STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

October 28, 2005

Case # 05.081 H, ***Adult Student & Parent v. Dallas Plantation (Union #37)***

REPRESENTING THE FAMILY: Amy Sneirson, Esq.

REPRESENTING THE SCHOOL: Brendan Rielly, Esq.

HEARING OFFICER: Rita Furlow, Esq.

I. Introduction

This hearing was held and the decision written pursuant to Title 20-A, M.R.S.A., 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

This due process hearing involves the student, whose date of birth is xx/xx/xxxx. The student and his mother requested the hearing on June 29, 2005. The student is xx years old and currently resides in California. The mother currently resides in Mena, Arkansas.

A pre-hearing conference was held on Wednesday, August 17, 2005, at the Franklin County Superior Court. In attendance at the conference were Amy Sneirson, counsel for the family, Brendan Rielly, counsel for the school district, and Rita Furlow, hearing officer. Both parties submitted a pre-hearing brief and exchanged documents. The hearing officer issued a post pre-hearing memorandum to clarify the issue of the hearing. (HO-9)

This hearing was held on Wednesday, September 7, 2005, and Thursday, September 8, 2005, at the Rangeley Town Office, Rangeley, Maine. During the hearing, the family presented four witnesses, three of whom participated by phone, and documents identified as P-1-24, P-110-215, and P-221-724 were submitted into the record. The school presented three witnesses and introduced documents identified as S-1–49 into the record. The hearing officer submitted eleven documents into the record. (HO –1-11) The parties submitted written closing briefs that were received by the hearing officer on October 3, 2005, and the record closed on that date.

II. Procedural Issues

On July 11, 2005, prior to the pre-hearing, the attorney representing Dallas Plantation requested that this hearing officer recuse herself because of prior employment representing parents and as the Executive Director of the Learning Disabilities Association of Maine. (HO-10) This hearing officer responded to the parties by letter and disclosed details regarding any potential claims of bias or conflict of interest, along with relevant case law. (HO-11) As this hearing officer was confident of her ability to be fair and

objective in the case, she rejected the request that she recuse herself. *Id.* The hearing officer entered the school's objection and her response into the record at the beginning of the hearing. (HO-10 and HO-11) The school noted on the record that while they were not waiving their objection to the decision of the hearing officer, they were satisfied with their written objection and the response being entered into the record at hearing. (HO 10-and-11)

On July 12, 2005, the attorney for the family sent a letter to the hearing officer that [sic] due to a clerical error, an incorrect version of the due process request form was filed with the Maine Department of Education. (HO-3) The attorney made a motion seeking leave to replace the incorrect due process request with the correct version of the request. *Id.* The school's attorney responded that they would not object to the request if they were provided with all documentation they were seeking in the case, including details regarding damages and supporting documentation. (HO-4) On July 18, 2005, the hearing officer granted the family's motion to replace the forms. (HO-5)

On September 2, 2005, the school's attorney asked to submit three additional exhibits. The attorney for the family responded that because of the "five-day rule" requiring all exhibits to be in hand five business days prior to the hearing, she objected to having the exhibits admitted. After reviewing the federal and state regulations, the hearing officer concluded that she did not have the authority to admit additional evidence within five days of the hearing. (HO-1)

The Maine Special Education Regulations (MSER) refers to the "five-day rule" twice. First, MSER §12.11 (K)(3) states that "any party" can prohibit evidence from being introduced "that has not been disclosed to that party at least five business days before the hearing … ." This section mirrors language in the federal regulations found at 34 C.F.R. §300.509 (a) (3). (The hearing officer disagrees, however, that this language alone takes away a hearing officer's discretion – see *Letter to Steink* ,18 IDELR 739 (OSEP 1992), *Shasta Union High Sch. Dist*., 16 IDELR 482 (SEA CA 1990); and *Plymouth Joint Sch. Dist.*, 506 IDELR 382 (SEA WI 1985).)

Second, and more significant, is the reference found in MSER §13.12 (D) relating to hearing procedures established by the Maine Department of Education. The final sentence of that section reads as follows: "The hearing officer may exclude irrelevant or unduly repetitious evidence and *shall* exclude evidence not disclosed to the other party at least five business days prior to the due process hearing (emphasis added)." *Id.* Given the language of Section 13.12 (D), Mr. Reilly's request to admit the three additional exhibits was denied. (HO-1)

At the hearing on Wednesday, September 7, 2005, the school's attorney objected to the relevancy of a number of the family's documents (P-24-151; P-159-164; and P-216-220). The parties agreed to exclude P-24-109. Documents P-110-147 were admitted, although the school's attorney reserved his right to object to them a [sic] later time. The hearing officer admitted documents P-148-151 and 159-164. Documents P-216-220 were excluded.

During opening statements, the school's attorney raised several issues relating to the equitable defenses of laches and waiver. It was also argued that res judicata/collateral estoppel bars this action. No formal motions were made regarding these issues.

Following the hearing, the attorney for the family made a motion asking the hearing officer to take

judicial notice of orders and decisions in the case of *Parent v. Dallas Plantation,* 40 IDELR 252 (SEA ME 2004). She also requested the admission of an affidavit from Lynne Williams, the hearing officer in the earlier case. The school objected to the motion. The hearing officer denied the request.

It should be noted that both at the hearing and in their [sic] briefs, the attorney representing Dallas Plantation stated that he believed School Union #37 to be the proper party in this hearing, not Dallas Plantation (Union #37). However, no formal motions or objections were made. This hearing officer is proceeding according to the assignment letter she received from the Maine Department of Education, which names the party as Dallas Plantation (Union #37)[sic]

III. Issue

The issue in this case is whether the family is entitled to reimbursement from the school district for non-tuition expenses related to the student's placements for the school years of 1999-2000, 2000-2001, 2001-2002, 2002-2003, and 2003-2004.

IV. Facts

1. The student is a former resident of Dallas Plantation, where he lived with his adoptive mother and older sister. The parents divorced when the student was around xx year old. The student's mother reported no developmental delays. The student attended pre-school, nursery school, and kindergarten, and there were no concerns regarding his performance. Dallas Plantation has no schools of its own and sends its elementary students to the Rangeley Lakes Regional School District, where the student reportedly enjoyed kindergarten. (Testimony: Mother & P-572)

2. The student was initially referred for special education services by his xx-grade teacher in October of 1992. His teacher reported the student could not work independently, was constantly disrupting class, and exhibiting [sic] destructive behaviors. The mother initially resisted that the student may [sic] need special education services. She did not see any of the described behaviors at home and described his xx grade classroom as riotous. She believed that the student's behavior would improve with another teacher. The mother agreed in the spring of that year that the student should be evaluated. The student was retained in xx grade for the 1993-94 school year. (P-564-565 and P-585; Testimony: Mother)

3. The Eastern Maine Medical Center (EMMC) in Bangor, Maine, conducted a medical and psychological evaluation and a behavior assessment of the student in May of 1993. Following those evaluations, Dr. Krystyna Tuckerman, M.D., and Dr. Laura Santilli, Ph.D., also requested that an educational assessment be conducted. This evaluation was conducted in August of 1993 at EMMC. (S-39-41 and P-556-563 and P-566-574)

4. The student's score on the Wechsler Intelligence Scale for Children-3rd Edition (WISC-III) found [sic] a full-scale I.Q. of 80 (9th percentile); a Verbal I.Q. of 88 (21st percentile); and a Performance I.Q. of 77 (6th percentile). The report notes, however, that the Performance I.Q. likely overrepresented his functioning because of his isolated strength on the Object Assembly subtest and that a score of 70 was perhaps more indicative of his true ability is [sic] this area. The student's profile suggested significant difficulties with visual-perceptual difficulties [sic] that would impact reading and math. (P-566-569)

5. The Woodcock-Johnson Psycho-Educational Battery-Revised (WJ-R) was also administered. The Broad Cognitive Ability indicated a score of 64 (1st percentile), yet because of a broad scatter of subtest scores, this score was considered unreliable. The evaluator found that the Comprehension/Knowledge cluster score of 87 (20th percentile), and within the average range, was a more likely indicator of the student's intelligence. Significant processing difficulties were noted with a Processing Speed score of 34 (0.1 percentile) and Visual Processing score of 48 (0.1 percentile). (P-558-563)

6. The medical and psychological reports both indicate [sic] that the school and the student's mother saw the student very differently. The medical report notes [sic] that the school does not have very much to say about the student that is positive. The mother reports [sic] no problems with the student at home and describes [sic] him as a usually happy child. The Achenbach and Attention-Deficit Hyperactivity Disorder (ADHD) rating scales also indicate very different perceptions of the student at home versus school. The reports recommended a full team conference and that educational testing be conducted. (P-566 and P-571-574)

7. The team concluded that the student was a child with Attention-Deficit Hyperactivity Disorder (ADHD) and a learning disability. The team recommended that the student be classified as a student with a specific learning disability and that services be provided in all academic areas with an emphasis on math and reading. Intense and continuous intervention was recommended so that the student could catch up with his classmates. The team felt that because of his severe disability, the student should be a priority student for services. Specific recommendations were made relating to managing the student’s ADHD at school, his visual perception problems, and reading delays. As indicated in the medical report, it was recommended that the student be tested for Fragile X syndrome and lead poisoning. The team also recommended that the student be promoted to the xx grade. (P-563)

8. The Pupil Evaluation Team (PET) met on September 22, 1993, and made the following determinations: 1) The student was eligible to receive special education services as a student with a learning disability; 2) Mother would have the pediatrician look into psychostimulants, Fragile X, and lead questions; 3) Staff would write and implement a behavioral plan to be modified as necessary; 4) The student would receive individual help in the resource room for at least a half hour per day; and 5) all team members were in consensus with the determinations. (S-4, P-551-554)

9. In November of 1993, the student's mother took him to Mid-Maine Medical Center in Waterville for a medical evaluation. The pediatrician concluded that the student exhibited enough features of ADHD to warrant a diagnosis and began the student on 10mg of Ritalin. The student was seen again in December by the pediatrician who stated that the mother was pleased with his response to the medication and that it appeared he was having a favorable response. (P-539-543)

10. The PET met in May of 1994 and reported that the student appeared more calm at school and home since he began [sic] taking Ritalin. It was noted that the student was now better able to attend to schoolwork and follow classroom and school rules. The minutes noted, however, that a behavior plan was still necessary for the student. Resource room services for reading support of 30 minutes a day were recommended. The PET made the following determinations: 1) continued resource services for reading support; 2) the student would receive his medication in the morning and at lunchtime at school; 3) school staff would maintain a behavioral plan with changes as necessary; 4) classroom modifications would be made as needed to promote success; and 5) PET members were in consensus on the

determinations and the development of the I.E.P. (P-531-532)

11. The student's xx grade year, 1994-95 [sic] was one of the best years he experienced at school. The PET met in May of 1995, and determined that while the student showed progress in reading, he still needed further assistance with written language and math. There were no references in the minutes or IEP to any behavior issues for the student at that time. The IEP for the upcoming year provided the student with resource services two times per day for 30 minutes a day. (S-6 and P-526-529; Testimony: Mother)

12. The student continued to struggle with math in the xx grade (1995-96). Behavior and social skills concerns were also evident at this time. The minutes of the May of [sic] 1995 PET noted that there was a behavior plan in place, but that the student didn't choose to take advantage of it. (P-519-524)

13. xx grade (1996-97) was very difficult for the student. The PET met in January of 1997 and scheduled the student's triennial evaluation. The team continued to be concerned about the student's ability to do independent work, particularly homework. The student appeared very unhappy. The mother reported that she planned to take the student to counseling. (S-8-10 and P-516-517)

14. A Psycho-Educational evaluation [sic] conducted on January 30, 1997 by Bonnie Farrar, School Psychological Service Provider. She found that the student hated school, had no real friends, felt picked on by others, would fight with others when angry, and that he tried to get sick to avoid going to school. He did not appear hyperactive, but instead seemed passive, flat, lethargic, and unhappy. On the WISC-III, the student achieved a Full Scale score of 72 (3rd %) with a Verbal score of 76 (5th %) and a Performance score of 72 (3rd %). The Verbal score was 12 points lower than his previous testing, with the most significant drop in vocabulary. Ms. Farrar felt the student's scores were low due to frustration and the student giving up. The Bender Visual Motor Gestalt Test found the student to be at the 5th percentile (over three years behind his peers). Teacher and parent behavior rating scales found a number of items in the clinical range, such as attention, social problems, and delinquent behavior. The evaluator recommended that the PET consider the student eligible for special education services under the Behaviorally Impaired category. Martha Nichols, the special education director, administered the Woodcock-Johnson Psycho-Educational Battery-Revised (WJ-R) in March of 1997. The student's achievement level varied between the average to very low range. His broad reading score was in the average range (97), while his broad math score was very low (60). The student's calculation score was 51, a 1.9 grade equivalent. (S-9 and P-497-517)

15. The PET team met on March 12, 1997 to review the evaluation results. The team made the following recommendations: 1) conducting additional testing for projectives, 2) changing his special education classification from specific learning disability to behavioral impairment; 3) increasing his resource room time; 4) classroom teacher and resource room staff working together on modifications; and 5) that the team was in consensus with the determinations. (S-9 and P-497-498)

16. The student stopped taking Ritalin, as both the school and the mother saw little impact [sic] in the student's ADHD symptoms beyond the initial treatment. The student met with a psychiatrist and a social worker at Tri-County Mental Health in Farmington, Maine in April and May of 1997. (P-471 and P-485)

17. The team met on May 15, 1997. The team discussed the student's visit to Tri-County Mental

Health. The mother said that the student wasn't expressing his feelings with the therapist. The psychiatrist recommended not pushing the student too hard and that he should return to see the pediatrician at Mid-Maine Medical Center. The team urged the mother to tell the doctor that before the student stopped taking the Ritalin, the drug or dosage was not effective for the student. It was agreed that the student's workload needed to be reduced. The team made the following determinations: 1) special education services would be provided five days [sic] for up to 80 minutes a week; 2) someone would do a daily check on the student's homework sheet; 3) mother will [sic] contact [sic] pediatrician at Mid-Maine Medical Center to reevaluate the student for ADHD; 4) counseling should continue every other week at Tri-County Mental Health; 5) classroom modifications should be made that are appropriate for the student; 6) continue with the behavior plan; 7) PET would like updates from the counselor; 8) PET would reconvene to discuss additional psychological evaluation; and 9) PET team was in consensus with the determinations. The IEP contained three goals for the student: 1) improve math skills to a 4.0 grade level by June of 1998; 2) improve spelling to a 3.5 grade level by June of 1998; and 3) maintain appropriate behavior during unstructured times. (S-10 and P-486-489)

18. The team met again in July of 1997. Projective testing was conducted by Bonnie Farrar in May of 1997, and indicated a serious level of emotional concern on the part of the student. The evaluation stated that his anxiety, withdrawal, depression, poor self-image and significant social difficulties were very likely impacting his ability to function and cope, both at school and home. The report recommended a psychiatric evaluation to consider medication in managing the student's ADHD and depression. Counseling, both in and out of school, was recommended to help the student with his academic, social, and emotional issues. The minutes stated that the student needed intense therapy and individual help. The team made the following determinations: 1) a psychiatric evaluation would be set up by the school; 2) the student's handicapping condition would be changed to both Specific Learning Disability and Behavior Impairment; 3) weekly counseling, both in and out of school, was suggested; 4) consultation with classroom teacher was important; 5) the team would meet again following psychiatric evaluation; 6) the special education teacher will [sic] meet with the classroom teacher and the mother to discuss a behavior plan and inform teacher on evaluation; and 7) the team was in consensus with the above determinations. (S-11 and P-480-81)

19. In August of 1997, the student’s xx grade teacher, his special education teacher, and the mother met to develop a behavior plan for the student. The mother shared that the student had a wonderful summer and participated in several camps and scouts [sic]. The special education teacher identified the student's physical aggressiveness as her biggest concern. She also stated she was worried about his poor peer relationships. It was agreed that if there were behavior problems on the playground between the student and peers, that this same group would reconvene to come up with a plan. The following determinations were made: 1) the mother would write a note to school addressing the snacks for the student; 2) the regular education teacher would contact the mother if she needed help in the classroom; 3) a transition plan would be worked out between the regular classroom and resource room; 4) the student would initially participate in spelling in the regular classroom; 5) a homework notebook would be created between home and school; 6) if the student became physically aggressive, he would be sent to an administrator with a note of explanation and work to do in the resource room; [sic] 7) the team members were in consensus with the above determinations. (S-12 and P-477-478)

20. At the beginning of the student's xx grade school year (1997-98), he was removed from the bus for a period of time for slapping a first-grade student. He was also reported to have been physically

aggressive with two of his classmates. A note in the school file mentions a call to the mother about counseling with the school psychological service provider, which the mother said she did not want to pursue until the student was finished with the evaluation at Evergreen. (P-474-476)

21. The student was evaluated [sic] Dr. Lourdes Soto-Moreno at Evergreen Behavioral Services on August 29, 1997 and September 19, 1997. The evaluation was not received by the school or parent until sometime between December of 1997 and March of 1998. The report stated that the student was referred by the school to assess the need for pharmacological treatments of ADHD and depressive symptoms. The doctor reported that while the student had a depressive episode earlier in the year, at the time of the evaluation most of the symptoms were resolved and that [sic] he did not meet the criteria for a mood disorder. It was also noted that the student had some issues around separation and that he experienced some anxiety when separating from his mother. The following recommendations were made: 1) the student may [sic] benefit from pharmacotherapy, including another stimulant or antidepressant. Since the student's depression had subsided, the mother preferred to wait on medication and expressed reluctance to this modality; 2) individual therapy and therapy with his mother; 3) psychosocial and or [sic] behavioral interventions such as behavior contracts should be used at school; 4) a one-to-one aide in the classroom to help the student stay on task and with structure and organization; and 5) participation in a social skills group to help improve the student's interactions with peers. (S-35 and P-465-473)

22. The PET met on March 11, 1998 to review the Evergreen Behavioral Services evaluation. Both teachers and the mother reported that while the student's year started off well, his behavior and emotional state had deteriorated since December. Suicide was discussed as a concern. The special education teacher stated she "had heard it" while the mother said she had not. The school psychological examiner stated she believed the mother should look into medication issues again. The mother was asked if she felt she could contact Evergreen about medication since they recommended it in their report. The minutes stated "We didn't get an answer back for that - except after their vacation." The student stopped seeing the counselor from Tri-County Mental Health Center. The mother indicated that she planned to contact an ADHD clinic in Massachusetts. (S-13 and P-465-466)

23. The student's annual review was held on May 6, 1998. The team discussed the student's continuing difficulties with academics, behavior, and sadness. The guidance counselor noted the student's depression prior to school vacation and asked about counseling. The mother stated that she was attempting to get an appointment with a psychiatrist in Lewiston, Maine. The minutes stated that the team wanted recommendations from Dr. Jensen on how to deal with the student's depression, anger, and ADHD. They also wanted to know if/how much counseling and or [sic] medication would help the student. It was noted that while the student met his spelling goal for the year, his math skills were still low. Summer tutoring was recommended at the end of August to prepare the student for middle school. The IEP contained three goals: 1) the student's math skills would improve to a 4.5 grade level; 2) the student would maintain appropriate behavior during unstructured times; and 3) he would demonstrate an ability to organize school assignments. The student's resource room time was increased to 100 minutes per day in the resource room. An Educational Technician II was also assigned to assist the student in the regular classroom three hours per day in all subjects, with the exception of gym, art, music, reading, and resource room. (S-14 and P-453-461)

24. At the beginning of the student's xx-grade year (1998-99), the team met to review programming,

discuss a behavior plan, and check on the student's progress. It was reported that due to an incident of his sexual harassment of a peer, the student would receive an in school suspension for two days. The mother stated that, as authorized by the school handbook, she would be with the student during the suspension. The team discussed and revised the behavior plan. The Dean of Students reported complaints from other students about the student's language. The mother reported that she was having the student evaluated in Connecticut after disagreeing with an evaluation that was performed over the summer at Mid-Maine Medical Center. The mother chose not to share the results of the evaluation, but did state that she did not find it to be comprehensive and that the report conducted [sic] that the student did not have ADHD. The mother also stated that she was considering home schooling the student for part of the day, possibly in math and language arts. The mother is a former elementary school teacher and member of the school board from Dallas Plantation. The need to increase the amount of time that the Education Technician would spend with the student was discussed. The team made the following determinations: 1) the Educational Technician would be with the student all day, with perhaps an exception for reading and P.E.; 2) changes were made in the behavior plan; 3) the mother was considering home school for part of the day 4) that the student would be evaluated at Newington Children's Center in Connecticut on September 28-29, 1998; 5) school members of the PET recommended that the student receive counseling and would pursue this after the evaluation; and 6) team members were in consensus with the above determinations. (P-444-445 and Testimony: Mother)

25. The student was very unhappy and felt embarrassed by the attention that the Educational Technician attracted. During the in school suspension, the mother told the Educational Technician that she might home school the student full-time. She was unsure exactly when the home schooling would begin. The student's last day of school was on September 18, 1998. (P-442; Testimony: Mother)

26. A letter dated September 14, 1998, from the Dean of Students of the Rangeley Lakes Regional School, was mailed to the evaluators at the Newington Children's Center in Connecticut. The letter explicitly detailed the alleged language that the student used during these sexual harassment incidents. The letter also commented that the mother was considering home schooling the student. The evaluators were also informed that the student had received three or four evaluations and that counseling was recommended, but that the student had only seen a counselor for a few months. The letter continued by stating that the administration and special education staff at the school wanted to inform them of these behaviors as the student began another evaluation process and hoped that the evaluation results would be shared with the school so they could develop the best possible program for the student. (P-440-441)

27. A letter was mailed to the mother from [sic] Special Education Director and [sic] Special Education teacher informing her of the school's obligation to provide the student with a free, appropriate, public education. Handwritten notes stated that the letter was mailed on September 29, 1998 and that a long form of parental rights was included with the letter. School records documented that one attempt was made to contact the mother in October of 1998 to check on the student's status. (P-437-38)

28. The mother reported that the student's home schooling went very well. She found that if she was patient with the student and very clear with instructions, he could learn a task well. She stated the student did not exhibit any aggressive behaviors with her. During the student's home schooling, the mother began to look for an appropriate program for the student for the following year. The mother was unable to find an appropriate program for the student in Maine. (Testimony: Mother)

29. After researching schools in Vermont and Massachusetts, the mother felt that the Greenwood School (Greenwood) in Putney, Vermont, would meet the student's needs. Greenwood is a small, private, residential school for boys of xx to xx years of age who have specific learning disabilities. In the late fall of 1998, the mother spoke with Greenwood's LEA Coordinator, Anne Bebko, regarding the student attending Greenwood. Ms. Bebko, who in addition to being Greenwood's LEA Coordinator, was a trained parent advocate, informed the mother that she should challenge the Rangeley School District's IEP and have the school pay for all costs relating to the student attending Greenwood. Ms. Bebko stated that the mother did not wish to "rock the boat." From her tenure as a school board member, the mother was aware of the policy of Dallas Plantation to pay a set amount of money for any parent to send a child to another school, whether a special education student or not. After deciding upon Greenwood in Putney, Vermont, the mother contacted the superintendent of School Union 37, Ken Coville, regarding the student attending Greenwood. Mr. Coville raised no objections to the student attending Greenwood and told the mother that Dallas Plantation would pay the standard tuition costs, plus the cost of any special education services; [sic]but would not pay for room and board. The mother stated that she contacted the school district to set up a PET meeting at the request of Ms. Bebko of Greenwood. (S-31-32 and Testimony: Mother, Anne Bebko, and Ken Coville)

30. The Rangeley School [sic] Regional School mailed the mother a notice of a PET meeting on May 6, 1999. A PET meeting was held on May 19, 1999. The purpose of the meeting was to review the home school program and draft an IEP. The mother stated that writing was still difficult for the student. The student's organizational skills and behavior were reported to have improved. The minutes indicated that the student would be attending Greenwood, a certified special education school in Vermont. The program, which normally lasts between two and three years, had a one-to-two teacher/student ratio. Some of the student's goals would center on self-discipline and relationships. No one from the school district disagreed with the student attending Greenwood and offered no [sic] alternative programming. The team made the following determinations: 1) an IEP was completed with the parent that would be shared with Greenwood; 2) the student would attend Greenwood school next year and that [sic] parent sought out this placement; 3) Ken Coville, superintendent for Dallas Plantation and School Union 37, would be the link between Rangeley School and Greenwood because the student was a resident of Dallas Plantation; and 4) the members were in consensus on the above determinations. The attached I.E.P. offered no direct services for the student, only "consultation services as desired by the parent." Testimony was provided from school employees that these were not "team determinations," but rather a report of the parent's school choice. (S-16; P-434; Testimony: Mother, Ken Coville, Anne Bebko, and Martha Nichols)

31. On June 15, 1999, Stewart Miller, Admissions Coordinator for Greenwood, sent a letter to Ken Coville, Superintendent, thanking him for his help in "making Greenwood a possibility for the student." A contract for tuition was included with the letter. The letter stated that the mother had mailed in a $2,000 deposit to secure the student's place at Greenwood. Mr. Miller stated that Greenwood understood "that this deposit will be deducted from room and board expenses, for which the mother remains financially responsible." (S-32)

32. Anne Bebko, LEA coordinator for Greenwood, mailed a draft IEP to Superintendent Ken Coville on July 19, 1999. The IEP contained fourteen objectives for reading, ten objectives for spelling, ten objectives for reading comprehension, ten objectives for writing, thirteen goals for social and emotional

issues, nine objectives for handwriting/keyboarding, and eight objectives for math. Ms. Bebko asked Superintendent Coville to send her any suggested changes to the I.E.P. She stated that she did not hear back from him regarding the IEP. (S-16 and S-17, Testimony: Bebko)

33. The student attended Greenwood for 1999-2000, his XX grade school year. (P-338-348 and P-351-424; Testimony: Mother)

34. On February 10, 2000, Superintendent Coville sent a letter to the mother regarding an invoice for assessment and psychotherapy services. He indicated that Greenwood needed to contact him regarding setting up a PET meeting so that the PET may [sic] authorize the services. These costs are reported to [sic] Maine Department of Education. (S-29 and P-645-648; Testimony: Ken Coville)

35. On April 17, 2000, staff from Greenwood sent Ken Coville a note regarding their phone conversation of that day relating to a contract for the student to attend Greenwood. The note indicated that the changes that Mr. Coville had requested had been made and that a separate contract for residential services was being sent to the mother. The contract, which was signed by Mr. Coville, is [sic] entitled "1999-2000 Contract for Enrollment of Publicly Funded Student." The language of the contract stated that the school district has [sic] determined that the student was to be educated at Greenwood and agreed to assume all costs associated with the student's education. The language also stated that the residential services portion would be the responsibility of the mother. The contract required that the school district agreed to conduct IEP meetings in accordance with Vermont Department of Education regulations and that it was Greenwood's responsibility to implement the services of the IEP. (S-31)

36. On April 29, 2000, Superintendent Ken Coville signed another contract for enrollment of a publicly funded student with Greenwood for the 2000-2001 school year. There were several changes in the contract from the previous year, which Greenwood staff stated were at the request of Mr. Coville. Several references to the Rangeley School system were crossed out. An agreement for non-instructional services was also included. This agreement provided that the sending school district is [sic] responsible for the initiation of meetings and IEP forms required by the state. (S-30; Testimony: Anne Bebko)

37. The PET met on May 24, 2000. The participants consisted of the mother, Anne Bebko of Greenwood, and Martha Nichols, special education director of Rangeley Lakes Regional School [sic]. Ms. Bebko reviewed the goals and objectives of the IEP with the team. She stated that the student was ending the year on a good note and that he had made progress. She noted that the student had progressed two years in reading and was making progress in math. Writing was still difficult for the student. While there were some minor behavior problems, the student was reported to be making progress socially and emotionally. Study skills and independent work were a continued focus for the student at Greenwood. The minutes noted that the student's three-year evaluation was due. The team decided that the Rangeley Lakes Regional School Psychologist would administer the Woodcock-Johnson and that the speech and language evaluation would be done at Greenwood. The mother was going to investigate further ADHD testing. The team made the following determinations: 1) the team members were in consensus concerning the goals and objectives of the new I.E.P.; and 2) that three-year testing would begin in the summer. (S-18-19)

38. The school psychologist for the Rangeley Lakes Regional School administered the Woodcock

Johnson Psycho-Educational Battery - Revised to the student on June 23, 2000. The results indicated that the student was in the average range for reading, but that math and writing were in the borderline range. The evaluation found calculation (1st percentile) and the mechanics of writing/dictation (2nd percentile) were the student's biggest weakness [sic]. (P-337)

39. A neuropsychological evaluation was conducted of the student at Dartmouth Medical Center in Lebanon, New Hampshire, in early September of 2000. The results of the testing continued to indicate that the student had Attention-Deficit Hyperactivity Disorder, combined type, and that the student suffered from bilateral frontal-subcortal systems dysfunction. (P-317-329)

40. On November 28, 2000, the Headmaster at Greenwood informed the mother, in a letter also sent to Superintendent Coville, that the student was being suspended indefinitely following several incidents of aggressive behavior with other students. It was indicated that the student would receive a psychiatric evaluation at Dartmouth Medical Center in January and the staff at Greenwood was attempting to find help sooner as well. The letter continued that the student should not return to school until a plan was in place, whatever that may be. (P-315)

41. The mother located, with assistance from the staff at Greenwood, a program to address the student's increasing behavior and aggression. She called Mr. Coville to inform him that the student would be attending the New Dominion School (New Dominion), in Dillwyn, Virginia. (Testimony: Mother & Mr. Coville)

42. New Dominion was a licensed special education school in Virginia with an outdoor, therapeutic approach that focused on students with anger, attention, and motivational issues. New Dominion was a full-year program. Testimony was given that no PET meeting was scheduled by Mr. Coville or anyone at School Union 37 to discuss this change of placement for the student. (Testimony: Mother & Mr. Coville)

43. On, January 30, 2001, the admissions director at New Dominion contacted Mr. Coville, Superintendent of School Union 37, to discuss the student's attendance at New Dominion. Mr. Coville sent a letter to the director on the same date indicating that the mother was placing the student at New Dominion under the town of Dallas Plantation's open enrollment policy. Mr. Coville indicated that while the standard state tuition amount is paid for regular education students, the town treats special education students differently in that "the receiving school then becomes the home school of the student and as such would then schedule and hold an IEP meeting to develop an IEP and authorize special education and related services." Mr. Coville stated, "once the student is enrolled at New Dominion you will need to schedule an IEP meeting, which I would attend by phone as the local community representative." He said that New Dominion staff would develop the IEP according to Virginia regulations. Following the IEP meeting, a fee structure that was based on the standard tuition plus the cost of authorized special education and related services could then be created. (S-28)

44. A letter was mailed to Mr. Coville from New Dominion School staff on March 1, 2001, inviting him to a meeting to develop a "Service Plan" for the student. The "Service Plan" is New Dominion's equivalent of an IEP document. The document was developed on [sic] at a meeting held on March 7, 2001. Mr. Coville, who participated by phone, and the mother were both listed as participants at the meeting. (P-288-295 and Testimony: Mother and Ken Coville)

45. The New Dominion School held another "Service Plan" meeting on February 20, 2002. The mother, the student, and three staff members attended the meeting from New Dominion. Testimony indicated there was no participation by Mr. Coville or anyone from School Union 37. (P-261-271, Testimony: Mother)

46. The student was successfully discharged from New Dominion in August of 2002. A discharge reported [sic] stated that the student had made significant progress, particularly in self-control, self-esteem, accepting authority, peer-staff relationships, and problem solving.   The student gradually developed strong peer relationships and toward the end of his stay took on a leadership role with his fellow students. The student held an on-campus job and was seen as a hard worker. Academics continued to be difficult for the student, and he continued to require further assistance. Invoices from New Dominion School indicate that Dallas Plantation was billed for tuition while the mother paid the remaining fees. (P-257 & P-635-640, Testimony: Mother)

47. The student began attending the Brush Ranch School (Brush Ranch) in Tererro, New Mexico in the fall of 2002, his xx grade year. Brush Ranch was a private school, accredited to serve special education students, which focused on academics [sic] skills for students with learning disabilities. The staff at Brush Ranch developed an IEP for the student and conducted a meeting on October 18, 2002. There was testimony that no one from School Union 37 participated in the meeting. (P-221-251-253; S-21; Testimony: Kay Rice and Mother)

48. At Brush Ranch, the student made progress in a number of areas that were very difficult for him in the past, such as homework. His language arts teacher noted his homework completion to be "excellent." In World History, it was reported that he "performed extremely well, turned in all of his assignment and received high marks." The report found him to be focused and displaying a desire to receive high marks and turn in quality work. His behavior and social interactions also seemed greatly improved. He was described as often thinking and acting in the best interests of others. The number of the student's previous inappropriate decisions were [sic] greatly reduced. He reportedly got along well with all of his cabin mates. He was described as having the potential to step forward the next year and become a true leader at the school. (P-221-251-253; S-21; Testimony: Kay Rice)

48.[sic] At the Dallas Plantation town meeting held during 2002, the town voted to change its policy on the choice options relating to tuition payments available for school-age students. The town changed its policy to restrict new placement of students to public or private schools in Maine approved by the Maine Department of Education for tuition purposes. The change was made in part as a result of the cost of the student's placement and to "change the likelihood of it happening again." (P-212 and Testimony: Ken Coville)

49. In April 3, 2003, staff at Brush Ranch faxed an IEP and third quarter progress report to Ken Coville, Superintendent. (S-22 and P-239)

50. On May 12, 2003, Nichols [sic] Nadzo, an attorney representing the Assessors of Dallas Plantation, informed Mr. Coville that that [sic] the town was refusing payment of his invoice for the student at the Brush Ranch. Mr. Nadzo stated the town assessors did not believe that the mother had resided in Dallas Plantation for the previous three years. He continued that the town was not responsible for paying

tuition for the student while the mother was not a resident and would pay no future invoices for tuition. The letter was also sent to the mother and the Brush Ranch. (P-237-238)

51. On May 16, 2003, Mr. Coville informed the mother that he would no longer be submitting invoices for the student's tuition based on her non-residency. She was referred to Mr. Nadzo for further information. (P-236)

52. On October 1, 2003, Mr. Coville, at the request of the mother, mailed a letter to Brush Ranch outlining the policy of Dallas Plantation relating to the education of children whose parents reside there. The letter states the following

> This letter is in response to a request from (mother of student). (Mother) requested a letter clarifying the policy of Dallas Plantation regarding the education of Children of Dallas Plt. Residents.
>
> I am expanding this response to insure clarity on this issue, as I understand it:
>
> 1. Under the statutes of the state of Maine the responsibility for provision of education is borne by the community in which a parent of a school eligible student resides.
>
> 2. Dallas Plt., like many other Maine communities does not provide education directly through operation of a school but rather through provision of tuition to other schools.
>
> 3. Dallas Plt. has for many years elected not to enter into an exclusive contract with any school for the education of residents' eligible children but rather has allowed parents to select the school of choice for their children.
>
> 4. In past years this choice has been limited by constitutional issues of the first amendment but not in other ways.
>
> 5. Under State statute Dallas Plt. [sic] financial obligation for regular education tuition is limited to the state average per pupil secondary cost of the previous year.
>
> 6. Under provisions of IDEA and state statutes related to children with exceptionalities Dallas Plt. has responsibility for any authorized special education or related services for an identified student.
>
> 7. This includes the costs of all specialized instruction, and supportive services.
>
> 8. When Dallas Plt. allows parents to select public/private schools of their choice rather than fulfilling the educational obligation through a unilateral contract with any given school the Plt. allows the parent to determine what school will be the student's school of enrollment. As such that school becomes the decision maker of what special education services are required and must be provided.
>
> 9. This does not include the costs of room and board at or transportation to a residential or boarding school since these costs arise from the parents [sic] exercise of the local choice option and not as a result by [sic] a local school as needed to address the needs of the student.
>
> 1O. Dallas revised its policy on choice options for parents at a town meeting in 2002. At that time the town through vote of its citizens restricted new placements of students to public or private schools in Maine approved by the Maine Department of Education for tuition purposes.
>
> 11. This change in the choice options was not treated as affecting the student since his

placement at the Brushwood School had occurred prior to the change made at the town meeting.

(S-27 and P-209)

53. Between the years of 1999-2004, the town of Dallas Plantation/School Union 37 reported the special education costs of the student to the Maine Department of Education. (P-641-724)

54. The Mother, through her attorney, Richard Morton, filed a request for due process against Dallas Plantation/School Union 37 on October 17, 2003. In a letter and memo, Mr. Morton stated that he wished [sic] a hearing to decide issues of residency and to determine liability for travel, room and board expenses. (S-25-26)

55. The parties held a pre-hearing conference on November 21, 2003, to clarify the issues for hearing. The hearing began on December 19, 2003 and continued on December 23, 2003. (S-23)

56. An independent hearing officer issued the decision, *Parent v. Dallas Plantation*, 03.129, on January 12, 2004. There were two issues decided in the case. First, was the student's mother a resident, for educational purposes, of Dallas? Second, were there any periods since the beginning of 2000 that student's mother has not been a resident, for educational purposes, of Dallas Plantation? The hearing officer found that the mother was a resident for educational purposes. *Dallas Plantation*, 40 IDELR 252 (SEA ME) 2004. (S-23)

V. Equitable Defenses

The school's attorney made a number of claims on the record that the parent's case should either be dismissed or is [sic] barred. While the hearing officer will address these issues, it should be noted that no formal motions were made for the hearing officer to consider any of these arguments at either the pre-hearing or hearing.

A. Laches

The school district contended that the family's claim of reimbursement should be barred by the equitable defenses of laches and/or waiver. Laches is an affirmative defense that can bar a claim for equitable relief, such as reimbursement. *Murphy I,* 973 F.2d at 16 (quoting *K-Mart Corp. v. Oriental Plaza, Inc.,* 875 F.2d 907, 911 (1st Cir. 1989)). The First Circuit concluded that if a delay by the party bringing the case was unreasonable, and prejudiced the opposing party, a laches defense could be used as a defense to reimbursement. *Id.* Documents submitted on the record show that the family informed the school on June 14, 2004 of their request for reimbursement. (S-42) The family also filed their claim within the six-year statute of limitations. This hearing officer does not find the delay unreasonable. The second requirement of *Murphy I* is that the defendant prove a "clear showing of prejudice" that 1) the memories of witnesses have faded, or 2) that witnesses are unavailable. *Murphy I,* at 16. In this case, the school's witnesses, who included the former superintendent, the special education director, and student's special education teacher, all provided detailed accounts of PET meetings and conversations relating to the student. There was no mention by the school of any key witnesses that were unavailable to testify.

Dallas Plantation argued that they were denied the "chance to fashion a less expensive acceptable alternative." *James v. Upper Arlington City Sch. Dist*., 228 F.3d 764, 769 (6th Cir. 2000), cert. denied, 532 U.S. 995 (2001). In this case, the school district could have convened a PET meeting at any time to propose an appropriate placement.

This hearing officer does not find that the defendant school district was prejudiced or that there was unreasonable delay in bringing the case. The laches defense may not be used to bar the claim to reimbursement.

B. Waiver

The school argued that the mother's claim in this case should be barred by the doctrine of waiver. The school contends that the mother "sat on her rights" and failed to bring a cause of action. The school contends the mother was informed of her right to object to an IEP by Anne Bebko of Greenwood in Vermont and that she did not want to "rock the boat." (Testimony: Anne Bebko) Additionally, Dallas Plantation made persistent statements to the mother that town "policy" prohibited it from paying room and board. The town provided [sic] Ms. Bebko suggested to the mother that Dallas Plantation should pay tuition and room and board. *Id.* The mother testified that she believed Dallas Plantation's "firm policy" involving the school choice issue made her situation different from that in Vermont. (Testimony: Mother) Dallas Plantation made persistent statements to the mother that town "policy" prohibited them from paying room and board for the student. (S-27, S-28, S-30, S-3 and P-209 and Testimony: Mother and Ken Coville) As the town provided the mother with erroneous information about her rights under IDEA, the doctrine of waiver should not, therefore, be used as a bar to her cause of action. Finally, the mother has not given up her legal right. She is exercising it within the statute of limitations, as noted above.

C. Statute of Limitations

The school argued that the family's claims should be barred based on the statute of limitations in the Maine Special Education Regulations. The school cites Section 13.5 of the Maine Regulations for this premise. MSER §13.5. This section refers to complaints filed with the department, not a due process hearing. Id. A statute of limitations period is not specified in the Individuals with Disabilities Act of 1997. (Beginning July 1, 2005, a two-year statute of limitations was created in the reauthorization of IDEA.) A previous Maine hearing decision has [sic] relied on Maine's general, six-year statute of limitations for civil actions found in 14 M.R.S.A. §752. See *Student v. Caribou School Department*, Maine Dept. of Ed. Case #01.135 (2001)(Williams, L.) citing *Murphy v. Timberlane Reg. Sch. Dist*., 22 F.3d 1186 (1st Cir. 1994). This hearing officer finds that the statute of limitations period applicable to IDEA claims has not yet expired, and the family's claim is not time barred.

D. Res Judicata

Res judicata, or claim preclusion, is an equitable defense that stands for the notion that persons who have had the opportunity to litigate a claim may be barred from litigating it twice. In an IDEA case in New Hampshire, the District Court found that when examining a defense of res judicata, the courts must resolve "whether or not the causes of action alleged arise out of a common set of operative facts." *Katz v. Timberlane Regional Sch. Dist.,* 184 F.Supp.2d 124, 127 (D. N.H. 2002). Three conditions must be

met for a successful res judicata defense: first, a final judgment on the merits in an earlier suit, second, a "sufficient identicality" between the causes of action asserted in the earlier and later suits, and three [sic], sufficient identicality between the parties in the two suits." *Id.*

Taking the three conditions in turn, first, there has been a final judgment on the merits in the earlier case. *Parent v. Dallas Plantation*, 03.129, (ME SEA 2004). Second, did the two causes of action "arise out of a common set of operative facts?" *Katz v. Timberlane Regional Sch. Dist*., 184 F.Supp.2d 124, 127 (D. N.H. 2002). Here, these two claims are distinguishable. The prior claim was exclusively over the issue of residency. *Dallas Plantation*, 03.129, (ME SEA 2004). The cause of action in the previous case related to whether the mother was a resident of the town for educational purposes. The cause of action in the matter before this hearing officer focused on whether the student was denied a free appropriate public education and therefore entitled to reimbursement. The claims raised in these two cases were very different. Third, were the same parties involved in both cases? With the exception that the student, who is now 19 years of age, is now a party in this action with his mother, the parties were the same. Given that the two claims raised in these cases were not similar, res judicata is not an appropriate defense in this action.

The court in *Katz* also notes that res judicata precludes claims that "were or could have been raised" in the first cause of action. *Katz,* 184 F.Supp.2d at 127 (D. N.H. 2002) (citing *Bay State HMO Mgmt., Inc. v. Tingley Sys., Inc.* , 181 F.3d 174, 177 (1st Cir. 1999)). In the previous case, the mother's previous attorney raised the claim of reimbursement for room and board in a letter and in a preliminary statement regarding the case. (S-25-26) For whatever reason, there was no discussion of the issue at the hearing, and the previous hearing officer did not address this issue in her decision. *Parent v. Dallas Plantation*, 03.129, (ME SEA 2004) (Testimony: Mother). Because the parent did not receive an adjudication upon the merits on the claim of whether she was entitled to reimbursement for non-tuition expenses, res judicata should not bar the claim.

E. Collateral Estoppel

Collateral estoppel, or issue preclusion, examines whether the issue in the subsequent case was "actually and necessarily determined" in the prior case. *Ludington Area Schs. v. Mich. State Educ. Agency*, 39 IDELR 86 at 1526 (SEA Mich. 2003) . A hearing officer in a Michigan case involving a student with a disability found that a central determination in a collateral estoppel defense is whether the 'same facts and evidence are essential to the maintenance of the two actions." *Id.* at 1526 (*citing Dearborn Hgts. Sch. Dist. No. 7 v. Wayne Co. MEA/NEAU*, 233 Mich. App. 198, 124 (1998)). The facts in the first case involving the parent and Dallas Plantation centered on whether the mother was a resident of the Plantation. The Statement of Facts in that decision contains items relating to the mother's driver's license, payment of taxes, and marriage license. The Statement of Facts in the current case involves numerous evaluations, PET minutes, and IEP documents from four different schools. The facts and evidence in the first case related to the issue of residency, whereas the facts and evidence in this case relate to the provision of FAPE and reimbursement. The same facts and evidence are not essential in the two cases; therefore the collateral estoppel defense fails.

VI. Discussion

The Individuals with Disabilities Education Act (IDEA) provides states and local school districts with federal funds to assist in the education of students with disabilities. Schools have an affirmative obligation to identify, locate, and evaluate all students who reside in the school district, who are suspected of having disabilities and who may require special education and related services. 20 U.S.C. § 1412(a)(3). IDEA requires that all students with disabilities receive a free appropriate public education (FAPE). 20 U.S.C. §1412 (a)(1). The education must emphasize special education and related services, which are designed to meet the unique needs of the student and prepare them for employment and independent living. 20 U.S.C. 1400 (d)(1)(a). Special education is defined as "specially designed instruction" provided at no cost to parents, to meet the unique needs of the child. 20 U.S.C. §1401 (25).

The U.S. Supreme Court provided additional insight into the standard due disabled students when it held that FAPE required "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). A "definitional checklist" required by the statute includes instruction and services to the student that must: 1) be provided at public expense and under public supervision; 2) meet the State's educational standards; 3) approximate the grade levels being used in the state in regular education; and 4) comport with the student's Individualized Education Program (IEP). *Id.* at 189.

The court in *Rowley* developed a two-step process to provide guidance to future courts in determining FAPE. *Rowley*, 458 U.S. 176, 206. First, has the school complied with the procedures set forth in the Act? *Id.* And second, is the individualized educational program developed in accordance with IDEA's procedures reasonably calculated to enable the student to receive educational benefits? *Id.* at 206-207. If both requirements have been satisfied, then FAPE has been provided. *Id.*

There is no disagreement in this case that the student was a child who qualified for special education services. (Testimony: Mother and Ken Coville) Here, the family argued that Dallas Plantation denied the student a free appropriate public education by requiring the mother to pay room, board, transportation and other expenses between the school years of 1999-2004. (HO 3) Dallas Plantation contends that the parent under the "school choice" option instead made a unilateral private placement. (Testimony: Ken Coville)

Numerous towns in Maine do not have their own public schools. The Maine Supreme Judicial Court described this common practice in a decision involving the constitutionality of the tuition program under the establishment clause. *Bagley v. Raymond Sch. Dept.,* 728 A2d 127, 130 (Me. 1999).

> Approximately half of the school districts in Maine satisfy their obligation by operating public elementary and secondary schools. The other half satisfy their obligation either wholly through Maine's tuition program, or by operating some schools, usually elementary, and paying tuition for students to attend only those schools which the school districts do not operate. Nearly 14,000 students attend public and approved private schools under the tuition program and approximately $70 million in public funds is expended each year by the Maine Department of Education and local school districts on tuition for students to attend these schools.

Id.

Dallas Plantation, where the family resided, has no school of its own. (S-23 and Testimony: Mother). Maine law requires Dallas Plantation, and similar communities, to provide tuition to elementary and secondary students. 20-A M.R.SA. §§5203-5204. Neither Dallas Plantation, nor School Union 37, provide [sic] a secondary school for its resident students. For a community, such as Dallas Plantation, where no secondary school or contract exists, Maine law states the following

> Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in chapter 219.

20-A M.R.SA. §§5204(4)

The parties in this case disagree about what obligation, beyond tuition, Dallas Plantation has to this special education student. Dallas Plantation argues that under the 20-A M.R.S.A. §§5204, which is referred to as the "school choice" option, the student's mother could choose to send the student to the school of her choice. (S-31-32 and P-212 and Testimony: Ken Coville) The "policy" of Dallas Plantation was that it would pay the tuition, including any costs related to providing special education services to the student. *Id.* The town would not pay, however, any costs associated with room, board, or other expenses. *Id.* Dallas Plantation believed it could also shift its responsibility for holding PET meetings, and other decisions related to special education services, to the private school of choice of the parent. (P-212 and Testimony: Ken Coville)

The "policy" developed by Dallas Plantation is a clear violation of federal law under IDEA. A school may not simply give a check to a private school and be absolved of its continued obligations under federal and state law. Dallas Plantation had an obligation under IDEA to provide the student with a free appropriate public education. By shifting responsibility to the private schools involved in this case, Dallas Plantation failed to provide the student with FAPE.

The first requirement under the *Rowley* standard is whether the school complied with the procedures required by IDEA. Rowley, 458 U.S. at 206. The clearest violation of the procedures is the school's failure to initiate PET meetings for the student. (Testimony: Mother, Ken Coville, and Martha Nichols)

The implementation of FAPE for students with disabilities is through the Individualized Education Program (IEP). *Honig v. Doe*, 484 U.S. 305, 311(1998). The IEP is often referred to as the "centerpiece" of the provision of special education under IDEA. *Id.*

The Maine regulations anticipate situations involving the development of an IEP for a student attending an out-of-district placement. The regulations state that the "sending school" is the administrative unit that has administrative responsibility for the student's education that is being placed by it [sic] at the out- of-district placement. M.S.E.R. §10.7. The "receiving school" may include a private school that is accepting the "tuition placement" from the SAU, such as in this case. *Id.* The regulations clearly state that it is the responsibility of the "sending school" to do the following: 1) initiate the required annual

review of the student's I.E.P. and placement; 2) revise the student's IEP; and 3) ensure compliance with these rules. *Id.*

The federal regulations provide that after the initial placement meeting, the public agency has the discretion to allow the private school to initiate meetings to revise and review the student's IEP, but that the public agency is still responsible for compliance. 34 C.F.R. §300.349(b)&(c). The Maine regulations clarify the responsibility of the sending school by stating

> Once a student with a disability has been placed out-of-unit, representatives of the receiving school shall request the sending school to initiate a P.E.T. meeting when the receiving school proposes to revise the student's Individualized Education Program. The sending school shall schedule the P.E.T. at a mutually convenient time for all parties and shall notify the receiving school and the parents of the meeting, as described and defined in §8.5, Parental Notice of P.E.T. Meetings. A copy of each such notification shall also be sent by the sending school to the receiving school unit.
>
> The sending school shall participate in any meetings related to proposed changes in the student's Individualized Education Program, and shall ensure the parent's involvement in the meetings. The parent must be provided prior written notice of any proposed changes and both the sending school and the parent must agree to any proposed changes prior to the initiation of implementation of any changes in the student's Individualized Education Program.

M.S.E.R. 10.7

During the final PET meeting that the school district initiated for the student in May of 1999, a determination was made that Mr. Coville, superintendent, School Union 37, would be the "link between Rangeley School and the [sic] Greenwood because the student was a resident of Dallas Plantation." (S-16; P-434.) Greenwood mailed Mr. Coville a draft IEP for the student in July of 1999; staff at Greenwood claimed he never responded. Dallas abdicated its responsibility to the student by failing to: 1) initiate the required annual review of the student's I.E.P. and placement; 2) revise the student's IEP; and 3) ensure compliance with the act and regulations. *Id.* Following the May of 1999 PET meeting, and continuing through the spring of 2004, Dallas was not involved in the special education needs of the student. (S-16 & S-17, Testimony: Bebko, Rice, Mother, Coville) While Mr. Coville was in touch with staff at the three private schools the student attended, the nature of these communications seemed to be fiscal in nature.

The Office of Special Education Program (OSEP) recently addressed situations involving communities that have no public school of their own in a letter to David Stockford, the Director of Maine Special Services. *Letter to Stockford*, 43 IDELR 225 (2005). The OSEP letter addressed issued [sic] related to publicly tuitioned students who attend private academies in Maine. *Id.* The letter noted that the obligation to provide FAPE to an eligible student with a disability applies “where a school district does not operate public secondary school programs of its own.” *Id.* OSEP stated that if parents were allowed to select a school from a list of approved public or private schools, which is then paid by a local agency, then the local agency must provide FAPE. *Id.* They stated “the public agency must ensure either that FAPE can be made available to the students with disabilities at the school the parents select, or that the parents are provided the opportunity to enroll their children with disabilities in another appropriate

school (whether public or private) where FAPE is available to their children." *Id.* (citing 34 C.F.R. §300.2).

The school alleges in this case that the placement was the choice of the parent (Testimony: Ken Coville and Martha Nichols and Sheila Butterfield) Regardless of the desires of the parent, the school's obligation under IDEA is to the student. Was this placement the least restrictive environment (LRE) for the student? The school did nothing to investigate LRE. It did nothing to provide the student with any type of program or to even determine whether the private schools that were chosen for the student were appropriate placements. (Testimony: Mother and Ken Coville and Martha Nichols) The final IEP that was offered the student included only consultation services. (S-16) This was clearly inappropriate given that prior to the mother removing the student to home school him, the school was proposing a one-on-one Educational Technician for the student for the majority of the day. (S-15)

Representatives of School Union #37 then met with the mother at a PET meeting, and the minutes of the meeting state a determination that the student was going to attend Greenwood. (S-16) While the minutes also stated that the mother had sought out the placement, she was given no alternatives by the school district. (S-16 and Testimony: Mother and Martha Nichols and Sheila Butterfield) No program was created for the student. *Id.* No attempt was made to investigate a closer appropriate placement. *Id.* The school district turned over its responsibility for the student's public education to the mother and the private schools.

While the school district attempts to paint this situation, as a unilateral private placement, this [sic] not supported by the facts. The mother contacted the Superintendent of Schools about her interest in having the student attend Greenwood. (Testimony: Mother) Mr. Coville informed the mother that the school district would pay for tuition costs at the school, including special education services, but not room and board. (Testimony: Mother and Ken Coville) The superintendent told the parent this was the "policy" of Dallas Plantation. *Id.*

Dallas Plantation argues that the Mother made a unilateral private placement and therefore they should be governed under 34 C.F.R. §450, which guides parental private placement. If this was a unilateral private placement, why did Dallas Plantation pay the additional special education costs, including services such as counseling for the student? (P-641-711) If this was a private placement by the parent, they had no obligation to pay any special education costs for the student. 34 C.F.R. §300.403(a). Yet the school did pay. The school paid the tuition for the student to attend Greenwood, New Dominion, and Brush Ranch. (P-641-711) The school cannot create their own "policy" that allows them to pick and choose among the costs they wish to pay for a special education student. IDEA requires that students be provided with a free appropriate public education, *at no cost to the parent*. (34 C.F.R. §300.26(a) emphasis added). If the school believed any of these private placements to be inappropriate for the student, it had an obligation to provide the mother with an alternative program or placement. The
mother could then have decided whether to agree with the school's proposed placement and program or pay for the private schooling herself and challenge the school's I.E.P. The school did not do this. While Dallas paid the tuition, including any special education costs, the student was offered no alternative program or placement.

The recent OSEP letter also examined a situation where a parent makes a private placement on his or her own. *Letter to Stockford*, 43 IDELR 225 (2005). OSEP states

> We should also note that there could be situations where students with disabilities attend private academies because their parents have enrolled them there even though the school district has offered to make FAPE available to their child through an appropriate placement at a public program or another private school. If the parents were to reject that offer of FAPE because they preferred their child to attend a particular town academy, the child with a disability would have no individual entitlement to services under IDEA and would have no individual right to receive some or all of the services that the child would receive if enrolled in a public school. 34 CFR § 300.454(a). These children are considered under 34 CFR § 300.450 to be children with disabilities enrolled by their parents in private schools. States and public agencies have different obligations to parentally placed private school students with disabilities, yet must ensure that these students have the opportunity to participate in equitable services under IDEA.

34 CFR §§ 300.450-300.462.

In the present case, it is clear that the student was not a student enrolled by his mother in a private school. Dallas paid the student's regular and special education costs. (P-641-711) The superintendent signed contracts with private schools that stated Dallas was making a *public* school placement. (S-30-31 emphasis added) As was noted by OSEP, the school district must offer FAPE at an appropriate public or private placement to the student. 34 C.F.R. §300.2(c)(1). If the parent rejects the offer, because they simply prefer a different private placement, then the obligation changes. 34 CFR §§ 300.450-300.462.

Dallas, in this case, failed to initiate the required PET meetings, revise the IEP, or ensure that the procedures of IDEA were followed to provide for the mother's participation in the process. No program or placement was offered to the student between 1999 and 2004. Dallas Plantation's failure to comply with crucial procedural aspects of IDEA relating to the IEP process, the cornerstone of the statute, denied the student FAPE under the first prong of the Rowley test.

The parent in this case requests reimbursement of non-tuition expenses that result [sic] from the student's placement between the years of 1999-2004. The U.S. Supreme Court has provided guidance for determining reimbursement awards to parents of students with disabilities under IDEA. The Court in two decisions *Burlington Sch. Comm. v. Dep't of Educ.,* 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) created a three-part test for tuition reimbursement cases. *Also see West Shore Sch. Dist* 34 IDELR 132 (SEA PA 2001). First, did the school propose an appropriate placement or program for the student? (*Burlington*, 471 U.S. at 370, 374) Second, if the program or placement was not appropriate, was the parents' [sic] unilateral placement appropriate? *Id.* Third, if the parent's placement was appropriate, do equitable considerations support the parent's claim? *Id.* Finally, following *Burlington and Carter*, the federal regulations were changed to address reimbursement issues. 34 C.F.R. 300.403.

In a review of the first prong of the *Burlington/Carter* test, whether the school proposed an appropriate placement for the student, we must begin by examining the 1999 IEP and the minutes of the PET. (*Burlington*, 471 U.S. at 370, 374; *Florence County Sch. Dist.,* 510 U.S. 7.[sic] Maine's unique system of allowing communities to provide tuition to secondary students result [sic] in an unusual set of facts in this case that is not typical of those found in private placement cases brought by parents. In this case,

the mother removed the student early in 1998 from the Rangeley School and decided to home school him. (Testimony: Mother) The parent then decided that the student would not be home schooled for the following year and began to look for an appropriate placement, aware that Dallas Plantation had a [sic] no secondary school that the student could attend. (Testimony: Mother) The mother contacted the superintendent about the choice of Greenwood and was told that under Dallas Plantation's "school choice" policy it would pay the state tuition rate and any special education costs, but not costs relating to room and board. (S-31-32 and Testimony: Mother and Ken Coville) The mother understood from Greenwood that a PET meeting needed to be held and an IEP drafted and requested this from the school union. (Testimony: Mother, Anne Bebko, & Ken Coville, S-31-32)

A PET meeting was held on May[sic]19, 1999 at the Rangeley School. The IEP that was drafted by the school offered the student no special education services, only consultation services for home schooling. The school offered no program or placement of its own for the student. (S-16; P-434 Testimony: Mother, Ken Coville, and Martha Nichols.)

The minutes of the PET meeting noted several determinations. (S-16 and P 434) The most significant determination was that the student would attend Greenwood and that the parent had "sought out this placement." *Id.* Ken Coville, the school union's superintendent, would serve as the link between the Rangeley School and Greenwood because the student was a resident of Dallas Plantation. *Id.*

It was the testimony of Union #37 school staff that these were not "PET" determinations, but rather the documentation of the parent's choice to have the student attend Greenwood. ((S-16 and P 434 and Testimony: Ken Coville, Martha Nichols, & Sheila Butterfield). Yet the top of the page states "Rangeley Lakes Regional School" and "PET MINUTES." *Id.* The document states it was the student's annual review. The document also lists "determinations." The document is similar in every[sic]way to all of the other team minutes in the record. *Id.* The hearing officer found this testimony unpersuasive.

In May of 2000, another PET meeting was held for the student. (S-18-19 Testimony: Mother, Anne Bebko, and Martha Nichols) The participants consisted of the mother, Anne Bebko of Greenwood, and Martha Nichols, special education director. *Id.* There was no discussion of any program or placement other than Greenwood. *Id.* Ms. Nichols did not offer any program or placement on behalf of the school union or disagree with the Greenwood placement. *Id.*

On November 28, 2000, the Headmaster at Greenwood informed the mother, in a letter also sent to Ken Coville, that the student was being suspended indefinitely and that the student should not return to school until a plan was in place, whatever that may be. (P-315 and Testimony: Mother). Neither the Superintendent nor any special education staff from Union 37 made any attempts to have a PET meeting to discuss the suspension or offer any type of programming or placement for the student. *Id.*

On January 30, 2001, Mr. Coville, Superintendent of School Union 37, sent a letter to the admissions director of New Dominion, indicating that the mother was placing the student at New Dominion under the town of Dallas Plantation's open enrollment policy. (S-28) He indicated that "the receiving school then becomes the home school of the student and as such would then schedule and hold an IEP meeting to develop an IEP and authorize special education and related services." *Id.* He stated that New Dominion staff needed to schedule an IEP meeting, which he would attend by phone as the local community representative, and that New Dominion staff would develop the IEP. *Id.*

A letter was mailed to Mr. Coville from New Dominion staff on March 1, 2001, inviting him to a meeting to develop a "Service Plan" for the student. (P-288-295). The plan, the equivalent of an IEP, was developed on March 7, 2001. *Id.* Mr. Coville, who participated by phone, and the mother, were both listed as participants at the meeting. *Id.* Mr. Coville did not offer any other programming or placement and had little to say about the New Dominion placement. *Id.*

New Dominion held another "Service Plan" meeting on February 20, 2002. The mother, the student, and three staff members attended the meeting from New Dominion. There was no indication of participation by Mr. Coville or anyone from School Union 37. (P-261-271, Testimony: Mother).

In the fall of 2002, the student, now in his xxx grade year, began attending Brush Ranch in Tererro, New Mexico. (Testimony: Mother) The staff at Brush Ranch developed an IEP for the student and conducted a meeting on October 18, 2002. There is no indication that anyone from School Union 37 participated in the meeting. Dallas offered no other program or placement to the student in 2002. (P-251-253; S-21; Testimony: Kay Rice and Ken Coville)

In April of 2003, staff at Brush Ranch faxed an IEP and third quarter progress report to Ken Coville, Superintendent. (S-22 and P-239) Mr. Coville had no comment or response regarding the IEP. (Testimony: Kay Rice)

The hearing officer is persuaded by the chronology of events that clearly indicated the school's failure to offer the student an appropriate program between the school years of 1999-2004. The only IEP that was drafted by anyone from Dallas or School Union 37 was the 1999 IEP. (S-16 and P 434) This document only offered "consultation" services to a student with a severe disability in math, significant behavior and emotional issues, and who was seriously struggling with social skills. *Id.* No program or placement was offered at all after that meeting. (Testimony: Mother, Ken Coville, Martha Nichols, and Sheila Butterfield) The parents [sic] therefore met the first prong of the test in Burlington/Carter.

The second prong of the test is whether the family's placement was appropriate. There were three different placements for the student between the years of 1999-2004: Greenwood in Putney, Vermont; New Dominion in Dillwyn, Virginia; and Brush Ranch in Tererro, New Mexico. (Testimony: Mother) All three schools were approved as a special education school within their respective states. (Testimony: Anne Bebko and Mike Forman and Kay Rice) Dallas Plantation paid the tuition costs for all three placements until the Town Assessors of Dallas Plantation informed [sic] the school superintendent to stop paying Brush Ranch because they questioned the mother's residency. (P-641-724) There was no argument by the school at any PET/IEP meeting or in any correspondence with the family that the placements were inappropriate. The second prong of *Burlington/Carter* is therefore met.

The third prong of the test is if the parent's placement was appropriate, do equitable considerations support the parent's claim? The Supreme Court in *Carter* urged the consideration of all relevant factors when "fashioning discretionary equitable relief under IDEA." *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). The court noted that total reimbursement might not always be appropriate if the costs of the private placement were unreasonable. *Id.*

The school argues that the parent's expenses are unreasonable and should be denied. They contended that the PET never recommended a residential placement. (Testimony: Martha Nichols and Ken Coville) The school states the residential component of a private placement at faraway schools should not be reimbursed. It is true that the PET never discussed the residential aspects of the placement. Yet it was the school's responsibility to discuss the least restrictive environment and determine whether a residential placement was appropriate for the student. The school failed to offer another program or placement that would have been in a less restrictive setting to the student. The mother was given no choice but to find her own placement or program because the school offered none. At the hearing, Dallas mentioned specific schools in Maine that may have been appropriate for the student. Yet the mother, and school staff, testified that none of these schools were [sic] suggested to the mother by anyone from the school during any PET meetings or phone calls. (Testimony: Mother, Ken Coville, and Martha Nichols) I find that for the above reasons, equitable considerations support the parent's claim.

The family seeks reimbursement for the student's room and board, transportation, and incidental expenses at Greenwood, New Dominion, and Brush Ranch. First, the hearing officer will consider the room and board expenses. Given that no program or placement was offered to the student between the school years of 1999-2004, with the exception of the May of 1999 IEP, which offered only consultation services, equity requires that Dallas Plantation reimburse the parent for room and board.

Second, the transportation costs will be examined. The parent asks for reimbursement [sic] all of the student's travel and one trip for herself to visit the student. Had the school district proposed a program near Dallas Plantation, or located an appropriate placement closer to the home of the student, perhaps these transportation costs could have been reduced. While the hearing officer found there are equitable considerations to reimburse these reasonable transportation expenses, she is concerned by the lack of documentary evidence supporting these expenses. At the hearing, while discussing the relevancy of documents P-110-147 (mother's calendars) the school's attorney offered to stipulate to the fact that the mother and student conducted the combined round trips per year between Dallas Plantation and the private schools, if the documents were excluded. Counsel for the family declined to agree to the stipulation and exclude the documents. In fact, the record is without documentation as to specific dollar amounts that the mother actually expended relating to transportation. The hearing officer finds that equity requires Dallas Plantation to reimburse the parent for six rounds [sic] trips for the student and one round trip for the parent, provided appropriate documentation is provided.

Finally, the incidental expenses must be considered. The hearing officer was not persuaded that these costs were essential to the student's educational program and therefore declines to reimburse for these expenses.

This decision should not be interpreted to permit parents of special education students who live in towns that operate under Maine's "school choice" law to choose any private school they wish and ask that the school district pay all costs associated with placement. The PET must meet and create an appropriate program to meet the unique needs of the child. Maine's special education regulations require that if the PET places a student at a private school, that school must be approved by the state to provide special education services. M.S.E.R. §17.1-4. The Commissioner of the Department of Education must approve an out-of-state private placement of a Maine special education student. M.S.E.R. §17.5. If a parent chooses a public or private placement, which the team finds inappropriate, the school needs to create its own program or suggest an alternative placement. As the Supreme Court noted in *Carter*

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Carter, 510 U.S. 7, 15 (1993)

VI. Conclusion

Schools may not shift their obligations under IDEA to a private school, even if they have no school of their own. IDEA requires them to provide the student with a free appropriate public education. Dallas Plantation's failure to conduct regular IEP meetings, draft IEPs, or offer any type of program or appropriate placement to the student was a violation of FAPE and a clear abandonment of its duty to the student under IDEA.

Consequently, I determine that, based on the evidence before me, the family is entitled to reimbursement of room and board, transportation expenses, and no incidental expenses.

VII. Order

1. The school shall reimburse the mother and student for room and board in the amount of $48.[sic]890.00 school years of 1999-2000, 2000-2001, 2001-2002, 2002-2003, and 2003-2004. (S-42-45; P-631-640)

2. Although the family is entitled to reimbursement for transportation costs of 7 trips per year (one round trip per year for the mother and six trips per year for the student) up to $250 per trip requested by family, the hearing officer is without documentation as to what those actual costs were. Therefore, I am ordering that this record be reopened until 5:00 p.m. November 10, 2005, for the ***sole*** purpose of the family submitting documentation (credit card receipts, cancelled checks, or some other corroborating evidence beyond the mother's calendar and testimony) on the dollar amounts requested. The parent must send a copy of the documentation simultaneously to the hearing officer and the school's attorney. This decision shall not be a final decision until such documentation, if any, is received, and shall be issued as a final decision on November 14, 2005. If such documentation is not received, the family shall not be reimbursed for transportation.

3. Dallas Plantation (School Union 37) shall submit to the Commissioner of the Maine Department of Education, within 45 days of the date the unit receives the final decision, documentation that the unit has complied with the decision or that an appeal is pending. (MSER §13.14(D))

______________________________ ______________________________
Rita Furlow, Esq. Date
Hearing Officer

Documentary Record

Family's Exhibits

P-1-24
P-110-215
P-220-724

School's Exhibits

S-1-49

Hearing Officer Exhibits

HO-1-11

Witness List

For the Family:

1. Mother
2. Kay Rice, Headmistress, Brush Ranch School
3. Michael Forman, Family Worker, New Dominion School
4. Anne Bebko, LEA Coordinator, Greenwood School

For the School:

1. Ken Coville, Former Superintendent
2. Martha Nichols, Special Education Director, Rangeley Schools
3. Sheila Butterfield, Special Education Teacher, Rangeley Schools