



The University of the State of New York

The State Education Department State Review Officer

No. 08-128

**Application of the [REDACTED] DEPARTMENT OF
EDUCATION for review of a determination of a hearing
officer relating to the provision of educational services to a
student suspected of having a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Emily R. Goldman, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondents' (the parents')¹ daughter was eligible for special education services as a student with an emotional disturbance and ordered the district to reimburse the parents for their daughter's tuition costs at the Vista Adolescent Treatment Centers (Vista) for the 2007-08 school year. The appeal must be sustained.

At the start of the impartial hearing, the student was attending Vista (Parent Ex. A p. 2; see Dist. Ex. 1 at p. 1). Vista has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an emotional disturbance is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The hearing record reveals the student resided out-of-State until she was in the second grade (Dist. Ex. 1 at p. 3).² In 2001, the student moved to New York State (Parent Ex. E at pp.

¹ Respondents in this appeal are the student's biological father and stepmother, referenced herein as "the parents".

² The hearing record reflects that until she was approximately seven years old, the student was subject and witness to physical abuse by a relative other than respondents (Dist. Exs. 1 at pp. 3-4; 2 at p. 9).

2-3). The student began attending third grade at a private parochial school after she moved to New York State (Tr. pp. 170-71, 189). In 2002, a private social worker began providing outpatient therapy services to the student (Tr. pp. 169, 184; Dist. Ex. 2 at p. 23).³

The student continued to attend the private parochial school through eighth grade (the 2005-06 school year) where she "earned mostly A and B grades" (Dist. Ex. 1 at p. 4). The student's stepmother described the student's classmates at the private parochial school as a "good mix of kids" (Dist. Ex. 2 at p. 21). However, approximately halfway through the 2005-06 school year, the parents noticed that the student's motivation regarding school declined (Tr. pp. 171-73). During this time period, the student reported feeling depressed (Parent Ex. J at p. 3). The student also reported that during this time period, she "would scratch herself to create welts," and on one occasion had cut herself with a knife (Dist. Ex. 2 at p. 12). During summer 2006, the student "attempted suicide" by ingesting an over-the-counter medication (id. at pp. 11, 23). The student described this incident as "attention seeking," in that she sought the attention of her friends and family (id. at p. 11).

In September 2006, the student entered ninth grade at a district high school (Tr. p. 65; see Dist. Exs. 4; 6 at p. 11). The hearing record reveals that the district's high school utilized an academically advanced curriculum (Tr. p. 64).⁴ It was reported that while at the district's high school, the student became increasingly unhappy, used alcohol and began using drugs to fit in with the other students (Parent Ex. C at pp. 8, 10; J at p. 4).⁵ The student reported that during the 2006-07 school year, she had smoked marijuana approximately twice per month, but that this usage increased until she was smoking marijuana two to three times per week (Dist. Ex. 2 at p. 10; Parent Exs. C at p. 8; H at p. 10). The hearing record reveals that the student also experimented with cocaine and with inhalants (Dist. Ex. 2 at p. 10; Parent Exs. C at pp. 4, 8; J at p. 2). According to the student's stepmother, the student began to associate with a group that "encouraged her to lie about her where she was" (Dist. Ex. 2 at p. 21). She further reported that the student cycled through groups of kids "until she ended up with a group, most if not all, who were serious drug users" (id.). After an incident where the student passed out and was abandoned by her friends, the parents obtained the services of a "therapist" who suggested a trial of medication (Tr. pp. 175-76, 196, 222). The student reportedly had a poor response to the medication (Tr. p. 222).

During this time period, the student also began to evidence symptoms consistent with an eating disorder (Parent Ex. J at p. 2). According to the student, she began restricting her food intake because people commented positively on her "light frame" (id. at pp. 2-3). The student also reported that she had "body image problems," wanted "to be skinny" and that her eating problems occurred more when she was anxious, angry or stressed (id. at p. 3).⁶

³ These therapy services continued until summer 2007 (Tr. pp. 169, 184; Dist. Ex. 2 at p. 23).

⁴ The hearing record reveals that the school contained 518 students (Tr. p. 64). The high school required incoming students to have previously maintained a cumulative average of at least 85, to have accumulated less than ten absences, and to have obtained "3's" and "4's" on standardized tests (id.).

⁵ The student reported that she began to consume alcohol at the age of 13 (Dist. Ex. 2 at p. 10).

⁶ The hearing record also reveals that the student had previously restricted her food intake when she was living out-of-State (Parent Ex. J at p. 2).

The hearing record reflects that while she was at the district's high school, the student found some of her classes to be challenging (Dist. Ex. 5). The district's narrative report card reflects that at the end of the first quarter of the 2006-07 school year, the student had earned the following grades: 66 in Spanish 2, 79 in global 9, 83 in math, "U" in physical education 9, 76 in biochemistry 1, "B+" in art 9, 98 in English 9, and "P" in biochemistry lab (*id.* at pp. 1-3).⁷ At the end of the second quarter of the 2006-07 school year, the student had earned the following grades: 55 in Spanish 2, 85 in global 9, 81 in math, "F" in physical education 9, 80 in biochemistry 1, 95 in art 9, 94 in English 9, and a "P" in biochemistry lab (*id.*).^{8, 9} The student's transcript for "2006/Term: 1" reflected that the student received the following grades: 55 in Spanish 2, 79 in global 9, 83 in math A, 80 in biochemistry 1, 95 in art 9, and 94 in English 9 (*id.* at p. 4). The student also received "P"s for courses entitled photography, model UN, advisory, physical education 9 and biochemistry 1 lab (*id.*). The student's overall cumulative average was 81 and she earned six out of seven possible credits (*id.*).

The student's stepmother testified that in spring 2007, the student showed increasing disrespect toward her parents, "drastic" mood swings, and repeatedly stayed out all night without parental permission (Tr. pp. 181-82). At this time, in the midst of the third quarter of the 2006-07 school year, the student was failing Spanish and gym (Tr. pp. 47, 196). Additionally, the student's stepmother was informed by the student's math teacher that the student was failing math as well (Tr. pp. 180-81). Moreover, as reported by the student's guidance counselor, the student was absent eleven days and was late on nine occasions (Tr. pp. 61, 63, 65, 68, 83).¹⁰ As a result, the student's outpatient therapist recommended that the student be admitted to an inpatient treatment center (Tr. p. 184; Parent Ex. C at pp. 1, 8). The student's stepmother contacted the high school's guidance counselor and informed her that the parents would be removing the student from the district's high school (Tr. pp. 182-83).

On March 12, 2007 the student was placed at a Caron Treatment Center (Caron), an out-of-State residential addiction treatment recovery center (Dist. Ex. 2 at p. 27; *see* Dist. Ex. 12; Parent Ex. C at p. 1). While at Caron, the student "attended community meetings to build upon group consciousness, in-house and outside AA/NA fellowship meetings, an hour and a half of group therapy five times weekly, a minimum of one weekly individual session with her addiction counselor, family sessions... [and] recreational therapy five times weekly" (Parent Ex. C at p.

⁷ According to the hearing record, the designation "P" reflected that the student passed the course (Dist. Ex. 5 at p. 3). The designation "U" reflected that the student had received a mark of unsatisfactory (*id.*).

⁸ By letter dated December 14, 2006, the district's guidance counselor informed the parents that the student had "failed one or more subject classes" and that "if this trend continues," the student might be in danger of attending summer school or not being promoted to the next grade (Dist. Ex. 7; Parent Ex. D).

⁹ The hearing record reveals that the designation "F" reflects that the student had failed the class (Dist. Ex. 5 at p. 1). Additionally, the narrative report card reflected that the student received a "P" in both quarters for a class entitled "Advisory" (*id.*). Additionally, the student received one "P" for her photography class (*id.* at p. 2). It is unclear whether this pass is for the first quarter, the second quarter, or for both quarters (*id.*).

¹⁰ The guidance counselor characterized the absences as "a very high number" and discussed her concern about the student's attendance with the student and her stepmother (Tr. pp. 68-69).

1).¹¹ While at Caron, the student's mental health needs were monitored by a treatment team that included a psychiatrist and a psychologist who treated the student medically and therapeutically (id. at p. 2). The medical staff also monitored the student for an eating disorder (id. at pp. 2, 6). While at Caron, the student participated in an "Alternative Education Program" (AEP) that consisted of two hours of instruction per day, five days per week in the following subject areas: biology, Spanish, English 9, geometry, global studies and physical education (id. at pp. 1, 15).

The student was discharged from Caron on July 13, 2007 (Parent Ex. C at p. 1). The discharge summary stated that the student's "primary" diagnoses were "Cannabis Dependence, Unspecified," "Alcohol Dependence, Unspecified," "Cannabis Abuse, Unspecified," "Personality Disorder Not Otherwise Specified (NOS)," "Mood Disorder NOS," and "Borderline Personality Disorder" (id. at pp. 2-3). The discharge summary stated that her "secondary" diagnoses were "Mood Disorder, NOS"¹² and "Anxiety, NOS" (id.). The discharge summary also indicated that the student's "level of investment and intention to live a sober life were minimal throughout treatment," and that the student had "minimal coping skills to avoid relapse due to her lack of desire for recovery and inability to self diagnose" (id. at p. 2). The report recommended "after care" including daily contact with her sponsor, daily "12-Step" meetings,¹³ attendance at a boarding school and continued medical and psychological monitoring (id.).

Upon her discharge, the student's AEP teacher at Caron commented that the student completed her third and fourth quarter requirements in all of her classes and also reviewed for the upcoming Regents examination (Parent Ex. C at p. 16). While attending Caron, the student received a grade of "A" in her biology, Spanish, and geometry classes; a "B+" in her global studies class; a "B" in her English 9 class; and she passed physical education (id. at p. 15). She also received a score of 84 on the "Math A" Regents examination (Dist. Ex. 5 at p. 4).

After the student's discharge from Caron, the parents placed her at an out-of-State private boarding school (Tr. pp. 191-92). Three days later, the boarding school asked the student to leave because she "wasn't keeping any food down" and the boarding school "could not provide the service that [the student] needed" (Tr. p. 192).

By letter dated July 26, 2007 to the Committee on Special Education (CSE) chairperson, the student's stepmother requested that the CSE evaluate the student (Parent Ex. F at p. 1). The stepmother stated in the letter that she believed the student required a residential placement (id.).

On August 2, 2007, the parents unilaterally placed the student at Vista (Parent Ex. I at p. 4). Upon arriving at Vista, the student completed an educational self-evaluation form (Dist. Ex. 2 at pp. 30-31). The student indicated that while attending the district's high school she felt that she "usually" had "pretty good" relationships with her teachers, and that her relationships

¹¹ Although undefined in the hearing record, "NA" is presumed to stand for "Narcotics Anonymous" (see Parent Ex. C at p. 1). In the hearing record, "AA" is defined as "Alcoholics Anonymous" (Parent Ex. H at p. 9).

¹² The discharge summary refers to the student's diagnosis of a mood disorder, NOS as both a "primary" and "secondary" diagnosis (Parent Ex. C at pp. 2-3).

¹³ Although undefined in the hearing record, "12-Step" meetings is presumed to refer to meetings designed to assist the student with addiction recovery (Parent Ex. C at p. 2).

with most students were "good" (id.). The student also reported that she was never sent to the principal for disciplinary purposes, never received detention, and was never suspended from school (id. at p. 30). The student indicated that she "quite often" attended school, asked for help when needed, concentrated and completed assignments, passed her tests and enjoyed learning new things (id.). She identified Spanish as her most difficult subject and indicated that she generally earned grades of "A's and B's" (id. at p. 31). The student also noted that she had participated in extracurricular activities such as student government, model UN and acting (id.).

On August 2, 2007 a psychiatrist from Vista conducted a "Psychiatric Evaluation and Initial Treatment Plan" for the student (Dist. Ex. 2 at pp. 1-8). The resultant report noted that the student's affect was "appropriate or congruent with content," but that her mood was "irritable" (id. at p. 6). The report also noted that the student exhibited a poor understanding of her problems, possessed limited impulse control, and had limited awareness of the consequences of her actions (id.). The student was given diagnoses of "PTSD, R/o Reactive Attachment D/O, Mood D/O NOS, Disruptive [B]ehavior D/O, Cannabis Abuse, EtOH Abuse, [and] Physical Abuse of a child" (id. at p. 7).¹⁴ The psychiatrist recommended that the student undergo "Substance Withdrawal/Detox Regime, Medication Management, Individual Therapy, Group Therapy, Family Therapy, Skills Development, [and] OT/RT" (id. at p. 8).¹⁵

On August 3, 2007, Vista conducted an interview of the student to determine the student's history (Dist. Ex. 2 at pp. 9-13). The resultant report was entitled "Initial 24-Hour Treatment Plan" (id.). This report stated that "[a]t this point the [student] feels that she is not motivated to perform well in school, which she attributed to emulating the motivation of her peer group during the time of her use... [t]he [student] stated that prior to that she enjoyed school and had no trouble excelling" (id. at p. 10; Parent Ex. H at p. 2). The student reported that until ninth grade, she had "remained a straight A student at which point her grades dropped to a B average" (id.). The student reported difficulty maintaining friendships, and that at the beginning of high school she began using substances to fit in with other students (id.). The student also reported having had suicidal thoughts during "heavy bouts of depression" and that she had attempted suicide on two occasions (Dist. Ex. 2 at p. 11). The student characterized these attempts as "attention seeking" (id. at pp. 11-12). The student also reported that she often acted selfishly in relationships and struggled with emotional vulnerability (id.). However, during her stay at Caron, she developed "true relational connections" (id.). The student received diagnoses of "cannabis dependence," "alcohol abuse," "Major depressive episode-severe," "Generalized Anxiety Disorder," and "Anorexia Nervosa-restrictive type" (id. at p. 11). The interviewer opined that the student "likely ha[d] some issues with social interactions, and social anxiety" (id. at p. 10). The interviewer opined that the student's past living environments, her prior "significant trauma" and the "lax boundaries" placed on her in her home had contributed greatly to her current mental health status (id. at p. 13). The interviewer opined that "more rigid boundaries [would help the student] ...develop appropriate living skills and interpersonal relationships" (id.). The interviewer recommended that the student receive weekly family

¹⁴ The hearing record defines "PTSD" as "posttraumatic stress disorder" and "R/o" as "rule out" (Parent Ex. C at pp. 2, 3). Although undefined in the hearing record, the following acronyms are presumed: "D/O" ("disorder") and "EtOH" ("alcohol").

¹⁵ Although undefined in the hearing record, the acronyms "OT" and "RT" are presumed to represent "occupational therapy" and "recreational therapy," respectively.

therapy telephone sessions, in-person visits/family therapy sessions at Vista and regular family contact via telephone and letters (id.).

By letter dated August 8, 2007 to the CSE chairperson, the student's stepmother indicated that she had not received a response to her July 26, 2007 letter requesting a CSE evaluation (Parent Ex. F at p. 2). The stepmother informed the CSE chairperson that because of the student's "emergency situation," the parents "had no choice but to place [the student] at the Vista school" until the district found an appropriate placement for the student (id.).

A "Master Treatment Plan" dated August 16, 2007, identified the student's Vista treatment team as consisting of a treatment team leader, a coordinator, a psychiatrist, three primary therapists, a substance abuse counselor, a nurse, a principal and a recreational therapist (Parent Ex. H at pp. 9-10). The treatment team identified the student's depression as the primary presenting problem; and academic underachievement, substance abuse, an eating disorder and a history of physical/emotional abuse as her secondary presenting problems (id. at p. 6). The team recommended individual psychotherapy, family psychotherapy, substance abuse counseling, substance abuse education group therapy, and consultation/case management with clinicians (id.). The team also recommended one daily session of group psychotherapy, one daily session of recreational psychotherapy, and one bi-weekly session of family substance abuse counseling (id.). The team developed behavioral definitions, long-term goals and short-term objectives/therapeutic interventions to address the student's presenting problems (id. at pp. 6, 7-9).

A September 4, 2007 "Report Of Psychological Evaluation" indicated that while at Vista, the student was evaluated by a private psychologist (Dist. Ex. 1 at pp. 2-6).¹⁶ Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following index scores: verbal comprehension (124, superior), perceptual reasoning (102, average), working memory (99, average), and processing speed (94, average) (id. at p. 7). The student achieved a full scale IQ score of 108 (average) (id.). On the verbal comprehension index, the student exhibited a relative strength on the vocabulary subtest (id. at p. 8). Her performance on the remaining indices did not indicate "any particular strengths or weaknesses" (id.). Administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH), yielded an academic skills standard score of 116 (86th percentile) and an academic fluency standard score of 112 (79th percentile) (id.). The student's oral language, reading and math cluster scores were in the high average range (id. at p. 9-10). The psychologist opined that the student did not have any deficits or disorders in her expressive language skills, in her receptive language skills, in her reading abilities, in her mathematics abilities, or in her written expression skills (id.). The psychologist reported that the student's overall writing abilities were in the superior to the very superior range (id.). The private psychologist reported that "IQ and achievement testing indicated [the student's] abilities in reading, writing and math are above average and consistent with her intellectual level as evidenced on the WISC-IV" (id. at p. 10).

¹⁶ The report revealed that the private psychologist personally evaluated the student on August 22, 2007, contacted the student's Vista therapist by telephone on August 28, 2007, and then contacted the parents by telephone on August 30, 2007 (Dist. Ex. 1 at p. 1).

The psychologist also administered the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A), the Millon Adolescent Clinical Inventory (MACI), the Sentence Completion Test, and the Rorschach Inkblot Test in order to evaluate the student's "personality dynamics and the potential for mental illness" (Dist. Ex. 1 at p. 10). The psychologist reported that the "fallout" of the student's prior abuse was evidenced in the student's difficulty in forming meaningful and lasting relationships (id. at p. 13). He reported that the student wanted to "feel connected with peers and her parents," but had a tendency to form only superficial relationships (id.). The psychologist reported further that "[o]ver the last couple of years, [the student] has developed unhealthy ways of coping with her problems... [t]hese involve numbing her feelings with drugs and avoiding feelings by restricting her food intake and purging" (id.).

To evaluate the student's alcohol and drug use, the psychologist administered the Substance Abuse Subtle Screening Instrument-Adolescent (SASSI-A) (Dist. Ex. 1 at p. 13). The student's responses indicated that she had a pattern of marijuana use "consistent with dependence," and that "her alcohol use appeared consistent with the level of abuse" (id.). The psychologist also opined that the student was likely to be impulsive, possessed few coping skills to deal with frustration, was resentful, was detached from her feelings, and had relatively little insight into the basis/causes of her problems (id.). The psychologist offered the following diagnoses: anxiety disorder NOS, histrionic personality disorder, eating disorder NOS, cannabis dependence and alcohol abuse (id.). In addition to these diagnoses, the private psychologist also offered diagnoses of a disruptive behavior disorder NOS, a parent-child relational problem, and abuse and neglect of a child (victim) (id. at p. 14). The psychologist recommended individual and group psychotherapy services, substance abuse treatment including substance-specific group therapy, 12-step/self-help groups and family therapy (id. at p. 15). The private psychologist stated that the student would benefit from instruction provided in a "multimodal manner that incorporates visual, oral, written and hands-on strategies," as well as positive encouragement provided by her teachers for efforts made in class (id.).

A September 2007 progress report from Vista reflected that the student receive an "A-" in chemistry, a "B" in world literature, an "A-" in US history, and an "A" in Spanish (Dist. Ex. 3).¹⁷ The progress report comments indicated that the student "seem[ed] ready to get to work in school," "work[ed] hard" and "turn[ed] in her assignments on time" (id.). The report also stated that the student reportedly had "a hard time beginning in P[hysical] E[ducation]," but that she was "doing well" in world literature and US history, and had "a great start in Chemistry" (id.).

On October 25, 2007 the CSE convened an "EPC Conference" for the student's initial review (Dist. Ex. 10; Parent Ex. B).¹⁸ Attendees included a district school psychologist (who also acted as the district representative), a district social worker, a district special education teacher, an additional parent member, the parents, and an educational advocate (Dist. Ex. 10 at

¹⁷ The student received the designation "NG" for algebra II (Dist. Ex. 3). "NG" was not defined in the hearing record.

¹⁸ A Vista progress report dated October 25, 2007 noted that the student had recently struggled to control her impulsivity, had difficulty with emotional regulation, difficulty with interpersonal relationships, and had acted out behaviorally (Dist. Ex. 14 at p. 7). The report also noted that the student had recently gone home and attempted to solicit a more emotional connection from her father. (id.).

pp. 1-2). The principal from Vista (who was also one of the student's general education teachers) and the student's counselor at Vista participated by telephone for a portion of the meeting (Tr. pp. 27, 36-37, 262; Dist. Ex. 10 at p. 2). Available to the CSE were: the student's September 4, 2007 private psychological report, grade and attendance reports from the district's high school, grade reports from Vista, and Vista's August 2, 2007 "Psychiatric Evaluation and Initial Treatment Plan" (Dist. Exs. 10 at pp. 3-4; 13 at p. 2). At the CSE meeting, Vista's principal informed the CSE that the student was somewhat withdrawn and resisted interacting with other students; however, she was "excelling academically" in most subject areas and had a good rapport with her science teacher (Parent Ex. G at p. 1). The student's counselor recommended a residential setting, noting that such a setting would provide appropriate structure and support to the student (*id.* at p. 2). The CSE made several attempts to contact staff members from the district's high school that the student had previously attended, but those attempts proved unsuccessful (Tr. pp. 39-40; Parent Ex. G at p. 2).

The CSE determined that the student's history, observations, and reports revealed that the student met three of the five characteristics provided for in the regulatory definition for a student with an emotional disturbance, specifically: characteristic "(C)," "inappropriate types of behavior or feelings under normal circumstances;" characteristic "(D)," "a generally pervasive mood of unhappiness or depression;" and characteristic "(E)," "a tendency to develop physical symptoms or fears associated with personal or school problems" (Dist. Ex. 9).¹⁹ The CSE also determined that the student exhibited all three of these characteristics "to a marked degree" (*id.*).²⁰ The CSE found further that characteristic "(C)," "inappropriate types of behavior or feelings under normal circumstances symptom" was "present for a long time" (*id.*).²¹ The CSE found that the student had "recently exhibited antisocial, risk taking and self-destructive behaviors... [n]evertheless, current reports have indicated that these behaviors do not appear to impede her academic functioning" (*id.*). Ultimately, the CSE determined that, because there was not an adverse impact on her educational performance, the student did not meet the eligibility criteria to be classified as a student with an emotional disturbance (*id.*). As such, the CSE found that the student did not require special education supports and services to benefit from instruction, and therefore the CSE recommended placement of the student in a general education setting (*id.*; Dist. Ex. 10 at pp. 1, 2). The "Minutes of CSE Meeting" stated that the parents and the educational advocate disagreed with the CSE's determination, believed that the student met

¹⁹ At the October 25, 2007 meeting, the CSE completed an "Emotional Disability Justification Form" (Dist. Ex. 9; *see* 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). This form was used to assist the CSE in determining whether the student met the regulatory criteria to be classified as a student with an emotional disturbance (Tr. pp. 32-33; *see* Dist. Ex. 9). The form contains "yes" and "no" boxes to indicate the presence or absence of symptomatic characteristics, and if present whether those characteristics were present for a long time and to a marked degree (*id.*). This form was signed by the school psychologist, social worker and special education teacher (Dist. Ex. 9; *see also* Parent Ex. G at p. 2).

²⁰ For characteristic "(D)," "generally pervasive mood of unhappiness or depression," both the "yes" and "no" boxes were checked to indicate either the presence or absence of the symptom "to a marked degree" (Dist. Ex. 9).

²¹ The CSE did not find evidence that the student met criteria "(A)," "an inability to learn that cannot be explained by intellectual, sensory or health factors;" nor did she meet criteria "(B)," "an inability to build or maintain satisfactory relationships with peers or teachers" (Dist. Ex. 9).

the criteria for eligibility as a student with an emotional disturbance, and further believed that the student required a therapeutic, residential setting (Parent Ex. G at p. 2).²²

By a "Final Notice of Recommendation" (FNR) dated October 26, 2007, the CSE chairperson informed the parents that the CSE concluded that the student was "not in need of special education and should remain in general education" (Dist. Ex. 11). The FNR informed the parents that they could request another CSE meeting or an impartial hearing and provided contact information for district staff that they could contact if they wished to discuss the recommendation (id.).

A Vista progress report dated November 5, 2007 revealed that the student struggled to regulate her emotions, intermittently worked on the pain surrounding her past trauma, and had begun to acknowledge her need for support (Dist. Ex. 14 at p. 6). The report also noted that the student was "doing well" in world literature and was "doing beautiful work" in her US history course (id.). The grade summary revealed that at that time, the student had received a grade of "A" in US history, Spanish, "Dance/Aero," fine arts, study skills and adult roles (id.). The student received an "A-" in chemistry, a "B+" in "PE" and a "B-" in world literature (id.). The report also noted that the student participated in "Halloween activities," a weekly drama class, the fall talent show and in community service (id.).

By a letter from their attorney dated January 25, 2008, the parents requested an impartial hearing (Parent Ex. A). In their due process complaint notice, the parents sought to have the student classified as having an emotional disturbance and also sought tuition reimbursement for the student's tuition at Vista for the 2007-08 school year (id. at p. 2). The due process complaint notice contended that the parents' placement of the student at Vista was appropriate and that the parents had cooperated with the CSE (id.). The due process complaint notice also raised several procedural issues regarding the October 25, 2007 CSE meeting including: a failure to include necessary members at the CSE meeting, a failure to conduct a classroom observation of the student, a failure to conduct a medical examination of the student, and a failure to get input from any of the student's teachers at the district's high school that (id.).

On February 4, 2008, the district filed an answer to the parents' due process complaint notice (Dist. Ex. 13 at p. 4). The answer provided that although the student had failed Spanish during the second quarter, she maintained an 81 average overall, received an 84 on her math Regents, and maintained nearly a straight "A" average at Vista (id. at pp. 3-4). The answer provided further that although the student's behavior included drug and alcohol abuse and an eating disorder, these conditions did not adversely impact upon her educational performance; therefore, the CSE properly concluded that the student should not be classified as a student having an emotional disturbance (id. at p. 4). The district's answer further stated that the CSE had no duty to perform a classroom observation because the parents had unilaterally placed the student outside of New York State (id.). Lastly, the answer contended that it was the parents' responsibility to provide the CSE with a medical evaluation of the student (id.).

²² The hearing record reflects that at the October 25, 2007 CSE meeting, the parents were provided with information regarding their due process rights (Parent Ex. G at p. 2).

A Vista progress report dated February 5, 2008 revealed that the student was "doing well" in world literature and in chemistry, "doing good work" in algebra 2, but was having "trouble staying focused" in history (Dist. Ex. 14 at p. 8). The grade summary revealed that at that time, the student had received a grade of "A" in "Dance/Aero," "Study Skills" and in "Adult Roles;" an "A-" in "PE;" and a "B+" in "Fine Arts" (*id.*). The report also noted that the student had participated in a variety of recreational activities (*id.*).

By letter dated February 15, 2008 to the "New York School District," the Vista principal reported the student's grade summary for January 2008 (Parent Ex. I at pp. 3-4). The summary revealed that the student had received a grade of "A" in US history, Spanish, "Dance/Aero," "Soc. Dev.," and "Adult Roles;" an "A-" in chemistry and in "PE;" a "B+" in fine arts; a "B" in world literature; and a "C" in algebra II (*id.* at p. 4). The letter indicated further that although the student's grades appeared good, in the approximately six and one-half months that the student had been at Vista, she had only completed one-quarter of her algebra and chemistry coursework and about one-half of her world literature and US history coursework. (*id.* at p. 3). However, as the letter explained further, student instruction at Vista is "self-paced" (*id.*).²³

By letter dated March 10, 2008, and addressed "To Whom It My [sic] Concern," the student's Vista therapist reported that the student was undergoing extensive group psychotherapy, milieu therapy and experiential therapy on a daily basis; and individual psychotherapy, individual substance abuse counseling and family therapy on a weekly basis (Parent Ex. I at p. 2). The therapist reported that the student had shown marked improvement in her disruptive behavior, had begun to form substantive relationships with her peers, was fully engaged in her 12-Step program, had improved her abilities to understand and regulate her emotions, and was continuing to work in her "dialectical behavior therapy [in order] to help increase her distress tolerance, [and to] improve her interpersonal, and emotional regulation skills" (*id.*).

A Vista progress report dated March 26, 2008 indicated that the student had struggled emotionally in the prior month, had displayed behavior patterns that she had displayed in the past, had regressed to old coping skills and had struggled to be honest with her peers about her emotions (Dist. Ex. 14 at p. 3). The report also revealed that the student was progressing in her substance abuse issues, had completed both "Step Two" and "Step Three," and was working on "Step Four" in her substance abuse treatment program (*id.*). The student was taking a prescribed medication for mood stability (*id.*). The report also noted that the student participated in recreational activities (*id.*). The grade summary revealed that the student had received an "A" in US history and in Spanish, an "A-" in chemistry and in "PE," a "B" in world literature, and a "C" in algebra II (*id.*).²⁴ The grade summary revealed that since the student had been at Vista, she

²³ Testimony reveals that students at Vista work individually on different levels or on different chapters at their own pace and according to their comprehension and reading skills (Tr. p. 261; Parent Ex. I at p. 3). Vista classrooms have between 16 and 18 students (Tr. p. 261). When a student has a question, the classroom teacher instructs that student from a nearby blackboard to demonstrate or explain (*id.*).

²⁴ I note that the March 26, 2008 letter does not indicate what time period the grades reported in the letter are from.

had completed one-quarter of her chemistry coursework, one-half of her algebra coursework and three-quarters of her Spanish, world literature, US history and "PE" coursework (id.).

A Vista progress report dated April 5, 2008 revealed that at that time the student had received three grades of "A" in "Dance/Areo," study skills, and adult roles (Dist. Ex. 14 at p. 2). The student also received an "A-" in fine arts (id.). The report also noted that the student had been "doing well" in world literature and chemistry, and "doing great" in "PE" (id.). However, the report noted that the student "hasn't done any work on chem." (id.). Additionally, the report indicated that the student participated in recreational activities (id.).²⁵

A Vista progress report dated April 25, 2008 revealed that at that time the student had received a grade of "A" in Spanish, US history, "Dance/Areo," study skills, and "Adult Roles," an "A-" in chemistry, "PE" and fine arts, a "B" in world literature, and a "C-" in algebra II (Dist. Ex. 14 at p. 5).²⁶

The impartial hearing began on April 30, 2008 and concluded on June 30, 2008, after four days of testimony (Tr. pp. 1, 111, 158, 235). The impartial hearing officer rendered her decision on September 23, 2008 (IHO Decision at p. 11). She determined that the CSE should have classified the student as having an emotional disturbance (id. at p. 7). The impartial hearing officer noted that although the district had correctly found that the student possessed "inappropriate types of behavior or feelings under normal circumstances," it had incorrectly concluded that the student's educational performance had not been adversely affected (id. at pp. 6-7). According to the impartial hearing officer, the CSE had relied too heavily on reports of the student's performance at the district's high school, and it had failed to consider information about the deterioration of the student's emotional condition after she had withdrawn from that school (id.). The impartial hearing officer also found that the CSE failed to obtain reports or testimonial evidence from the district's high school teachers (id.). The impartial hearing officer further found that the CSE failed to ask the Vista witnesses about the issue of classification or about the impact of the student's behavior on her education at Vista (id.). The impartial hearing officer noted that the student had "significant psychological and emotional issues that went way beyond maladaptive behavior," had received many diagnoses of disorders, was involved in drug abuse, had engaged in self-injurious behavior, had failed Spanish and gym, was close to failing math, had significant absences and tardiness, and was at risk to be held over in order to attend summer school (id. at p. 7).

Regarding the issue of whether the district had provided a free appropriate public education (FAPE), the impartial hearing officer found that the CSE's failure to classify the student was a denial of FAPE (IHO Decision at p. 8).²⁷ The impartial hearing officer also found

²⁵ The report also indicated that the student had displayed behaviors that signified a regression in her ability to handle her emotions (Dist. Ex. 14 at p. 2).

²⁶ A Vista progress report dated May 5, 2008 revealed that the student was "doing well" in world literature, US history, and chemistry, but "having trouble focusing in Algebra 2" (Dist. Ex. 14 at p. 4).

²⁷ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;

that several procedural inadequacies also amounted to a denial of FAPE including: a lack of proper parental consent to perform a physical evaluation, a failure to perform a classroom observation, a failure of the CSE to respond to the parents' referrals and requests for a review, and an improper reliance by the CSE on an inadequate social history (id. at pp. 8-9). The impartial hearing officer determined that she "need not consider" whether the composition of the CSE constituted a deprivation of FAPE because the above-mentioned procedural factors were enough for her to render a determination as to whether the district provided a FAPE (id. at p. 10).

The impartial hearing officer further found that Vista was appropriate because the student had made progress in the program by reducing her emotional and behavioral issues (IHO Decision at p. 10). She also noted that Caron had recommended a therapeutic boarding school and that Vista was such a school (id.). The impartial hearing officer found no equitable impediment to the parents' request for tuition reimbursement and noted that it was the district that had ignored the parents' requests for a CSE review (id.). The impartial hearing officer also found that the parents were justified in placing the student at Vista rather than waiting for the CSE to make a recommendation (id. at pp. 10-11). She ordered that the student be classified as having an emotional disturbance, that the district reimburse the parents for the tuition costs at Vista for the 2007-08 school year, and that the CSE reconvene within 15 days of the decision for the purpose of classifying the student and in order to make program recommendations for special education supports and services to address the student's unique special education needs (id. at p. 11).

The district appeals and asserts that the impartial hearing officer erred in classifying the student as having an emotional disturbance. The district asserts that even though the student met some of the criteria for the regulatory definition of a student with an emotional disturbance, the CSE's determination not to classify her was proper because the student's educational performance was not adversely affected.^{28, 29} The district also asserts that the student's difficulties stem not from an emotional difficulty but from drug and alcohol use.

The district also asserts that the impartial hearing officer erred in determining that the district failed to provide a FAPE. In addressing the alleged procedural defects, the district asserts that any delay in scheduling a CSE meeting was de minimus because the student is not eligible to receive special education services and programs and moreover, that it did not prevent

and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. § 1401[9]).

²⁸ The district noted in its petition that the student satisfied three of the characteristics delineated in the regulatory definition for emotional disturbance, including characteristics (C), "inappropriate types of behavior or feelings under normal circumstances;" (D) "a generally pervasive mood of unhappiness or depression;" and (E), "a tendency to develop physical symptoms or fears associated with personal or school problems" (see 34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]).

²⁹ The district asserts that the student did not satisfy criteria (A), "an inability to learn that cannot be explained by intellectual, sensory, or health factors" because the hearing record reveals that the student received "As and Bs" as grades (see 34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]) The district also asserts that the student did not satisfy criteria (B), "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" because the hearing record reveals that the student had many friends (id.).

the parents from meaningfully participating in the CSE process. The district also asserts that the absence at the CSE meeting of the district's high school personnel from the school that the student had previously attended did not significantly impact the parents' ability to participate at the CSE meeting. The district further asserts that even though there was no staff from the district's high school at the CSE meeting, the district's CSE psychologist had previously obtained "insight" about the student's performance at the district's high school from a guidance counselor there and that she in turn provided this information to the CSE at the CSE meeting. The district further submits that the information the CSE had from the district's high school was sufficient for the CSE to make a classification determination, and that the CSE reviewed documents not only from the district's high school, but also from Caron and from Vista. The CSE also asserts that there is no mandate that the district perform their own evaluations and that the CSE believed that it had the necessary information available to them to make an appropriate recommendation. Lastly, the district asserts that the impartial hearing officer erroneously held that the district should have performed a full evaluation of the student. The district contends that since the student was living out-of-State at the time of the CSE review, the CSE could not perform any independent evaluations of the student.

The district also asserts that the impartial hearing officer erred in determining that the parents had established that the program at Vista was appropriate. The district asserts that Vista is too restrictive, the student only receives two hours of instruction per day, that instruction is largely self-led, and the hearing record did not provide any evidence of the functional, emotional or academic grouping within the classes or within the school's therapeutic settings.

In addressing the equities, the district asserts that it was unable to conduct an evaluation of the student because, at the time of the parents' referral to the CSE and at the time of the CSE meeting, the student was out-of-State. Moreover, the district asserts that the parents prevented the district from obtaining information about the student, and failed to give adequate notice of the student's unilateral placement.

The parents' answer alleges that aside from the parents and two Vista staff members who participated by telephone, none of the other CSE meeting participants had ever met the student. The parents also assert that there were no teachers present for the duration of the CSE meeting and no one from the district's high school attended the meeting. The parents further assert that the CSE was not duly constituted because no regular education teacher from the district's high school was present and although the Vista teacher participated by telephone, she did not participate during the entire meeting. The parents also assert that the CSE failed to consider the student's difficulties at the district's high school during the first half of the third marking period (immediately before the student withdrew and entered Caron). The parents also assert that the student's program at Vista was appropriate and despite what the district has alleged in their petition, the student received more than two hours of instruction per day. The parents assert further that the district's equity arguments should not be given any weight because these arguments were not asserted at the impartial hearing and were raised for the first time on appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that

the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2];

8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). This case commenced on January 25, 2008, after the statute took effect (Parent. Ex. A at p. 1).

Preliminarily, I will address the district's objection to parents' service of the memorandum of law as untimely. The district served the parent with its verified petition on October 28, 2008. The parent served an answer on November 17, 2008. On December 10, 2008 the Office of State Review received a memorandum of law in support of the parents' answer. Thereafter, by letter dated December 10, 2008, the district asserted that the memorandum of law was untimely because 8 NYCRR 279.5 required that the memorandum of law be submitted simultaneously with the answer (see 8 NYCRR 279.5).³⁰ The parents asserted via letter, also dated December 10, 2008, that the applicable regulation was 8 NYCRR 276.4, not 8 NYCRR 279.5 (see 8 NYCRR 276.4, 279.5). The parents asserted that the memorandum of law was timely because 8 NYCRR 276.4 allowed the parents to file their memorandum of law "within 30 days after service of the answer" (see 8 NYCRR 276.4). By letter dated January 5, 2009, the parents asserted further that there was good cause for their delay in filing the memorandum of law because 8 NYCRR 276.4 is ambiguous, that any delay caused by the tardy memorandum of law was minimal, that the petitioners had not been harmed, and that the memorandum would be helpful

³⁰ Although the district objected to the memorandum of law as untimely, they conceded that the answer was timely.

when rendering a decision. By letter dated January 6, 2009, the district reiterated the arguments previously made in their letter dated December 10, 2008 and again asserted that the provisions of Part 279 govern the procedural practices of State Review Officer who review special education determinations made by impartial hearing officers. The district asserted further that the parent's reliance on Part 276 was misplaced because in the context of these reviews Part 276 only applies when Part 279 is silent. In these circumstances, because Part 279 directly addresses the memorandum issue, Part 279 is the applicable regulation. I agree with the district's interpretation of the State regulations and find that the district's argument that the regulations require a simultaneous filing of the answer, memorandum of law, and additional documentary evidence to be correct. However, under the circumstances presented, I have accepted and considered the parents' memorandum of law (see Application of the Dep't of Education, Appeal No. 08-097; Application of the Dep't of Education, Appeal No. 08-130).

I now turn to the impartial hearing officer's determination that the student should have been classified by the CSE as a student with an emotional disturbance.

A student with an emotional disturbance must meet one or more of the following five characteristics:

- (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.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

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; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), 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]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; 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], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399; see also M.H. v. Monroe-Woodbury Cent. Sch. Dist., 2008 WL 4507592 [2d Cir. Oct. 7, 2008]). 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 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 Clarke, 48 IDELR 77).

At the impartial hearing and on appeal, the district admits that the student met more than one of the criteria for a student having an emotion disturbance in that she exhibited inappropriate types of behavior, was depressed and had physical symptoms related to school. However the district asserts that these characteristics had not existed for a prolonged period of time and did not adversely impact the student's educational performance. The impartial hearing officer's decision only addressed that the student met criteria "(C)," "inappropriate types of behavior or feelings under normal circumstances" (IHO Decision at pp. 5-11). The impartial hearing officer determined that the student exhibited characteristic "(C)" for a long time and to a marked degree (id. at p. 7). Additionally, she found that the student's educational performance had been adversely affected because while the student was at the district's school, she had failed Spanish and gym during the first semester, had been at risk of being held over or mandated to attend summer school, had been in danger of failing math, and had significant school attendance difficulties (IHO Decision at pp. 5-7; Dist. Exs. 5; 6 at p. 5; Parent Ex. D).

The hearing record reveals that the student has a long history of self-injurious behavior. At the impartial hearing, the private psychologist testified that the student's current behavioral problems were related to the trauma caused by prior abuse she had witnessed earlier in her childhood (Tr. pp. 250-53). The private psychologist reported that the student had described an instance when she tried to hang herself (Parent Ex. J at p. 5). The student also acknowledged that more recently, she had "scratched herself to create welts" and had cut herself with a knife (id. at p. 6). Throughout the time period from 2002 to spring 2007, after her move to New York State, the student received private outpatient therapy (Dist. Ex. 2 at p. 23). During summer of 2006, before her entry into the district's high school the student attempted suicide (id. at pp. 11, 23). While at Caron, she was treated medically and therapeutically and experienced a brief stay in the psychiatric unit after verbalizing a lack of hope for the future and thoughts of suicide (Parent Ex. C at p. 2). A Caron psychiatric evaluation dated March 21, 2007 revealed that the

student had suicidal thoughts at age eight and has had recurrent depressions since age seven or eight (id. at p. 4). While at Caron, the student was prescribed psychotropic medications (id. at pp. 5, 6). According to the hearing record and testimony from the student's Vista therapist, the student has reported suicidal ideations (Tr. p. 201; Dist. Exs. 1 at p. 6; 2 at p. 12).

The hearing record also reveals that the student has had a long history of eating disorders, and first restricted her food intake during her childhood reportedly due to the abuse she had witnessed (Dist Ex. 2 at p. 10). While living in New York State, the student again began to restrict her food intake in response to positive comments about her appearance (Parent Ex. J at p. 2). She restricted her food intake in order to maintain her "light frame" and to "gain attention from her peers" (Tr. p. 192; Parent Exs. C at pp. 2, 6; J at pp. 2-3). The student began to purge after her parents began to force feed her once they noticed the student's weight loss (Parent Ex. J at pp. 2-3). During summer 2007, the student was also asked to leave a private residential school due to her restrictive and purging behaviors (Dist. Ex. 1 at p. 3). The student described her desire to be skinny and attributed this desire to "body image problems" (id.). According to the student, she restricts what she eats because "it is a better way to deal with my emotion than experiencing uncomfortable feelings" (id.). The student reported that her eating problems occurred more when she experienced anxiety, anger or stress (id.).

The hearing record further reveals that the student has been anxious about forming personal relationships with others (Dist. Exs. 1 at p. 10; 2 at p. 10; Parent Exs. C at pp. 9-10, 13; H at p. 2). When she moved to New York State she suffered from nightmares, was fearful that she would be kidnapped, and felt abandoned by her father (Parent Ex. C at pp 9-10, 12). The student had been seeing a therapist to cope with her depression and anxiety since 2002 (Parent Exs. C at pp. 8-9; H at p. 6; J at pp. 3-4). The student's stepmother reported that while at summer camp, the student got into fights "with all the girls" (Tr. pp. 170-71). While at the district's high school, the student had been involved in a verbal argument with another student (Tr. p. 67). The student revealed that many of her relationships were "superficial," that she had "difficulty maintaining friendships," acted "selfishly in relationships," struggled with "emotional vulnerability," had trouble trusting her stepmother and had a confrontational relationship with her father (Dist. Ex. 1 at p. 4; see Dist. Ex. 2 at pp. 9-10). When the student arrived at Vista, she was disruptive in class, remained isolated and had poor peer relationships with the other students (Tr. pp. 203-04). The private psychologist described the student as cynical, fearful of closeness in relationships, self-centered and that she tended "to opt for superficial and transient relationships" (Dist. Ex. 1 at pp. 12-13). He opined that the fallout of the student's childhood trauma is "evidenced in ...[her] having difficulty forming meaningful and lasting relationships" (id. at p. 13) According to the psychologist, the student wanted to feel connected with peers and her parents, but when people attempted to get close to her, fear overwhelmed her (id.).

I find that upon an examination of the entire hearing record and based on the longstanding issues discussed above, the student meets criteria"(C)," of the regulations for a student with an emotional disturbance (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

I now turn to the district's assertion that the presence of characteristic "(C)" did not adversely impact the student's educational performance.

As noted above, in assessing educational impact courts have often considered the extent to which the student's academic performance has been affected (see Springer v. Fairfax County School Board, 134 F. 3d 659, 661 [4th Cir. 1998]; Muller, 145 F.3d 95, 103 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d at 543; R.B., 496 F. 3d at 946 [9th Cir. 2007]; Hoffman v. East Troy Cmty. Sch. Dist., 38 F. Supp. 2d 750, 753-55, 764-65 [E.D. Wis. 1999]; Johnson, 108 F. Supp. 2d at 918 [M.D. Tenn. 2000]; St. Pierre, 307 F. Supp. 2d at 399 [N.D.N.Y. 2004]; St. Joseph-Ogden Comm. High Sch. Dist. No. 305 v. Janet W., 2008 WL 170693, at * 14 [C.D. IL. January 17, 2008]; N.G. v. District of Columbia, 556 F.Supp.2d 11, 26-27 [D.D.C. 2008]). However, courts have considered a variety of other factors as well (see Bd. of Educ. of Montgomery County v. S.G., 2006 WL544529, at *13, aff'd 230 Fed.Appx. 330 [4th Cir. 2007]; N.G., 556 F.Supp.2d at 35-36 [D.D.C. 2008]; Doe v. Bd. of Educ., 753 F. Supp. 65, 70 [D. Conn. 1990]; Johnson, 108 F. Supp. 2d at 918 [M.D. Tenn. 2000]).

During the 2006-07 school year, the student appeared to have some difficulty with one or two of the district's advanced ninth grade courses.³¹ After the first two quarters, the student received a failing 2006/Term 1 grade of 55 in Spanish; and at the time that the student was removed from the district's high school in March 2007, in the midst the third quarter of the 2006-07 school year, she was failing Spanish and gym (Tr. pp. 47, 196; Dist. Ex. 5 at p. 4). Ultimately the hearing record reveals that this decline in the student's academic performance proved to be short lived. While at Caron during the later half of the 2006-07 school year, the student earned "A"s and "B"s, including an "A" in Spanish (Parent. Ex. C at p. 15). During the 2007-08 school year, while at Vista, with the one exception of algebra, where the student's grade fluctuated between a "C" and a "C-," the student again received all "A"s and "B"s (Dist. Exs. 3; 14 at pp. 2, 3, 5, 6, 8; Parent Ex. I at p. 4). A review of the hearing record indicates that the student's 2006-07 Term 1 grades were probably not reflective of her full potential. Despite the Term 1 failure in Spanish, while the student was at the district's high school she received passing grades in all her other classes, including physical education (Dist. Ex. 5 at p. 4). Unlike the student in St. Pierre, who suffered greater than an 18 point decline in his GPA, and unlike the student in Muller, who was required to repeat a grade, needed remedial reading services and failed multiple subjects during successive school years; the alleged adverse educational impact on the student in this case was less significant and short lived (Dist. Exs. 3; 5 at p. 4; 13 at pp. 3-4; 14 at pp. 2, 3, 5, 6, 8; Parent Exs. C at p.15; I at p. 4).

The hearing record shows that the inability of the student to maintain the "A's" and "B's" that she had previously obtained at the parochial school, and the behavioral difficulties she had while at the district's high school, were the result of her increased substance abuse and not the result of an emotional disturbance as defined under the State and federal regulations (see N.C., 473 F. Supp. 2d at 543, 546 [holding that the student's demonstrated inappropriate behavior under normal circumstances was better described as social maladjustment and further that there was not enough evidence to show an adverse effect on educational performance]; 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). I find significant the student's own statement that she attributes her lack of motivation to perform well in school to her desire to emulate the motivations of her peer group who used drugs and put little effort into school (Dist. Exs. 1 at p. 4; 2 at p. 10). This rationale provided by the student is strongly supported by the hearing record,

³¹ A Caron psychological evaluation dated March 15, 2007 reported that the Spanish and math classes that the student attended were "advanced placement" classes (Parent Ex. C at p. 10; see also Tr. pp. 29, 64).

which reveals that at the same time that the student was at the district's high school, she was engaged in significant substance abuse. According to the student's stepmother, at the time that the student was attending the district's high school, the student was staying out all night with her friends (Tr. pp. 175-79). The hearing record also shows that at the time the student was at the district's high school, she was using marijuana regularly, experimenting with alcohol and with other narcotics, and combining narcotics with alcohol (Dist Exs. 1 at p. 2; 2 at p. 10; Parent Exs. C at p. 8; H at p. 10).³²

I note that this student does not have a history of learning disorders, has never been held back or had to repeat a grade, and has never received any special education services (Dist. Ex. 1 at p. 4). When discussing the student's poor performance in Spanish at the district's high school, the district's guidance counselor testified that it was not unusual for good students, like the student in this case, to do poorly in one class (Tr. p. 69). As noted above, the student has long grappled with significant behavioral issues such as self-injury, food restriction/ purging and a difficulty in forming relationships with others. With the help of outpatient therapy services, the student was able to manage these issues for many years without having any impact on her academic performance (Tr. pp. 169, 184; Dist. Ex. 2 at p. 23). It was only after the student's increased substance abuse during the 2006-07 school year that she experienced difficulty with her academics. I also find it significant that when the student's substance abuse ended and she began receiving substance abuse treatment at Caron and at Vista, her academic performance returned to its prior level. This correlation also suggests that the student's substance abuse was the causal factor which resulted in the slight decline in her academics.

For the foregoing reasons, I disagree with the impartial hearing officer's determination that the student's alleged emotional issues, in particular characteristic "(C)," had an adverse impact on the student's educational performance.³³ There is no evidence that the student's long-standing behavior issues resulted in her inability to maintain "A"s and "B"s while at the district's high school. I find that the student's academic performance difficulties were the result of her substance abuse. According to the student herself, she was merely emulating the social maladjusted motivations and behaviors of her peers. Therefore, I do not agree with the impartial hearing officer that the CSE should have classified the student as emotionally disturbed (see 34 C.F.R. § 300.8[c][4][ii]; 8 NYCRR 200.1[zz][4][ii]; see also N.C., 473 F. Supp. 2d at 544; Springer, 134 F. 3d at 664-65 [4th Cir. 1998]; A.E. v. Independent Sch. Dist. No. 25, 936 F. 2d 472, 476 [10th Cir. 1991]; Doe, 753 F. Supp. at 69-70 [D. Conn. 1990]) and I find that the student is not eligible to receive special education services under the IDEA.

Because I have found that the student is not a student eligible to receive special education programs and services as a student with a disability under the IDEA, the parents are not entitled

³² The hearing record also reveals that while the student was attending the district's high school, she reportedly had difficulty staying awake during class (Tr. pp. 65-66). It is unclear from the hearing record whether her inability to stay awake in class was the result of staying out with her friends or the result of prescribed medication (see Tr. pp. 75, 175-79).

³³ I also disagree with the impartial hearing officer's finding that the CSE relied exclusively on the student's performance at the district's high school to assess the educational impact of the student's disability (IHO Decision at p. 5). The hearing record reveals that the CSE considered documents from the district's high school, in addition to reports from Vista and from the private psychologist (Tr. pp. 28-29, 31, 42-43, 52-54; Dist. Exs. 10 at pp. 3, 4, 6; 13 at p. 2).

to tuition reimbursement and I need not reach the issue of whether or not Vista was an appropriate placement. The necessary inquiry is at an end (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142F. 3d at 134; Application of a Child with a Disability, Appeal No. 03-058; Application of a Child Suspected of Having a Disability, Appeal No. 03-058).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled in its entirety.

Dated: **Albany, New York**
 February 5, 2009

PAUL F. KELLY
STATE REVIEW OFFICER