

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

S.V.)	
)	
)	Student
vs.)	Case No. 3428
)	
ELGIN UNIT SCHOOL DISTRICT 46)	
)	
)	Local School District

CAROLYN ANN SMARON, Hearing Officer

DECISION AND ORDER

PROCEDURAL BACKGROUND

On May 2, 2003, the local school district received a request for an impartial due process hearing from counsel for the parents of the student. ISBE received that request on May 7, 2003 and on the same date, CAROLYN ANN SMARON was appointed the impartial due process hearing officer.

The hearing officer contacted the parties to set a date and time for a prehearing conference. On May 15, 2003 the hearing officer served the parties with a Notice of Prehearing Conference. At the request of counsel for the parents, the prehearing conference date was changed and the hearing officer served the parties with an Amended Notice of Prehearing Conference. Counsel for the parties submitted prehearing statements regarding the issues to be decided and the remedy being sought. At the request of counsel for the parents, the prehearing was rescheduled to allow counsel to review those submissions. The prehearing conference took place on June 9, 2003.

The Prehearing Conference Report was finalized on June 16, 2003 and the hearing set for August 25-29, 2003 with back-up dates of September 22-25, 2003.

The parties agreed to abandon the August dates and the hearing commenced on September 22, 2003 and continued on September 23, 2003, September 24, 2003, September 25, 2003, October 8, 2003 and October 17, 2003. The parties submitted written closing statements, limited to twenty pages, accompanied by most cited cases and transcripts, on October 27, 2003. The record was closed on November 3, 2003.

At all relevant times, the parties by agreement extended the 45-day timeline for conclusion of the due process proceedings.

ISSUES PRESENTED AND REMEDIES REQUESTED
AT PREHEARING CONFERENCE

PARENT ISSUE: The parents allege that the school district did not commence an evaluation of the student in a timely manner nor did the school district conduct an appropriate evaluation. Specifically, the parents contend that the school district did not comply with its "child find" obligations under IDEA nor did the school district comply with the "timelines" for completion of an evaluation under IDEA. The parents allege that as a consequence of the actions of the local school district, (a) they unilaterally placed the student in a residential placement in Maine and (b) they secured independent educational evaluations. The parents allege that the student should have been found eligible for special education with placement in a residential facility and the actions of the school district in this matter are evidence of "bad faith".

REQUESTED REMEDY: A finding that the student is eligible for special education requiring placement in a residential facility accompanied by an Order that (a) the local school district reimburse the parents for all costs related to the student's placement at Elan School, (b) the local school district pay for the prospective placement of the student at Elan School, (c) the school district reimburse the parents for all fees in connection with the independent educational evaluations secured to-date and the testimony of any experts retained by the parents for the purpose of these due process proceedings, and (d) that Elan School is the student's "current educational placement".

LOCAL SCHOOL DISTRICT POSITION: The local school district contends that it conducted an appropriate and timely case study evaluation of the student and correctly concluded that the student was not eligible for special education. Further the local school district contends that the parents withdrew the student and as a consequence, the local school district is not responsible for the costs of the unilateral placement at Elan School including all private consulting and expert costs. In the alternative, the local school district contends that if the hearing officer concludes that the student is eligible for special education, the unilateral placement at Elan School is not the least restrictive environment for the student.

FACTS

The student attended Elgin High School for her freshman year, 2001-2002, and for the first part of her sophomore year from September 2002 to November 5, 2002. In November 2002, the student transferred to Streamwood High School. The student attended Streamwood High School until some point in December, 2002 when she was admitted to the psychiatric unit of Highland Park Hospital. On December 20, 2002, the student was transferred to Elan School, a residential facility in Poland Springs, Maine where she remains today.

During the Fall semester of the student's freshman year at Elgin High School, nothing remarkable was noted either by the student's teachers, the administrative staff at the high school, nor the parents. The father testified that he did not notice anything unusual about the student when she began her freshman year at the high school.

The student's teachers described her as a conscientious high achieving student. The student participated in classroom discussions, completed her assignments on time and in good order, and was often a leader in class. She was observed to be well liked by her peers and the adults within the school setting. Laura Seller, the student's counselor, observed the student on a daily basis in that the student also worked for the Dean's Office located right next to the Guidance Office. She described the student as "...determined, motivated, she wants to do well". (Record 9/22/03 p.122) Her grades for freshman year were generally A's and B's (School District Document Tab 60). Her counselor testified that she had a grade point average of 3.3 and was in the top 20% of her class at the end of the school year. (Record 9/22/03 p.127).

Elgin High School has four Deans of Students, each having an "alphabet slice" of the student body for purposes of discipline. Ms. Susan Matei testified that her "alphabet slice" was the last part of the alphabet, PR through Z, which included this student. Ms. Matei met the student the first time as a consequence of a discipline referral based on an ID in her freshman year. After that, Ms. Matei acted as a mentor to the student who was then working daily as a page in the Dean's officer. She described the student as fun loving, respectful, easy-going, willing to learn life skills and how to make things successful. (Record, 9/24/03, pp.113-114). The student confided in Ms. Matei that she had problems at home, problems with her parents, and on November 26, 2001, Ms. Matei referred the student to the social worker at Elgin High School. A conference was held with the student and her parents at that time. The student and her parents were referred to a Student Assistance Program (voluntary service provided by a counseling center outside of school).

Ms. Matei saw the student on a daily basis and saw no general mood of depression. The student appeared to have appropriate peer relationships in school in general i.e. she got along with the majority of the students at Elgin High School. Ms. Matei was also the coordinator for the conflict resolution program (a peer mediation program) and in that capacity formed her opinion regarding the student's relationships with her peers. Ms. Matei would have had occasions to receive reports from teachers or other staff members if they felt there was a problem with any particular student regarding peer relationships and received no such reports for this student.

During the Spring semester of the student's freshman year, the student was suspended three times. On January 11, 2002, the student was suspended for five days after engaging in a physical altercation with another female (Record 9/24/02 p.136). On March 6, 2002, the student received a Saturday suspension for a verbal altercation with another student at the bus pick-up area. On April 29, 2002, the suspended for ten days

for fighting with another student. (School District Document 65, 68 and 73). During this same time period, the student confided in her freshman English teacher, Susan Joy Newman that she had conflicts at home and the three suspensions involved a conflict over the student's boyfriend and two other female students. In fact, the student suggested that Ms. Newman separate the students within the classroom (Record 9/24/03 p.132). Ms. Newman recalls that the student received an A in both semesters, that she completed all of her assignments on time, was an eager participant in class, and a tremendous asset in her class (Record 9/24/03 pp.120-123).

The student's parents did not approve of the relationship with her boyfriend and after a particularly intense confrontation and argument over the student leaving the home to meet the boyfriend, the parents arranged for the student to be hospitalized at Alexian Brother's Behavior Center from 1/28/02 to 2/1/02. The discharge diagnosis was depression and conduct disorder. The parents requested the student's assignments during the hospitalizations and the record reflects that the student's counselor, Laura Sellers, notified the student's teachers of her hospitalization but could not recall why the student was hospitalized. (School District Document 70-71/Record 9/22/03 p.125-126)). The father testified that he spoke with Ms. Matei upon the student's return to school and after all of the above referenced suspensions apprising Ms. Matei about the volatile situation at home. (Record 9/25/03 pp.15-17).

On May 13, 2002, the parents secured an Order of Protection from the Circuit Court of Cook County, Illinois enjoining the boyfriend from any involvement with the student. A certified copy of that Order was sent to Elgin High School on May 15, 2002 (Parent Record 25) and Dean Matei entered the Order into the administrative record for the school and alerted the security police.

The student's level of conflict with her parents escalated during June, 2002. After another argument with her parents, the student attempted to commit suicide, resulting in a second hospitalization at Provena-St. Joseph's Hospital on June 25, 2002. Her diagnosis was "major depressive disorder, single episode" (Parent's Document 20). Upon her discharge from the hospital, the student's father brought her to the airport for a visit to her relatives in Puerto Rico (Record 9/25/02 pp.26-27). Upon the student's return from Puerto Rico, the student was admitted to the Walkabout Program, a wilderness program in Utah (Record 9/25/02 pp.27-28) where she stayed until the first part of September, 2002. On August 30, 2002, the student's mother telephoned the student's guidance counselor, Laura Sellers. She advised Ms. Sellers that the student had attempted suicide during the summer; was in the wilderness program and would not be returning to Elgin High School until September, 2002. (Record 9/22/03 p.153/Record 9/22/03 p. 197)

Kathleen Duchai was the student's sophomore English teacher upon her return to Elgin High School in September, 2002. She described the student as a very enthusiastic student, very much a leader in class, and an excellent writer. She testified that when she saw the student, she appeared happy, was always talking with her friends, people always

wanted to be in the student's group for group work. She described her relationship with the student as very much just a teacher and a student. (Record 9/24/03 p.100) Mary Moschini testified that she was the student's childhood education teacher during the student's sophomore year at Elgin High School. She described the student as confident, friendly, on task, well liked by peers and her teachers and also by her teaching assistant, very motivated, competent. (Record 9/24/03 p.163,

The student returned to Elgin High School on September 3, 2002 (Record 9/22/03 p.156). By that point, the student had resumed her relationship with the older boyfriend and had resumed her confrontational behavior at home. (Record 9/24/02 p.33). On September 11, 2002 the student engaged in a physical altercation with two sisters in the school parking lot, resulting in student being suspended from school for eight days. In a letter dated September 19, 2002, the parents disputed the disposition of the physical altercation and contested the appropriateness of the suspension. Ms. Matei responded to the parents' concerns outlining the steps and interventions attempted with the student upon her return from Utah. (School District Documents Tab 48).

On the advice of Dr. Marvin Schwartz, a psychiatrist who was attempting to treat the student, by letter dated September 13, 2002, the parents sent a written request to the school district asking that their daughter be evaluated for special education as they believed that she was emotionally disabled. The parents also requested that Dr. Schwartz be involved in any meetings regarding the student. (Parents Documents Tab 12)

The school district's "service team" met on September 24, 2002, October 1, 2002 and October 8, 2002 to consider the parental request for a special education case study. The parents reviewed the domains to be considered in the proposed evaluation and consented for the evaluation on October 9, 2002. The student remained at Elgin High School until November 5, 2002 when she transferred to Streamwood High School. During that time period, Keisha Williams, the school district social worker was assigned the task of assessing the social developmental component of the case study. Ms. Williams testified that she initially tried to reach the student and determined that the student had transferred to Streamwood High School. She subsequently learned that the student was no longer attending any school district when she attempted to complete an interview with the student's mother in January, 2003. Record 9/22/03 pp.208-213

In contrast to her freshman grades, the student's grades on transfer to Streamwood High School consisted of an A in English, a B in Child Ed Observation and two C's one in Algebra 3 and Chemistry. (School District Document 38). Ms. Seller, her guidance counselor, testified that she believed that the lower grades were very understandable " given that she missed alot of school, she really shows -- through all she went through that summer, I mean I'm thinking that whole summer and a six week program, and now -- turmoil, boy she's holding things together pretty well...and, you know, I think given what she has been through, she held it together pretty well." (Record 9/22/03 p.204).

Although the student transferred to Streamwood High School on November 5, 2002, the father of the student recalled that the student was in actual attendance on five days. The detailed attendance log for September, 2002 and October, 2002 reflect that of the 43 school days, the student was absent for 38 days. For November, 2002, the student was present for 6 of the 25 days of school. (School District Document Tab 26) Instead, the student was now leaving her residence in the middle of the night, taking off and not returning sometimes for days. (Record 9/25/03 pp.50-51) The father's recall is consistent with the testimony of Dr. Schwarz who was offered as an expert in the medical practice of psychiatry with a specialization in the treatment of adolescents. In that capacity Dr. Schwarz had become involved with the student and her family sometime in September, 2002 after the parking lot altercation. Dr. Schwarz met with the student twice a week on an outpatient basis. At that time, the student's parents expressed fears that the student would attempt suicide again, that the student was sexually involved with a nineteen year old male, that the student's peer relationships were horrible and that she had been attached at her local high school (Record 10/17/03 p.29). The parents told Dr. Schwarz that the student had marked mood swings, did not want to be alive, and was fighting with her parents, especially with her mother. The parents advised Dr. Schwarz that she was not functioning at school in anyway similar to what she had been prior to high school. (Record 10/17/03 p.29).

In September 2002, Dr. Schwarz ' clinical impression of the student was severe depression with some periods of agitation which raised a question of more additional mood disorder factors. He did not find the student to be psychotic except he found significant cognitive distortions when he attempted to deal with the stressful areas of the student's life where the student tended to distort things to justify what she was doing.

In order to clarify diagnostic issues, Dr. Schwarz referred the student to John Glennon, a psychologist at Glen Oaks Hospital. Dr. Glennon's report dated October 4, 2002 noted a history of school failure, a suicide attempt, inappropriate sexual relationships, change to a negative peer group, and increased frequency and intensity of family conflicts. The student's test results were consistent with intense anger and resentment. Dr. Glennon believed that the intensity of the student's emotional reactions likely interfered with her perceptions of some situations and found evidence of uncontrollable intrusive thoughts and low frustration tolerance. Dr. Glennon believed that the student had a mood disorder, which interfered with her ability to develop healthy relationships with peers and authority figures (Parents Document 7G)

Dr. Schwarz believed that the psychological report validated his fears that the student was at extreme risk for suicide particularly in conjunction with his clinical diagnosis. Dr. Schwarz recalled that the student was not responsive to outpatient treatment but wanted to pretend to be in treatment in order not to have to look at herself and change (Record 10/17/03 p.33)

The student continued in out-patient therapy with Dr. Schwarz where the student told him that her peer relationships and relations with adults within school were a disaster (Record 10/17/03 p.36) The student told Dr. Schwarz that she was not doing homework, was not interested in school, and was talking of running away (Record 10/17/03 p. 37) The student ran away from home in November, 2002 and Dr. Schwarz hospitalized her at Glen Oaks Hospital from November 13-19, 2002. Her discharge diagnosis was mood disorder, not otherwise specified, with individual and family therapy recommended. During her stay at Glen Oaks Hospital, Dr. Schwarz recalled that the student openly admitted that she was suicidal. (Record 10/17/03 p.41).

In December 2002 the student ran away again and when the student could not be convinced to hospitalize herself, the parents sought the assistance of the police. The police located the student and she was hospitalized at Highland Park Hospital from December 15-20, 2002 when Dr. Schwarz arranged for the student's transfer to Elan School in Maine. Dr. Schwarz believed that the student's life needed to be stabilized with a highly structured residential education setting (Record 10/17/03 p.46) Maria Smith, the Director of Special Education for the school district, testified that the mother of the student telephoned her during the Winter Break (December, 2002) to advise her that the student was hospitalized and to inquire about the Home/Hospital Program. The mother did not indicate where the student was hospitalized. (Record, 9-22-03, p. 42)

Elan School is licensed by the State of Maine as a residential special purpose junior/senior high school. Elan School services adolescents with social and behavioral difficulties. It does not provide specialized instruction, create Individual Education Plans, and less than half of its student are identified as in need of special education. No Individual Education Plan was created for the student herein involved.

During the month of October, 2002, the school district was attempting to complete the components of the case study evaluation. On October 15, 2002, Margaret Janik Rehberg, the special education supervisor for Elgin High School, scheduled a meeting for November 27, 2002, believing that the components could be completed by that time. That meeting did not take place.

Meanwhile on December 17, 2002, the school district received a request to transfer the student's records to Kentucky and Portland Maine School for Girls (School District Documents Tab 34) On December 19, 2002 the school district received a request to transfer the student's records to Elan School in Maine. (School District Documents Tab 32) and on January 8, 2003 received a document indicating that the student was transferring to Mary Hearst School for Girls in Kentucky (School District Documents Tab 30) The social worker assigned to the case study evaluation, Kiesha Williams, testified that she learned that the student had left the school system in January, 2003 when she attempted to interview the student. (Record 9/22/03 pp.215-217)

On January 10, 2003, Dr. Schwarz completed the School District U-46 Home/Hospital Services certifying that the student was medically unable to attend school and physically able to benefit from Hospital Classes for a period of one to two years. On January 12, 2003, Dr. Schwarz notified the school district that the student was at a mental health facility in Maine - Elan. (School District Document Tab 72)

The school district continued to attempt to complete the case study evaluation and in mid-February 2003, retained Dr. Greggus Yahr to conduct a psychological assessment of the student. Dr. Yahr recalls that the school district advised him that Elan School would prefer that he wait awhile to interview the student, which request was not inconsistent with what he knew of Elan School procedures (Record 9/23/03 pp. 57-59. The Psychological Evaluation completed by Dr. Glennon on September 20, 2002, the student's grades at Elgin and Streamwood High Schools, teacher feedback forms from both Elgin High School and Elan School staff were made available to Dr. Yahr. (Parent Document Tab 4)

Dr. Yahr met with the student in March, 2003 and in his report dated April 25, 2003 concluded that the crux of the student's difficulties were emotional and behavioral. His assessments results revealed that the student's emotional outbursts were long standing and indeed interfered with appropriate socio-emotional functioning. He described the student as holding conflicting emotional responses and possessing a more limited range of emotional coping skills than her vocabulary suggests.

Dr. Yahr assessed whether or not the student had an inability to build or maintain interpersonal relationships with peers and teachers and concluded that his assessment yielded mixed results in that the student clearly had friends, did not fight with everyone she saw and was well liked by her teachers at Elgin High School and Elan School. In contrast to Dr. Schwarz, Dr. Yahr ultimately concluded that his assessment did not support this statement.

Dr. Yahr assessed whether the student had inappropriate types of behaviors or feelings under normal circumstances and like Dr. Schwarz, found that the student had a low frustration tolerance, weak emotional coping skills and a tendency to misread other's motivations because of her own conflicted needs for independent and dependent nurturing, often combining to create reactions out of proportion to the situation e.g. her suicide attempt in June 2002.

Dr. Yahr had to evaluate whether the student had a general pervasive mood of unhappiness or depression and in this area, Dr. Yahr could not express an opinion citing the inconsistency of the student's self-report and her classroom teachers' opinions and the mother's clear endorsement of depression.

Dr. Yahr had to evaluate whether the student had a tendency to develop physical symptoms or fears associated with personal or school problems and concluded that the criteria seemed not to apply.

After determining the presence of one or more of the characteristics of an emotional disturbance, Dr. Yahr concluded that the student exhibited and has, for a marked period of time, one or more of the criteria for identification as a seriously emotionally disturbed student. From a clinical perspective, Dr. Yahr agreed with Dr. Schwarz that the student's placement at Elan was appropriate and was supportive of her continued placement at Elan from a treatment perspective. Dr. Yahr testified as to his understanding of adverse effect on educational performance and based on that understanding was initially of the opinion that the student's emotional disability did not adversely affect her educational performance. In his testimony at the due process hearing, Dr. Yahr stated that if asked if the emotional disability affected the student's educational performance, he would have to respond that "I'm not even sure". (Record 10/8/03 p.91) With reference to whether or not the student's behavior was volitional (socially maladjusted), Dr. Yahr expressed the opinion that it was both because he did not know the student and his assessment was made in a slice of time. (Record 10/8/03 p.83-84)

On April 29, 2003, the school district convened a meeting to discuss the components of the case study evaluation of the student.

Laura Sellers, the student's counselor at Elgin High School attended the April 29, 2003. She testified that she considered all of the information presented at the meeting but

"...didn't see it impacting her education. Given what she's been through, meaning that starting sophomore year late, she's passing all of her classes. Her attitude is 'I'm going to do this' It was still, 'I'm going to college. I'm going to -- you know, 'this thing with my parents, I got to deal with it'. She just, you know, felt very determined that she could do it". Record 9/22/03 p.174.

Margaret Janik Rehberg attended the meeting on April 29, 2003 in her capacity as Special Education Supervisor for Elgin High School. Mrs. Rehberg recalls that Dr. Marvin Schwarz spoke on behalf of the parents. She recalls that there were no records presented to the meeting participants regarding the student's hospitalizations at Highland Park Hospital and no written reports were presented by Dr. Schwarz. (Record 9/24/03 pp.217-218. When asked if she believed that the student was eligible as a student with disability, Ms. Rehberg stated that she did not believe that the student met the eligibility requirements under IDEA because the student was doing well academically at school, was reported to have friends, teachers reported that she went out of her way to be successful (meeting after school to make up work with them), and the student had an

excellent rapport with certain of her teachers. Upon her transfer to Elan School, Ms. Rehrberg attributed the low grades to truancies and absences (Record 9/24/03 p.208) Ms. Rehrberg did not believe that the met the criteria for emotional disturbance because she was doing well academically, was reported to have friends, and in general did not find that the student met any of the listed criteria for emotional disturbance (Record 9/24/03 pp. 218-219, 229,230).

Dr. Nancy Schneider attended the April 29, 2003 meeting in her capacity as the school district's psychologist. Dr. Schneider was there in a dual capacity: (2) she certified to the team that Dr. Yahr's psychological report fulfilled the case study requirement for a psychological evaluation (Record 9/23/03 pp.253-255) and (2) she participated in the discussion as to whether the student was eligible for special education as a student with an emotional disorder. In preparation for those roles, Dr. Schneider reviewed Dr. Yahr's report, reviewed her interview with the student's mother (Record 9/23/03 p.237), reviewed the intake evaluation from the student's June 2002 hospitalization, and the psychological evaluation completed by John Glennon in September, 2002 (Record 9/23/03 pp.257-257)

Dr. Schneider recalled that Dr. Schwarz attempted to convince the school district personnel that the student was severely emotionally disturbed and that she was transferred to Elan School from Highland Park Hospital because she was not safe. (Record 9/23/03 pp.260-261) But she dismissed what Dr. Schwarz was saying as he could not, in her opinion, explain his treatment plan for the student prior to her transfer to Elan School. Dr. Schneider testified as follows:

"So I went back to rely on the documentation in front of me, which I could I could not agree with Dr. Schwarz in terms of seeing his point" (Record 9/23/03 pp.261-262)

When asked for her opinion as to whether the student should be found eligible for services, Dr. Schneider responded as follows:

"Personally and professionally I did not feel that (the student) met the criteria for emotional disturbance under special education law...over an extended period of time to a marked degree and there was no evidence of adverse effects in her educational performance" (Record 9/23/03 pp.273-274)

"While there were certainly clinical factors that the family felt the need to address and Dr. Schwartz felt the need to address that I would not disagree with, based on these criteria, the student seemed to have always held a value of wanting to do well in school and in spite of whatever difficulties she was having, to maintain that good effort, even though this were some slippage of grades, some behavior disturbances, these did not meet

anywhere near the severity of some of the other cases that we had seen, nor would I say that there would be any need to intervene for her educationally" (Record 9/23/03 p.274)

"...the only thing that was occasionally reported by the student in the documents that I saw by the reports was family conflict and in terms of the school setting maybe several, maybe two or three situations of altercations with other girls that occurred over boys, things that -- while those are outside of the realm of good behavior, would have been outside of the realm of a special ed team to address under special ed under an emotional disturbance category" Record 9/23/03 p.275)

Under cross examination, Dr. Schneider agreed that Dr. Schwarz provided the team, for the first time, with the chronology of events that the other members of evaluation team were not aware e.g. the student's hospitalization at Alexian Brothers in January 2002, what was transpiring from Dr. Schwarz' point of view in the fall of 2002, the admission to Glen Oaks, the treatment at Highland Park and his expressed concerns for the student's physical and emotional safety. (Record 9/24/03 pp.18-21)

With respect to the student's grades dropping significantly at the time of the student's transfer to Streamwood High School, Dr. Schneider testified that "so I'm not sure that I knew the extent of to which her grades were dropping" (Record 9/24/03 p.28)

Finally, Dr. Schneider indicated that she had read Dr. Yahr's entire report, in particular the paragraph which stated:

"the crux of the student's difficulties are emotional and behavioral. The student's defiant actions and opposition to following rules escalated to the point where her parents simply did not believe their daughter could continue to be successful without extraordinary measures such as residential placement that could control her behavior across all settings" (Dr. Yahr's report, p16)

and testified that she had no disagreement with that statement, that the student's difficulties were emotional and behavioral. (Record 9/24/03 p.65-66)

At the April 28, 2003, Dr. Schwarz acted as the spokesman for the parents. He reviewed the student's history in great detail, commented upon the psychological report from Dr. Yahr, commented upon the psychological evaluation by Dr. Glennon and shared with the team the student's history of multiple psychiatric hospitals. At the meeting, Dr. Schwarz was of the opinion that there was more than sufficient evidence that the student was mentally ill and that her illness pervaded all of the areas of her life. Dr. Schwarz advised the team that at the time of the student's enrollment at Elan, she was diagnosed with a mood disorder of major degree, pervading all of the areas of her life. . Dr.

Schwarz testified that he was surprised by the school district personnel's apparent belief that the student's behavior was volitional, that she was socially maladjusted and that she was not emotionally disabled within the meaning of IDEA.

At the conclusion, a majority of the team participants concluded that the student was not eligible for special education as an emotionally disabled person and declined to offer any services to the student.

APPLICABLE LAW

The law applicable to the facts in this case is set forth in the Individuals with Disabilities Education Act (IDEA), 20 USC §1401 et seq., the federal regulations to IDEA, 34 CFR Part 300, the School Code of Illinois, 105 ILCS §5/14-8.02 et seq., and the applicable state regulations, 23 Ill.Admin.Code Part 226. The local school district bears the burden of proof that at all times relevant it properly identified the nature and severity of the student's suspected disabilities and if appropriate, that it offered the student a free appropriate public education in the least restrictive environment, consistent with procedural safeguards.

"Child Find" Each school district shall be responsible for actively seeking out and identifying all children from birth through age 21 within the district, including children not enrolled in the public schools, who may be eligible for special education and related services. Procedures developed to fulfill this responsibility shall include ongoing review of each child's performance and progress by teachers and other professional personnel, in order to refer those children who exhibit problems which interfere with their educational progress and/or their adjustment to the educational setting, suggesting that they may be eligible for special education and related services. When the responsible school district staff member(s) conclude that an individual evaluation of a particular child is warranted based on factors such as a child's educational progress, interaction with others, or other functioning in the school environment, the requirements for referral and evaluation set forth in this Subpart B shall apply. 23 Ill.Admin.Code §226.100

The evaluation and IEP meeting shall be completed within 60 school days after the date of referral or the date of the parent's application for admittance of the child to the public school. Section 14-8.02 of the Illinois School Code, 23 Ill.Admin.Code §226.110(d)(1).

Emotional Disturbance (includes schizophrenia, but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance): A condition exhibiting one or more of the following characteristics over an extended period of time and to a marked degree that adversely affects a child's educational performance:

An inability to learn that cannot be explained by intellectual, sensory, or health factors;
An inability to build or maintain satisfactory relationships with peers and teachers;
Inappropriate types of behavior or feelings under normal circumstances;
A general pervasive mood of anxiety or unhappiness or depression; or
A tendency to develop physical symptoms or fears associated with personal or school problems. **23 Ill.Admin.Code §226.75**

Educational performance: A student's academic achievement and ability to establish and maintain social relationships and to experience a sound emotional development in the school environment. 23 Ill.Admin.Code §226.75.

In **Board of Education, Hendrick Hudson Central School District. v. Rowley.** 458 US 176 (1982) ("Rowley"), the Supreme Court set forth a two pronged test for evaluating whether or not the school district has complied with applicable special education laws - there must be compliance with statutory procedures and then the individualized education program (IEP) developed through such procedures must be reasonably calculated to enable the student to receive educational benefit.

In **Florence County Sch.Dist.Four v. Carter**, 510 U.S. 7 (1993) ("Carter") the Supreme Court held that a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and place the child in a private school that provides an education that is otherwise proper under IDEA but does not meet all of the requirements of IDEA.

In **School Comm. of Burlington v. Department of Ed. of Mass.**, 471 U.S. 359 (1985) ("Burlington") the Supreme Court recognized the right of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and held that IDEA's grant of equitable authority empowers a court to order school authorities retroactively to reimburse the parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, was proper under the Act.

APPLICATION OF LAW TO THE FACTS

The issue at the hearing was whether the local school district properly classified the student as an individual without a disability. The student was not provided with an Individual Education Plan (IEP) because the school district determined that she was not emotionally disabled as that term is defined under IDEA. The dispute, therefore, is not whether the school district developed an IEP for the student that was "reasonably calculated to enable her to receive educational benefit" **Rowley at 207** but rather whether she satisfied the definition of "emotionally disturbed" set forth in the relevant state and federal regulations.

In a matter involving statutory interpretation, the trier of fact was as well positioned as the local school district to determine the student's eligibility. As the underlying facts as to the student's behavior and academic performance were not in dispute but only the legal conclusions to be drawn from those facts, the school district was in no better position than the trier of fact to make conclusions with respect to the student's statutory eligibility based on the testimony adduced and documents received during the hearing. Accordingly, the hearing officer was not bound by the Rowley rule of deference and was free to consider the issue of the student's eligibility *de novo*. **Muller ex rel. Muller v. Committee on Special Education of the East Islip Union Free School District, 145 F.3d 95 (8th Cir.1998)**

The facts in this case tell a tale of parallel universes. The school district employees uniformly describe a child who was compliant, a respected member of any classroom and a good student. The father of the student described a non-compliant child who was so out of control in the home setting that she was hospitalized in psychiatric institutions and ultimately forcibly removed to the behavior modification program at Elan School in Poland Springs, Maine. A psychologist testified on behalf of the parent that he was so unsuccessful in his treatment of the student that he recommended the Elan placement to the parents. The universes collided when the parents filed a request for an impartial due process hearing officer alleging that the school district failed in its responsibility for this student.

It appears clear from the testimony that the school district viewed the student's suspensions during her freshman year as an aberration and volitional behavior on the student's part. Despite the fact that the parents were reporting intense conflict in the home setting and a hospitalization in January, 2002, the testimony and documents show that the student continued to perform well academically and none of the confrontational behavior was present in the school setting. In hindsight, maybe the school district should have initiated a case study evaluation then, but it also seems entirely reasonable that, given what it knew then, the school district could conclude that its child find obligations had not been triggered. The "child find" duty requires children be identified and evaluated within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability and it was not reasonable for the school district to suspect a disability at that time.

Sometime in September, 2002, the parallel universes collided. The student returned from a tumultuous summer (an attempted suicide attempt, a psychiatric hospitalization, a wilderness program). The student remained out-of-control in the home setting and the school district does not contest that it was apprised of the attempted suicide, psychiatric hospitalization and wilderness program. It seems fairly clear that either the parents or the school district should have initiated a case study evaluation sometime that Fall. In this case, the parents requested a case study evaluation by letter dated September 13, 2002. The parents consented to the components of the case study on October 9, 2002 and the school district attempted to complete the evaluation.

The detailed attendance log for September, 2002 and October, 2002 reflect that of the 43 school days, the student was absent for 38 days. For November, 2002, the student was present for 6 of the 25 days of school. (School District Document Tab 26) During this period, the student was involved in twice weekly therapy with Dr. Schwarz where she told Dr. Schwarz that she was not doing homework, was not interested in school, and was talking of running away. The testimony of school district personnel indicated that they saw no change in the student. In fact, when asked about the decline in her grades prior to her transfer to Streamwood, school district personnel attributed the decline to failure to turn in assignments and failure to attend school. This attitude persisted in the face of information concerning the student's behavior in the home setting and the ongoing special education evaluation. It seems entirely reasonable that the parents would conclude that there would no assistance forthcoming for the student. Despite notifying the school of her November, 2002 hospitalization, the school district seemed not to sense the escalating nature of the situation. At the point when the student was transferred to Elan School, the school's social worker had not yet contacted the student for a personal interview!

The school district was required to complete the case study evaluation within sixty school days after parent consent. That date was January 13, 2003 but by that time the school district was completely confused as to the location of the student. On January 8, 2003, the school district received a request to transfer the student's records to Mary Hearst School for Girls in Kentucky. (School District Document Tab 30) A few days later, a similar request came for Elan School. The school district proceeded with the case study evaluation and in January, 2003 contacted a Maine psychologist to arrange for the psychological component of the study. It seems entirely reasonable that the school district could not complete the case study within the statutory time period given the complete confusion caused by a transfer to another high school within the school district, two psychiatric hospitalizations, and a transfer to an out-of-state residential facility. I find no "child find" violations in this case.

However, having said all of the foregoing regarding the district's compliance with its "child find" obligations, it is also readily apparent from the testimony of school district personnel at the hearing that the parents could expect little assistance from the school district in the remaining months of 2002. The parents had requested a case study evaluation, not the school district, and the school district's failure to do so spoke volumes about the school district's position regarding this student - volitional behavior, punishment, and educational performance not affected.

In order to be found eligible for special education as an emotionally disturbed student, the evaluation team must conclude that the student exhibits one or more of the following characteristics:

An inability to learn that cannot be explained by intellectual, sensory, or health factors;

An inability to build or maintain satisfactory relationships with peers and teachers;

Inappropriate types of behavior or feelings under normal circumstances;

A general pervasive mood of anxiety or unhappiness or depression; or

A tendency to develop physical symptoms or fears associated with personal or school problems

The characteristic(s) must be exhibited over an extended period of time and to a marked degree. Having found the foregoing, the evaluation team must then determine that the emotional disturbance adversely affects the child's educational performance.

The mental health professionals all agreed that the student was emotionally disturbed. Dr. Schwarz testified that his initial clinical impression was severe depression with some periods of agitation. Dr. Schwartz referred the student to Dr. Glennon for psychological testing who found that the student was filled with intense anger and resentment, and the intensity of the student's emotional reactions likely interfered with her perceptions of some situations and found evidence of uncontrollable intrusive thoughts and low frustration tolerance. Dr. Glennon believed that the student had a mood disorder which interfered with her ability to develop health relationships with peers and authority and authority figures. Dr. Schwarz believed that the student was at extreme risk for suicide and by her second hospitalization in December 2002 the student openly admitted to being suicidal.

Dr. Yahr met with the student in March 2003 (three months after her placement at Elan School) and in his report concluded that the crux of the student's difficulties were emotional and behavioral, that the student's emotional outbursts were long standing, and interfered with appropriate socio-emotional functioning. Dr. Yahr could not exclude the 2nd characteristic to-wit: an inability to build or maintain satisfactory relationships with peers and teachers because the student clearly had friends, did not fight with everyone she saw and was well liked by her teachers at Elgin High School and Elan School. I found this analysis simplistic but nonetheless it should be noted that Dr. Yahr did not exclude this characteristic. Dr. Yahr clearly found that the student had inappropriate types of behavior or feelings under normal circumstances and like Dr. Schwarz, found that the student had a low frustration tolerance, weak emotional coping skills and a tendency to misread other's motivations. Finally, it should be noted that Dr. Yahr agreed with the student's placement at Elan (even after three months) after finding that the student has exhibited for a marked period of time, one or more of the criteria for identification as a seriously emotionally disturbed student. In his testimony at the due process hearing, Dr. Yahr was asked about any adverse effect on educational performance. In contrast to his written report, Dr. Yahr testified that he was not sure. As to whether the student's behavior was volitional, Dr. Yahr could not express an opinion.

Dr. Schneider reviewed Dr. Yahr's report, reviewed the psychological evaluation of another mental health professional, Dr. John Glennon, and considered the comments of Dr. Schwarz at the April 29, 2003 meeting. Dr. Schneider apparently ignored all of the foregoing and concluded that she did not have enough information to conclude that the student was emotionally disturbed. She seemed completely focused upon comparing this student's behavior with that of other students at Elgin High School and by comparison, could not find this student to meet the criteria. It was apparent in her testimony that she was dismissive of the information from Dr. Schwarz and, although she read Dr. Yahr's report, could not seem to agree with his findings regarding emotional disability.

In light of all of the foregoing testimony and documents, it is difficult to understand the apparent belief of the school district teachers and administrators that the student's behavior was volitional and confined to the home setting. Margaret Rehrberg, the special education supervisor at Elgin High School, testified that she attributed the student's failing grades to truancies and absences. Even in the face of the opinion of the mental health professional retained by the school district (Dr. Yahr) that the student clearly met one of the characteristics for an emotional disorder, Ms. Rehrberg persisted in her belief that the student was not eligible for special education as an emotionally disabled student. Laura Sellers, too, could not see any impact on the student's education, apparently preferring to ignore the school district's own documentation of escalating absences and plummeting grades.

In conclusion, I find that the testimony and assessments of the mental health professionals (Dr. Schwarz, Dr. Yahr, and Dr. Glennon) should have persuaded the other members of the evaluation team that the student met the criteria for emotionally disturbed and she should have been found eligible for special education as an emotionally disturbed student on April 29, 2003.

Having found that the student met the eligibility requirements for an emotional disorder under IDEA, the next issue is whether these parents are entitled to reimbursement from the school district for the expense of privately placing the student at Elan School in December, 2002. It is clear that a district can be required to reimburse parents for the cost of private placement if it is found that the district failed to provide the student a free appropriate public education in a timely manner prior to enrollment at the private school and the private placement is appropriate 20 USC §1412(a)(10)(C)(ii). Because this school district did not find the student eligible for special education, it could not and did not provide a FAPE to this student. It has already been determined that the placement at Elan School was appropriate in December, 2002, remained appropriate in March, 2003 when Dr. Yahr examined the student and in all likelihood would have been found to be the appropriate placement had the assessment team listened the mental health professionals and reviewed their own documents.

In **Manhattan Beach Unified School District**, 34 IDELR 249 (March 14, 2001), the parents claimed that the school should be ordered to pay for their unilateral residential

placement because of the school district's failure to assess and identify the student in a timely manner. Here, that parents had demanded that the student be assessed and while the assessment was on-going, the student's life was spinning out of control, resulting in the December 2002 psychiatric hospitalization followed by the recommendation from Dr. Schwarz that the student required a residential treatment facility. In the absence of a finding of eligibility, the placement at Elan School addressed the student's educational needs.

In **School Comm. of Burlington v. Department of Ed. of Mass.**, 471 U.S. 359 (1985), the parents unilaterally withdrew the student from the local school district during the pendency of proceedings challenging the adequacy of a proposed individual education plan. The Supreme Court recognized the right of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and held that IDEA's grant of equitable authority empowers a court to order school authorities retroactively to reimburse the parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, was proper under the Act. In **Burlington**, the court commented upon the impossible dilemma posed to parents who have no faith in the school system adequately responding to their child's needs: "parents who disagree are faced with a choice: go along with the individual education plan to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. **Burlington** at 370. Here, these parents were faced with such a choice: return the student to Streamwood High School upon her discharge from the hospital in December, 2002 or pay for what they considered to be the appropriate placement. Upon the advice of Dr. Schwarz, the student was placed at Elan School. In **Burlington**, the parents were ordered retroactive reimbursement because the placement was found to be appropriate. Here, placement at Elan was the appropriate placement in December, 2002 and the parents are entitled to reimbursement from December 16, 2002 forward.

The right to reimbursement is even more appropriate when one views Dr. Yahr's report. Dr. Yahr examined the student in March, 2003, almost three months after the student's placement at Elan, and Dr. Yahr found the student's placement to be appropriate from a clinical perspective (Dr. Yahr's views as to the effect of the student's emotional disorder on the student's educational performance having been discredited earlier) This student should have been found eligible in April 2003 and at this point there is enough information in the record to conclude that the student requires a residential placement. The choice of Elan School is endorsed as the student's current educational placement.

DECISION

A. The hearing officer finds as a matter of law that the student is eligible for special education under the condition known as "emotional disorder" and the school district and parents are ordered to agree upon a person or entity to complete an independent evaluation of the student's current emotional/educational status at Elan

School for purposes of creating an appropriate Individual Education Plan for this student. The student's placement at Elan School (residential treatment facility) shall be deemed to be the least restrictive environment pending the development of and creation of the aforesaid Individualized Education Plan for this student.

B. The local school district is ordered to reimburse the parents for all costs related to the student's placement at Elan School since December 16, 2002.

C. The school district is ordered to reimburse the parents for the expert testimony of Dr. Marvin Schwarz during the instant proceedings.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. **The right to request such a clarification does not permit a party to request reconsideration of the decision itself and the hearing officer is not authorized to entertain a request for reconsideration.**

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction

within 120 days after a copy of this decision was mailed to a party.

ISSUED this 6th day of November, 2003.

CAROLYN ANN SMARON
Due Process Hearing Officer

CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL

The undersigned hereby certifies that a copy of this Decision and Order was placed in the U.S. Mail at Flossmoor, Illinois, via certified mail return receipt requested, postage prepaid and directed to:

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before 5:00 p.m. on November 7, 2003.

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