

State of Maine  
Special Education Due Process Hearing Decision

**Parents v. Nobleboro, Case No. 01.249**

REPRESENTING THE SCHOOL: Amy Tchao, Esq.,  
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REPRESENTING THE PARENT: Richard O'Meara, Esq.,  
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HEARING OFFICER: Carol B. Lenna

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This hearing was held and the decision written pursuant to Title 20-A, MRSA, §7207-B et seq., and 20 USC §1415 et seq., and accompanying regulations.

The case involves Student, whose date of birth is xx/xx/xxxx. She resides with her parents in Nobleboro, Maine. The student currently attends the Elan School, having been placed there by her parents in March 2001. She has earned sufficient academic credits to be a high school senior. The student is eligible for special education services as a student with an emotional disability.

Beginning in September 1998, the student attended Lincoln Academy as a tuition student from the Nobleboro School Department. By November of the 2000-2001 school year she was failing all academic subjects. In March 2001, after a suicide attempt, her parents removed her from Lincoln Academy and placed her at the Elan School. In May the parents made a referral to special education to support that placement. In October 2001 the student was found eligible for services as a student with an emotional disability. The PET developed an IEP that did not support continued placement at Elan, but recommended she be returned to Lincoln Academy for the balance of her senior year. Her parents disagreed and requested that the school continue her placement at the Elan School. Unable to come to agreement, the parent requested a due process hearing.

Extensions to the original dates set for the pre-hearing conference and the hearing were requested by both the school and the parents and granted by the hearing officer. The parties met in a pre-hearing conference on November 19, 2001 to exchange documents and witness lists. Documents numbered 1-172, 179-180, 185-193, 197-312, P3, P18-24, P33, P53-54, P76-78, P85-99, P142, P147, P152-153, P187-188, P195-196, P209-210, P219-238 were entered into the record. The hearing convened on November 29 and 30, and December 5 and 17, 2001. Nine witnesses gave testimony. The hearing record closed on December 27, 2001.

Following is the decision in this matter.

## **I. Preliminary Statement**

The student is a student from Nobleboro, a district that does not operate a high school. In the fall of 1998 she entered Lincoln Academy High School in 9<sup>th</sup> grade as a tuition student. Her performance was above average in 9<sup>th</sup> grade and average through the latter part of 10<sup>th</sup> grade. Late in her sophomore year her school performance deteriorated. In the beginning of her junior year this trend continued. She failed to complete work assignments, had a high absentee rate and often visited school health center with no identifiable health complaint. In November 2000 she was hospitalized as a psychiatric in-patient for a brief period. She returned to Lincoln, but again did poorly in school. After a suicide attempt in March 2001, she was hospitalized a second time. Her parents removed her from Lincoln and unilaterally placed her at the Elan School in late March 2001. A special education referral was made by the parents in late May 2001 in order to obtain financial support from the school for this placement. In October 2001 the PET identified the student as a student with an emotional disability, eligible for special education services. In November 2001 an IEP was developed which placed the student back in the public school.

It was the parents' position that the Nobleboro School Department failed in its Childfind obligations to identify and evaluate the student in a timely manner. In addition, they maintained that the IEP that was developed by the school in November 2001 is inappropriate. They argued that the student requires placement at Elan, or an equivalent facility, in order for her to benefit from her education. They requested on-going funding for such a placement, in addition to reimbursement for the student's placement at Elan since March 2001.

It was the school's position that school staff were concerned about the student's poor performance and growing detachment with school and attempted to provide assistance to the student as early as the spring of 2000, but that those efforts were rebuffed by the parents. The district states that they were not notified that the parents had placed the student at Elan until May 2001 when the parents requested the special education referral. They maintain that the Elan placement is not appropriate and that they have offered an IEP that is reasonably calculated to provide educational benefit to the student in the least restrictive environment. They contend they are not required to reimburse the parents for their unilateral decision to place her at Elan.

## **II. Issues**

1. Did the Nobleboro School Department commit procedural violations under the Childfind principle by failing to refer, evaluate and identify the student in a timely manner?
2. Is the IEP developed by the PET on November 15, 2001 reasonably calculated to provide the student with a free appropriate public education in the least restrictive educational environment?

3. If not, does the student require placement in a restrictive environment such as that chosen by the parents?
4. Are the parents entitled to reimbursement for their unilateral decision to place the student at the Elan School from March 2001 to present?

### **III. Findings of Fact**

1. The student had a history of high academic performance until 10<sup>th</sup> grade. After successfully completing her first year of high school with all A's, she finished 10<sup>th</sup> grade with B's and C's. At the conclusion of the first trimester of her junior year she was failing all subjects. Her poor performance was the result of high absences and failure to complete work. (Exhibit 44-54; Testimony Parent, Ropes)
2. Email notes in early January 2000 among the student's 10<sup>th</sup> grade teachers, show her teachers were concerned about the student's high absenteeism, tardiness and distracted behaviors, which were affecting her school performance. These concerns were shared with the student's mother on January 14, with a request by the school to schedule a meeting, or "staffing", with the student, her parents and school staff to discuss these concerns. The parents agreed to consider this action and get back to the school. On March 1, 2000 the student's father called the school to discuss the student's continued lack of progress. Again, the school requested a staffing. The parents declined to meet with the teachers in a staffing, but requested they be kept updated about the student's progress in school. They asked that the student not be told of their request for information. (Exhibits: 58, 77, 78, 79, 80, 81, 82; Testimony Ropes)
3. In September and October 2000, in the beginning of her junior year, teachers again expressed concerns among themselves, and with guidance, about the student's absences and missed work, which was resulting in poor school performance. The school was concerned about possible situational depression around the deaths of two of her fellow classmates. A staffing was requested on October 16 by one of her teachers. The student's guidance counselor talked with the student's mother to schedule the meeting. At the mother's request the guidance counselor asked all teachers to provide academic updates to the parents, but did not agree to the staffing at that time. (Testimony: Parent; Exhibits 87, 88, 89, 90, 91, 92, 93, 94-95, 98, 99, 100)
4. Teachers responded to the parents' request indicating work owed by the student and their individual concerns about the student's progress. The guidance counselor set a date for the staffing, even though the parents had not yet agreed to attend, and informed the parents of the date. A plan to assist the student to catch up on work was put together. (Exhibit 93, 94, 95)
5. The staffing was held on November 1, 2000. The student, her parents, the student's teachers, the guidance counselor and the Assistant Headmaster attended. Teachers conveyed their concerns about the student's school failure and emotional fragility. The parents and school have different opinions about the tenor of the meeting, but both agree it ended in acrimony between

- the school and parents. The meeting ended without agreement about how to proceed on the student's behalf. (Testimony: Parent, Ropes Ryder; Exhibits: 58, 65, 96, 97)
6. On November 15, 2000, the student was hospitalized for one week in the psychiatric unit of Maine Medical Center after expressing suicidal plans and cutting herself 40-50 times on the forearm. Intake information provided by the student cites depression lasting over a one and a half year period with recent stressors including the deaths of two students at her school, the hospitalization of a friend with anorexia, the hospitalization of her boyfriend, and the death of a family pet. During her stay Ellen Popenoe, Ph.D administered the Minnesota Multiphasic Personality Inventory, Adolescent Report (MMPI-A). Dr. Popenoe recommended further evaluation to assess possible academic skills deficits and behavior problems, a substance abuse evaluation, and further psychological testing. Her Treatment Considerations advised "[t]he possibility that [the student] is experiencing organically based problems [which] should be evaluated before psychological treatment is begun... She might respond to supportive, goal-oriented therapy and medication for her affective symptoms". She was started on a regimen of risperidone before leaving the hospital. Treatment notes indicate positive results. This information was not shared with the school. There is no record of further evaluation. (Testimony: Ropes; Exhibits: 155-156, 157, 213-217)
  7. Through discussions at the November 1<sup>st</sup> staffing, and subsequent meetings with the Assistant Headmaster and the Headmaster, parents' comments caused the school to conclude that the parents had put the student's mental health needs off limits to the school. (Testimony: Ryder, Ropes; Exhibits: 58-59, 61, 62, 70, 102, 103)
  8. In mid-November 2000 the student began seeing a psychiatrist, Carl Metzger, MD. She continued as a client of Dr. Metzger until January 2001. No treatment notes are contained in the record of the hearing. The school and Dr. Metzger had no contact during his treatment of the student. (Testimony: Ropes, Parent, Ryder)
  9. The student's aggressive, and sometimes bizarre, behaviors were escalating at home. None of these behaviors were evident at school. The school became aware of the student's behaviors at home in mid-December 2000 through reports from a home tutor. (Testimony Parent; Exhibits 65, 67, 68-69)
  10. The student reported suicidal ideation to school staff on February 12, 2001. Both the student's parents and her psychiatrist were informed. (Exhibit 110)
  11. By the middle of the second trimester the student had failed all subjects. Efforts were made by teachers to assist the student to make-up work to improve grades, with little success. (Exhibit 100, 104, 105, 106, 107, 108, 109, 111)
  12. In January 2001 the parents changed psychiatrists. The student became a client of Lawrence Fischman, MD. There was no contact between this psychiatrist and school staff. No assessment or treatment notes are contained in the hearing records. (Testimony: Parent)

13. Reports from the guidance office and the school health center show both had frequent contact with the student during the 2000-2001 school year. Health Center notes state that of the student's 10 visits to the Health Center between October 30, 2000 and March 14, 2001, six were for "emotional distress". Since the parents had not consented for Health Center services, intervention was minimal with referrals to guidance and parents as appropriate. Parents were notified of some visits, but not others. (Exhibit 55, 56, 57; Testimony Parent)
14. On March 14, 2001 the student reported to the school Substance Abuse Counselor that she had taken a large quantity of over-the-counter cold pills in an attempt to kill herself. She was taken by ambulance to the local hospital. She was transferred from there to the adolescent psychiatric ward of Maine General Hospital where she remained until March 22 when her parents enrolled her at the Elan School. No treatment or discharge summary is available from her stay at Maine General. The [sic] neither parent nor Elan conducted any educational or psychological evaluations prior to her placement there. (Exhibit: 230, 259; Testimony: parent, Sapan)
15. The parents met with the Headmaster on March 28 to inform him that they were withdrawing the student from Lincoln Academy. They would not disclose where she had been placed. They requested information that might assist them in paying for the placement, but did not request other assistance from the school. (Testimony: Parent, Ryder; Exhibit 61)
16. A staff member at Elan informed the parents that Elan was classified as a private, special purpose school and as such could accept special education tuition students. In May the parents met with Karen Ropes, Director of Special Services for Union 74, to inquire about special education support for the student's placement at Elan. Ms. Ropes recommended they proceed with a referral and assisted them in that process. (Testimony: Parent, Ropes; Exhibit: 34-39)
17. During the summer the school contracted with an outside evaluator, recommended by Elan, to complete an evaluation of the student. The evaluator, Greggus Yahr, Ph.D., conducted the evaluation at Elan on August 10, and 13, 2001. As part of the evaluation process he spoke to Karen Ropes, Director of Special Education for Union 74; reviewed records from Lincoln Academy sent to him by Ms. Ropes; interviewed the parents and the student; reviewed the Elan progress reports and administered the following instruments: Developmental History and Diagnostic Category Questionnaire, Woodcock Johnson Third Edition – Extended Cognitive Battery, Achenbach Child Behavior Checklist (completed by both parents and the student), Incomplete Sentence Questionnaire, Irrational Beliefs Inventory, Millon Adolescent Clinical Inventory (MACI), and the Woodcock-McGrew-Werder Mini-Battery of Achievement. (Testimony: Yahr, Parent, Ropes; Exhibit: 112-129, 304, 305)
18. Dr. Yahr did not interview either of the student's psychiatrists, Dr. Metzger or Dr. Fishman. He did not interview Dr. Popenoe, nor did he review her MMPI

- results as part of his evaluation. He did not interview any school staff at Lincoln Academy. (Testimony Yahr)
19. Standard scores obtained by the student on psychological assessments administered by Dr. Yahr show that she achieved an Average IQ score of 105, with Very Superior verbal ability and Low cognitive efficiency. Her scores on educational achievement assessments in Reading, Writing, and Factual Knowledge are in the Superior range; her scores in Mathematics are in the Average range. Testing does not show significant negative discrepancy between her ability and her academic achievement. (Testimony Yahr; Exhibit 118-121)
  20. The Millon Adolescent Clinical Inventory (MACI) is a 160-item "True/False" questionnaire. The student's answers to these questions were scored by computer and generated a Clinical Interpretive Report. This Report shows a graphic profile as well as a narrative interpretation based on the student's responses. The "Prognostic and Therapeutic Implications" section of the report states "[i]t would be advisable to attend to and ameliorate this adolescent's current depression by the rapid implementation of supportive psychotherapeutic measures or targeted psychopharmacologic medications..." (Testimony: Hoch; Exhibit: 132-137)
  21. Dr. Yahr holds a license as a school psychological service provider. He is not licensed by the Board of Examiners of Psychologists and is therefore not licensed to provide psychotherapy. He does not hold a medical degree. (Testimony Yahr)
  22. After receiving the evaluation report from Dr. Yahr, Ms. Ropes contacted the parents to request consent for further assessment around depression and substance abuse issues to assist the PET to consider the eligibility determination. Consent was not granted. (Testimony: Ropes, Parent)
  23. The PET met on September 28, 2001 to consider the student's eligibility for special education services. Both parents, teaching and administrative staff from Lincoln Academy and Ms. Ropes attended. The PET reviewed the evaluation. Ms. Ropes again requested consent for further evaluations. The PET minutes list the following determinations:
    - a. [Parents] will contact Karen Ropes on Monday, October 1, 2001 with their decision concerning further evaluations. [Parents] will consider providing the PET with medical reports from their daughter's hospitalization in November and March.
    - b. The PET determined that [the student] does not have a learning disability.
    - c. Determination as to whether the student is a student with an emotional disability was tabled until the parents decided whether or not they would consent to further evaluations.(Testimony: Ropes; Exhibit: 24-27 [see also 309-312, 307-308, 270-276])
  24. On October 3, 2001 (and again on October 26) the parents notified the school in writing that they would not grant consent for further evaluations and that

- they were seeking legal counsel to represent the student's interest. On October 9, they requested a due process hearing to have the student identified as a student with a disability, and to seek reimbursement for the student's placement at Elan. (Testimony Ropes; Exhibit: 287, 298, 299, P19)
25. On October 17, 2001 the PET met again to resume consideration of the student's eligibility for special education identification. Attending the meeting were: both parents and their advocate, staff from Lincoln Academy, and Ms. Ropes. The team came to consensus that the student met the criteria as a student with an emotional disability, and identified her as eligible for services. Ms. Ropes asked the parents to give consent for the district's Behavioral Consultant, Scott Hoch, Ph.D., to observe the student at Elan in preparation for the development of an IEP and concomitant Behavior Intervention Plan. The parents declined to give consent. (Testimony: Ropes; Exhibit: 21, 22-23, 282)
  26. On November 15, 2001 the PET met at Elan to complete the student's IEP. The school complied with the parents' request to the date and the location of the meeting to accommodate Elan staff and Dr. Yahr, whom the parents wished to attend. Attending the meeting were: both parents, staff from Lincoln Academy, Ms. Ropes, Dr. Hoch, Dr. Yahr, and six members of the Elan staff. The purpose of the meeting was to complete the development of an IEP and determine placement for the student. After a lengthy description of the Elan program, the PET reviewed the proposed IEP, which places the student in the public school. Agreement on the appropriateness of the IEP was not achieved. The meeting adjourned without consensus. (Testimony: Ropes, Parent; Exhibit: 18-21, 286, 285, 283, 282, 277)
  27. The proposed IEP offers 140 minutes of direction [sic] instruction from a special education teacher every three days; extended day/tutorial services four hours per week; 15 minutes each day at the beginning of the day and 15 minutes at the end of the day for the student to check in with the case manager; 60 minutes of group counseling with the school social worker; and 60 minutes a week of individual and/or child/parent psychotherapy with a licensed psychologist. A Behavior Intervention Plan sets behavior goals with positive reinforcement and consequences. Academic placement will be in regular high school classes. The IEP is proposed to occur at Lincoln Academy or another local high school. (Testimony DePatsy, Ropes; Exhibit 1-17, 18-21)
  28. The Elan program is based on a hierarchical program of ten levels. All students have the same goals in the program. Students earn their way up the levels based on meeting the goals of the Elan paradigm, and are demoted when they fail to continue to perform to the expectations of the level. "When a student has a negative attitude that impedes growth, he is demoted...in order to teach him the consequences of his actions, as well as to facilitate him working on problematic areas." In addition, students participate in two kinds of "groups" two to three times a week. "Encounter Groups' allow students the opportunity to vent feelings of anger, jealousy, loneliness, etc., towards other students in order to attempt to resolve these feelings..." These groups are

- student led with adults generally present. “Static Groups” are groups focused around a specific topic. Again, they are student led with adults usually present. No trained or licensed psychotherapist participates in these groups. Students attend academic classes from 6:20-10:30 p.m. Monday through Thursday. Medication therapy is not permitted at Elan. (Testimony: Sherburne, Sapan; Exhibits: P86-92)
29. Staff reports from Elan dated May 15, and September 12, 2001 indicate that the student had inconsistent progress in the non-educational portion of the program. She had earned, and lost, positions in the hierarchy over that period. The May 15 report states that “[the student] has been indoctrinated into the program... [Her] initial involvement...can be described as adequate... [Her] participation in...Groups is adequate” As of September 12 she had “not formed any meaningful relationships since her arrival”. The report notes that “she has...an ability to effectively complete...job responsibilities when she chooses to do so”, but that “[i]n recent weeks...she has put forth the minimal amount of effort required to get by”. When this report was written the student had not seen her parents since entering Elan in March, and “has expressed mixed feelings about the visit... [She] needs to understand that if she chooses not to make spending time with her family a priority, then she will not be eligible to earn a visit following her Parent Group”. The September 12 report notes that at the end of June the student had reached the level of “Expeditor Trainee” the third from the bottom of the ten levels. (It is the first level where a student has a position of responsibility over peers in lower levels.) As of November 15, 2001, the student was at the “Expeditor” level. By late December, the student was classified as an “Expeditor”.<sup>1</sup> In the nine months the student has been in the program she has gained and lost levels in the hierarchy, but has never moved beyond the Expeditor level. (Testimony: Sherburne, Sapan; Exhibit: 256-257, 265-266)
30. School reports from Elan dated June 7, and 8, 2001, and November 2, 2001, show that the student has performed “good” to “excellent” work in all subjects with grades averaging in the mid-90’s. The student is currently taking Chemistry, American History and Algebra II. (Exhibits: 221-224, 259-264)
31. There is no IEP that places the student at the Elan School. The goals and objectives developed by the Elan school, in preparation for the November 15, 2001 PET meeting, are not individualized to the student, but rather reflect the expectations for all students who attend Elan. The student receives no specialized educational instruction. (Exhibit: 247-253; Testimony: McDermott, Sapan)

#### IV. Conclusions

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<sup>1</sup> The PET minutes referred to the title “Expeditor”. Ms. Sherburne and the Elan admissions material describe an “Expeditor Trainee” and a “Shingle Expeditor”. From the descriptions given, the student appears to have achieved the level of “Expeditor Trainee” the lower of the two Expeditor levels.



**Did the Nobleboro School Department commit procedural violations under the Childfind principle by failing to refer, evaluate and identify the student in a timely manner?**

*Each school unit has the responsibility for identifying, locating and evaluating all students within its jurisdiction who are in need of special education and supportive services including students with disabilities attending private schools... Final identification of students with disabilities and programming for such students occurs only after an appropriate evaluation and a determination by the Pupil Evaluation Team. Maine Special Education Regulations, Chapter 101, §7.1, (1999)*

*At risk students – Local policy shall establish a process where by students “at risk” are identified, evaluated, and referred as appropriate to the PET. Such students may include individuals who have accumulated 45 absences during a school year, have been suspended or removed in excess of 10 days during a school year, students who have experienced an illness or accident likely to cause neurological or emotional impairment, etc. Id., §7.7(D)*

With the gift of hindsight, it is apparent that this student should have been referred to the Pupil Evaluation Team for evaluation and consideration as a special education student earlier than May 2001. Looking at the events from a distance, there was sufficient concern expressed among the school staff to have warranted a referral to special education for a student “at risk”, especially in the period from November 2000 through March 2001. As the events unfolded contemporaneously, however, this is not so clear. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990) (actions of school systems cannot be judged exclusively in hindsight) There is also sufficient evidence to conclude that the parents bear some of the responsibility for the outcome. *Rome Sch. Comm. V. Mrs. B.*, 32 IDELR 33 (2000) (parents’ actions put school in poor position to remedy omissions) There was no single event to trigger a referral, and by the time the school might have made a referral there is little likelihood the parents would have consented to such action.

The student was known to be a very bright student who began having problems with most classes in 10<sup>th</sup> grade due to a lack of engagement in class and a failure to complete work assignments. Her teachers were clearly concerned about her educational and emotional well being, and shared those concerns among themselves and with the guidance counselor. However, neither the parents nor school staff viewed the student as a “handicapped” student<sup>2</sup> during the 1999-2000, or most of the 2000-2001, school years. None of the parent/school conversations or meetings was ever discussed in those terms. While the student had high absences and tardiness, she had not been absent for 45 days. She had not been

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<sup>2</sup> Even in May 2001 when the parents spoke with Ms. Ropes about a referral for special education identification, they were reluctant to go forward with a process that might label the student and impact her self-image as “being sick”.

suspended. Her behaviors at school, except for a “lack of engagement”, were unremarkable. Early in the 2000-2001 school year, even her melancholy seemed unremarkable given tragic events at the school. School staff saw her growing emotional fragility initially as situational depression around the deaths of two students from Lincoln Academy early in the school year as a possible contributing factor<sup>3</sup>.

Evidence supports the school’s contention that they made efforts to offer assistance. In the spring of 2000 they requested a staffing between the parents and the student’s teachers to discuss their concerns about the student’s poor performance. The parents did not accept the offer and notes make it apparent that they were unforthcoming with the Lincoln staff about their growing concerns about the student’s behavior outside school. There was no notable improvement in the student’s performance through the end of that school year.

In reconstructing the events from November 2000 to March 2001, when concerns about the student were growing, it is difficult to conclude that a referral to special education would have been embraced by the parents, had one been proffered. It is difficult to conclude that the parent would have consented to any evaluation as a follow up to that referral. Based on the strained relationship between the parents and the school after the November 1 staffing both seemed to have adopted a siege mentality in their interactions with one another.

When a staffing was convened in November 2000, the school felt rebuffed by the parents. Even though both knew the student was close to crisis, the meeting ended in discord. There is disagreement about what was said, and how it was said, but the result was to render the relationship between the parents and the school uncooperative, with the beginning of hostility. The parents saw the meeting as a confrontation. The school saw it as the parents’ unequivocal rejection of assistance. In the school’s eyes they had been told without question to keep at arm’s length regarding the student’s emotional health. Whether that was an accurate perception on the part of the school or not, it is clear that they were operating under that assumption. The parents’ actions over the following months did nothing to dispel that perception.

Soon after the staffing the parents enlisted the assistance of outside mental health professionals. They did not share information regarding the student’s treatment or enlist the school’s involvement in that treatment. When the student was hospitalized for a week shortly after the staffing, the parent did not include the school in that process. The parents did not reveal any information about the escalating behaviors at home. In short, the parent did not invite any cooperation or assistance from the school on the student’s behalf.

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<sup>3</sup> The parents argued that the student was not close to either of these students and that the school held this opinion incorrectly. But, both the treatment notes from Maine Medical Center and the Yahr evaluation stated that by student report she was depressed by these events.

As the fall and winter continued the school's perception that they were barred from offering assistance was reinforced. After a meeting between the parents and the school's Head, Mr. Ryder, school staff members were advised by Mr. Ryder that the parents wanted to deal with the student's mental health issues without school interference. While the parents take the position that the school, especially Mr. Ryder, made an incorrect assumption about their position at that meeting, the result was the same. The school clearly felt the student's emotional issues were off limits and that they were not to intervene in any way. Again, the fact that the parents had little interaction with school staff, did not share information regarding the student's treatment and did not share the severity of the behaviors at home support that conclusion<sup>4</sup>.

In March, after the student's attempted suicide, there was a clear indicator of a student "at risk" who should have been referred to special education. But, the student did not return to Lincoln after that episode. When the parents met with Mr. Ryder after that event, again there was no invitation for the school to become part of the student's care and treatment. The parents had made a unilateral decision to place the student. They would not reveal where she had been placed, or the nature of the placement. Regardless of their reason for declining to share that information, it was interpreted by Mr. Ryder as a clear message to "stay away". The fact that the parents asked Mr. Ryder what monetary support the school might be able to offer to assist in payment for the placement arguably should have been construed as a trigger to refer the student to special education. But again, under the current events around this meeting, the school's position that this request was not a request for assistance in the student's educational program was a plausible conclusion on their part.

Nobleboro has a legal obligation to assure the Childfind obligations of its students placed in private high schools such as Lincoln Academy. And, Lincoln Academy as an institution that accepts these students shares some of that responsibility. The fact that Lincoln staff did not involve the Nobleboro School District at any juncture in the growing concerns around this student is troubling. The fact that Nobleboro had no vehicle to track students who were in danger of school failure is a violation of Childfind regulations. But the parents' allegation that Nobleboro "flagrantly violated the 'Childfind' requirements of the IDEA" is not compelling.

Evidence does not lead to the conclusion that the parents would have embraced such a referral or that they would have consented to any evaluations associated with a referral. The parents' own actions hindered the process after November 2000. The school did not ignore the student's needs. Rightly, or wrongly, they felt powerless to intervene. When the parents did inquire about a referral for special education, it is clear that the school acted quickly and appropriately to provide the parents with notice of their procedural safeguards and to move the referral along in a

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<sup>4</sup> It is clear that the student began to use this lack of communication to manipulate both the school staff and her parents. She became the conduit between the two, misrepresenting events and comments. One such event at home led the school to make a DHS referral.

timely fashion. I cannot conclude that the school is obligated as a result of their procedural violation to reimburse the parents for their unilateral placement of the student.

**Is the IEP, developed by the PET on November 15, 2001, reasonably calculated to provide the student with a free appropriate public education in the least restrictive educational environment? Does the student require placement in a 24-hour residential facility such as that chosen by the parents?**

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a “free appropriate public education” which is described in the student’s “individualized education program” (IEP). [20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)]

The standard for a “free appropriate public education” is defined as a program that is “reasonably calculated to enable the child to receive education benefit”. (*Board of Education v. Rowley*, 3 IDELR 553:656, 667 (1982) The court made clear that “educational benefit” was not synonymous with “maximum” benefit.

We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child’s potential “commensurate with the opportunity provided other children”.

(*Id.* 666)

Prior to the student’s placement by her parents at the Elan School, she attended a regular high school where she had performed well until the 2000-2001 school. There was no evidence of aggressive or violent behavior at school<sup>5</sup> although there were many such episodes reported at home. By March 2001 the student was failing all her subjects due to a lack of engagement and failure to complete work. She was depressed and expressing suicidal ideation. However, evidence does not lead to the conclusion that she is incapable of benefiting from her education under the plan outlined in the proposed IEP.

Evidence shows that the student has the ability to achieve academically in the superior range, and that she benefits from being challenged academically, and likes art-oriented academics. While assessment revealed a processing deficit that will require accommodations to complete tests and assignments, she is able to perform educationally in regular and advanced level high school classes. The IEP provides

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<sup>5</sup> The “Statement of Parents Concerns” attached to the IEP states that “there had been increasing incidents of...disruption in class requiring disciplinary intervention”. No evidence was presented by either the parent or the school to support this statement.

that opportunity. Lincoln Academy<sup>6</sup> offers both regular and advanced level high school classes, as well as language and art electives.

Assessments show that the student requires counseling and psychotherapy as a supportive service as defined in MSER §6.5 and §6.11 respectively. Evidence supports Parent Counseling and Training, as defined in §6.10, should be a component of the IEP. The proposed IEP provides for one hour per week of social work services in a group counseling setting with peers. In addition, the IEP provides for one hour per week of individual psychotherapy provided by a licensed psychologist, which would include the student's parents.

The program provides for a case-manager who will structure the student's day to include individual transportation to and from school, daily check in and check out, and escort between classes. Small group and individual educational assistance will be provided as needed to accommodate the student's processing deficits, and to monitor missing class and homework assignments. A Behavior Intervention Plan, which describes behavioral expectations and interventions with re-enforcers and consequences, is part of the IEP. There is every reason to believe that the student will benefit educationally from this program.

**Does the student require placement in a 24-hour residential facility such as that chosen by the parents?**

The parents did not argue that the goals and objectives of the proposed IEP were inappropriate. Rather, it was their position that the service array and placement were insufficient to meet her needs. They contend that the student's "problems are so profound that they can only be effectively addressed in a highly structured residential setting providing intensive [24-hour] monitoring...with the resources available to impose immediate and meaningful consequences for inappropriate behaviors".

In March 2001 when the student took an overdose of over-the-counter cold medication in an apparent suicide attempt, her parents admitted her to the Adolescent Unit at the Seaton Campus of Maine General Hospital. After a week, she was being discharged home. Her parents were concerned about her safety and continued problematic behaviors at home, and so sought an alternative placement for her. They were told about Elan, visited the school, completed the admission process, and placed her there on March 22. There is no evidence that the treatment team from Maine General Hospital, the student's then-current psychiatrist, or any

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<sup>6</sup> Nobleboro, the district responsible for the student's education, does not operate a high school. The IEP proposed by the district assumes the student would be a tuition student at Lincoln Academy, although two other area high schools were offered to the student. This decision assumes the IEP would be implemented at Lincoln Academy.

objective evaluative process recommended that placement specifically,<sup>7</sup> or a residential placement generally.

In May 2001 the parents contacted Karen Ropes regarding a special education referral and informed her that they had placed the student at Elan. While the parents did not ask for special education identification as a means to have that placement paid for by the school, that appears to have been the purpose. They made the contact with Ms. Ropes after Elan staff suggested that some students were placed at Elan by child placement teams, with full tuition paid by the schools. They structured the discussion and referral around safety reasons that precluded the student's return to public school and required her continued placement in a 24-hour facility. And, as the referral process unfolded, they restricted access to the student by the school and refused any additional information to enter the process except that which recommended her continued placement at Elan.

The parent's rely on Dr. Greggus Yahr's evaluation to support the student's need for a 24-hour residential placement. Dr. Yahr evaluated the student over the summer of 2001 and presented the school with an 18-page evaluation. This is the only current psycho-educational data available for the student. His report, however, reaches far beyond the scope of an evaluator as defined in regulation.

Evaluation reports shall not make either eligibility or placement determinations since these deliberations are the responsibility of the Pupil Evaluation.[sic]

#### MSER, §9.13(D)

Dr. Yahr begins his report with a disclaimer that evaluators are restricted from making eligibility and placement determinations. He then goes on, at length, to do just that. He poses the hypotheses, then proceeds to draw his own legal conclusions regarding the student's eligibility as a student with an emotional disability and her failure to meet the definition as a student with a learning disability. In addition, Dr. Yahr makes the unequivocal recommendation that the student requires continued placement at Elan. To bolster this recommendation his conclusions state that the student's "[i]nvolvement in therapy will not be a positive experience for [the student], thus a milieu environment will likely be the most successful".<sup>8</sup> This recommendation is not supported by the evaluator's own computer-generated profile of the student's MAPI results, nor is it supported by the

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<sup>7</sup>The Elan brochure states that a current psychological evaluation is necessary as part of the admissions process. The student did not have a psychological evaluation nor did they speak with the student's treating psychiatrist prior to her acceptance.

<sup>8</sup> Dr. Yahr was recommended to the school by Elan. In the past he has performed 5-6 evaluations that have been used in special education due process hearings to recommend student placement at Elan. He did not disclose this to the school when they contracted with him. Remarkably, in one of these cases (with a similar fact pattern) he proffered the identical recommendations, in contradiction to other psychologist's conclusions, for that student regarding her need to forego counseling until she advanced to a higher level in Elan's behavioral-level system. *Dripping Springs Independent School District v. Texas SEA*, 25 IEDLR 564 (1997)

evaluation conducted by Dr. Ellen Popenoe in November 2000. Both recommend psychotherapy for the student. Dr. Yahr testified that he did not have any conversations with Dr. Metzger or Dr. Fischman, or review any treatment notes from them about the student. He was without their input on this issue as well. Dr. Yahr's conclusions appear to be based on his own preference for the Elan program, not an objective analysis of the student's assessment data.

The school was right to request to have additional information by a more objective evaluator. The parents' failure to provide consent for any further evaluation or observation by the school's psychologist can only lead me to determine that they were so protective of Dr. Yahr's recommendations that the student remain at Elan, that they were loathe to have any conflicting opinions presented to the PET.

The Education for All Handicapped Children Act, the precursor to the IDEA, was founded on the principal [sic] that all children with disabilities have a fundamental right to be educated with their non-disabled peers in the least restrictive educational environment appropriate to meet their needs. The law as it was written in 1975 was changed little during the reauthorization of 1997:

[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USC § 1412 (a)(5)(A)

The parents argue that the student requires constant monitoring (every 10 minutes) to impose immediate and meaningful consequences for inappropriate behaviors. While this is the model used at Elan, there is no evidence to suggest that this is what she needs. It is true that the student is making all A's in her classes, where she was failing in March 2001. However, evidence does not support that only at Elan can she be successful in gaining educational benefit. To compare her educational success at Elan with her lack of success at Lincoln is to compare something with nothing. The student was receiving no supportive services. There was no plan to share information between treating mental health professionals and home to develop a coordinated approach to managing her education and interfering behaviors. There was no coordinated effort to be on the alert for crisis signals to intervene as appropriate. There was no case-manager to direct her school day and prevent her school failure as she was becoming overwhelmed with her emotional events. In short, the state of affairs, which is described and used by the parents as the reason for the student's need for 24-hour support, is premised on the student's returning to Lincoln under the same circumstances as when she left. This is not what is being proposed. While not offering the level of intervention desired by the parents, the

IEP is proposing sufficient services to allow the student to benefit from her education and complete her high school credit requirements.

Finally, the parents assert that they do not feel that Lincoln can assure the student's safety or the safety of others. They point to her depression, her suicide attempt, her cutting of her arms and torso, and her aggressive, sometimes violent behaviors at home. These are certainly causes for grave concern on the part of the family and school. There is, however, no way to evaluate the validity of that concern at this time. The school's IEP has a significant level of intervention built into it during the school day. Two hours a week of counseling and psychotherapy are designed to begin to address some of the underlying problems that exist for the student. School staff testified that they would encourage, and work with, the parents to apply for community-based mental health support to be incorporated into this plan to assist to address some of these concerns. In addition, the school is offering additional evaluations to gather meaningful data regarding the student's depression and possible medication therapy. This is not an option for the student while she remains at Elan, a school that does not allow students to be in medication therapy.

During testimony the parents described episodes of aggressive and violent behaviors exhibited by the student at home. They argue that she would continue to present a clear and present danger if she were to return home. Once more, these are troubling matters, but the cost of a residential placement must be directly related to the student's ability to benefit from her education.

The Court recognizes that Joshua's behavior, particularly outside the structure of his school programming, is often unpredictable and sometimes dangerous. This, by itself, is not enough to compel a residential placement under the IDEA, as long as the student is receiving an educational benefit from his placement.

*Ciresoli v. MSAD No. 22*, 901 F. Supp. 378, 386 (D. Me. 1995) [Internal citations omitted.] See also *Board of Education of Oak Park v. Illinois State Bd. Of Educ. And Kelly E.*, 29 IDELR 52 (E.D. Ill. 1998) (court found 24-hour placement was primarily for non-educational reasons including substance abuse, runaway behavior, defiance of home rules), *Board of Education of Montgomery County v. Brett Y.*, 28 IDELR 460 (4<sup>th</sup> Cir. 1998) (court concluded that the school need not fund a residential placement if it is required to address "medical, social, or emotional problems that are segregable from the learning process".)

The parents have not presented compelling evidence that only in a 24-hour residential facility can the student benefit from her education. The proposed IEP is comprehensive. The school stands ready to implement it. The student should have the opportunity to return to her public school with these supports in place. Her safety concerns must be balanced with the student's right to be educated with her non-disabled peers.



It follows from Rowley that the Act does not authorize residential care merely to enhance *an otherwise sufficient* day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress.

*Abrahamson v. Hershman*, 701, F.2d 223, 227 (1<sup>st</sup> Cir. 1983) (emphasis in original)  
See also *Oberti v. Clementon School District*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993).

**Are the parents entitled to reimbursement for their unilateral decision to place the student at the Elan School from March 2001 to present?**

The parents argue that they are entitled to reimbursement for their unilateral decision to place the student at the Elan School. In order to be eligible for reimbursement of the costs for a placement made outside the PET process, as in this case, the parents must show that the program offered by the school is inappropriate, and that the program they have chosen is appropriate to meet the needs of the student. *Burlington School Committee v. Department of Education*, 471 US Ct, 359 (1985) The evidence shows that the program proposed by the school's IEP is appropriate.

The Elan program does not comply with special education law and regulations that students have an individual education plan to meet their identified needs. All students at Elan conform to the program. There is no individualized plan for this student, but rather a description of the behaviors that are expected of all students and their movement within the levels defined in the Elan hierarchy.

Evaluations of the student recommend psychotherapy and psychopharmacology. The Elan program does not provide psychotherapy and does not allow for psychopharmacology. The Elan program instead relies on a peer pressure model to modify a student's behaviors. There is no evidence that the student in this case responds to this kind of model, and some evidence to suggest that she does not. Statements by Elan staff indicate that she has not bought into the system, only that she does what is required to "get by". Statements by Elan staff state she has not developed meaningful relationships and continues to isolate herself at every opportunity.

The parents argue that Elan has made it possible for the student to be "emotionally available to learn". While her grades are superior, she reports that the work is easy and unchallenging. Her good grades seem to be most closely tied to the fact that she completes assignments. It is true that the Elan structure makes it virtually impossible for her to get out of completing her schoolwork. There is no evidence,

however, that the emotional problems that led to her previous school failure have been addressed.

Anecdotal history and evaluations cite a significant parent/child conflict. Dr. Yahr's evaluation suggests a "Parent – Child Relational Problem" under the DSM-IV Axis I diagnostic profile "that needs to be the focus of clinical attention". This conflict is not being addressed at Elan. Since the student has been at Elan she has had one face-to-face visit with her parents. She has to succeed in the hierarchy to earn additional visits. Elan staff notes make it clear she was actively avoiding earning another visit until very recently. No parent/child therapy is part of the program.

In contrast, the program offered by the school provides the student with individual and parent/child psychotherapy led by a psychologist and group counseling led by a licensed social worker. Medication therapy is an option if the parents and the treating psychiatrist prescribe it. There is sufficient structure to the school day to assume that the student will participate in her classes and gain benefit from them. In addition, for a student with the intellectual ability and processing deficit identified by testing, the educational offerings at Lincoln are far superior to that offered at Elan.

## **V. Order**

The IEP offered by the Nobleboro School Department is found to be appropriate. If the student is re-enrolled in public school, the PET shall meet to finalize placement in a local public high school and make any refinements necessary to the IEP. The program shall begin immediately after such meeting. The parents are not entitled to reimbursement for their unilateral action to place the student at the Elan School.

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Carol B. Lenna  
Hearing Officer