that the Student was trying to find her own therapist, but she had not engaged in individual therapy because her Parents wanted to sit in on her sessions. She was not resistant to treatment but wanted it to be on her terms. [S-H-59] There was difficulty finding an inpatient placement for her, so she was admitted to Sweetser. When Sweetser spoke with Mr. Fitzgerald, he said he did not think the Student was suicidal nor did he feel she needed an inpatient placement level of care, but he also did not think the Student should be in the family home. [S-H-67] Although the Parents wanted a "boot camp" type of placement, Sweetser recommended a year-round boarding school. [S-H-75] While the Student was at Sweetser, Ms. Murphy-Lewis visited her. They discussed the school work the Student missed and the fact that she had time to complete it so she could finish her sophomore year. Ms. Murphy-Lewis thought the Student went through a "ton of transition and did a very good job." [Testimony of E. Murphy-Lewis] They discussed how the Student was not to blame for everything that was wrong in the family, that families are systems, and it was not possible to isolate just one person.
- 27.** On May 31, the day the Student was discharged from Sweetser, a Sweetser staff member spoke with Mr. Fitzgerald regarding the discharge plan and the Father's report that both parents were in agreement about discharging the Student to live in a rented house with the

Father's sister (henceforth "Aunt"). Mr. Fitzgerald reported his intention to discontinue family therapy due to the Parents not following through with his recommendations. [S-H-184] The Parents had minimal contact with her and gave her space while she stayed with the Aunt. [Testimony of Father] The Student made an effort to complete her work and successfully completed 10th grade, earning grades between 81 and 97, and she had an 89.32 average, which was a B+. [Testimony of J. Shedd, S-17, S-A-21] She took the AP Statistics exam and passed it. [Testimony of J. Shedd] She did very well in the areas that were more interesting to her, and had a very close relationship with her band teacher. [Testimony of E. Murphy-Lewis] Although the Student had a few more late arrivals and early dismissals than during her freshman year, the Parents had reported that most of these absences were for doctors' appointments. [Testimony of J. Shedd, S-C-3-5] She was not absent or tardy while living with the Aunt. [S-C-5] Mr. Shedd explained that a typical CEHS student has 2-3 tardies or absences per month, so the Student's attendance was considered average. CEHS ran weekly grade and attendance reports for all students in order to identify ones who were at risk. A student support team consisting of the principal, assistant principal, special education department chair, school nurse, school social workers and guidance counselors would meet bi-weekly to discuss students who were identified as having a high number of absences or at risk of failing as part of their child find obligations. [Testimony of J. Shedd]

28. After Daughter B graduated from CEHS that June, the Parents separated. This was a very difficult time for the family. [Testimony of Father] The older daughters and the Student lived with the Father in a rented house (henceforth "the Cottage"). It was not just the Student who was struggling with the Mother, and this was an opportunity for her to align with her siblings and get to know them. As the Father said he would never put the Student in a hospital setting again, the Student thought someone might be on her side. [Testimony of E. Murphy-Lewis]

The youngest, Daughter C, lived with the Mother in what had been the family residence.

While living with the Father, the other daughters had contact with the Mother. [Testimony of Father]

29. Before the beginning of the Student's junior year, Ms. Murphy-Lewis reached out to the Father to discuss the fact that the Student had spoken with her about wanting a fresh start, and that the Student was not sure she could be successful at CEHS. The Student was afraid people would see her as someone who was damaged. Nonetheless, she had success the year before in the face of a lot of transition, and Ms. Murphy-Lewis recommended that she stay at CEHS. [Testimony of E. Murphy-Lewis]

30. The Student began her junior year at CEHS on September 6, 2016. Daughter A returned to Duke University and Daughter B matriculated at Tufts University, so the Student remained in the Cottage with her Father. It was her first experience being at CEHS without one of her siblings there. Because the Father traveled a good deal for work and worked long hours, the Student was often alone when she was home. Although the Father wanted to create an environment in which the Student would be successful, she did not have much in the way of in-home support at the time. [Testimony of E. Murphy-Lewis, Father]

31. On September 16, 2016, the Student was in a car accident. She was a passenger in a car with two friends when a deer crossed the road. In swerving to avoid it, the car went through a fence and onto a field. The Student hit her head on the back passenger window, and thought that she had a concussion. Three days later, she saw James Foster, M.D., who evaluated her condition. [Testimony of Father, S-G-135] Dr. Foster diagnosed her with a concussion, and

that she was in the “red zone.”⁴ Consequently, he advised her to not attend school and to limit her use of screens. [S-G-136-137, S-165]

32. Dr. Foster referred the Student to a new psychiatrist that day, Melissa Bowker-Kinley, M.D.

The Student had presented with what might have been anxiety-provoked hives twice in the past week, which was part of the reason she was seeking help for her anxiety. [S-G-140] Dr. Bowker-Kinley diagnosed the Student with GAD, and noted to monitor the level of conflict with each parent. Her notes stated, “Parents have a fairly high set of expectations and I suspect that anxiety and self-esteem issues prevent [the Student] from feeling that she can meet standards so she’s effectively self-sabotaged in several domains.” She recommended a specific family therapist, noting “the role for family therapy in this situation is quite important, but I’m unclear what the best approach might be given the previous experience family has had in family therapy.”⁵ [S-G-138-139, 143] Dr. Bowker-Kinley also observed, “Dad shares that [the Student] is smartest of his 4 children and 2 older sisters are quite high achieving academically, so family is quite frustrated that [the Student’s] grades don’t reach her intellectual potential. This seems to be the source of parental efforts to get a diagnosis of ADHD starting in 9th grade.” [S-G-139] Dr. Bowker-Kinley also prescribed Fluoxetine for anxiety. She noted that the Student was in a positive treatment relationship with Ms. Murphy-Lewis, and that this may be sufficient therapy for her to progress in recovery. [S-G-143]

⁴ The Parents in their closing argument write, “Although [the Student] claimed to have been concussed in a motor vehicle accident . . . there is no objective evidence to support this diagnosis.” To the contrary, there is a medical diagnosis of a concussion and medical notes to support the fact that the Student had symptoms consistent with a concussion. Contrary to the Parents’ assertion, this diagnosis is supported by evidence in the record.

⁵ The family did not engage in therapy again, however, while the Student was attending CEHS. Although the Mother referred in conversations to Mr. Fitzgerald as their family therapist, the Father was adamant that he was not. [Testimony of E. Murphy-Lewis]

- 33.** The Student returned for a visit with Dr. Bowker-Kinley on October 10, 2016. She had been continuing to have anxiety and had begun trying to avoid going to school. It was not uncommon for high achieving students who were recovering from a concussion to experience anxiety associated with falling behind in their school work while subject to concussion restrictions. [Testimony of J. Shedd] Some days, the Student would attend school, then go to the nurse’s office because of headaches related to the concussion, or just general malaise or emotional concerns. [S-166] Some days, she was unable to continue, and the Father would pick her up. [Testimony of Father, S-A-57] Dr. Bowker-Kinley noted that the Student “demonstrated today the pattern of distress intolerance and impulsive, slightly irrational decision making that she makes in the setting of anxiety and distress. . . upset with Dad for not giving into her demands to not go to school, and as the appointment carried on it became clear that [the Student] was planning to grand stand in the appointment for the purposes of getting approval to not go to school.” [Testimony of Father, S-G-175-176] The Father reported feeling that the concussion and health issues had been driving conflicts around school attendance, as the Student had not been attending regularly that fall. [Testimony of Father, S-G-176] Dr. Bowker-Kinley also recommended against leaving CEHS to attend a different high school, stating that CEHS “was certainly capable of offering her the support and accommodations that she needs to be successful at school, and I am not in agreement with fleeing from something because of anxiety or desire for anxious avoidance.” [S-G-175]
- 34.** When Ms. Murphy-Lewis learned of Dr. Bowker-Kinley’s anxiety diagnosis, she asked to initiate a proceeding under Section 504 of the Rehabilitation Act of 1973 (“Section 504” or “504”) that day for the Student because the Student was struggling to get to school due to her anxiety. [S-A-53] This was around the time the Student was cleared by her doctor to fully participate in school following her concussion. Ms. Murphy-Lewis wanted to figure out what

was hindering the Student from staying on track in school and what would help her. She explained that she was seeing different factors converging, including the concussion, the Student's new living arrangements, her relationship with her parents, anxiety and feeling like she did not fit in with the culture at CEHS. [Testimony of E. Murphy-Lewis, S-A-53, 66] Additionally, although the Father "really tried," this role was a huge shift for him, as he was the "breadwinner" for the family, but was now also a single parent. [Testimony of E. Murphy-Lewis] The Father made his best efforts, yet the Student refused to attend school. At the time, the Father was unaware this was due to anxiety, but thought it was just oppositional behavior.

35. The Student retook the PSATs in October and scored in the top tenth percentile. [Testimony of J. Shedd]

36. On October 28, the Student told the nurse practitioner at her medical office that she had not been attending school due to anxiety and hives, and that she wanted to transfer because at CEHS, "all they care about is academics and I want to focus on music and the arts." [S-G-170] School personnel had coordinated with the Student's teachers about her assignments because she was missing so much school. [Testimony of J. Shedd, E. Murphy-Lewis]

37. The 504 meeting was held on November 10, 2016 and was attended by the Parents, four of the Student's teachers, her guidance counselor, Ms. Murphy-Lewis, Principal Shedd and Assistant Principal Carpenter. [S-51] The Mother said she did not think a 504 plan was appropriate for the Student because, "she is capable of doing her work in a timely manner but chooses not to," and she thought the Student would be better served in a residential setting. [S-A-64, S-57, testimony of Father] The Father, however, supported the 504 plan as setting a structure moving forward, and thought that despite marital issues and different parenting styles, everyone was working for the Student's benefit. [Testimony of Father] He also

thought the Student could do well at CEHS and that a residential placement was not necessary at that time. Ms. Murphy-Lewis discussed how the Student was anxious all the time, and shared that coming to school is very hard for her. [Testimony of E. Murphy-Lewis, S-57] The Student was found eligible under Section 504, and the team created a plan that provided the Student with the following accommodations: tutoring as needed to get her back to school and address work that she missed, allowing her to receive incomplete grades for the first quarter, setting priorities for the assignments she missed so she would get the essential work done, and permitting her to leave class as needed to see the social worker or school nurse. [S-56] The Student was already receiving social work services and previously had been doing well academically, so tutoring to help her catch up made sense. [Testimony of A. Perez] The 504 plan was distributed to her teachers and others on November 23, 2016, but they were aware of it before then because they had been in attendance at the 504 meeting. [S-51, 58, testimony of J. Shedd] The Parents were provided with a copy of the procedural safeguards at the meeting.⁶ [Testimony of J. Shedd, S-55]

38. On November 14, 2016, Dr. Bowker-Kinley faxed a letter to CEHS stating that she diagnosed the Student with GAD. This was the first time CEHS had received a formal mental health diagnosis for the Student, as the Parents had not yet given the District a copy of the Paradis evaluation. [Testimony of E. Murphy-Lewis, S-61] That day, the Aunt reached out to Ms. Murphy-Lewis. She sent an email telling Ms. Murphy-Lewis that the Student had just spent the weekend with her in the Boston area after reaching out to her and asking for help.

⁶ The Parents could not recall whether they received a copy of procedural safeguards, but Principal Shedd testified that he was 100% sure they had because he followed a protocol that included giving the Parents that form. [Testimony of J. Shedd] The Father did not recall whether he was given 504 procedural safeguards, and testified that he did not have a clear recollection. [Testimony of Father]

The Aunt expressed her great concern about the Student's health and wellbeing. She related the Student's report that CEHS had been doing its best to help her, but it was the Aunt's opinion that the Student would do well in an art-related boarding school away from her family and Cape Elizabeth. It was her opinion that "[the Student] is a great kid with her share of struggles but I believe that she will flourish and be at peace with herself if she can focus on being a kid getting through high school as opposed to all these serious difficulties in her current situation." [S-A-90] Ms. Murphy-Lewis obtained permission from the Parents to speak with the Aunt and did so. The Aunt did not see the same behaviors in the Student as the Parents, and thought it would be helpful for the Student to get away from her home for a while. [Testimony of E. Murphy-Lewis]

- 39.** Ms. Murphy-Lewis tried to make the 504 plan work. She went to the Student's home to encourage her to access tutoring. Mr. Shedd coordinated with the Parents about a superintendent's agreement so that the Student could attend either Portland High School ("Portland") or South Portland High School ("South Portland") because the Student said she wanted a fresh start. [Testimony of E. Murphy-Lewis, J. Shedd] In a situation like this, the District usually gave the 504 plan a little time to see whether it was effective.
- 40.** On November 21, 2016, the Mother sent an email to Ms. Murphy-Lewis to inform her that the Student was smoking marijuana, and that she was concerned the Student would turn to drugs if left untreated for her anxiety and oppositional issues. [Testimony of Mother, P-22] She also asked Ms. Murphy-Lewis to share any insights from her conversation with the Aunt. The Mother added,

I greatly appreciate your efforts to help. You have gone above and beyond for her. However, her life is rapidly spiraling out of control and I think we need to consider other options for her care/treatment. I think we can all agree that the current situation is untenable. [P-22]

The following day, Ms. Murphy-Lewis went to visit the Student at the Cottage, but she did not answer the door. [Testimony of E. Murphy-Lewis]

- 41.** Because CEHS was not able to implement the 504 plan because the Student had not attended school regularly, on December 2, 2016, Ms. Murphy-Lewis referred the Student to special education. [S-A-109] That week, the Student had attended school several days. Ms. Murphy-Lewis emailed the Parents requesting to meet with them to discuss next steps for the Student. [Testimony of Father, P-24] A preliminary meeting was held on December 6 to explain the special education evaluation and referral process, discuss evaluations and obtain consent from the Parents to evaluate the Student. Ms. Murphy-Lewis also recommended to the Parents that the Student be invited to attend, but she did not. [Testimony of E. Murphy-Lewis, S-A-114] At the meeting, attended by the Parents, Mr. Shedd, Ms. Murphy-Lewis and special education teacher/case manager Ben Raymond, they discussed the challenges in implementing the 504 plan, and the Mother signed consent for an initial evaluation, including a psychological evaluation and academic testing. [Testimony of E. Murphy-Lewis, S-62-64] Above her signature was a checked box stating, “I understand the nature of and reasons for the evaluations indicated above, and have received the statement of procedural safeguards attached to this consent form if this is an initial referral or a parental request for an evaluation.” [S-64] Although Principal Shedd had no specific recollection of giving the Parents procedural safeguards, it was the District’s practice for the special education case manager to provide a copy along with any consent to evaluate. Principal Shedd testified that he attended many special education meetings, and the case manager always has the

procedural safeguards to hand out when a parent signed the consent to evaluate.⁷ [Testimony of J. Shedd, E. Murphy-Lewis] At this meeting, Ms. Murphy-Lewis asked the Parents to share the Paradis evaluation with her personally, which they did. [Testimony of E. Murphy-Lewis] This evaluation was not made available to the District until February 2017.

[Testimony of Father, S-309]

42. Because the Parents were in the process of making important decisions about the Student, but were separated and experiencing conflict regarding their differences of opinion, Ms. Murphy-Lewis recommended that they try mediation, and recommended Opportunity Alliance as a resource. At that point, the Parents were discussing boarding schools, McLean Hospital and therapeutic boarding schools for the Student, and remarked about how expensive they were.

[Testimony of J. Shedd, E. Murphy-Lewis S-A-123] It was very early in the special education referral process, and the District did not yet have an evaluation, so the District did not discuss with the Parents the possibility that Cape potentially could be responsible for paying for an out-of-district placement. There were many less restrictive options the District would normally try before looking at a residential placement. [Testimony of J. Shedd]

43. On December 8, 2016, the Student met with Principal Shedd and Ms. Murphy-Lewis to discuss the special education referral. Principal Shedd told her it was his decision and she was fine with it. At the meeting, they discussed alternative school settings for her, including Portland or South Portland. Principal Shedd explained that the Student might really enjoy the diverse vibe of Portland, to which the Student responded that it sounded like a neat fit.

[Testimony of J. Shedd, E. Murphy-Lewis, S-A-125] They also discussed Snow Pond Arts

⁷ The Mother testified that she did not recall receiving procedural safeguards, and did not remember when she first received them. [Testimony of Mother] Her testimony about procedural safeguards, whether and when she received them, and what they looked like was very vague.

Academy, an arts-focused charter school, which intrigued the Student. Principal Shedd offered to contact other principals to see whether the Student could attend there. They discussed tutoring as a short-term option, and the Student agreed to meet with the tutor as a first step. [S-A-126] Later that month, the Student changed her mind about transferring to Portland. [Testimony of Father]

- 44.** On December 22, there was a meeting at CEHS attended by the Student, Ms. Murphy-Lewis, Principal Shedd, and Brandy Lapointe, the Student's guidance counselor. At the meeting, they agreed upon changes in the Student's schedule to help her be successful. [Testimony of E. Murphy-Lewis, S-A-167] The Mother agreed with the changes, and wrote, "I so appreciate the EXCESSIVE amount of time you all have devoted to [the Student]." [S-A-167] Unfortunately, this did not improve the Student's attendance. [Testimony of Father]
- 45.** While District staff was trying hard to help the Student attend school and be successful there, Rosemary Kooy, the school psychologist, was trying to arrange a time to conduct a special education evaluation of the Student. The 45-day deadline under the Maine Unified Special Education Regulations ("MUSER") to evaluate the Student and hold an IEP team meeting was February 27, and Ms. Kooy had four other evaluations to administer before evaluating the Student. On January 12, Ms. Murphy-Lewis emailed the Parents that Ms. Kooy would be doing the evaluation in February. Although the Parents were aware of the MUSER deadline, they were skeptical about how long the process would take [Testimony of E. Murphy-Lewis, S-A-182] The IEP team meeting was scheduled for February 17, and the Parents were sent notice of this. [S-84] Ms. Kooy began the evaluation during the first week in February by obtaining parent rating scales, interviewing the Parents and Ms. Murphy-Lewis. She had planned on testing, interviewing and observing the Student that week, but was unable to do so because the Student was absent from school. [S-70, S-80, Testimony of E. Murphy-Lewis,

Father] Ms. Kooy tried contacting the Student directly, but unknown to Ms. Kooy, the Student was not accessing her CEHS email. The Father emailed Ms. Kooy to explain that the Student was very resistant to additional testing, and offered to continue discussing it with the Student to get her to cooperate. [Testimony of Father, S-A-255]

46. To avoid increasing a student's stress, the District did not evaluate students during mid-term exams in late January. Nonetheless, Ms. Kooy's timeline for assessment would have allowed her to complete her report prior to IEP team meeting scheduled for February 17, 2017, had the Student been available and had she not been hospitalized at Spring Harbor, then withdrawn from school and sent to Trails Carolina ("Trails"). [Testimony of A. Perez]

47. In late January, the Parents hired Marjorie Schaffel, an educational consultant and special education parent advocate in Lexington, MA, to help them explore residential treatment programs that would accept the Student on an involuntary basis. [S-72-73, 75, S-A-205] Consequently, the Parents began exploring the possibility of admitting the student to McLean Hospital ("McLean"), a Harvard-affiliated psychiatric hospital in Belmont, MA. They participated in an informational telephone call with McLean, and began researching long-term placements for the Student. [S-A- 181, 188, Testimony of Father, E. Murphy-Lewis] The Father wanted to expedite this placement, as problems with the Student were escalating. [Testimony of Father, S-A-261] Dr. Bowker-Kinley completed paperwork for McLean, not recommending inpatient treatment, but recommending boarding school or a longer term DBT program. She reported that the Student had no history of suicide attempts or other self-harming or dangerous behaviors, but had oppositional behavior with the Mother and occasionally the Father, but not at school or in the community. [S-G-1-4] Admission to McLean must be voluntary, and the facility accepted the Student on February 10. [Testimony

of Father, E. Murphy-Lewis] The Father notified Ms. Murphy-Lewis of this, and said that it was likely they would have an opening for the Student the following week. [S-A-272]

- 48.** The family met with the mediators on January 31, and the Parents thought it was helpful. [Testimony of Father, S-J-1, P-65]. The Mother wrote, “It definitely seemed helpful with finally getting everyone on board with the McLean Hospital plan.” [P-65]
- 49.** On February 14, 2017, Officer Webster and Sgt. Kennedy were dispatched to the Cottage, as the Father reported that the Student was out of control and yelling at him. When they arrived, the Father explained that Shannon from Opportunity Alliance was in the house with the Student. The Parents had been working for weeks to get the Student a bed at McLean and one was available for the Student that day. Upon learning this, the Student became hysterical and refused to go there. When the officers spoke with the Student, she was calm initially, but refused to go to any hospital other than Maine Med. She kept changing her mind. The police gave her an option of going by cruiser or ambulance. The Student said she would only go if the Father took her, to which the police would not agree because the Student had a history of trying to exit the Parents’ vehicles. The Student was uncooperative, so the officers handcuffed her for her safety. Cape Rescue arrived and transported the Student to Maine Med. [S-I-17, Testimony of Father]
- 50.** From Maine Med, the Student was transported to Spring Harbor Hospital (“Spring Harbor”) for evaluation. While there, the Student told her caregivers “My parents think I’m the problem.” She explained that her parents frequently accused her of being suicidal, but she was not. [S-100-101] The psychiatric evaluation conducted by nurse practitioner Kim Comparetto concluded that the Student was at low risk for attempting suicide, and would be encouraged to attend DBT groups and learn skills such as self-soothing and mindfulness to help her when she feels anxious. [S-98-99, 101] The Student reported that when she went off

stimulants for ADHD, she gained around 20 pounds, and her mother gave her smaller portions and tried to control her eating, which led to restricting behaviors. The Student said she could not live with the Mother because she was emotionally and verbally abusive, and living with the Father was not much better. [S-101-102] When Ms. Comparetto pointed out to the Student that she was not going to school or working, “[the Student] would argue that she tried to go to school but could not stay due to anxiety and PTSD symptoms. I tried to help her find ways to cope with these symptoms, but she was rejecting of any help.” [S-103] The Student had no behavioral issues, however, while at Spring Harbor. [Testimony of Father]

- 51.** The next day, Ms. Murphy-Lewis spoke with the Parents about the status of the Student’s special education evaluation. Because the Student had been absent from school and was now hospitalized and awaiting a residential placement, the District proposed to extend the IEP evaluation process for 15 days to allow for the testing to occur. Ms. Kooy also offered to meet in several alternative settings if that was more comfortable for the Student. In an email, Ms. Murphy-Lewis confirmed the Parents’ agreement with this extension. [Testimony of E. Murphy-Lewis, S-87, S-A-280] Because the Student never returned to CEHS and was unilaterally placed out of state, however, the District was not able to complete its evaluation of the Student. Conducting an evaluation while the Student was at Spring Harbor was not a good option, as she was under stress, not stable, and having concurrent clinical evaluations, all of which could affect the validity of the evaluation, so the District preferred to do the evaluation once the Student was back at home. [Testimony of A. Perez, H. Blier]
- 52.** The Student remained at Spring Harbor for eight days while the Parents and Ms. Schaffel located an involuntary residential placement for her. On February 23, she was ultimately placed at the Trails wilderness program in North Carolina. [Testimony of Father] Ms.

Schaffel recommended this program because she liked the therapist there, Shalene Pierce, who worked with oppositional kids and kids with anxiety. [Testimony of Mother, S-A-289]

The Parents did not provide notice to the District that they would seek reimbursement for this program. [Testimony of Father, J. Clark]

53. Although Director of Special Services Jessica Clark testified that the District sent procedural safeguards to the Parents after the February 17 IEP team meeting was cancelled because it was the District's practice to send them out to all parents with students in either the system or referral process [Testimony of J. Clark], no one had a specific recollection of having done this, and there was no record of it. The Parents did not recall receiving procedural safeguards at this time. [Testimony of Father]

54. At the recommendation of Ms. Schaffel, the Parents hired a transportation company for \$5500 to bring the Student to Trails. [Testimony of Father] The treatment team at Spring Harbor was not comfortable with that plan. Furthermore, the nurse practitioner, Kim Comparetto, was "quite certain that the patient would not agree to go and we would be unable to discharge her to people who were not her parents." [S-103] Spring Harbor allowed the Father to come in the middle of the night and discharge the Student himself to take her to meet the transportation company. Ms. Comparetto told the Student about the plan, and she was resigned to have to go. The Father came get her at 2:00 a.m. and escorted her to the transportation company. [Testimony of Father, S-103-104] She was tearful about it but denied suicidal ideation and was no more dysregulated than on other days when she met with Ms. Comparetto. [S-103-104] Ms. Murphy-Lewis was not in agreement with this placement, but no one asked her opinion about it. Although she had no problems with wilderness programs, how the Parents forced the Student to go was extreme, and it was very upsetting for Ms. Murphy-Lewis to imagine the effect this had on the Student. [Testimony of E.

Murphy-Lewis] The Mother notified Ms. Murphy-Lewis that the Student had arrived at Trails, adding, “I CANNOT THANK YOU ENOUGH FOR YOUR HELP WITH HER! Your commitment to her and our family has been unbelievable. You are an AMAZINGLY caring professional and person.” The Parents were very pleased with Ms. Murphy-Lewis and thought she was doing everything she could to help the family. [Testimony of Mother, Father, S-A-291]

55. The Trails program is a for-profit wilderness program for adolescents that is registered in North Carolina as a “residential therapeutic camp.” It is not a psychiatric residential treatment facility, and for that reason, does not fall within State of North Carolina regulation of those facilities. Shalene Pierce, a licensed clinical social worker, has been with the program since it opened 10 years ago and is the primary therapist there. [Testimony of S. Pierce] Carlyn Daubs, the licensed psychologist who evaluated the Student, was one of the founders of Trails and worked there from 2008-2012, although she was no longer employed by Trails. [Testimony of C. Daubs] Ms. Pierce was responsible for a group of girls between the ages of 14-18, and provided weekly therapy to each adolescent. Her educational experience was as a bilingual pre-K teacher. The students go on expedition for two weeks, then come back to one of the campuses, where they hike, do equine work and traditional academics. One teacher “does all of it,” but he was not a certified teacher, and Ms. Pierce did not know how much academic instruction the Student received nor whether any of the Trails teachers were certified. [Testimony of S. Pierce] There were two staff for seven students. All of the students of varying ages took the same classes together in a “one room schoolhouse.” Ms. Schaffel refers several students each year to Trails, and is listed as the referral source at the top of every progress record. Ms. Pierce reported back to Ms. Schaffel regularly on referred clients. [Testimony of S. Pierce, P-509-533]

56. Upon arrival at Trails, the Student was assessed by a social worker, Jenevieve Rollins. This assessment reported that the Student had no history of suicidal ideations or attempts, self-harming behaviors, aggression, elopements, homicidal ideation, nor did she currently have any of these issues. The Student's current problems were listed as "My parents getting mad at me." She reported that the Mother, for as long as she can remember, hit and kicked her and threw things at her. [P-139-147] Although Trails had a treatment plan that was used for children who might harm themselves, the Student was found to not need this. The Student noted she felt intense feelings of panic or dread that her parents would get mad at her, and played traumatic family events over and over in her mind. She was emotionally dysregulated because of rejection and fear of abandonment, and initially needed a lot of feedback that she was doing a good job. [Testimony of S. Pierce] Shalene Pierce was not aware that the Student had a therapeutic relationship with Ms. Murphy-Lewis, and although she knew the Student was hospitalized at Spring Harbor and that she had been treating with a psychiatrist, did not speak with anyone in Maine about the Student when developing her treatment plan. Her mental health diagnosis was GAD and Parent-Child Relational Problem.⁸ There were no substance abuse issues. [Testimony of S. Pierce, P-148, 172] In therapy, Ms. Pierce focused on what the Student could control, rather than shifting the blame to someone else.

[Testimony of S. Pierce]

57. At the request of Ms. Schaffel, who sends approximately five clients a year to Dr. Daubs, the Student was evaluated by Dr. Daubs on April 3, 2017. Dr. Daubs recommended a "high

⁸ Based upon her one-hour interview with the Student, Ms. Pierce drafted her treatment plan, recommending a stay of 75-90 days at Trails, followed by a therapeutic boarding school or residential treatment program for after care. [P-204] As she was unable to provide a cogent explanation of the basis of this recommendation, this evidence was not given any weight.

degree of supervision and monitoring” to ensure the Student’s safety.⁹ [Testimony of C. Daubs, S-148] Dr. Daubs met with the Student for 3 ½ to 4 hours, but did not provide a summary of the setting in her evaluation. Although the Student had been in the field with her group, she was transported to the main campus for testing. [Testimony of C. Daubs] Dr. Daubs had the Parents sign a release in which they gave unrestricted permission to speak with the Student’s pediatrician and psychiatrist. Dr. Daubs, however, did not speak with any of the Student’s previous providers or anyone who knew her before arriving at Trails except the Parents.¹⁰ [P-482, testimony of C. Daubs] She reviewed the Paradis evaluation, but did not review any other evaluations or any records from the Student’s previous hospitalizations. She discussed the Student with Ms. Pierce for around an hour on April 6, and also spoke with Ms. Schaffel, who had not yet met the Student. After presenting her findings and diagnoses, Dr. Daubs interviewed the Parents for about an hour on April 10. [Testimony of C. Daubs] In her written report, which was undated although Dr. Daubs testified that she wrote it on April 10, Dr. Daubs did not note any problems with peer or staff relationships or academics at Trails. She did not find that the Student had any behavioral dysregulation or problematic behaviors there. [Testimony of C. Daubs, S-124-150] She noted from clinical reports from the Student’s treatment at Trails that the Student is “superficially engaged in the therapeutic process” and although actively engaged in the physical goals of the program, was reluctant to

⁹ There was no evidence to support this recommendation, and the Student’s record during her stay at Trails provided no evidence to support this, either. Despite Parent reports to the contrary, no other mental health professional who had worked with or assessed the Student considered her suicidal or a danger to herself or others.

¹⁰ Throughout the hearing, the Parents took issue with the fact that Dr. Paradis did not discuss the Student with Mr. Fitzgerald in performing her evaluation, yet none of the people who assessed the Student while she was at Trails or Vista Sage had any contact with the Student’s prior providers of psychological services.

share her personal struggles in a group setting. [S-128] After providing the Parents with her evaluation report on April 11, 2017, Dr. Daubs wrote the following to Ms. Schaffel:

I just wanted to let you know that my call with [the Parents] went great – no surprises! They asked great questions and are on board with diagnoses and recommendations! I think they are going to try to move forward with getting their school board to try to fund some of [the Student’s] treatment and I told them that if their attorney needed me to word recommendations in a certain way to help their case, then I’d be happy to amend the report accordingly. I should have everything finalized and ready to go within a day or two!

[P-502.] According to the ethics standards set forth by the American Psychological Association, offering to amend an evaluation to aid the Parents in their litigation was a violation of the ethical code of a psychologist. [Testimony of H. Blier, A. Perez]

58. Heather Blier, Ph.D., a clinical psychologist, was contracted by Ms. Clark in May of 2017 to give an unbiased opinion about the Student’s case.¹¹ Dr. Blier has a doctorate in clinical psychology with specialties in clinical psychology, child and adolescent psychology. She has worked in day treatment, public school and hospital settings, with mood disorders and ADHD, and taught in a Ph.D. program in Ohio. [Testimony of H. Blier] Dr. Blier had a “multitude of concerns” about Dr. Daubs’ evaluation, from errors that professionals do not usually make to ethical violations. [Testimony of J. Clark, H. Blier] Both Dr. Blier and Alina Perez, Ph.D., the District’s school psychologist, found significant problems with Dr. Daubs’ evaluation and both questioned the basis for many of Daubs’ findings and recommendations. [Testimony of H. Blier, A. Perez.] Dr. Blier and Dr. Perez each explained that if done in accordance with best practices, an evaluation reports speak for itself and should not require additional information, but such was not the case with Dr. Daubs’ evaluation. Her evaluation

¹¹ Ms. Clark had not previously worked with Dr. Blier. Dr. Blier had done work for the District previously, in either 2009 or 2010. She currently contracts with more than 10 school departments. 75% of her work is for school departments, and 25% with families.

did not conform to the requirements of Maine law for “specification of the results of each evaluation with testing interpretation (including standard deviation scores).” In other words, her report did not contain standardized scores, which, in addition to not complying with the requirements of the Maine special education law and rules for evaluations, was problematic for other clinicians trying to evaluate the results. [Testimony of H. Blier] Dr. Blier noted careless errors in Dr. Daubs’ report, including reporting the administration of a cognitive test called the “Wechsler Intelligence Scale for Adolescents” yet there is no such test. There is a cognitive test called the Wechsler Intelligence Scale for Children. Sloppy errors like this caused Dr. Blier to wonder about Dr. Daubs’ experience and qualifications. This test was commonly used and naming it incorrectly was an unusual error for a professional to make. [Testimony of H. Blier, A. Perez] Dr. Daubs also did not provide data as part of the Minnesota Multiphasic Personality Inventory (MMPI-2), and appeared to have given the Student the adult version of this tool. Without the data, it was unclear whether Dr. Daubs used an incorrect tool or just made a cutting and pasting error. Furthermore, the results of this test did not support significant symptomology as GAD. [*Id.*] This test contains 31 areas of assessment, 10 clinical scales and 16 additional content scales. Dr. Daubs found a moderate elevation in only one of them. She did not, however, find an elevation in the scale intended to identify individuals who are deliberately trying to avoid answering the questions honestly, so there was no reason to doubt the veracity of the Student’s answers. [Testimony of H. Blier] Dr. Blier explained that individuals in residential treatment settings usually have much more elevated and complex profiles than this. Without the data, however, it was unclear whether the Student had a clinically elevated score or not, as the scores actually tell how significant the elevations are. Dr. Blier was not sure that Dr. Daubs fully understood how to even interpret the MMPI. [Testimony of H. Blier] Dr. Daubs also administered the Beck Anxiety

Inventory, which is an adult measurement tool that is not normed for people the Student's age. The appropriate tool for the Student would have been the Beck Inventory for Adolescents. [S-143, testimony of H. Blier, A. Perez] Dr. Daubs did not collect rating scales or information from anyone who knew the Student in an educational setting. Dr. Daubs also had the Student complete the Rorschach Inkblot Test, which is explicitly not used for diagnostic purposes. Furthermore, neither Dr. Perez nor Dr. Blier found substantial evidence in Dr. Daubs' report to support a diagnosis of GAD that aligned with the Diagnostic and Statistical Manual-V, and it was unclear upon which data Dr. Daubs based her diagnostic impression to rule-out Borderline Personality Disorder, a diagnosis normally reserved for adults in any event. [Testimony of H. Blier, A. Perez, S-148, S-190] Dr. Daubs did not tie the information in her report to her recommendations. [S-148, testimony of H. Blier]

59. On April 18, Ms. Pierce told the Student that she would not be returning home to Cape Elizabeth after she completed the program at Trails. [P-525] The Student was defensive and angry during her therapy session that day, and processed her feelings regarding this news. While the Student was at Trails, she did not engage in any oppositional behaviors. [Testimony of S. Pierce] The Student's discharge summary from Trails listed the Student's many strengths, and listed her needs as: more time to process information, more reflection time, smaller class sizes, more group therapy, more individual therapy, more discussion about a transition before it occurs, more substance abuse prevention and support¹², and continued medication evaluation and management. The Student's preferences were listed as preferring not to continue in residential treatment, but that she still had significant difficulty with emotional regulation with the family system. The discharge summary did not identify

¹² The Student's Trails assessment identified no substance abuse issues, however.

any reasons why the Student would need to be in a residential treatment facility, noting only that “the parents would prefer [the Student] stops blaming her mother . . . for her continued struggles and for [the Student] to take more responsibility.” [S-J-94]

- 60.** While the Student was at Trails, Ms. Murphy-Lewis wrote to the Parents saying they were suspending the special education referral process until the Student returned and the District could complete the evaluation. She also asked for a release so that she and other school officials could speak with the Student’s team at Trails, and requested copies of any evaluations that were done there. [Testimony of E. Murphy-Lewis, S-A-299] The Parents did not respond, so Ms. Murphy-Lewis emailed the Parents again on April 11 to check in and see how the Student was doing. She had not heard anything from Trails, and again asked for copies of any evaluations done there. [Testimony of E. Murphy-Lewis, S-A-302] Because neither Parent responded to her emails, she called the Mother, who reported that they felt the Student had not been getting better and that she was still really struggling emotionally. While she was engaging in the outdoor activities, and doing exceptionally well with this, she was not engaged in the clinical therapeutic part. [Testimony of Father, S-A-303] The Mother thought the Student needed more treatment than she was receiving at Trails. The Student, on the other hand, did not think she belonged at Trails, but was performing all of her duties there and being very cooperative with the program. [Testimony of Mother] On April 28, Ms. Clark emailed the Parents to request copies of any evaluations from the Student’s placements because the Student was in the special education referral process with Cape Elizabeth. She also offered to complete the testing when the Student was at home. [Testimony of J. Clark, P-74] The Mother reported that this was not possible because the Student would not be home at all. [Testimony of Father]

- 61.** On May 4, the Parents emailed Ms. Clark, Principal Shedd and Ms. Murphy-Lewis to give them an update on the Student's status. The Parents wrote that they did not understand why the Student's special education referral process ceased in February without determining eligibility. On the other hand, they had Dr. Daubs' evaluation for almost a full month before they shared it with the District, despite receiving several District emails requesting any evaluations. The Parents attached the evaluation and said they were willing to allow the District to speak with Dr. Daubs directly. Dr. Daubs and the Trails staff recommended a therapeutic residential placement for the Student, and it was their opinion that that she could not return to public school or a less restrictive placement.¹³ In this email, the Parents notified the District that they intended to seek reimbursement from the District for that placement. [S-A-306, P-73] The Parents were planning to send the Student to Vista Sage, a for-profit therapeutic residential program in Sandy, Utah that works with adolescent girls who suffer from depression, anxiety and eating disorders. [Testimony of Mother, B. Carter]
- 62.** Ms. Clark sent the Parents a letter dated May 12, 2017, explaining that the District had until late February to complete the special education referral process, and was unable to evaluate the Student, due to her being absent from school and then hospitalized. Because the Student did not return to Cape Elizabeth, the District could not complete the testing needed to make an eligibility determination. Ms. Clark further explained that the District had requested records from both Spring Harbor and Trails, hoping there would be enough information to allow the IEP team to make an eligibility determination, but had not received much until the previous Friday, May 5, when the Parents sent Dr. Daubs' evaluation report. She also

¹³ As noted above, there were no actual documented issues in Trails' discharge summary or Dr. Daubs' report that supported the need for a residential treatment placement. Furthermore, none of the other mental health professionals who had seen or treated the Student in the past had made such a recommendation.

received some clinical documentation from Trails the previous day. Upon receipt, Ms. Clark wanted to convene an IEP team meeting to decide whether there was sufficient information to determine eligibility for special education, and if not, determine what additional information was needed. [Testimony of J. Clark, S-153] Ms. Clark wanted someone objective to review the evaluations, so the District contracted with Dr. Blier, as she had no prior involvement in this case. [Testimony of J. Clark] Ms. Clark also asked for parental consent to allow Dr. Blier to speak with people at Spring Harbor and Trails. The Father returned signed releases, limiting the Parents' consent so that, "consent for verbal communications is provided only on the condition that one or both parents is included in all such conversations." [Testimony of J. Clark, S-154, S-160-163] Ms. Clark had never seen such a limitation on consent before, and she was concerned that this would prevent people from providing an honest opinion. [Testimony of J. Clark]

63. On May 17, the Student was sent to Vista Sage alone, referred primarily because of family issues. [S-264] The Student did not understand why she had to be there. [Testimony of Mother] Bobbi Carter, the Clinical Director and the Student's therapist, was not there for the Student's first week. [S-J-39] Dr. Blier was concerned that if the Student had such significant clinical needs requiring the high level of care at Vista Sage, having the clinician present for the transition would be recommended.¹⁴ [S-J-39, testimony of H. Blier] The Student lived in a large house with 16 beds housing girls between the ages of 13-17. There is a 1:4 staff to student ratio, a full-time psychiatrist who met weekly with each girl, and a full-time nurse was available to attend to other medical needs. There were three primary therapists. Girls in the program had an hour of individual therapy each week, family therapy and 1 ½ hours of

¹⁴ Ms. Schaffel acknowledged that this was "not ideal," but consulted with Ms. Pierce and the two agreed they were not particularly concerned." [S-J-39]

group therapy daily. DBT was the main therapeutic focus, although the therapists also used cognitive behavior therapy. Students learned to use DBT to regulate their emotions. Medical Director Jeffrey Kovnick, M.D., did the Student's intake, noting that her mood was "content and happy," her rapport friendly, and her affect appropriate. On the intake form, there was a box under "Mood" for "anxious," but this was not checked. [S-B-18] The Student's intake paperwork noted that she had appropriate social skills and relationships. Nonetheless, the first three objectives in her treatment plan dealt with improving her social skills, decreasing social anxiety and negative social behaviors. [Testimony of B. Carter, S-B-29] The remaining objectives involved modulating her emotions and relationships, and demonstrating coping skills to reduce mood swings and control impulses.¹⁵ [S-B-30] Students at Vista Sage attended school daily at Stansbury Academy ("Stansbury"). Because the abilities and ages of the girls at Vista Sage were so different, Stansbury did not provide the Student with direct academic instruction. She worked at her own pace independently on assignments provided to her. Tim Grayson, the education director at Vista Sage, said the Student's academic performance was outstanding. [Testimony of T. Grayson] When the Student arrived at Vista Sage, she had very little insight, was focused on leaving the program, and blamed her Mother for all of her problems. [Testimony of B. Carter] The Student said she "felt betrayed by her parents and therapist for sending her to Vista Sage. . . she was told she was going to boarding school. . . she felt that many of her issues stem from being treated poorly by her mother." [S-B-61] She wanted to go home nonetheless, but Ms. Carter told her that "going home is off the table." [Testimony of B. Carter] While at Vista Sage, the Student was never oppositional or defiant, and she worked very hard in school. [Testimony of B. Carter, S-B-2-11] She

¹⁵ The interventions described for this all referred to the Student using he, him and his pronouns. [S-B-30]

quickly became a team leader there, and was stable and honest in all areas. Throughout the Student's therapy, however, her anxiety was related to her relationship with her Mother, an upcoming home visit or interactions with her parents. [Testimony of B. Carter]

64. On May 30, the District provided Advance Written Notice of a June 9, 2017 IEP team meeting to review available evaluations and see if the information was adequate to determine whether the Student was eligible for special education. [S-179] The Parents invited Joan Kelly, a non-lawyer parent advocate, but did not invite any outside evaluators or professionals who had been working with the Student. Dr. Blier attended the meeting, along with Dr. Perez. As was the District's practice, the meeting began with Ms. Clark giving the Parents a copy of the procedural safeguards and the Parents signed a form indicating receipt. [Testimony of J. Clark, S-186] Ms. Murphy-Lewis discussed her history with the Student, and the Team reviewed the evaluations of Dr. Paradis and Dr. Daubs. Dr. Perez said there was no substantial evidence for diagnosis in either report, and that made it impossible for her to know if GAD was an appropriate diagnosis, based solely on those reports. [Testimony of A. Perez, S-190] Dr. Blier added that the GAD diagnosis was unclear because the Student appeared to be involved in a very stressful home life. [S-190] Furthermore, the reports did not determine the impact of the Student's mental health on school performance. Dr. Perez recommended executive functioning testing, observations in the learning environment and rating scales, then revisiting the diagnosis. She also pointed out that despite the fact that both evaluators gave the Student the same diagnosis, each was based upon very different conclusions. [Testimony of A. Perez] Dr. Blier concurred with Dr. Perez's opinion that there was insufficient information at this point, not just in terms of eligibility, but from a program development and school refusal standpoint. [Testimony of A. Perez, H. Blier, S-190] In other words, there was not sufficient information to develop an appropriate IEP. Neither Dr. Daubs

nor Dr. Paradis had conducted an observation in the classroom or addressed the impact of the Student's diagnoses on her education. [Testimony of H. Blier] Despite the lack of adequate evidence to support the diagnoses in the existing evaluations, Dr. Blier recommended a functional behavior assessment ("FBA"), but said she would be unable to do it if the Parents insisted on being present for clinical interviews, as was the condition in their signed consent forms. [Testimony of H. Blier, A. Perez] It is the first tenet of child interviewing to get a true understanding of the child's thoughts and feelings, which a therapist cannot do with the Parents present. Because school refusal had been a big problem, an FBA would offer insight into that. [Testimony of A. Perez] Regarding the restrictions the Parents placed on their consent to evaluate, Dr. Blier consulted with her professional colleagues, all of whom agreed that ethically, she could not perform the evaluation unless she could interview the Student without her parents present. The District said it would send the Parents new consent forms, but Ms. Kelly said the Parents would not be willing to provide full consent. [Testimony of H. Blier, S-191, S-259] The Parents disagreed that more information was necessary to make an eligibility determination. They said that they had not previously been provided with their procedural safeguards. [Testimony of Father, Mother, S-194] Ms. Clark said that these would have been mailed to the Parents following the February 17, 2017 IEP team meeting that was cancelled. When procedural safeguards are mailed, there is no signed record. [Testimony of J. Clark, S-194]

- 65.** The District reached out to numerous other evaluators, including the New England Center for Children, which has over 100 Board-Certified Behavior Analysts ("BCBA") who contract out for assessments, but because of the Parents' qualified consent, none would agree to conduct the FBA. [Testimony of J. Clark, S-218]

66. By the end of July, the District was able to contract with Thomas Higbee, Ph.D., BCBA-D, of Utah State University, who agreed to perform the Student's FBA. [Testimony of J. Clark, S-218] Dr. Higbee observed the Student at Vista Sage on September 20, 2017. [S-263] Ms. Clark and Dr. Higbee had tried to arrange the FBA earlier, but received no response from Vista Sage, so Ms. Clark emailed the Parents for the name of a contact person there. [S-A-348, 358] When Dr. Higbee finally met the Student and staff at Vista Sage, he was unable to complete an FBA because the Student had never engaged in any problematic behaviors there. His report stated, "as noted in my behavioral observation . . . all program staff reported that she has been a "model citizen" since arrival and that she had not displayed any significant behavioral problems . . . Quite simply, there was no aberrant behavior for me to assess." [S-261] Mr. Grayson described the Student as

a very easy student. She is very independent and bright. She is organized and has good study skills. She has a tendency to "fly under the radar" since she is not causing problems and because she is so compliant. The therapy work has really been critical to her success. It has helped her deal with the significant family issues she has faced. She hasn't needed specific academic accommodations. She is taking fairly advanced classes and is earning good grades in all of her courses. It is difficult to know when she is experiencing anxiety because you can't see it. [S-267]

When conducting his evaluation, Dr. Higbee interviewed the Student and other staff without the Parents present. His first question for the Student was what led her to not having success in high school, to which she replied that she was in a car accident and had a concussion at the beginning of her junior year. She missed a month of school and fell behind because she was in advanced classes and felt really overwhelmed. She stayed home to escape the overwhelming amount of work, and felt like she might as well give up. The Student thought Vista Sage was easier, and although she was not a "huge fan of the program," liked having the ability to work at her own pace. [S-265]

- 67.** The Student returned home on a “home pass” from Vista Sage in mid-September, but the Parents did not inform the District of this or make the Student available for evaluation.
[Testimony of Father, S-B-101]
- 68.** By the end of September 2017, the Student was doing “fantastic” at Vista Sage, so she was moved to the day treatment program. She only got in trouble once, and this was for posting a video of her physical education class on Snapchat. The Student admitted to doing this. For this single violation of the Vista Sage rules, the Student was returned to the more restrictive the residential treatment program again. [Testimony of B. Carter] She continued to make progress and was returned to day treatment shortly thereafter.
- 69.** On October 24, 2017, the IEP team met to review Dr. Higbee’s report. Dr. Higbee attended via teleconference. [Testimony of J. Clark, S-281] He observed the Student and did not see any challenging behaviors or hear reports of the same. [S-282] The Father was concerned that Dr. Higbee had interviewed the Student without the Parents present. [Testimony of Father] The Parents’ advocate, Ms. Kelly, pointed out that consent was limited and did not permit Dr. Higbee to interview the Student without the Parents’ present. In response, Dr. Higbee prepared a revised assessment that did not include the interview with the Student. [S-268-270] Because Dr. Higbee’s interview with the Student, however, provided the causal link between her anxiety and her school avoidance, the IEP team found her eligible for special education services under the disability category of Other Health Impairment. [S-263-267, 281, testimony of J. Clark]
- 70.** After the IEP team meeting, Ms. Clark sent the Parents an email with a new consent to release information discussed earlier that day. On October 26, the Father responded to this email saying,

What we understood leaving the meeting was that you wanted to have Dr. Heather Blier speak directly with staff at Vista Sage without our being able to hear their discussions or know what was said. As we have told you before, this approach is unacceptable and we do not consent to it. We want full transparency in this process. [S-A-383]

- 71.** Ms. Clark emailed the father on November 2 explaining the need to send school staff to Vista Sage to observe the Student's programming and speak directly with the program staff in an effort to better understand the Student's current educational needs, support, services and interventions being utilized by the program to address those needs. She explained that she thought the Parents agreed at the IEP team meeting to provide unqualified consent for District staff to exchange information with Vista Sage to develop appropriate programming for the Student, but that the Father's email indicated otherwise. Ms. Clark added that the restrictions placed by the Parents on these communications might impact the District's ability to develop appropriate programming for the Student. [S-A-386, testimony of J. Clark] The Father said that the Parents never provided unqualified consent, as their attorney advised them not to. [Testimony of Father]
- 72.** During a November 1, 2017 family psychotherapy session from Vista Sage, the Student told the Parents that she was going to be able to graduate from Vista Sage, and said she was applying to college. [S-B-108] One week later during family therapy, the Student said she was unwilling to prolong her high school graduation just so her school might pay for her treatment. The Mother voiced frustration with this decision, but Ms. Carter encouraged the family to move forward with what the Student decided. [S-B-109] The Parents were not expecting the Student to graduate so soon. She earned straight As at both Trails Carolina and Vista Sage and had an overall grade point average of 3.56. [S-B-109, 544]
- 73.** The Student came home for a visit for six days at Thanksgiving, and had a lot of anxiety about returning to Vista Sage. The IEP team was scheduled to reconvene on November 28,

but on November 22, the Parents cancelled the meeting and requested other dates. The District also asked the Parents for consent to invite Bobbi Carter of Vista Sage to participate. [S-A-409]

74. The first date that everyone on the IEP team was available was December 21, 2017. Ms. Carter and Mr. Grayson provided updates on the services the Student was receiving and her progress at Vista Sage. [Testimony of J. Clark] At this time, the Team determined that it could implement each of the services the Student was receiving locally in Maine, and that residential treatment was not necessary. [Testimony of H. Blier, J. Clark] Despite the Parents being aware of the Student's impending graduation since early November, this was the first time the District learned that the Student would be graduating in one month. [Testimony of J. Clark]

75. Although Ms. Carter said the Student still had some anxiety, her prognosis was very good, and she did not have borderline personality disorder. The Student finished her high school requirements early and graduated high school on January 23, 2018. She has remained in Utah in a "step down" program recommended by Ms. Carter, where she is working and living with a host family, and has been accepted to several colleges. [Testimony of Father, B. Carter]

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parents:

The District failed to meet its child find obligations to refer, evaluate and identify the Student, thereby denying her a free appropriate public education ("FAPE"). The trigger for the obligation to refer a child for an IDEA evaluation is a mere suspicion of a disability adversely affecting the child's educational performance. A student unable to attend school due to a suspected disability is suffering an adverse educational impact. The District suspected the Student of having such a disability no later than early October of 2016. Although Ms. Murphy-

Lewis began to initiate the process for section 504 accommodations, she did not refer the Student for an IDEA evaluation. The District violated the IDEA by not referring the Student for an IDEA evaluation by mid-October or at the very least, by November 10, 2016. Commencing the 504 process did not relieve the District of its obligations under the IDEA.

The District violated the referral and evaluation requirements when it failed to convene the IEP team to design the Student's initial evaluation on December 6, 2016. The IEP team never met or worked in any way to review existing data on the Student or plan her initial evaluation. Had the IEP team been called upon to review existing data and design an appropriate evaluation, the Team would have taken notice of the Student's strong reluctance to come to school or be evaluated, and designed an approach with the Parents' cooperation that could have been successful.

The District also failed to evaluate the Student within the mandated 45-day time frame. Cape scheduled the IEP team meeting for February 17, which was one day before the 45-school day period elapsed on February 27. By February 14, the date on which the evaluation report needed to be sent to the Parents, Ms. Kooy had nothing ready and no plan for gaining access to the Student. The District essentially abandoned all attempts to evaluate the Student. The failure to determine eligibility and provide the Student with an appropriate IEP and placement amounts to a violation of FAPE.

The District also failed to provide the Parents with notice of their procedural safeguards. The evidence established that at no time in the IDEA referral and evaluation process prior to June 9, 2017 did the District provide the Parents with notice of their procedural safeguards as required by the IDEA and Maine law.

The Parents are entitled to tuition reimbursement for the costs associated with Trails and Vista Sage, both of which are proper placements under the IDEA. In February 2017, the

District's attempts to educate the Student failed, and the Parents needed to place her unilaterally. The lack of reimbursement notice prior to the Student's removal in favor of Trails may not be held against the Parents, as the District failed to provide them with notice of procedural safeguards.

No equitable factors bar reimbursement, as the Parents never obstructed the District's effort to evaluate or program for the Student. The Parents wanted to hear firsthand what the private school providers would say about the Student in answer to questions posed by Cape's "hired gun" psychologist and wanted the process to be completely transparent. No hearing officer or court has ever ruled that districts are prohibited from monitoring the conversations between public school staff and independent evaluators, yet it is amazing how loudly a public school will scream about obstructionism when parents want to monitor the conversations between the District's hired expert and the private school providers serving their child.

B. Brief summary of the position of the District:

The Hearing Officer should deny the Parents' requested remedy because the District timely referred the Student to special education and complied with all of the state and federally mandated timelines for the referral process. Any delay in the process is attributable to the Parents' unreasonable actions, including not allowing school staff or evaluators to conduct clinical interviews with the Student or speak with staff at the private placements without the Parents present, and failing to timely provide the District with evaluations from outside providers.

The District did not violate its child find or evaluation and identification obligations under the IDEA with respect to the Student between September 2016 and October 2017. As soon as there was evidence in the fall of the Student's 11th grade year that the Student may have a

disability that was interfering with her ability to access her education, District staff immediately made a referral to Section 504, and shortly thereafter to special education.

Evidence of problems in the home environment without any corresponding impact on educational or functional performance in the school is not sufficient to trigger child find.

Although CEHS administrators were aware of the Student's tremendous turmoil at home, her grades, attendance, PSAT scores and other factors showed that it was not adversely affecting her educational or functional performance until the fall of her 11th grade year.

The Student's absences following her concussion were expected and it was not until the first week of October that the Student began visiting the nurse for emotional concerns. It was reasonable to assume that with supports in place through a Section 504 plan, the Student would be able to catch up and complete her work as she had done in the past when she missed school. The 504 plan was an appropriate first step, but when the Student did not access her accommodations, Ms. Murphy-Lewis referred her for special education just 12 school days after the Section 504 meeting. The Student's had only seven unexcused absences at the time of her referral, only two of which were consecutive, and this did not fall within the number of absences for a mandated referral.

The District was within its right under MUSER to review existing data to determine the need for additional evaluations outside of an IEP team meeting. The evaluation would have been completed well within the 45-day time frame, had the Student been available for testing. Her Parents took no steps to assist with this, and further stymied the process by having the Student hospitalized at Maine Med and Spring Harbor. Following her hospitalization on February 14, she never was available to the District again.

The District had no obligation to evaluate a student who was privately placed by the parents outside of Maine, and the District's obligation to complete the referral process ended

when the Parents placed the Student at Trails on February 23, 2017. This was before the District's deadline to complete its special education evaluation. The Student remained unavailable for evaluation through her high school graduation in January 2018.

Despite having no legal obligation to do so, the District nonetheless made significant efforts to assess the Student. Within 20 days of receiving adequate evaluative data, the IEP team met and found the Student eligible for special education.

The Parents have failed to meet their burden of proving that the District failed to provide them with special education procedural safeguards. The Mother signed an acknowledgement of receipt in December of 2016, and the Parents did not introduce evidence to prove that they did not actually receive these documents.

As the District did not violate the IDEA, the Parents are not entitled to a remedy.

Even if the hearing officer determines there was a violation, the Parents are not entitled to reimbursement for Trails for two reasons: they did not notify the District of intent to seek reimbursement for the Student's placement at Trails, and Trails does not qualify for reimbursement under Maine law in any event, as it is not private preschool, elementary or secondary school.

C. Discussion of Issues:

The U.S. Supreme Court has held that in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005) *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35, n. 3 (1st Cir. 2012). Therefore, the Parents must prove by a preponderance of the evidence that the District violated its child find and other obligations under the IDEA, that the District failed to provide the Parents with special education procedural safeguards, and that they are entitled to an appropriate remedy for any violations.

The parties introduced a lot of evidence during seven days of hearings and in thousands

of pages of documents. Although most of the testimony, documents and witnesses were credible, I did not find either Carlyn Daubs or Shalene Pierce to be as knowledgeable as other witnesses of similar education and training, nor were they able satisfactorily to substantiate and explain their opinions and conclusions. I did not find their testimony about their conclusions and recommendations to be credible evidence.

It was unclear to me how, after a one-hour interview with the Student to create a treatment plan, Ms. Pierce could possibly have been able to conclude that the Student would need a therapeutic boarding school or residential treatment program following Ms. Pierce's recommended stay of 75-90 days at Trails. While the Student was at Trails, she did not engage in any oppositional behaviors. There was no evidence in what was provided of the Student's record during her stay at Trails to support Ms. Pierce's recommendation. The Student's discharge summary from Trails listed the Student's many strengths, but also a lengthy list of her supposed needs that were largely unsupported by evidence. The discharge summary did not identify any reasons why the Student would need to be in a residential treatment facility, noting only that "the parents would prefer [the Student] stops blaming her mother . . . for her continued struggles and for [the Student] to take more responsibility." When Ms. Pierce was questioned on cross-examination, without counsel having the benefit of all of the requested documents, including family therapy notes, she was unprepared and unable to adequately answer questions. Her testimony, along with Dr. Daubs, raised concerns about the legitimacy of Trails and its program.

I have been an adjudicator for IDEA disputes since 2002 and have read hundreds if not thousands of psychological evaluations. Dr. Daubs' report is the only one I can recall by a psychologist who did not provide data to support her testing or her conclusions. The Parents claimed they wanted full transparency in the process, but Dr. Daubs was the opposite of transparent. She was unwilling to share documents that she used during her testimony, refused to

release all of her test data and did not produce documentation to support her evaluation results or recommendations. Her evaluation of the Student made conclusions that lacked supporting evidence, contained inappropriate test choices and assorted errors. As a witness, Dr. Daubs did not explain her evaluation well and unable to provide clear answers to questions. I could not compel Dr. Daubs to release documents requested by the District because she was not within my jurisdiction. This impaired District counsel's right to cross-examine Dr. Daubs. I allowed her to testify but gave her evidence the weight it deserved, which was very little. The fact that Dr. Daubs did not include test data and refused to share documents that allegedly supported her conclusions allowed an inference that her conclusions were not supported by any data or other evidence. When the District's psychologists took the stand, they merely confirmed what was readily apparent from Dr. Daubs' evaluation report and testimony: her evaluation was poorly prepared, was not done in accordance with best testing and evaluation practices, did not contain evidence to support her conclusions and recommendations, and she was unable to defend her report when questioned.

It was ironic that the Parents' closing argument referred to Dr. Blier as the "District's hired gun" when it appeared that if there were any "hired guns" here, they were Dr. Daubs, Ms. Pierce and Ms. Schaffel. The Parents hired Ms. Schaffel to help the Parents place the Student in a residential treatment program, involuntarily if necessary, and attempt to have the District fund it. Ms. Schaffel, who regularly funneled work to Dr. Daubs, asked her to perform an evaluation of the Student after she had been at Trails for over a month, while Ms. Schaffel was working with the Parents to find the Student her next involuntary residential program. Dr. Daubs clearly and unabashedly admitted to her "hired gun" role when she told Ms. Schaffel that essentially everything went as promised adding, "I told them that if their attorney needed me to word recommendations in a certain way to help their case, then I'd be happy to amend the report

accordingly.” [P-502]

Attorneys for the two firms involved in this hearing represent most of the parties in the IDEA cases over which I have presided since 2002. The attorneys have their preferred providers to whom they send their clients or recommend for psychological testing, educational testing, tutoring, or treatment. Despite regularly seeing reports from some of these individuals, and having them testify before me repeatedly, I do not think of them as “hired guns” because, while these professionals may have different perspectives and approaches, they almost always provide well-reasoned opinions supported by test data or other evidence. Dr. Daubs and Ms. Pierce, however, did not do this. The evidence supports a conclusion that they prepared reports and recommendations to produce a pre-ordained result, and what little data they shared did not support their conclusions. It was troubling to see that arrangements like this exist at the expense of young women like the Student.

Dr. Blier, on the other hand, has testified in one other hearing over which I presided, [REDACTED]. In that hearing, she was a contracted expert who testified for the school department. She was a very knowledgeable and credible witness and I find her to be one here as well.

1. Did the District violate its child find or evaluation and identification obligations under the Individuals with Disabilities Education Act (IDEA) with respect to the Student between September 2016 and October 2017?

A. Timeliness of the referral to special education

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). To be sure that each child receives FAPE, the special education laws require schools to make a referral to special education whenever “the child find process indicates that a child may require special

education and related services in order to benefit from regular education because of a possible disability.” MUSER §IV.2(D) (2013); 34 CFR §300.301(b). So-called “child find” is an affirmative, ongoing obligation of all school administrative units to identify, locate and evaluate all children with disabilities residing within their jurisdiction who may be in need of special education and related services. 34 CFR 300.111(a)(1)(i). This includes children who are suspected of being children with disabilities and in need of special education, even if they are advancing from grade to grade. 34 CFR 300.111(c). There is no dispute that the District has an appropriate child find policy. CEHS school officials had an excellent method of making sure students were identified, which included bi-weekly meetings of the administrators, guidance and social workers to discuss students who were identified as having a high number of absences or at risk of failing. [Fact # 27]

Evidence of problems at home without a corresponding impact on educational or functional performance in school is not sufficient to trigger child find. The IDEA does not require schools to address behaviors that have minimal, if any, impact upon the Student at school. In *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001), the First Circuit explained that IDEA services need not address "problems truly 'distinct' from learning problems." 254 F.3d at 352 (1st Cir. 2001).

Under Maine law, the child find process specifically takes into account absenteeism and states that, “children who have the equivalent of 10 full days of unexcused absences or 7 consecutive school days of unexcused absences during a school year” should be referred to special education for evaluation. MUSER IV.2(A)

Although school officials had the Student on their radar during 10th grade because of the conflict she was experiencing at home, she was taking a challenging course load but doing well academically, had a good group of friends, was respectful and kind to everyone at school and did

not show any atypical behaviors there. Consequently, she did not meet the criteria for a referral to special education because her problems at home were not having an adverse effect on her school performance and functioning. The Student was already receiving considerable support from Ms. Murphy-Lewis for the turmoil she was experiencing at home and had a positive therapeutic relationship with her.

At the start of 11th grade, Ms. Murphy-Lewis and Mr. Shedd were keeping an eye on the Student because they were aware that her living situation had changed and she expressed a desire to attend school elsewhere. Although the Student's problems had previously been exclusively about her relationships with the Parents, the impact of those relationship problems had begun spilling into school. Ms. Murphy-Lewis expected the Student to experience some adjustment to these changes. She explained that she was seeing different factors converging, including the concussion, the Student's living arrangements, her relationship with her parents, anxiety and feeling like she did not fit in with the culture at CEHS. This would explain why the Student was having a difficult time, plus she was falling behind in her school work due to her concussion. These factors would not necessarily have prompted a special education referral unless her concussion had been more serious and resulted in a traumatic brain injury. The District was unaware of any learning issues or mental health issues at that point. Although the Parents had the Student evaluated by Dr. Paradis, they had elected not to share this information with the District, so the District was unaware of the Student's GAD diagnosis.

On the day Ms. Murphy-Lewis learned that Dr. Bowker-Kinley had diagnosed the Student with GAD, she made a referral for a Section 504 plan for the Student. The 504 plan contained supports that were intended to allow the Student to catch up on her work. Although this was not known for certain at the time, the Student had been avoiding school to escape the overwhelming amount of work. The timing of this referral was very reasonable. In fact, it was

immediate. It is not unusual in a situation like this for a school department to see whether Section 504 accommodations were helpful to the Student before considering a special education referral, and a diagnosis of GAD does not automatically mean a student requires special education to succeed in school. As Ms. Murphy-Lewis explained, “many many students” have anxiety. [Fact #24]

Although the Parents argue that the special education referral should have been made at that time, I disagree for the reasons stated above. Additionally, the Student had not yet met the threshold number of absences which would have mandated such a referral. At the 504 meeting, the Mother expressed her view that the Student needed a residential placement. She had wanted the Student out of the home for approximately two years, however, and had been advocating for a residential placement long before the Student had any problems in school. [S-57]

It was only a matter of days after the 504 plan was put into place that the District moved swiftly to refer the Student for an evaluation to determine special education eligibility. Between learning of Dr. Bowker-Kinley’s diagnosis, the attempt to assist the Student under Section 504 and the special education referral, less than two months had transpired. With this timing, I do not find any violations of the District’s child find obligations under the IDEA.

B. The referral process

The Parents also assert that the District violated the IDEA when it failed to convene the IEP team to design the Student’s initial evaluation on December 6. MUSER clearly states that this is not necessary. The regulations require that all special education referrals must be acted upon in a timely manner. This includes IEP team review of any existing evaluation data and a determination of whether any additional evaluations are necessary. The rules specifically say this may be done *without* a meeting. MUSER §IV.2 (E), §V(3)(B). If additional evaluations or data are needed to determine eligibility under the IDEA, the District must send a consent to evaluate

form to the Parents within 15 school days of receipt of the referral. The District had an informational meeting with the Parents on December 6, at which time the Mother signed the consent to evaluate.

Although the Parents speculate considerably in their closing argument about how the failure to hold an IEP team meeting undermined the entire evaluation process, the CEHS staff who attended the December 6 meeting, Mr. Shedd, Ms. Murphy-Lewis and special education teacher Ben Raymond, were very capable of making the necessary determinations and answering the Parents' questions. The initial evaluation included a psychological evaluation and academic testing. No evidence was introduced that the evaluations chosen were inappropriate. From that point, the District had 45 school days to complete the evaluation process and have an IEP team meeting. MUSER §V.1(A)(3)(a)(i). With school vacations, that deadline was February 27, 2017.

Identification and development of an IEP can only occur after an appropriate evaluation is completed and a determination is made by the IEP team. MUSER IV.2(A). The District has the responsibility to conduct the evaluation. It was the Parents, however, who prevented both the evaluation and determination from occurring during the required time frame.

Although the District's evaluator did not begin the process until late January 2017, the evidence supports a conclusion that she would have had time to complete it, had the Student been available. Ms. Kooy was willing to be flexible about where the Student's evaluation took place, and offered to meet with her either at home or in the community. The Parents did not take steps to make the Student available for testing and put all of the blame on Ms. Kooy. MUSER, however, appears to place the responsibility with parents to produce a child for evaluation, and in fact provides an exception to the 45-day timeline when "[T]he parent of a child repeatedly fails or refuses to produce the child for the evaluation." MUSER §V.1(A)(3)(b)(ii).

The evaluation was necessary to make a determination about both the Student's eligibility

and her programming. When the Parents had the Student involuntarily hospitalized, however, the District had no evidence that the Student had a disability adversely affecting her academic performance, and there was no evidence from any educational or health professional that she required a residential placement at all, let alone that it would be the least restrictive environment in which she could be educated.

Rather than facilitating the Student's evaluation by the District or allowing the IEP team to make a determination regarding the appropriate placement for her, the Parents made it their priority to place the Student in a hospital or residential treatment program. Without allowing the referral process to take place, in which the IEP team would have decided what placement was appropriate under the law, the Parents proceeded to make their own plans to have the Student hospitalized at McLean Hospital in Massachusetts. When the Student's psychiatrist, Dr. Bowker-Kinley, completed paperwork for McLean, she recommended boarding school or a longer term DBT program, not inpatient or residential treatment. Had the Student agreed to the McLean placement, she would have been unavailable for evaluation for that reason, but when she refused, the Parents had her hospitalized involuntarily at Maine Med and then Spring Harbor. In fact, they paid Ms. Schaffel to look for residential treatment programs that accepted adolescents involuntarily. From this point on, the Student was not available to the District for evaluation. Consequently, the Parents' focus on a residential placement for the Student actually blocked the District's ability to complete the Student's evaluation and the IEP team's ability to identify her for special education and create an IEP.

When the Student was in North Carolina and Utah, the District continued to contact the Parents in an effort to move the identification process forward, sending emails requesting copies of the Student's evaluations and records from Trails and Vista Sage. The Parents did not respond to these emails, so Ms. Murphy-Lewis telephoned them.

The District cites the case of *C.G. v. Five Town CSD* as authority that when parents unilaterally place a student out of state, the school district cannot be compelled to assume any responsibility for evaluating the child while she remains in the unilateral out-of-state placement. 513 F. 3d 279 (1st Cir. 2008). As in the *Five Town CSD* case, the Parents here interrupted the IEP process while it was ongoing by unilaterally making a decision to remove their child from Maine and place her at a residential program in another state. As Judge Selya noted in *Five Town CSD*, and what is likewise true here is that “the parents harbored a fixed purpose: to effect a residential placement for their daughter at the School District's expense, come what may.” The First Circuit denied the parents’ request for reimbursement, explaining that their actions had

. . . disrupted the IEP process, stalling its consummation and preventing the development of a final IEP . . . the cause of the disruption was the parents’ single-minded refusal to consider any placement other than a residential one. Such Boulwarism, whether or not well-intentioned, constitutes an unreasonable approach to the collaborative process envisioned by the IDEA. See *Roland M.*, 910 F.2d at 995. Here, that attitude sufficed to undermine the process.

Five Town CSD, 513 F.3d at 288.

There is considerable authority in other jurisdictions as well that a parent’s lack of cooperation in unilaterally placing a child out of state and offering only to permit school staff to travel to where the child is to conduct an evaluation “deprived the school district of a reasonable opportunity to conduct an evaluation of [the child] and fulfill its obligations under the IDEA.” *E.g.*, *Patricia P. v. Board of Educ. Of Oak Park*, 203 F. 3d 462 (7th Cir. 2000). In *Patricia P.*, the Seventh Circuit stated that a school department required the cooperation of the parents to properly evaluate a child and convene an IEP team meeting to determine appropriate services. In that case, like here, the parents unilaterally enrolled their child in private school in another state and would not send the child back to the home state for an evaluation. The parent’s sole action indicating a willingness to make the child available was for the district staff to come to the

student to evaluate him. And as here, the parents made their unilateral placement a priority over allowing the school department to evaluate the student. Once the Parents unilaterally placed the Student out of state, however, they rendered her unavailable for testing until she returned to Maine or the Parents otherwise made her available for testing here. *Five Town CSD, Patricia P., supra.*

Although the Parents contend that the District made no efforts to evaluate the Student at Trails or Vista Sage, these cases are authority that the District had no such obligation. As the *Five Town CSD* court ruled, the “District had no obligation to send its evaluators to Utah or to contract for evaluation by Utah-based third parties; rather, the Parents’ decision to remove [the Student] to Utah rendered her unavailable for testing.” *Id.*

Here, the District exceeded its legal obligations by being willing to consider the evaluation of Dr. Daubs and Dr. Paradis without having its own evaluation completed, and hired Dr. Higbee in Utah to complete an FBA, when in fact, the District had the right under the IDEA to evaluate the Student using its own evaluators. *Id.* Furthermore, when the Student returned home for visits, the Parents did not inform the District, nor did they make the Student available for evaluation.

Additionally, the Parents placed an untenable condition upon their consent to allow the Student to be evaluated. This conditional consent is not something that I have seen in any other due process hearing. Although the Parents placed no restrictions on the consent they gave Dr. Daubs, they were very clear that neither Dr. Blier nor any other District evaluator was permitted to speak with the Student, the staff at Vista Sage or Trails without one of the Parents being a party to the discussions. The District’s experts confirmed my concern about this restriction: that it would be very difficult for the Student or her providers to be completely honest if the Parents were party to the discussions, and no doubt such a restriction would affect the outcome of an

evaluation, especially in light of the Student's lack of trust in her parents and her extremely conflicted relationship with the Mother. This restriction was patently unreasonable.

Because the Parents did not make the Student available for evaluation and actually hindered the District's ability to evaluate her, the District did not violate the IDEA by failing to evaluate the Student within the time allowed under applicable law and regulations.

C. Identification process

In any other situation, the Parents' failure to make the Student available for an evaluation by the District would have ended the inquiry. The District, however, again exceeded its responsibilities under the IDEA, and convened the IEP team to review existing evaluative data without having had the ability to conduct its own evaluation and without having the classroom observation required under MUSER §V.3, VII.2 and V.1(A)(1). The law specifically defines a child with a disability as: (1) one who is over age 3; (2) has neither graduated from a secondary school program with a regular high school diploma nor reached 20 years of age; (3) has *been observed in the learning environment/classroom setting*; and (4) *has been evaluated according to these rules* and been determined to have a disability which requires the provision of special education and supportive services. MUSER VII.2. [emphasis added]

Although IEP teams must consider private evaluations provided by the family, the Federal courts have been clear that school districts have the right to evaluate, with evaluators of their own choosing, any student they are obligated to serve under the IDEA. *See, e.g., Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178 (5th Cir. 1995).

Because of the lack of an evaluation by an evaluator of the District's choice or a classroom observation, the District had no obligation to convene the IEP team and consider the Student's eligibility. Nonetheless, it did so and convened the IEP team on June 9, 2017. Although the Parents could have invited any of the Student's providers to attend this meeting to

present evidence supporting the Parents' position that the Student was eligible, they did not do so. The IEP team concluded that there was insufficient information to decide whether the Student met the criteria for special education, and determined that an FBA was needed. This determination was correct and consistent with the requirements of the special education laws and regulations. Not only were the above-noted evaluations and observation missing, but the credible testimony of Dr. Blier and Dr. Perez affirmed that there was inadequate information on which to make an eligibility determination. Without adequate information, the IEP team could not draft an IEP or make a placement decision.

The District also went above and beyond its obligations under the IDEA to find an evaluator to conduct the FBA in Utah, and one who was willing to do it despite the Parents' refusal to give full consent to the evaluator. Again, the inquiry could have ended here, but the District persisted in attempting to follow through with the IDEA process, despite the roadblocks the Parents placed in the way. The District paid Dr. Higbee to conduct an FBA which he ultimately was unable to do because the Student had no problem behaviors for him to assess.¹⁶

At the October 24, 2017 IEP team meeting, the Team considered Dr. Higbee's report and the other assessments. Based upon the evidence, the Team found the Student eligible for special education as a student with an Other Health Impairment. An IEP was drafted in December 2017, but the Student did not access it, and graduated from high school in late January 2018.

Based upon the evidence and for the foregoing reasons, I conclude that the District did not violate its child find, evaluation or identification obligations under the IDEA.

¹⁶ As noted in Fact #66, Dr. Higbee interviewed the Student and others at Vista Sage without the Parents being present, in violation of the terms of their conditional consent. He then revised the report to remove the interview with the Student, but this interview contained the evidence necessary for the IEP team to determine the causal connection between her anxiety and school refusal needed to find the Student eligible for special education.

2. Did the District violate the IDEA by failing to provide the Parents with notice of their procedural safeguards?

Under Maine law, all school administrative units must adopt and implement procedural safeguards contained in 34 CFR 300.500-520. All school districts must distribute the notice of procedural safeguards set forth in Appendix 1 of MUSER to parents or legal guardians upon the initial referral or parent request for an evaluation. MUSER §XV, 34 CFR §300.504(a)(1).

The District had several opportunities to provide the Parents with procedural safeguards. The first opportunity was in connection with the Section 504 referral. The facts support a conclusion that Principal Shedd provided the Parents with a copy of the Section 504 procedural safeguards at the November 2016 Section 504 meeting. [Fact #37] His testimony about this was credible, and the Parents' testimony was very vague on this issue. This does not, however, eliminate the requirement that the District provide the Parents with a copy of the IDEA procedural safeguards.

The Parents allege that the first time they received IDEA procedural safeguards was at the June 2017 IEP team meeting. The District, on the other hand, contends that the Parents were given procedural safeguards on several occasions, including: (1) at the December 6, 2016 meeting at which the Mother signed the consent to evaluate form; (2) by mail following the February 2017 IEP team meeting that was cancelled; and (3) at the June 9, 2017 IEP team meeting. There is no dispute that the Parents received a copy of procedural safeguards at the June 2017 IEP team meeting.

Regarding the December 6, 2016 meeting, Principal Shedd testified that although he had no specific recollection of giving the Parents procedural safeguards, it was standard practice for the special education case manager to do so, and CEHS followed a protocol which included providing this document whenever a parent signed a consent to evaluate at each initial referral

and IEP team meeting that he attended. Mr. Shedd was a very credible witness. Ms. Murphy-Lewis, another very credible witness, corroborated this testimony, and said she believed that Mr. Raymond had provided the Parents with procedural safeguards at this meeting. The Mother specifically signed a written acknowledgement that clearly stated that she “received the statement of procedural safeguards attached to this consent form if this is an initial referral or a parental request for an evaluation.” [S-64, Fact #42] This is consistent with the testimony about the District’s practice. The Mother did not have any explanation regarding why she would have signed this acknowledgement of receipt without having actually received a copy of the procedural safeguards. She testified that she did not recall receiving procedural safeguards, and that she had not received them at the December meeting because she could not find them in her files, but had no specific recollection either way. Her testimony was vague and unconvincing.

The Parents have the burden of proving, by a preponderance of the evidence, that they were not provided with procedural safeguards in a timely manner. They have failed to meet that burden. Neither Parent’s testimony was definitive nor did either have a very clear recollection about receiving procedural safeguards. They could not recall with any assurance whether they received the safeguards at the 504 meeting or at the December 6 meeting at which the Mother acknowledged in writing that she received them. At the hearing, it was unclear from the Mother’s testimony whether she was even aware of what the procedural safeguards looked like, even though the Parents do not dispute receiving a copy in June of 2017.

The evidence supports a conclusion that the Parents received procedural safeguards on December 6, 2016. Therefore, the District did not violate the IDEA.

3. If the hearing officer determines that the District violated the IDEA, what remedies are appropriate?

As the District did not violate the IDEA, the Parents are not entitled to any remedy.

4. Should the Parents be required to provide unqualified consent for the District to fully evaluate the Student and to consult with the Student's providers at Trails Carolina, Spring Harbor Hospital, and Vista Sage for the purpose of developing an appropriate IEP for the Student?

As the Student has graduated from high school and is no longer eligible under the IDEA, this issue is now moot.

V. ORDER

1. The District did not violate its child find obligation or its obligation to evaluate, identify and place the Student in special education.
2. The District did not violate the IDEA by failing to provide the Parents with notice of their procedural safeguards
3. As the District did not violate the IDEA, it is not responsible any costs incurred by the Parents associated with their unilateral placement of the Student at Trails or Vista Sage.

SHARI B. BRODER. ESQ.
Hearing Officer