



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-117

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] School District

Appearances:

Joyce B. Berkowitz, Esq., attorney for petitioner

Wayne A. Vander Byl, Esq., attorney for respondent

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that respondent (the district) appropriately determined that her son was not eligible for special education and related services as a student with an emotional disturbance. The appeal must be dismissed.

At the time the impartial hearing convened in September 2009, the student was enrolled in the district but was suspended as a result of a May 2009 superintendent's hearing (Tr. pp. 3-4; Joint Ex. 24). The student was not classified by the district as a student with a disability and his eligibility for special education and related services as a student with an emotional disturbance is in dispute in this appeal (Joint Ex. 25; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

With regard to the student's educational history, the student reportedly has a history of struggles with appropriately dealing with anger since elementary school and has required a variety of interventions including both in-school and out-of-school counseling (Joint Ex. 13 at p. 22). The hearing record indicates that the student began attending the district in seventh grade (Tr. p. 157; Joint Ex. 13 at p. 4). During the 2005-06 school year when the student was in eighth grade, he worked with a school counselor and a behavior plan was implemented in which the student was able to leave the classroom if he became angry (Joint Ex. 13 at p. 5). The student displayed behavioral difficulties during the ninth grade and, according to the parent, she sought assistance at one point with transporting the student to a local hospital (id.). At the parent's

request, the student was placed under "mental health arrest" and taken by police officers from his home to the hospital for evaluation (Tr. pp. 316-18; Joint Ex. 13 at p. 5). After several hours, the student was sent home from the hospital (Joint Ex. 15 at p. 5). The hearing record reflects that the student subsequently saw a psychiatrist who determined the student met the criteria for diagnoses of an oppositional defiant disorder (ODD), an intermittent explosive disorder and a "rule out" mood disorder, for which the psychiatrist prescribed treatment (Tr. pp. 159, 246-47, 322; Joint Exs. 11; 13 at p. 5). Throughout the ninth, tenth, and eleventh grades, the student participated in school-based counseling on an "as needed" basis and was provided with either a written or unwritten informal plan developed annually by district administrative staff, teachers and the counselor, in which the student could leave the classroom for the counselor's office if he became angry (Tr. pp. 249, 252-54; Joint Ex. 13 at pp. 2, 5). The student's behavior improved during the tenth grade but declined as the student progressed through the eleventh grade (Tr. p. 159; Joint Ex. 13 at pp. 1, 22). A disciplinary log maintained by the district records 45 incidents of problem behavior between 2005 and 2009, many involving the use of foul language, one involving punching a file cabinet, and one involving verbal threats and kicking a door (Joint Ex. 19), the latter of which is further described below.

In the latter portion of eleventh grade, an incident occurred on May 18, 2009 in the student's physical education class in which the student engaged in a verbal altercation with a classmate and began leaving the school gym to go to the counseling office (Tr. p. 134; Joint Ex. 13 at p. 8). Upon leaving the gym, the student was confronted by the physical education teacher and the assistant principal regarding his behavior and the student became upset, "dropped kicked open the door," used obscene language toward the other student, the teacher and a school resource officer (a State trooper), and the student verbally threatened to kill the other student (Tr. pp. 133, 293; Joint Exs. 13 at p. 8; 19 at p. 1).

A superintendent's hearing was held on May 26, 2009 to consider the student's suspension from school for a period in excess of five days (Joint Ex. 24). The student was accused of threatening to kill the other student and using foul language toward his teacher, the assistant principal and the State trooper, and leaving school grounds without permission (Tr. p. 133). The district's superintendent issued a decision dated May 26, 2009, which indicated that, at the superintendent's hearing, the student had been found guilty of the conduct as charged (Joint Ex. 24). The superintendent suspended the student through the end of the first semester of the 2009-10 school year in January 2010 (*id.*).¹ The superintendent also determined that the suspension might be conditionally set aside after the first marking period in November 2009, provided that the student completed an anger management program, maintained grades in the 70's and 80's, and had "no further incidents" (*id.*). The superintendent determined that the student would be able to attend the district's tutoring center for the duration of the suspension and stated that the student would be expected to complete his studies as assigned by the tutor, maintain good attendance and passing grades, and demonstrate appropriate behavior throughout the tutoring sessions (*id.*).

In a letter to the district's director of student services dated May 27, 2009, the parent requested that the district conduct educational, physiological, and central auditory processing

¹ The superintendent's decision indicated that the student would be able to return to the district high school for his final exams in June 2009 (Joint Ex. 24).

evaluations of the student within 60 days (Joint Ex. 26). The parent indicated that she wanted the evaluations conducted to confirm the student's previous diagnoses of an ODD and an intermittent explosive disorder (id.). The parent requested that upon completion of the evaluations, the district convene a Committee on Special Education (CSE) to accommodate the student for the 2009-2010 school year (id.).

On July 7, 2009, the district's school psychologist conducted a psychoeducational evaluation of the student (Joint Ex. 14 at pp. 1, 6). In the resultant evaluation report, the school psychologist indicated that the student was friendly, polite, and amiable and that he worked diligently, required only minimal breaks, and generally displayed attention that was on task throughout testing (id. at p. 2). The school psychologist described the student as having a "deliberate approach" to solving problems and answering questions, which he determined was a tendency that interfered with the student's performance on timed tasks (id.). The school psychologist noted that the student generally appeared comfortable during testing, except for a few instances when he appeared to be frustrated and was observed holding his breath and clenching his fists (id.). The school psychologist further indicated that in general, the student appeared to participate honestly, openly, and with adequate effort during the evaluation, and that the results of the evaluation appeared to be valid indicators of the student's intellectual, academic, social, and emotional functioning (id.).

According to the psychoeducational evaluation report, administration of the Wechsler Adult Intelligence Scale-III (WAIS-III) yielded a verbal IQ score of 112, a performance IQ score of 97, and a full scale IQ score of 105 (Joint Ex. 14 at p. 2). The student achieved standard scores (and percentiles) of 114 (82) in verbal comprehension, 101 (53) in perceptual organization, 102 (55) in working memory, and 80 (18) in processing speed (Joint Ex. 14 at p. 2). The school psychologist determined that the student demonstrated significantly stronger verbal reasoning skills than his other cognitive abilities and noted significant weakness in the student's visual-motor processing speed, which he indicated was a measure of the student's efficiency at completing a rote visual-motor task (id. at p. 5). According to the evaluation report, the student struggled on tasks that were time-dependent due to his slower visual-motor efficiency (id.).

Academically, the psychoeducational evaluation report indicated that based on grades and academic testing, the student's academic achievement appeared to be "largely at grade-level" (Joint Ex. 14 at p. 6). Administration of the Woodcock-Johnson Tests of Achievement-III (W-J III ACH) yielded a broad reading standard score (SS) of 96 (39th percentile), a broad math SS of 95 (37th percentile), a math calculation skills SS of 95 (36 percentile), a written expression SS of 91 (27th percentile), an academic knowledge SS of 103 (58 percentile), an academic fluency SS of 87 (20th percentile), and an academic applications SS of 103 (59th percentile) (Joint Ex. 14 at p. 3). The psychoeducational evaluation report indicated that the student's academic skills generally appeared to be commensurate with his ability (id. at p. 5). According to the school psychologist, the student had difficulty with tasks that required him to read and comprehend material quickly and accurately due to his difficulties with visual-motor efficiency (id.). The evaluation report indicated that difficulty with being able to quickly and accurately perform academic skills could make classroom performance "arduous" due to the effort and time required to complete basic level tasks (id.).

During the school psychologist's evaluation, the student was assessed using the Behavior Assessment Scale for Children-II (BASC-II), using the student's completion of the self rating scale: adolescent form, the parent's completion of the parent rating scale form, and a math teacher's and a tutor's completion of the teacher rating scale form (Joint Ex. 14 at pp. 3-4). In general, the reports from the student, the parent and the student's teachers described the student as being similar to other adolescents in most respects (id. at p.5). However, the student's mother reported more problem behaviors at home than the student's teachers reported at school (id.). According to the evaluation report, the student's responses reflected that he sometimes felt that he was blamed for things he did not do, sometimes considered his teachers to be unfair or uncaring, and had difficulty maintaining his self-control when faced with adversity (id.). The math teacher's responses reflected that the student would sometimes have difficulties maintaining self-control during adverse situations, and that the student could withdraw or appear pessimistic more than other students in the class (id.). The tutor's responses reflected that the student was similar to other adolescents in most areas (id.). The school psychologist opined in the evaluation report that, overall, social-emotional testing generally confirmed reports and observations of the student's behavior and that he was generally a polite, well-functioning student who could in certain instances exhibit explosive behavior, and who seemed to have difficulty recovering from adverse situations and managing his anger during those times (id.). The evaluation report further indicated that the student acknowledged this difficulty, and indicated that, when he became "emotionally charged" and his negative emotions dominated, he misinterpreted the intentions of others (id.). Although the student had difficulty coping with his emotions in school and at home, the school psychologist also reported that at times the student could successfully cope with frustration, as evidenced by his ability to keep a job for nearly a year and maintain a relationship with a girlfriend for longer than six months (id.).

The school psychologist recommended that the CSE consider the psychoeducational evaluation as well as other information to determine an appropriate educational program for the student (Joint Ex. 14 at p. 6). The school psychologist also recommended that the student should seek out academic programs that he found interesting and engaging; obtain notes for his classes to eliminate the stress of keeping up with note-taking; and that the student might require "slightly longer" time to complete classroom assignments (id.). The school psychologist further recommended that classroom teachers should attempt to avoid engaging in the "conflict cycle" with the student by addressing situations in a nonverbal manner, or individually with the student away from a peer audience to preserve the student's dignity (id.). Furthermore, the school psychologist indicated that the student needed to learn coping methods that were less threatening toward others when dealing with his frustration and, in addition, the student needed to realize that if his behavior patterns continued, there might be severe consequences for him and others, such as negative health effects and involvement with law enforcement including civil or criminal prosecution for some of his words (id.). The school psychologist stated in the evaluation report that the student needed to be held to consistent consequences for behavioral and verbal outbursts while, at the same time, he needed to be supported in his efforts to cope with his feelings more effectively (id.). Additionally, the student and his mother were encouraged to continue to seek consultation with a psychologist and a psychiatrist outside of school, and to "analyze the benefits and risks balanced against the student's future career and academic goals" (id.).

Upon the suggestion of the student's high school counselor and a referral by his pediatrician, a private educational evaluation of the student was conducted on August 12 and 14, 2009 (Joint Ex. 13 at p. 1). Administration of various formal tests indicated that the student's academic performance skills were in the low average to high average range, with significant discrepancies between the student's performance on verbal, nonverbal, visual-spatial, and auditory/verbal skills and abilities (id. at pp. 12-18). Overall, the private evaluation report reflected that the student displayed significant academic strength in his story recall skills and abilities, as well as in his naming facility skills and abilities, but showed significant weakness in his sound blending skills and abilities (id. at pp. 15, 19, 22). The August 2009 private evaluation report further indicated that the student exhibited difficulties with tasks requiring fluid reasoning and visual processing speed and perceptual speed (id. at p. 22).

The private evaluation report noted that completion of an instrument identified in the hearing record as the "DEMARLE INC"² by the student's eleventh grade teachers in June 2009, reflected that the teachers identified the student's strengths as his athleticism, intelligence, ability to hold himself accountable whenever he missed a class, tendency to be generally personable, friendly, and respectful, as well as that the student was "a great person" (Joint Ex. 13 at pp. 8-9, 21). The private evaluator determined that administration of social-emotional testing in June and August of 2009 revealed the student's "rigid inflexible style with some obsessive-compulsive traits," as well as clinically significant scores on behavior scales that were administered and which the private evaluator related to the student's diagnoses of an intermittent explosive disorder and an ODD, and borderline clinical range scores related to the student's diagnosis of a rule out mood disorder (id. at pp. 12, 13, 21-22). According to the private evaluation report, the student's teachers rated his social skill difficulties in the significant problem range due in part to his anger and explosiveness (id. at p. 22).

The private evaluator indicated that the student was "struggling significantly" at the time of the evaluation in August 2009, but that the student's struggle was not always apparent due to the nature of his disability (Joint Ex. 13 at p. 23). The evaluation report noted that, when things were going well for the student, he was consistently described as pleasant and responsible, but that when things were not going the way the student perceived they should or when confronted, he quickly became explosive and had little control over what he said or did (id.).

The private evaluator opined in the report that the student's struggles stemmed from a number of factors that included the student's rigid and inflexible style with "some obsessive-compulsive traits" and a tendency for "black and white thinking" and rigidity (Joint Ex. 13 at p. 23). The evaluator indicated that the student's tendency to become angry and have emotional outbursts was a form of anxiety reaction, and that, therefore, the student required additional individual counseling, which would help him learn strategies to deal with this difficulty and could also assist in ruling out an anxiety disorder and/or an obsessive-compulsive disorder (id.).

The private evaluator indicated that student's diagnosis of an intermittent explosive disorder led to a number of the student's struggles in school and to his emotional disability (Joint Ex. 13 at p. 23). The evaluation report indicated that although the student may present as "very

² The hearing record indicates the DEMARLE, INC. teacher form was obtained from another individual by the private evaluator who modified it for his own use (Tr. p. 164).

oppositional," his opposition appeared to "stem from his rigid inflexible style which leads him to become more oppositional and defiant" (*id.*). The private evaluator reported that there had been concerns in the past with regard to a possible mood disorder but that at the time of the educational evaluation in August 2009, the student did not describe himself as being depressed (*id.*). The private evaluator opined in the report that the student's mood could change rapidly once the 2009-10 school year began because of the student's aforementioned difficulties and the uncertainty about the student's present school situation, stating that "he presents at times with behaviors that . . . distance him from friends and others and that wear away at friendships and relationships" (*id.*).

The private evaluator recommended a combination of in-school and out-of-school supports, with the goal of building on the student's strengths while providing treatment and supports to address his specific areas of weakness (Joint Ex. 13 at p. 23). The evaluation report noted that the student would benefit from developing a connection with a mentor to help the student recognize the value of his school work and how it related to his other interests (*id.*). Additional recommendations included placement in "consultant teacher classes for core academic classes," resource room support, weekly counseling support, a functional behavioral assessment (FBA), a positively based behavior intervention plan (BIP) with a cueing system in the classroom to provide warnings for the student when he is getting angry, a system to allow the student to leave the classroom before he becomes upset, a follow-up system requiring the student to review the situation that made him upset, and a training system coordinated with the student's private therapist to practice relaxation strategies (*id.* at p. 24). Furthermore, the evaluation report included a recommendation for a series of meetings between the student, his family and a transitional planning counselor to discuss the student's areas of interest, "reconnect" him to the school curriculum, and to begin planning for his post high school academic and/or vocational program (*id.*). In regard to the student's educational placement, the educational evaluation report indicated that a first option was to return the student to his home school in September 2009 if possible, or in the alternative, consideration should be given to an out-of-district program such as the Board of Cooperative Educational Services (BOCES) "START program" (*id.*).³ The private evaluator also recommended modification of the student's testing procedures such as provision of an alternative setting (*id.*).

With regard to out-of-school recommendations, the private evaluator indicated that, among other things, the student needed counseling for himself and his family and "lifestyle changes" such as monitoring and reducing the student's solitary time with electronics, monitoring the student's level of actual sleep time, and ensuring the student's proper diet and exercise (Joint Ex. 13 at p. 25).

In a due process complaint notice dated August 21, 2009, the parent alleged that the district failed to: (1) refer the student to the CSE and identify the student as a student with a disability; (2) presume that the student was a student with a disability for disciplinary purposes; (3) determine if the student's behavior was a manifestation of his disability; (4) timely conduct an expedited evaluation of the student after referral to the CSE; (5) conduct an FBA and develop a BIP in accordance with State regulations; and (6) offer the student a free appropriate public education (FAPE) (Joint Ex. 22 at pp. 1-3). For relief, the parent sought a CSE meeting to: (1)

³ The hearing record does not contain a description of the "START program."

classify the student as a student with an emotional disturbance; (2) determine that the student's conduct in May 2009 was a manifestation of his disability; (3) return the student to school from suspension; (4) develop an individualized education program (IEP); (5) conduct an FBA and develop a BIP; (6) develop a transition plan; and (7) recommend special education services including consultant teacher services, resource room support, and counseling (id. at p. 4).

On August 27, 2009, the CSE convened for an initial meeting to determine the student's eligibility for special education services (Joint Ex. 25). The August 2009 CSE meeting attendees included the CSE chairperson, two special education teachers, the school psychologist, two assistant principals, two regular education teachers, the student's high school counselor, the student's father, the parent, the parent's husband, the private educational evaluator, an additional parent member, the parent's attorney, and the student (id.). At the August 2009 CSE meeting, the CSE considered, among other things, the input of the private evaluator and the school psychologist (Tr. pp. 46, 156-57). The hearing record indicates that the high school counselor was not asked and did not give her opinion during the CSE meeting regarding whether the student should be classified as a student with a disability (Tr. pp. 272-75). The August 2009 CSE meeting minutes indicate that the CSE determined that the student was not eligible for special education services (Joint Ex. 25).

An expedited impartial hearing was convened in September 2009. In a decision dated September 28, 2009, the impartial hearing officer determined that the student did not exhibit an inability to learn despite his disciplinary referrals and that he maintained satisfactory academic performance during the 2006-07 through 2008-09 school years (IHO Decision at p. 11). The impartial hearing officer concluded that the student was not eligible for special education as a student with an emotional disturbance (id.). The impartial hearing officer found that the district should have presumed that the student was a student with a disability for disciplinary purposes and referred the student to the CSE and that therefore, the district violated its child find responsibilities (id. at pp. 11-14). With regard to the parent's claim that the student was not timely evaluated, the impartial hearing officer determined that the district did not comply with State regulations requiring that the student be evaluated on an expedited basis within 15 days (id. at pp. 14-15). For relief the impartial hearing officer directed that the district convene a Section 504 meeting to determine if the student was eligible for services under that statute (id. at pp. 15-16).

The parent appeals, contending that the student's conduct in May 2009 was a manifestation of his disability and that the impartial hearing officer erred in determining that the student should not be classified as a student with an emotional disturbance. For relief, the parent seeks a determination that: (1) the district denied the student a FAPE; (2) the student is eligible for special education services as a student with an emotional disturbance; and (3) the student's conduct in May 2009 was a manifestation of his disability. Furthermore, the parent seeks an order directing the district to conduct an FBA, develop a BIP, return the student to school, and expunge the May 2009 incident from student's disciplinary record. The parent also seeks a determination upholding the impartial hearing officer's rulings that the district violated its child find obligations, failed to presume that the student was a student with a disability for disciplinary purposes, and failed to timely conduct expedited evaluations.

In its answer, the district denies that the student should be classified as a student with an emotional disturbance and urges that the impartial hearing officer's decision in this regard should be upheld. The district also asserts that the remaining issues have been rendered moot if the student is not eligible for special education and related services.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]). 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]).

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 law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning first to the parent's request that I affirm the portions of the impartial hearing officer's decision that were rendered in her favor, I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the parent is not aggrieved by the portions of the impartial hearing officer's decision rendered in her favor and, therefore, these issues are not properly before me. Furthermore, the district did not appeal the portions of the impartial hearing officer's decision that favored the parent. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the impartial hearing officer's determinations that the district failed to comply with State regulations with regard to conducting evaluations of the

student on an expedited basis,⁴ presuming that the student was a student with a disability for disciplinary purposes,⁵ and following child find procedures have become final and binding upon the district (IHO Decision at pp. 11-15; see Application of the Dep't of Educ., Appeal No. 08-092). In view of the foregoing, I decline to address these issues.

Turning next to the parties' contentions regarding whether the student should have been classified by the CSE as a student with an emotional disturbance, in order to be eligible for special education services as student with an emotional disturbance, the student 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., 496 F.3d 932, 944 [9th Cir. 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

⁴ State regulations provide that a CSE must conduct an expedited evaluation "no later than 15 days after receipt of parent consent for evaluation" and that the "[t]he CSE shall make a determination of eligibility of such student in a meeting held no later than five school days after completion of the expedited evaluation" (8 NYCRR 201.6[b]).

⁵ If a non-classified student violated any rule or code of conduct of the school district and the school district is deemed to have had knowledge that the student was a student with a disability prior to the behavior that precipitated disciplinary action, such student is a "student presumed to have a disability for discipline purposes" and his or her parent may assert the procedural protections found in Part 201 of State regulations (8 NYCRR 201.5).

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 the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-128; 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).

In challenging the impartial hearing officer's decision, the parent argues that the student met the following two of the five criteria for emotional disturbance: (1) inappropriate types of behavior or feelings under normal circumstances; and (2) a general pervasive mood of unhappiness or depression (Parent Mem. of Law at p. 10; see 34 C.F.R. § 300.8[c][4][C]-[D]; 8 NYCRR 200.1[zz][4][iii]-[iv]). With regard to the former, the hearing record reflects that the private evaluator indicated that the student's teacher noted that "when he has an 'off' day he becomes easily irritated, insulting, and testy" (Joint Ex. 13 at p. 9). However, the same teacher also noted that the day after an "off" day the student tended to apologize for his previous behavior (id.). According to the August 2009 educational evaluation report, several of the student's eleventh grade teachers completed the DEMARLE INC teacher form in June 2009 regarding the student (id. at pp. 8-9). One teacher indicated that the student displayed strengths in his ability to hold himself accountable whenever he missed a class and he always checked to see what he had missed when he was absent (id. at p. 8). The student's business teacher described the student as being generally personable, friendly, and respectful, as well as being a "great person" (id. at p. 9). The student's football coach noted the student's intelligence and athleticism, but reported that the student's outbursts eventually lead to his dismissal from the football team (id.). The educational evaluation report further indicated that the student's eleventh grade history teacher noted on the teacher form that the student was very intelligent and was very polite and respectful toward the teacher (id.). The educational evaluation report also indicated that the student's eleventh grade math teacher described the student on the teacher form as a quiet, well-behaved student who completed his homework (id.).

An excerpt from the transcript of the May 2009 superintendent's hearing indicated that the student did not recall swearing at the State trooper and that the student stated that when he gets angry, he tends to "just black out" and "say things" (Joint Ex. 23 at p. 1). However, during the superintendent's hearing, the student also stated that he was aware that he could not "get along in life" with that kind of behavior (id. at pp. 1-2). The student remarked that he had a problem with his anger at school and that, therefore, he had not done well (id. at p. 2).

The student also testified at the superintendent's hearing that his manager at work was "horrible" and "very strict;" however, he stated that he tended to "just take it in stride" because "[y]ou can't keep going off at your teachers and if you do this to a boss, you will get fired" (Joint Ex. 23 at p. 2). When asked by the superintendent whether he could control his behavior at work the student responded "[y]es, I can" (id.).

In his evaluation report, the private evaluator noted that the student left classes when he became upset (Joint Ex. 13 at p. 8). In one instance, the both the student and the parent reported that the student regularly skipped his co-taught astronomy class, which was alternately taught by two teachers (Joint Ex. 13 at p. 8). The student also reported that he skipped English classes (id.). However, in the case of the astronomy class, the student explained he left the class each time a particular co-teacher taught because he did not like her (id.). Similarly, the student reported that he skipped his English classes because he was frustrated with the way in which the teacher asked him to write essays differently than he had in the past (id.).

The student's private evaluator testified that individuals with an impulse control disorder were very limited in their ability to control outbursts (Tr. 172-73). The district's school psychologist noted in his testimony that, despite having incidents that have resulted in discipline, the student is able to identify "stressors" or instances which lead to difficulties and understand his feelings that lead to emotional responses (Tr. pp. 32-33). The school psychologist indicated that it is unusual for an individual with inappropriate behavior or feelings to "understand the chain of events" and exhibit the level of insight that the student possesses (id.). He further testified that the student has a "pretty clear idea of . . . what the stressors were . . . [and] he is able to cope with those feelings without exploding" (id.). In view of the forgoing evidence, I find that the student does not exhibit inappropriate types of behavior or feelings under normal circumstances.

The hearing record also does not reflect that the student exhibited a generally pervasive mood of unhappiness or depression. Although there is evidence regarding the student's difficulties with frustration, anger and aggression, the student's mother reported that the student's mood was generally happy (Joint Ex. 13 at pp. 10-11). The student's mother also reported that socially, the student did well with making and with keeping friends (id. at p. 11). With regard to the student's diagnosis of a "rule out mood disorder," the private evaluator testified that "rule out" indicated that an individual meets some, but not all of the criteria for a diagnosis of a mood disorder [Tr. p. 199]. According to the private evaluator, depression, and dysthymia are sub-diagnoses of mood disorders and that based upon the screening instruments he administered, the private evaluator concluded that the student was not depressed at the time of the evaluation (Tr. pp. 200-01). The private evaluator also testified that "his mood is normal, but he tends to be a little more on the down side" (Tr. p. 224). Under the circumstances of this case, I find that the

hearing does not support the conclusion that the student exhibited a generally pervasive mood of unhappiness or depression.

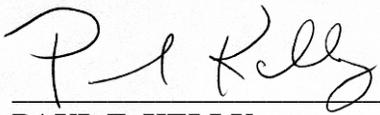
I note also that academically, the student has generally performed well, with most but not all, of his grades falling in the B to C range (Joint Exs. 14 at p. 1, 17A; 17 B). The student's report card for eleventh grade indicated that he earned 6.50 credits during the 2008-09 school year, and by September 2009, he earned a cumulative, unweighted grade point average of 80.5 and earned 21.25 credits toward graduation from high school (*id.*). The district superintendent testified that, based on the student's previous and current academic performance at the time of the impartial hearing, it was anticipated that the student would graduate at the end of the 2009-10 school year (Tr. p. 139). Although the school psychologist provided recommendations for interventions to reduce the student's frustration and strategies for avoiding conflict cycles (Joint Ex. 14 at p 6), he also testified that the student did not require special education services (Tr. pp. 26-27). Furthermore, the district's director of student services testified that, with regard to the private evaluator's recommendations for consultant teacher services and resource room support, the student did not require academic support services, which is consistent with the evidence regarding the student's academic performance (Tr. pp. 105-06).

In view of the evidence above, I find that, at the time of the August 2009 CSE meeting, the student did not meet one or more of the criteria for eligibility as a student with an emotional disturbance. Even if the student had met one of the criteria, I find that the hearing record does not indicate that the student requires special education services as a result. Therefore, I find that there is no reason to modify the impartial hearing officer's conclusion that the student is not eligible for special education services as a student with an emotional disturbance (IHO Decision at p. 11). Consequently, as the student does not meet the criteria for classification as a student with a disability, he is not entitled to the remedies available under IDEA.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 4, 2009**



**PAUL F. KELLY
STATE REVIEW OFFICER**