



The University of the State of New York

The State Education Department State Review Officer

No. 07-086

Application of a CHILD SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Massapequa Union Free School District

Appearances:

Law Office of H. Jeffrey Marcus, attorney for petitioners, Jason H. Sterne, Esq. and Kyle M. Costello, Esq., of counsel

Guercio & Guercio, attorney for respondent, Randy Glasser, Esq., of counsel

DECISION

Petitioners appeal from a decision of an impartial hearing officer which upheld a determination of respondent's Committee on Special Education (CSE) that petitioners' daughter should not be classified as a student with a disability. The appeal must be sustained.

At the commencement of the impartial hearing in January 2007, petitioners' daughter was receiving tenth grade homebound instruction from respondent (Tr. pp. 83, 963-64; Dist. Ex. 16). The student was not classified as a student with a disability eligible for special education services and her classification remains a matter in dispute.

The student's father indicated that the student had been the victim of bullying since entering respondent's school in fifth grade (Tr. pp. 114-19; Parent Ex. I). She consistently earned grades of "A" and "A+" in her academic subjects (Dist. Ex. 9 at p. 1). In eighth grade, the student received an "incomplete" for physical education (PE) after the parties disputed the manner in which the student could participate (Tr. pp. 121-26, 127-33, 162, 601-02; Dist. Ex. 10 at p. 1). During eighth grade, the bullying continued, and the student stopped attending school in January 2005 (Tr. pp. 71-72). According to the student's father, the student complained of headaches and stomachaches, became erratic in her sleeping habits, and had nightmares (Tr. p. 73).

On February 5, 2005, after learning about homebound instruction from the student's guidance counselor and teachers, petitioners submitted an application to respondent for homebound instruction (Tr. pp. 74-75; Dist. Ex. 42). Homebound instruction started in the middle of February 2005 and continued until the end of the school year (Tr. p. 75).

In September 2005, the student returned to school and attended respondent's ninth-grade-only high school building (Tr. p. 182). According to her father, the student thought that she was ready to return to school (Tr. pp. 75-76, 182). However, the student's father testified that the bullying continued when she returned to respondent's school, and as the bullying intensified, she reportedly feared for her physical safety (Tr. pp. 76-77; Parent Ex. I). Respondent conducted an investigation of the alleged bullying incidents and took action based upon its findings (Tr. pp. 630-32). According to the student's father, by the end of October 2005, the student's condition appeared to deteriorate (Tr. p. 78). Around this time, and as a result of what they were observing in their daughter, petitioners took the student to her pediatrician for evaluation (*id.*). Results of blood work conducted indicated that there was nothing medically wrong with the student (*id.*). The pediatrician recommended that the student be seen by a psychologist (Tr. pp. 78-79).

The parties dispute about the student's participation in PE class continued during fall 2005 (Tr. p. 161). Subsequently, the student received an incomplete in PE for the first quarter of ninth grade (Parent Ex. J-4 at p. 1). In November 2005, the student was reportedly feeling physically ill and she stopped attending school (Dist. Ex. 9 at p. 1). Respondent sent petitioners an application for homebound instruction, and in December 2005, petitioners returned their application to respondent (Tr. p. 83; Parent Ex. J-1).¹

On December 8 and 10, 2005, petitioners had an evaluation of the student conducted by a private psychologist (Dist. Ex. 5 at p. 1). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a Verbal Comprehension Index (VCI) score of 130 (98th percentile) (very superior range), a Perceptual Reasoning Index (PRI) score of 100 (50th percentile) (average range), a Working Memory Index (WMI) score of 123 (94th percentile) (superior range), a Processing Speed Index (PSI) score of 112 (79th percentile) (high average range), and a Full Scale IQ of 120 (91st percentile) (low end of the superior range) (*id.* at pp. 2, 4). The psychological evaluation report indicated that, although wide discrepancies were found in the very superior to average cognitive domains scores on the WISC-IV, no specific weaknesses in any one individual subtest were found, and that the student was not expected to have any significant difficulties with the learning of basic academic skills required in school (*id.* at pp. 3-4). The private psychologist also conducted projective testing via administration of the Rorschach Test to assess the student's emotional functioning at the time of the evaluation (*id.* at p. 3). According to the evaluation report, the student's responses suggested that she was experiencing significant anxiety associated with concern over bodily harm (*id.*).

The private psychologist's emotional assessment of the student resulted in the diagnoses of dysthymia, posttraumatic stress disorder (PTSD), schizoid personality disorder, chronic

¹ Although the parties dispute the reason why the student stopped attending school in November 2005, a copy of the December 2005 application for homebound instruction stating the reasons why such instruction was being sought is not included in the record.

fatigue, and school and social problems (id. at p. 4). The private psychologist recommended that psychiatric medication should be administered to the student in order to relieve her many symptoms (id.). In light of the reports of bullying, the private psychologist indicated that the student "would benefit from enrollment in another district, perhaps in a program with students also suffering from school avoidance problems" (id.). She concluded that "it seems imperative that [the student] begin a more structured program where she can slowly begin to reenter more normative peer interaction" (id.).

In January 2006, respondent approved homebound instruction for the student (Tr. p. 83). On January 16, 2006, a board-certified private psychiatrist evaluated the student and reviewed the aforementioned psychological evaluation report (Dist. Ex. 28). In a one-page letter dated February 14, 2006, the private psychiatrist concluded that the student was suffering from depression and anxiety, and possibly from PTSD induced by incidents of being bullied at school (id.). The private psychiatrist agreed with the recommendations of the private psychologist (id.).

In approximately March or April 2006, respondent was advised that the CSE should evaluate the student, and petitioners provided their consent for the student's evaluation (Tr. p. 85; Dist. Ex. 9 at p. 1). Teacher observation forms completed in May 2006 by four of the student's instructors indicated ratings of "always" prepared, "maximum" effort, "excellent" quality of assignments, "excellent" tests, "cooperative" behavior, and "excellent" attendance. None of the teachers reported that the student was having any specific difficulties (Dist. Ex. 7 at pp. 1-4). Individual teacher comments included "Student is a pleasure to work with," "Student is very conscientious...", and "[the student] is a wonderful student and a pleasure to work with. She puts in the utmost effort" (id. at pp. 1-2). All grades reported in the teacher observation forms were in the "A" to "A+" range (id. at pp. 1-4).

The student's grades, as reported on her final ninth grade report card, included an "A+" in math II, Spanish II, studio art, health, English, a class listed as "P.C. APP A/D," and social studies; an "A" in earth science and second-semester PE; and a "C" in first-semester PE (Parent Ex. J-4 at pp. 4-5). Her teachers' comments on the report card included, "a pleasure to have in class," "above average attitude," "work is commendable," and "excellent attitude" (id.).

A specific learning disabilities diagnostic report by respondent's special education teacher, dated May 11, 2006, indicated that on the day the student was tested at her home, she was suffering from allergies (Dist. Ex. 8 at p. 1). The student's level of conversational proficiency was described in the report as "typical for her age and grade" (id.). The report also indicated that she was cooperative during all phases of testing, and her level of activity was typical for her age and grade level, even though she was not feeling well (id.). Administration of the Woodcock-Johnson Tests of Achievement - Third Edition yielded a standard score (SS) (percentile) for clusters of oral language SS 133 (99) (superior); broad reading SS 127 (96) (superior); broad math SS 115 (84); and broad written language SS 136 (99) (id. at p. 2). The student's oral language skills were described as "very superior" when compared to others at her age level (id. at p. 4). Her ability to apply academic skills was "high average" (id.). Both the student's academic skills and fluency with academic tasks were described as being "within the superior range" (id. at p. 5). When compared to others her age, the student's performance was characterized as "very superior" in written language and written expression; "superior" in broad

reading; and "high average" in mathematics and math calculations skills (id.). No discrepancies were found among the student's achievement areas (id.).

A psychological evaluation report, prepared by respondent's school psychologist on May 19, 2006, indicated that the student was referred to her for an evaluation "to determine the most appropriate educational setting for [the student] as part of the procedures of the [CSE]" (Dist. Ex. 9 at p. 1). The school psychologist conducted the evaluation in the student's home (Tr. pp. 390-91). Administration of the Woodcock-Johnson Tests of Cognitive Abilities - Third Edition yielded a standard score (SS) (percentile) (range description) for the cognitive ability domains of visual processing SS 101 (52) (average); crystallized intelligence SS 109 (73) (average); auditory processing SS 107 (68) (average); fluid reasoning SS 128 (97) (superior); processing speed SS 108 (71) (average); short-term memory SS 119 (90) (high average), and long-term storage and retrieval SS 131 (98) (superior), as well as an overall score of SS 125 (95) (superior) for general intellectual ability (Dist. Ex. 9 at pp. 2-4). According to the school psychologist, she was unable to obtain specific information about the student's emotional functioning because petitioners elected not to complete the requested social history form or the behavior rating forms (Tr. pp. 279, 399-400). The student and petitioners were reportedly uncomfortable completing behavior scales for that purpose (Dist. Ex. 9 at p. 4). The school psychologist noted that the student expressed that she did not want to speak about her "feelings" (id.). In addition, the student's mother reportedly told the psychologist that the student was "very hesitant" to work with her because she did not feel comfortable expressing herself to psychologists from the school district (id.).

On May 31, 2006, the CSE conducted an initial referral meeting and reviewed the student's comprehensive evaluations (Dist. Ex. 15 at p. 1). Petitioners, the CSE chairperson, respondent's guidance counselor, one of the student's regular education teachers, and the school psychologist were in attendance (Tr. p. 417; Dist. Ex. 15 at p. 1). The participation of an additional parent member was waived by petitioners (Dist. Exs. 15 at p. 1; 16 at p. 3). Respondent's CSE considered the May 2006 psychological evaluation, specific learning disabilities diagnostic report, a medical data report, teachers' observation reports, and parent and additional teacher verbal reports that were presented at the CSE meeting (Dist. Exs. 6; 7; 8; 9; 15 at p. 2). The CSE Chairperson indicated that some information regarding the private evaluation report was disclosed at the May 2006 CSE meeting (Tr. p. 265; see Dist. Ex. 5). Comments listed in the May 2006 Committee Meeting Information report (CSE minutes) indicated that the student had been receiving homebound instruction services as requested and secured by petitioners through the regular education curriculum office; that the student's grades and written reports provided by her teachers were all exceptional; and that abiding by school rules and regulations had been an issue between petitioners and respondent's administration (Dist. Ex. 15 at p. 1). Additional comments in the May 2006 CSE minutes noted that respondent's psychologist would address the student's emotional issues on the building level by planning additional supports (id.). Petitioners were advised that they could refer their daughter to the CSE after pre-referral strategies had been put in place (id.). According to the May 2006 CSE minutes, the student's parents actively participated in the meeting and disagreed with the recommendation (id. at pp. 1-2). The May 2006 CSE determined that, based on all of the available evaluative material, as well as the parent and school staff verbal reports, there was no evidence to support a classification of the student as a student with a disability at that time (id. at p. 1). The May 2006

CSE minutes indicated that the CSE would reconsider its eligibility determination after reviewing the results of a psychiatric evaluation and a social history (id.). The CSE also indicated it would consider the effects of behavioral interventions and other school-based counseling supports (id.).

Respondent referred the student for a psychiatric consultation to determine what, if any, diagnostic conditions compromised the student's academic performance and her social and emotional adaptation, and to determine educational and treatment recommendations (Dist. Ex. 13 at p. 1). The psychiatrist met with petitioners on July 26, 2006 and August 14, 2006 (id.). She met with the student on August 7, 2006, and spoke with the student's private psychologist on August 11, 2006 (id.). The psychiatrist reviewed the private psychologist's December 2005 evaluation report, the May 2006 school psychologist's evaluation report, the May 11, 2006 specific learning disabilities diagnostic report, and the May 2006 CSE minutes (Dist. Ex. 13 at p. 1; see Dist. Exs. 5; 8; 9; 15).

The psychiatrist's August 2006 consultation report indicated that the student endorsed most symptoms of PTSD, and that the student did not elaborate on her traumatic experiences because she believed that talking about it would worsen her symptoms (Dist. Ex. 13 at p. 5). In addition, the psychiatrist indicated that the student was depressed and anxious and struggled to go out in public (id.). The psychiatrist concluded that the collective impact of the student's emotional difficulties on her social functioning was significant and affected her ability to attend school (id.). According to the psychiatric consultation report, the student had been cooperative during their meeting, but she did not return for a second session of the evaluation (id.). The psychiatric diagnostic impression included diagnoses of major depressive disorder, moderate; generalized anxiety disorder; agoraphobia without history of panic disorder; PTSD, chronic; rule out schizoid personality disorder;² and victim of bullying (id.). The psychiatrist indicated that the student would benefit from a more intensive regimen of psychotherapy, with frequent therapy visits and trials of psychotropic medication to target her anxiety and her depression (id.). The goal of the therapy would be to teach the student coping skills in preparation for treatment specific to the resolution of her posttraumatic stress (id.).

The psychiatrist recommended, among other things, that the student would benefit from attending school with peers in a supportive structured setting with a small teacher-to-student ratio, intensive therapeutic support and monitoring of her ability to function in her environment (id. at pp. 5-6).

On September 13, 2006, the CSE reconvened and reviewed the psychiatric consultation report, a social history completed by petitioners in August 2006, and the student's academic record (Dist. Ex. 16 at p.1; see Dist. Exs. 12; 13; Parent Ex. F). Petitioners, the CSE chairperson, a guidance counselor, a regular education teacher, a special education teacher, a secondary supervisor of special education, and the school psychologist were in attendance (Dist. Ex. 16 at p. 1). Participation of an additional parent member was once again waived by petitioners (id.). Comments included in the September 2006 CSE minutes summarized the recommendations

² The psychiatrist explained that there is not sufficient data to make a determination with regard to a personality disorder because, generally, such findings may not be made while an individual's personality is still in the developing stage prior to reaching age 18 (Tr. p. 891).

made at the May 2006 CSE meeting (id.). The September 2006 CSE minutes indicated that the results of the August 2006 psychiatric consultation were consistent with the previous findings in the private psychologist's evaluation report (id.). The September 2006 CSE minutes stated that "[the student's] psychiatric disorders have precluded her from physically entering the school. An educational disability, however, has not been diagnosed. The student has met with, and continues to meet with educational success after exposure to the curriculum" (id. at pp. 1-2).

Based on the information described above, the CSE determined that there was no evidence to support the classification of the student as a student with a disability at that time, and that the student did not meet the regulatory criteria to receive special education services (id.). However, due to the nature of the student's psychiatric issues, the September 2006 CSE recommended referral pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) to consider developing an accommodation plan for the student (id. at p. 2). Petitioners were not in agreement with the September 2006 CSE's recommendations (id.).

On or about October 16, 2006, petitioners filed a due process complaint notice, alleging that, in May and September 2006, the CSE failed to determine that the student was eligible for special education as a student with an emotional disturbance (Dist. Ex. 1 at pp. 1-6). Petitioners filed an amended due process complaint notice in January 2007 (Dist. Ex. 3). An impartial hearing commenced on January 23, 2007 and concluded on April 13, 2007 after five days of testimony.

By decision dated June 16, 2007,³ the impartial hearing officer determined that the student continued to perform educationally, despite having chronic PTSD, schizoid personality disorder, depressive disorder, anxiety, agoraphobia and dysthymia (IHO Decision at p. 11). He also determined that petitioners failed to establish that the student's condition adversely affected her educational performance and that it was petitioners' failure to cooperate with respondent in developing and securing a placement pursuant to section 504 rather than the student's condition, which resulted in the student being unable to attend school (id.). The impartial hearing officer concluded that the CSE appropriately determined, in both May and September 2006, that the student was not a student with a disability (id. at p. 12).

Petitioners appeal the impartial hearing officer's decision, contending that the impartial hearing officer misconstrued the facts and should have ordered that the student be classified as a student with an emotional disturbance. Petitioners assert that student receives home instruction due to her psychological disorders, and while she has good grades, she is unable to attend school. Petitioners assert that the student requires homebound instruction and is eligible for special education and related services as a result.

In its answer, respondent argues that the student's refusal to attend school during the 2005-06 school year began as a result of the parties' dispute regarding her physical education class. Respondent also contends that petitioners failed to satisfy their burden to establish that the student has a disability that adversely affects her ability to learn. Respondent requests that the

³ The impartial hearing officer issued an "amended" decision on June 20, 2007, which appears to add only a clause indicating that his decision may be appealed to a State Review Officer.

impartial hearing officer's decision be affirmed, asserting that an appropriate section 504 program was offered to the student and that equitable considerations weigh against awarding petitioners the relief they seek.

The Individuals with Disabilities Education Act (IDEA) defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

A child with a disability having an emotional disturbance, pursuant to federal regulations, means "a child evaluated . . . as having . . . a serious emotional disturbance . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a]; see Letter to Clark, 48 IDELR 77 [OSEP 2007] [explaining that a child must meet a two-prong test to be considered a child with a disability]). Emotional disturbance, in turn, is defined as

(i) a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No.

55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at *9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546). Moreover, as recently noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clark, 48 IDELR 77).⁴

In this case, the parties do not dispute petitioners' assertions regarding the student's diagnoses of PTSD, agoraphobia, and major depressive disorder (Tr. pp. 38, 40, 51, 55). The private psychologist's emotional assessment of the student resulted in the diagnoses of dysthymia, PTSD, schizoid personality disorder, chronic fatigue, and school and social problems (Dist. Ex. 5 at p. 3). After her August 2006 psychiatric consultation, the psychiatrist reported that the student endorsed most symptoms of PTSD, and that the student refused to elaborate on her traumatic experiences because she believed that talking about it would worsen her symptoms (Dist. Ex. 13 at p. 5). The psychiatrist also noted that the student was depressed and anxious and struggled to go out in public (id.). The psychiatrist concluded that the collective impact of the student's emotional difficulties on her social functioning was significant and affected her ability to attend school (id.). However, the parties do not agree that the student's educational performance has been adversely affected as a result of her condition or that the student, for that reason, requires special education. Consequently, I will next examine those two issues.

Petitioners assert that several district court cases demonstrate that this student should have been found eligible for special education by the CSE in May and September 2006. Petitioners point to Board of Educ. v S.G., 2006 WL 544529 (D.Md. March 6, 2006), to support their argument that a schizophrenic student who could not attend class, but received good grades, was nevertheless eligible for classification as a student with a disability. However, that case is

⁴ Letter to Clark further states that "Section 614(b)(2)(A) of IDEA and the final regulations at 34 CFR § 300.304(b) state that in conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance."

unpersuasive because the court found that the school district's reliance on the student's high marks in making their educational performance findings was flawed because, unlike others, that student was not penalized when she failed to turn in her work (S.G., 2006 WL 544529, at *13), whereas in the instant case, the hearing record indicates that the student completes her work and petitioners do not contest the reliability of the evidence of her strong academic performance (Tr. p. 949; Parent Exs. J-3; J-4).

Petitioners also point to Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906 (M.D.Tenn. 2000), which held that a student with satisfactory grades, who was unable to remain in school, was eligible for classification as a student with an emotional disturbance. However, the court, in reaching its conclusion, relied upon a broad definition of "adverse affect on educational performance," which had been established by the State of Tennessee. Here, I find that it is not appropriate to apply the policy set forth by a different state, and the parties do not point to an authoritative definition of "adverse affect on educational performance" that should be applied in this case. Thus, I must resolve the issue based on the evidence presented by the parties.

With regard to the student's educational performance, the hearing record shows that regardless of where she received instruction, the student's psychiatric/psychological conditions did not prevent her from consistently achieving high academic performance in the general curriculum. Administration of the WISC-IV in December 2005 and the Woodcock-Johnson Tests of Cognitive Abilities - Third Edition in May 2006 yielded results showing that the student's intellectual functioning was within the superior range (Dist Exs. 5 at p. 4; 9 at p. 4). Standardized achievement testing per results of the Woodcock-Johnson Tests of Achievement - Third Edition suggested that the student's academic skills and fluency with academic tasks were "within the superior range," and suggested no discrepancies in her achievement abilities (Dist. Ex. 8 at pp. 4-5). The student's report cards for eighth grade in 2004-05 and ninth grade in 2005-06 reflected final grades of "A" and "A+" for all academic subjects (District Ex. 10 at p. 1; Parent Ex. J-4 at pp. 4-5). The report card for the first quarter of tenth grade in fall 2006 also reflected grades of "A+" for English, Spanish 3 Accelerated (ACC), Social Studies 10 R (Regents), and Biology (Regents) (Dist. Ex. 10 at p. 4). Although I find that the student has consistently earned high grades, the hearing record indicates, and respondent does not dispute, that the student's psychiatric/psychological problems prevented her from reentering respondent's school building in January 2006 (Tr. pp. 40, 479, 710-712; Dist. Exs. 7 at pp. 1-4; 10 at pp. 1-2).

With regard to the student's interactions with others, I find that the record shows that respondent relied heavily on the student's academic strengths to arrive at its overall conclusions. Her teachers' comments, which were consistently positive, were noted on the student's academic report cards, and included "a pleasure to have in class," "above average attitude," "work is commendable," and "excellent attitude" (Dist. Ex. 10 at p. 2). However, with regard to her peers, the evidence shows that she had diagnoses of PTSD and agoraphobia, which required planning for the student to socialize outside of her home (Tr. p. 884; Dist. Ex. 13 at p. 5). Testimony by the private psychologist indicated that the student communicated with peers on the internet about topics of mutual interest and that there was a possibility of inviting some of the friends to her home (Tr. p. 778).

Turning next to the evidence with respect to the student's emotional state, the December 2005 psychological evaluation report reflected that the student's "perceptions are most often grounded in reality" even though she was unsure of herself socially (Dist. Ex. 5 at p. 3). The evaluation report indicated that the student's responses suggested that she was experiencing significant anxiety associated with concern over bodily harm (id.). The report indicated that the student utilized defenses to keep her at a distance from others, and that she seems to use an oppositional stance (id.).

The evidence described above establishes that the student has a generally pervasive mood of unhappiness or depression and a tendency to develop physical symptoms or fears associated with personal or school problems. The question presented herein is, does the evidence establish that her condition adversely affected her educational performance?

While the school psychologist stated that regardless of the student's conditions, she was still able to achieve grades of "A" and "A+" in school and on homebound instruction (Tr. p. 479), testimony by respondent's high school principal, who had extensive credentials in special education, speech and audiology, and administration (Tr. pp. 339-42) revealed that

[o]ne of the issues I believe that would separate the two is the fact that usually a child, from my experience, who has been classified under IDEA experiences extreme academic difficulty. It is usually one of the criteria, that their course work is not up to their potential, that their grades do not reflect their ability

(Tr. p. 377). In the circumstances of this case, respondent erred by inadequately considering the student's non-academic limitations in determining eligibility for special education services. In light of the foregoing evidence, I do not agree with the impartial hearing officer's conclusion that the student's psychological conditions did not adversely affect her educational performance.

With regard to her need for special education, petitioners also established that special education instruction or services were required for the student. Petitioners assert that the student's condition necessitated homebound instruction because she was unable to attend school. According to the private psychologist's evaluation report, it seemed imperative that the student begin a more structured program where she could begin to slowly reenter more normative peer interaction (Dist. Ex. 5 at p. 4). The psychiatric consultation report indicated that the student would benefit required a supportive, structured setting and a small student-to-teacher ratio, and that monitoring of her ability to in her environment was essential (Dist. Ex. 13 at p. 6).

In summary, because the student's condition is severe enough to adversely impact her ability to function in her school setting such that she requires special education services under the circumstances of this case, I find that the May and September 2006 CSE inappropriately concluded that the student should not be classified as a student with an emotional disturbance.

I have considered the parties' remaining contentions and find that it is either unnecessary to address them in light of my decision or that they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that unless the parties otherwise agree, that respondent's CSE shall reconvene within 30 days of the date of this decision, develop an IEP, and recommend an appropriate placement for the student.

Dated: **Albany, New York**
 September 4, 2007

PAUL F. KELLY
STATE REVIEW OFFICER