

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

August 7, 2006

06.041H – Parent v. Bath

REPRESENTING THE FAMILY: Kate Leifeld, Esq., Kids Legal Aid of Maine

REPRESENTING THE SCHOOL: Eric Herlan, Esq., Drummond Woodsum &
MacMahon

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on July 12 and 13, 2006, at the District Court in West Bath, Maine. In addition to counsel and the hearing officer listed above, those present for the entire proceeding were the Student's Mother and Bonnie Violette, Director of Special Services for Bath School Department. Present for part of the hearing were Katherine Bubar, Esq., attorney at Drummond Woodsum & MacMahon; Kim Chabot, the Student's case manager from Sweetser; Chet Randall, Esq., co-counsel for the Parent; Sara Stewart, summer associate at Drummond Woodsum & MacMahon; and Martha Witham, Superintendent of Bath School Department. Testifying at the hearing under oath were:

Michael Broderick, Ph.D., psychologist
Holly Corrigan, teacher, Bath Middle School
Larry Dyer, Principal, Bath Middle School
Mother of Student
Linda Hoch, M.S., NCSP, psychological examiner
Scott Hoch, Ph.D., psychologist
Jeremy LaRose, teacher, Bath Middle School
James Morin, teacher, Bath Middle School
Bonnie Violette, Director of Special Services, Bath School Department

I. PROCEDURAL BACKGROUND

The Parent filed a request for this due process hearing on May 12, 2006, on behalf of her son, xx-year-old Student. A prehearing conference was held on June 14, 2006. Present were the Parent, Kate Leifeld, Esq., Bonnie Violette, Eric Herlan, Esq., and Rebekah Smith, Esq. Both parties submitted prehearing memoranda. Documents and witness lists were exchanged in a timely manner. The hearing officer provided a post-prehearing memorandum summarizing the issues for hearing and the evidentiary issues presented.

Subsequent to the prehearing conference, the school obtained subpoenas for the testimony of the Student as well as for the Student's mental health and juvenile criminal records related to the Student. The Parent voluntarily provided the Student's mental health records from Sweetser, a community family services provider, which were redacted by the hearing officer for privileged material after an in camera review, and the school withdrew its request for the Student's juvenile criminal records, except that it continued to seek the Student's forensic psychological evaluation. The Parent sought to quash the subpoenas for the Student's testimony and the production of his forensic psychological evaluation. The Commissioner of the Department of Education sought the hearing officer's recommendations, which were provided, and subsequently quashed the subpoena for the Student's testimony but let stand the subpoena for the production of the forensic psychological evaluation. The District Court, on the Parent's motion, released the forensic evaluation to the Parent who then provided it to the school. Protections were agreed to by the parties wherein all copies of the Student's mental health records from Sweetser and the forensic evaluation will be returned to the Parent at the conclusion of

these proceedings and any appeal therefrom. [sic] The redacted versions of these documents will remain a part of the official record.

The hearing was held on the dates noted above after the parties jointly requested an extension of the original hearing dates due to the lack of availability of counsel and witnesses. The family submitted 31 documents, comprising 35 pages, all of which were accepted into the record (hereinafter P-1 to P-35). The school submitted 55 documents comprising 253 pages, all of which were accepted into the record (hereinafter S-1 to S-253).

At the conclusion of the hearing, I granted the parties' joint request that the record remain open until July 24 to allow the submission of written closing arguments.

II. ISSUES

- a. Whether Bath School Department violated the Individuals with Disabilities Education Act ("IDEA") or Maine special education law by failing to find the Student eligible for special education services as a student with a specific learning disability in math?
- b. Whether Bath School Department violated the IDEA or Maine special education law by failing to find the Student eligible for special education services as a student with an emotional disability?

III. FINDINGS OF FACT

1. The Student is a xx-year-old student who recently completed the xxx grade at Bath Middle School. (S-187.)
2. The Student first entered the Bath School Department in xx grade. In xx and xx grades, the Student received multiple scores of "3" in math on his report cards, indicating that he was "progressing slowly." He also had already begun to fail to complete homework. During the Student's xx grade year, he was out for the entire second quarter due to an allegation that he made a bomb threat. He was retained that year and went

through xx grade again. At the end of his second year in xx grade, the Student's teachers remarked that he was capable of achieving higher scores in most areas but that he rarely completed homework on time. (S-251-253; Testimony of the Parent.)

3. The Student attended Bath Middle School for grades xx through xx. Larry Dyer, principal of Bath Middle School, was assigned to be the Student's mentor towards the beginning of the Student's xx grade year. As his mentor, Mr. Dyer met with The Student one to three times a week. During xx grade, this program was successful for the Student, who sought out Mr. Dyer regularly. All xx grade students had a homework planner that went back and forth between home and school, which worked well for the Student. In xx grade, the Student passed all of his classes with grades ranging from D to A and was absent only thirteen and a half days. (S-93; Testimony of the Parent; Larry Dyer; James Morin.)

4. Shortly after the Student began xx grade, he informed Mr. Dyer that he did not wish to continue meeting with him and that something had happened that he did not wish to talk about. In xx grade, the Student's grades began to fall. He passed several classes but received incompletes in others and was required to attend summer school. Teachers remarked on the Student's report card that his attendance was poor, he did not complete homework assignments, and he did not come to class prepared. The Student was absent fourteen days in xx grade. The Parent testified that her request to continue the use of a homework planner in xx grade was refused. (S-92; Testimony of the Parent; Larry Dyer.)

5. In xx grade, the Student failed several classes. Teachers remarked on his report card that he did not come prepared to class, was not completing his homework, and needed to

take a more serious approach to school. He was absent thirty-nine days, including one three-day suspension, and was given detention thirty-four times. (S-91; S-153-162.)

6. At the end of the Student's first year in xx grade, he was promised that successful completion of summer school would ensure his promotion to xx grade at Morse High School, which he wished to attend. The Student did not complete the summer school program and was therefore retained for a second year of xx grade. (Testimony of Larry Dyer.)

7. In August 2005, Dr. Ledro Justice, a psychiatrist at Sweetser, diagnosed the Student with depression and prescribed Seroquel. The Parent informed the school that the Student was taking Seroquel, so that he could be observed for side effects, but she did not specify the diagnosis underlying the prescription. The Parent reported that prior to taking Seroquel, the Student would often wake after a few hours of sleep and be unable to return to sleep the entire night. The Parent testified that the Seroquel greatly improved the Student's ability to sleep. (Testimony of The Parent.)

8. Also in August 2005, Eileen Boardman, L.C.S.W., of Sweetser, assessed the Student as being at high risk for needing crisis intervention services and recommended that the Student be placed in a residential facility as soon as possible. Based on the Parent's reporting, Ms. Boardman described the Student as a teenager who chronically ran away from home, was picked up by police, and who hung around with older people in their late teens and early twenties who had criminal histories. This evaluation was not provided to the school until this due process proceeding. (S-195-197; Testimony of Bonnie Violette.)

9. Following Ms. Boardman's assessment, Mark Dionne, M.S.W., of Sweetser, began providing Home-Based Multi-Systemic Therapy ("MST") services to the family with the

goal of decreasing the Student's oppositional behaviors at home and in the community.
(S-199.)

10. Returning to school in the fall of 2005 for his second attempt at xx grade, the Student was placed in a newly-created "Outreach" program at Bath Middle School. The Student had stated to school staff that he wished to have fewer teachers because he wished to have fewer people setting rules for him. The Outreach program was created for approximately six students who were having problems in school due to lack of attendance and homework completion. Students took part in mainstream classes for much of the day but were in the Outreach classroom for Language Arts and study halls. The program also allowed The Student to take part in a community karate class, which he enjoyed. The Student did well in the program until a system of points was applied to keep the students accountable. After that, the Student was disruptive in the Outreach classroom and confrontational with the classroom teacher, swearing at her and raising his middle finger at her on occasion. The Student repeatedly requested to be removed from the program and the Parent repeatedly indicated that she felt the program was not working. (S-64; S-131-133; S-136-138; Testimony of Larry Dyer; Bonnie Violette.)

11. In October 2005, the Parent requested in writing that the Student be tested for eligibility for special education services. (S-90.)

12. On November 3, 2005, a "staffing meeting," often the first step in the Bath school system after the referral of a student for possible identification, was held to discuss the Student's referral to special education. His teachers reported that the Student's frequent absences due to suspensions negatively impacted his ability to succeed. They also stated that he was regularly failing to turn in his homework. Larry Dyer, Bath Middle School

Principal, noted that he had informed the Student that he would be promoted to xx grade at Morse High School in January if he passed all of his courses in the fall semester. The Student's request to be removed from the Outreach program was denied.

Psychoeducational and psychological evaluations were scheduled for the Student. (S-84-89.)

13. In January 2006, Arthur DiRocco, Ph.D., conducted a diagnostic evaluation of the Student pursuant to the Student's involvement in the juvenile court system, including a clinical interview with the Student, interviews with the Parent, the Student's probation officer, and the principal of Bath Middle School, and application of the Mental Status Checklist for Adolescents, Millon Adolescent Clinical Inventory, and Schema Questionnaire. Although evasive at the start, the Student warmed up and successfully completed the evaluation. (S-240-250.)

14. Dr. DiRocco noted that the Student had been referred for the evaluation as the result of a "disturbing escalation of events . . . that consist of an evident disregard for authority or rules despite repeated sanctions from school, home, and legal domains." He diagnosed the Student as having both Conduct Disorder and Oppositional Defiant Disorder. Dr. DiRocco's evaluation did not reveal any mood or emotional disturbances such as anxiety, depression, or hopelessness. Dr. DiRocco found that the Student had a tendency to engage in behavior using coercion, deception, or lying as a means to get what he desired. The Student's testing showed a heightened likelihood of acting out with minimal provocation due to intense distrust and a belief that others would take advantage of him unless he attacked them first. Dr. DiRocco reported that the Student had found ways since xx grade to avoid complying with expectations for his behavior. Nevertheless, Dr.

DiRocco noted that the Student was capable of presenting as a charming individual and had the ability to fit in with peers when he desired. Dr. DiRocco concluded that the Student had the behavioral and emotional ability to focus and direct his actions. He reported that although many of the Student's relationships were superficial, his strongest connections were likely to be with peers who shared his asocial views and values. This evaluation was not provided to the school until subpoenaed in this proceeding.

(Testimony of Bonnie Violette; S-241; S-245-249.)

15. On January 6, 2006, the Student was suspended, his seventh suspension of the year, for nine days. As a result of the school's refusal to allow the Student back to school while the terms of the behavioral contract were being finalized, the Student missed eighteen additional school days after the suspension ended. Under the behavioral contract, the disruptive use of profanity was subject to a ten-day suspension as well as possible expulsion. (S-51; S-120; Testimony of the Parent.)

16. On January 17, 2006, a Pupil Evaluation Team ("PET") was convened to determine the Student's eligibility for special education services. The Team reviewed teacher progress reports as well as psychological and psychoeducational evaluations of the Student. (S-58.)

17. The PET reviewed a psychoeducational evaluation of the Student performed by Linda Hoch, M.S., NCSP, a licensed psychological examiner contracted by the school. Ms. Hoch's evaluation consisted of a review of the Student's records, an interview of [sic] the Student, and application of the Woodcock-Johnson Tests of Cognitive Ability - III and Achievement - III. The Student was polite, engaged, and cooperative for the evaluation. (S-69-70; Testimony of Linda Hoch.)

18. He received a score of 113 on general intelligence testing, classified in the High Average range and ranked at the 82nd percentile. In the cognitive ability testing, the Student received a score of 81 in his processing speed on math, placing him in the 10th percentile, at the low end of the Low Average range. In the achievement testing, the Student received a score of 65 in math fluency, placing him in the 1st percentile. The Student correctly answered all of the questions he got through in the three-minute subtest for math fluency, but did not answer many questions. He fared better in the math calculation subtest, scoring in the 24th percentile, and in applied problems, scoring in the 38th percentile. Although his performance on the Broad Mathematics Cluster was in the 19th percentile, in the upper end of the Low Average range, his broad math skills were significantly discrepant from his overall ability score, with a deviation above the 1.5 significance level used by Bath. (S-69-73.)

19. Ms. Hoch felt that the Student's math fluency score, an outlier, was less valid than other scores because the test was shorter than other tests and because the Student had chosen to be completely accurate and had therefore not gotten through many questions. Ms. Hoch concluded that the Student did not have a specific learning disability in math because the test results were skewed by the one particular subtest and because the Student's performance in math class and on standardized tests did not reveal any evidence of a processing disorder. She did, however, believe that the Student's weakness in the area of processing speed would present him with some difficulties. (S-60; Testimony of Linda Hoch.)

20. According to the Student's xx grade math teacher, Holly Corrigan, the Student was able to apply math concepts, quickly determine answers, and share them in class, even

when he had missed significant portions of instruction. Ms. Corrigan noted that she had allowed the Student to lend his notes to a student who had missed class since his notes were neat and organized. (S-53; Testimony of Holly Corrigan.)

21. On the “Wrap It Up!” standardized math assessment, given in xx grade, the Student showed proficiency in measurement but only partially met standards in patterns and relations. Ms. Corrigan testified that the Student focused on the bonus question in the patterns portion of the test, despite her recommendation that he complete the basic test first, and he ran out of time, which caused him to only partially meet the standard. On the Maine Assessment Portfolio test, also given in xx grade, the Student showed proficient or sophisticated demonstration of mathematical reasoning, mathematical communication, and discrete mathematics. In xx grade, the Student had scored in the 97th percentile nationally against other xx grade students in the area of math. (S-97-108; S-110; Testimony of Holly Corrigan.)

22. The Team also reviewed the psychological evaluation and risk assessment of The Student performed by Scott Hoch, Ph.D., a licensed clinical psychologist. Dr. Hoch’s evaluation consisted of a clinical exam, a mental status exam, interviews with school staff, a review of the Student’s record, and application of the Millon Adolescent Clinical Inventory, Incomplete Sentences, Rorschach, and Thematic Apperception Test. The Student was friendly and cooperative for the testing. (S-65; Testimony of Scott Hoch.)

23. Dr. Hoch diagnosed the Student as having Conduct Disorder and Oppositional Defiant Disorder, accompanied by histrionic and anti-social personality traits. Dr. Hoch’s testing revealed no evidence of depression or anxiety, nor any behavior that was interfered with by emotions or thoughts. The Student reported that he had trouble

sleeping because he would stay out too late, but that the Seroquel helped him to sleep.

Dr. Hoch concluded that the Student's behavioral problems were a symptom of social maladjustment and not an emotional disorder. (S-66-67; Testimony of Scott Hoch.)

24. Dr. Hoch concluded that the Student had formed satisfactory relationships with teachers and peers based on teacher input as well as on the Student's statements that he enjoyed staying out all night, hanging out with his friends, and partying. (S-66; Testimony of Scott Hoch.)

25. At the PET, the Student's teachers reported to the Team that the Student's poor grades were the result of his failure to complete the vast majority of his homework assignments and that he was able to do grade level work in class. The Student's PET Team, without the agreement of the Parent, concluded that the Student did not have a specific learning disability in math. (S-52; S-54-55; S-58-60; Testimony of Bonnie Violette.)

26. With regard to an emotional disability, the Team, by consensus, ruled out criteria A, D, and E from the definition of emotional disturbance or disability in 34 C.F.R. § 300.7(c)(4)(i) and Maine Special Education Regulations ("*MSER*") § 3.5. Teachers felt that The Student had good relationships with them and with peers and was able to get along with others in the classroom. The Team, except for the Parent, thus determined that the Student did not fit within category B, characterized by "[a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers." (S-52; S-54-55; S-59; Testimony of Bonnie Violette.)

27. Reviewing criteria C, regarding inappropriate behaviors in normal circumstances, the Team felt that The Student was able to use appropriate conduct in all classrooms except

for the Outreach classroom, in which he did not want to be. The Student's other inappropriate behaviors were noted to occur mainly in hallways or during in-school suspensions. The Team, again without the agreement of the Parent, concluded that the Student's inappropriate behaviors were the result of social maladjustment and thus specifically excluded from the definition of emotional disability by 34 C.F.R.

§300.7(c)(4)(ii) and *MSER* § 3.5. It was also decided that the Student would be removed from the Outreach program and placed in a regular xx grade classroom. (S-59-60; Testimony of Bonnie Violette.)

28. On January 24, 2006, The Parent requested an independent evaluation of the Student to which the school agreed. (S-57; Testimony of Bonnie Violette.)

29. Around the start of April 2006, the Student began to receive tutoring provided by Bath for two to four afternoons a week. The Student completed several assignments during the tutoring and was respectful and appropriate. (S-14.)

30. Also in April, Malinda Cote, a Behavioral Specialist with the Bath School District, conducted a Functional Behavioral Assessment of the Student. Ms. Cote found that the Student's behaviors, such as refusing to follow directions, using inappropriate language, engaging in aggressive, violent, and sexually harassing behavior, were interfering with his educational progress. She recommended graduated levels of response to the Student's inappropriate behaviors, beginning with a reminder of appropriate replacement behaviors, followed by an in-school suspension, followed by sending the Student home. These recommendations were not implemented. (S-18-20; Testimony of Larry Dyer; Bonnie Violette.)

31. On April 27, 2006, the Student's PET met again to consider the psychological assessment of the Student by Michael Broderick, Ph.D., the independent evaluator selected by the Parent. Dr. Broderick's assessment included a clinical interview, record review, and application of the Weschlser [sic] Intelligence Scale for Children, Wisconsin Card Sort Test, Child Behavior checklist, Brown ADD Scales, Minnesota Multiphasic Personality Inventory, and Rorschach. In addition, Ms. Corrigan filled out a Behavior Rating of Executive Function and Teacher Report Form and the Parent filled out a Behavior Rating of Executive Function. The Student was cooperative after an initial negative reaction when he learned that the testing would take up the whole day. (S-22-23; Testimony of Michael Broderick.)

32. Dr. Broderick diagnosed the Student with Conduct Disorder. Dr. Broderick did not observe any symptoms of depression, anxiety, or a thought disorder in the Student. Dr. Broderick concluded that the Student was "not impulsive per se in terms of lacking resources or capacities for self-control" and did not "appear impulsive in terms of limited resources to be able to cope." The Student's test results suggested that he "simply decides not to control himself," despite the fact that he is "quite capable of controlling his behavior and avoiding emotional outbursts and impulsive actions." Although Dr. Broderick found that the Student did not have a consistent way of coping compared to others his age, "in general he has more than adequate capacities to deal with most stress in his life without becoming overwhelmed or overly upset." (S-28; S-32; Testimony of Michael Broderick.)

33. Although Dr. Broderick agreed that the Student was socially maladjusted, he believed that the Student had a "chronic inability" to form satisfactory interpersonal

relationships that stemmed from an emotional disability. The Student reported to Dr. Broderick that he had few friends at school because he lived in his own world. Dr. Broderick also concluded that the Student's deeply entrenched attitudes, including his perceived need to outwit others before they outwit him, led him to make poor choices. He felt that the Student had a hard time expressing and regulating his emotions appropriately. He also felt that the Student lived largely in a fantasy world that was not consistent with others' views. Dr. Broderick believed that the Student's social skills allowed him to maintain superficial relationships but that he was not able to build or maintain meaningful long-term intimate relationships. (S-33-34; Testimony of Michael Broderick.)

34. In terms of the Student's executive functioning, Dr. Broderick's testing and the Parent's ratings revealed that the Student had above average skills in terms of the ability to shift cognitive strategies and in his capacities for strategic planning, organized searching, and goal-oriented behavior. Nevertheless, the evaluation that Ms. Corrigan completed for Dr. Broderick, based on the Student's behavior both inside and outside her classroom, indicated significant dysfunction in terms of regulating his behavior, shifting his focus, and planning and organization. Dr. Broderick believed that these deficits would affect the Student's ability to complete homework in an unstructured environment. He also suggested that the Student would have difficulty setting long-term goals and realistic subgoals along the way as a result of these problems in executive functioning. (S-34-36; Testimony of Michael Broderick.)

35. With regard to a specific learning disability in math, Dr. Broderick's testing did not reveal any processing disorder or deviation between ability and achievement in math,

although Dr. Broderick hypothesized that the Student's "processing style" was problematic such that "when the Student processes information from his environment, he tends to take in more information than he can organize efficiently and to examine situations more thoroughly than is generally required." Dr. Broderick concluded that if in fact the Student did have such a processing style, it would result in a "perfectionist learning style which promotes performance anxiety and limits his willingness to take intellectual risk or to entertain the possibility of making mistakes." Dr. Broderick felt that the Student's low math fluency score on Ms. Hoch's testing signaled a specific learning disability in math. (S-35; Testimony of Michael Broderick.)

36. The Team, without the agreement of the Parent, again concluded that the Student did not have a specific learning disability or an emotional disability. The Student accepted the school's offer to attend school until mid-day and have afternoon tutoring for the rest of the year. (S-11; Testimony of Bonnie Violette.)

37. The Student's MST therapy with Mark Dionne ended in April 2006. Mr. Dionne concluded that the Student's behaviors at home had become more manageable, although in March Mr. Dionne counseled the Student on being somewhere he was not supposed to be without his mother's knowledge. (S-214; S-239.)

38. During the Student's second year in xx grade, completed in June 2006, he failed all of his classes except for math, which he passed with a D-plus. According to teacher remarks on his report card, his low grades were the result of poor attendance and incomplete projects. Despite his failing grades and poor attendance, the Student was promoted to xx grade at Morse High School because Bath Middle School staff felt that it would serve no academic purpose to retain him again, particularly given his desire to

attend Morse High School. Jeremy LaRose testified that he believed that the Student knew he was going to be promoted at the end of his second xx grade year regardless of his grades. (S-187; Testimony of Larry Dyer; Jeremy LaRose.)

39. By the end of the 2005-2006 school year, the Student had been suspended ten times for a total of forty-nine days and had been absent an additional forty-three days (eighteen of which were during the negotiation of the behavioral contract). In addition, he had received nineteen detentions. The suspensions were for behaviors that ranged from skipping detention or refusing to take off a hat to very serious vulgar outbursts directed at other students or school staff. A few of the suspensions were for sexually harassing female students. The Student also was suspended for striking another student after following him to an area of the school in which he was not supposed to be. In the only incident involving damage to school property, the Student punched a hole in the wall after swearing at the Outreach teacher when she told him he had to complete his work before he could watch a movie. (S-114-146; Testimony of Bonnie Violette.)

40. None of the Student's disciplinary referrals occurred in classrooms other than the Outreach classroom, and the majority resulted from behaviors exhibited in the In School Suspension Room, the hallways, or the cafeteria. (S-59; S-114-146.)

41. Principal Dyer testified that the Student understood what was expected of him and the consequences of bad behavior. He stated that the Student always seemed in control of his actions, even when his behavior was inappropriate. (Testimony of Larry Dyer.)

42. Despite the Student's inappropriate behaviors outside of his classrooms, inside the classroom he was eager to participate, polite, and pleasant, with appropriate social skills. He understood the behavioral expectations of him in class and was able to meet them.

His teachers felt they had good relationships with the Student in which he appropriately engaged with them and responded to them. The Student was able to sit down next to almost anyone in class and he worked well in groups, whether assigned or selected.

(Testimony of Holly Corrigan; Jeremy LaRose; James Morin.)

43. The Student was also able to master classroom material when he was present. He often provided more insightful answers than other students in the class. (Testimony of Holly Corrigan; Jeremy LaRose; James Morin.)

44. The Student did poorly in his courses due to his failure to turn in homework both when he was in class and for periods during which he was suspended or otherwise absent. When informed by one teacher that he would get a zero for all uncompleted assignments but that he could turn his homework in late with no penalty, the Student indicated that he was willing to accept zeros and turned in only two of twenty assignments. The Student was also described as shrugging off his failure to complete homework and the effect it would have on his grades. The Student reported that he liked his academic day to end when school ended and that he brought homework home but never removed it from his backpack. (S-22; S-60; Testimony of Holly Corrigan; Larry Dyer; Jeremy LaRose; James Morin.)

45. The Parent testified that the Student found his homework overwhelming and was unable to focus long enough to complete it. The Parent found that as a result of the Sweetser therapy, the Student has been more obedient at home. The Student's Parent testified that he has two friends, but spends most of his time at home by himself. She states that he does not attend parties. The Parent testified that although in the summer of 2005 she did have a problem of the Student leaving the house without permission, this

behavior ceased after a few months. The Parent agrees with Dr. Broderick's assessment that the Student lives in a fantasy world and disputes Dr. Hoch's conclusion that the Student had friends with common interests, noting that Dr. Hoch did not interview her. (Testimony of the Parent.)

IV. DISCUSSION AND CONCLUSIONS

Parent's position: The Parent contends that the Student has a specific learning disability in math, arguing that he exhibited both a processing disorder and a severe discrepancy between his general intellectual ability and his achievement scores in math. The Parent argues that Ms. Hoch's conclusion that the deviation was less relevant because the very low math fluency score brought down the math cluster score is not supported by special education law. The Parent further relies on Dr. Broderick's suspicion that the Student had a peculiar processing style that caused him to work more slowly than expected and suggests that the Student's historical failure to complete assignments in math was due to his difficulty processing mathematical information.

The Parent also contends that the Student is eligible for special education due to an emotional disability. The Parent does not argue that the Student is not socially maladjusted, but contends that the Student additionally has an emotional disability. First, the Parent contends that the Student is unable to maintain satisfactory relationships. The Parent argues that the Student's reports to several evaluators of an active social life are inaccurate and were contradicted by the Parent's testimony. The Parent also points out that the Student's teachers were not able to identify his friends, even though they testified that he easily socialized with the students in the classroom, as an indication that the Student is able to form superficial but not satisfactory relationships.

Second, the Parent argues that the Student exhibits inappropriate behaviors under normal circumstances. The Parent contends that the Student's failure to stay out of trouble and pass his classes in the first half of his second year in xx grade, despite the promise of promotion to the high school, indicates that he cannot control his negative behaviors. The Parent also relies on the findings of Dr. Broderick that the Student was less accurate in his perceptions in uncommon and unclear situations and argues that this caused the striking distinction between the Student's appropriate behavior in class and his inappropriate behaviors outside of the structured environment of the classroom.

School's position: Bath contends that the Student is not eligible for special education services under either classification. With regard to a specific learning disability in math, the school relies on the Student's math teacher's testimony that the Student is able to perform math at grade level when he applies himself as well as his success in standardized testing in math. The school maintains that the discrepancy found in Ms. Hoch's testing was the result of a singular low math fluency score and relies on Dr. Broderick's finding that the Student did not have a processing disorder as well as on the conclusions of Ms. Hoch and Dr. Hoch that the Student did not have a specific learning disability in math.

With regard to an emotional disability, the school contends that the Student's diagnosis of Conduct Disorder should be equated with social maladjustment and that the Student does not have an accompanying emotional disability that makes him eligible for special education. With regard to his inappropriate behaviors, the school contends that such behaviors were under the Student's control, relying on the conclusions of Dr. Hoch that the Student acted inappropriately when it served his purpose and of Dr. Broderick

that the Student had the ability to control himself but sometimes chose not to. With regard to interpersonal relationships, the school argues that the Student has been able to form satisfactory relationships with his teachers as well as peers and takes issue with Dr. Broderick's definition of "satisfactory," arguing that it rises far beyond reasonable expectations for an xx grade boy.

A. Specific Learning Disability in Math

A specific learning disability is defined in special education law as a "disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations," *MSER* § 3.11; see also 20 U.S.C. §1401(30)(A). A PET may determine that a student has a specific learning disability in math if the Student, in the areas of mathematical calculation or mathematical reasoning, has a disorder and "does not achieve commensurate with his or her age and ability levels." The 2004 amendments to the IDEA, not yet reflected in regulation, prohibited state agencies from using a severe discrepancy formula to determine whether a student had a specific learning disability, although Bath continues to voluntarily use this standard. 20 U.S.C. § 1414(b)(6)(A); *MSER* § 3.11; 34 C.F.R. § 300.541.¹ Thus, Bath looks for a processing disorder, usually signaled by a processing score under 85, and a severe discrepancy between the Student's cognitive ability and their academic performance in mathematical calculation or mathematical reasoning in identifying a

¹ Amendments to the federal regulations, recently announced but not yet effective, will require states to permit schools to use an evaluation process that determines if the child responds to scientific, research-based intervention, 34 C.F.R. § 300.307 (August 2006), since "[r]ecent consensus reports and empirical syntheses concur in suggesting major changes in the approach to the identification" of specific learning disabilities. Comments to Draft 34 C.F.R. Part 300 at 35802 (July 2005). Nevertheless, the parent does not challenge the use of the severe discrepancy standard here.

specific learning disability in math. Bath utilizes psychoeducational testing with a review of the Student's academic history, performance on standardized tests, and teacher observations.

Applying the Woodcock-Johnson Test of Cognitive Ability – III, Ms. Hoch found that the Student achieved a processing score of 81. (S-71.) Ms. Hoch interpreted the Student's processing score, at the low end of the Low Average range, to be indicative of difficulty processing but not a processing disorder, a conclusion she found to be reinforced by Dr. Broderick's testing. Dr. Broderick, using the Wechsler Intelligence Scale for Children – IV, found that the Student had a processing score of 88, low but within the normal range for students his age. (S-27 & S-34.) Based on his testing results, Dr. Broderick agreed that the Student did not have a processing disorder.²

Although he did not find that the Student had a processing disorder, Dr. Broderick hypothesized that the Student's "processing style" was problematic, even though the Parent reported no executive dysfunction at home and his own findings were that the Student had "above average executive skills in terms of abstraction ability or ability to shift cognitive strategies and in capacities for strategic planning, organized searching, and goal-oriented behavior." (S-34.) Dr. Broderick relied on Ms. Corrigan's assessment of the Student's executive function at school, as reported in the Global Executive Composite, which measures a person's ability to appropriately regulate behavior and undertake systemic problem solving. Ms. Corrigan's testimony contradicted Dr.

² The school argues that a processing disorder is required in order for a student to have a specific learning disability. *MSER* § 13.11(A), as explained above, defines a "specific learning disability" as a "disorder in one or more of the basic psychological processes," thus implying that a processing disorder is required. See also 20 U.S.C. § 1401(30)(A). At least one hearing officer has interpreted this language to mean that a student must have a processing disorder that causes a discrepancy between ability and achievement. Carlsbad Unified Sch. Dist., 37 IDELR 197 (Cal. SEA 2002). This issue need not be reached here,

Broderick's conclusions in that she found that the Student was capable of solving math problems quickly in class but that the Student often expressed more interest in working on what he preferred than on required assignments. Further, Dr. Broderick's hypothesis was related to a processing style, not a disorder, and as such, even if ultimately found to be present, would not bring the Student within the classification of a specific learning disability in math.

In Ms. Hoch's testing, the Student also showed a significant discrepancy (more than 1.5 standard deviation [sic]) between his general intelligence score of 113, in the High Average range, and his achievement score in the Broad Mathematics Cluster of 87. (S-74.)³ According to Ms. Hoch, the Student's extremely low math fluency score, in the first percentile, largely caused the low math cluster score and the resulting deviation since his math calculation and applied problems scores were much higher. (S-73.) Ms. Hoch testified persuasively that the Student's results on the three-minute test of relatively easy questions that he performed slowly did not reveal the presence of a learning disability. Further, Ms. Hoch and Dr. Hoch both opined that the Student's math fluency could be improved with practice of similar drills. (S-75; Testimony of Scott Hoch.) In Dr. Broderick's testing, the Student obtained a general intelligence score of 93, which when compared with his cluster scores, did not reveal any severe discrepancies. (S-27.) The only witness besides the Parent who felt that the Student did have a specific learning disability in math was Dr. Broderick, whose own testing did not reveal a processing

however, since The Student does not meet the other criteria for a specific learning disability in math.

³ Although the parent points out that the Student's score in the broad written language cluster nearly met the severe discrepancy standard, the parent has not argued that the Student has a specific learning disability other than in math.

disorder or a severe discrepancy and whose opinion was based on his interpretation of Ms. Hoch's testing, contrary to Ms. Hoch's own interpretation.

In math class, the Student was capable and competent when present. His performance on standardized tests also exhibited competence and at times sophistication. His grades were poor as a result of his failure to turn in homework. Thus, I hold that the totality of information about the Student's abilities and achievements in math indicate that he does not have a specific learning disability.

B. Emotional Disability

Also at issue is whether the Student has an emotional disability that qualifies him for special education. Maine law defines an emotional disability in the context of special education as a

condition which exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the Student's educational performance:

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- B. An ability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- C. Inappropriate types of behaviors 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.

MSER § 3.5; 34 C.F.R. § 300.7(c)(4)(i) (identical criteria under title of "emotional disturbance"). Specifically excluded from the classification are students who are "socially maladjusted," unless they have an accompanying emotional disability. *MSER* § 3.5; 34 C.F.R. § 300.7(c)(4)(ii).

Beginning with the points of agreement, the Team, including the Parent, ruled out criteria A, D, and E. Although Dr. Justice, who did not provide any written evaluation or

testimony, had apparently diagnosed the Student with depression, the Student's teachers, the Parent, Dr. Broderick, Dr. Hoch, and Dr. DiRocco observed no features of depression or anxiety in The Student.

Thus, the two criteria at issue are B, whether the Student has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, and C, whether the Student exhibits inappropriate types of behaviors or feelings under normal circumstances. The school argues that the Student's diagnosis of Conduct Disorder, to which all evaluators agreed, should be equated with social maladjustment.⁴ The hearing officer need not reach this issue, however, because the three evaluators who testified also agreed that the Student was socially maladjusted. At issue, then, is whether the Student also has an emotional disability in addition to being socially maladjusted, a possibility contemplated under the law. *MSER* § 3.5; 34 C.F.R. § 300.7(c)(4); Board of Educ. of Syracuse City Sch. Dist., 37 IDELR 232 (N.Y. SEA 2002).

Several courts have found that students who exhibited characteristics similar to the Student's were socially maladjusted but did not have emotional disabilities, with one court suggesting a definition of "social maladjustment," as "a persistent pattern of violating societal norms with lots of truancy, substance . . . abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative." In re Sequoia Union High Sch. Dist., 1987-88 EHLR Dec. 559: 133, 135 (N.D. Cal. 1987); see also Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 664 (4th Cir. 1998) (applying this

⁴ The parent argues that Conduct Disorder may in fact be recognized as an emotional disability, although the only support she provides for this assertion is a citation to a footnote stating that a "student with Conduct Disorder can be considered eligible as a 'student with an emotional disability' if other criteria in the regulations are met." Parent v. MSAD 49, Case No. 01.159 n.3 (Me. SEA 2001) (emphasis added). In fact, "[c]ourts and special education authorities have routinely declined . . . to equate conduct disorders or

definition). In Old Orchard Beach School Department, 21 IDELR 1084 (Me. SEA 1994), a hearing officer found that a student did not have a “behavioral impairment,” the precursor to the current “emotional disability” category, when she had good social skills but was not successful in maintaining relationships with teachers and peers and her inappropriate behaviors were situationally motivated and not out of the range of behavior exhibited by her peers. The hearing officer found that the Student was able to control her behaviors even though she made poor choices to skip school and associate with delinquent peers. See also Pflugerville Indep. Sch. Dist., 21 IDELR 308 (Tex. SEA 1994) (student who made poor choices, including fighting and doing drugs, was not emotionally disabled because his actions were the result of conscious choices).

In Portland Public Schools, 25 IDELR 1247 (Me. SEA 1997), a student who received twenty-two discipline referrals and eight suspensions in one year, mainly for smoking on school grounds, skipping class, and failing to attend detentions, was found by the hearing officer to not be behaviorally impaired because he was able to learn when he attended class and completed his assignments. The Student suffered poor grades due to his absences while suspended and his failure to complete homework and assignments.

Finally, in Springer, a case with a fact pattern very similar to the present one, the Fourth Circuit Court of Appeals found that the Student did not have an emotional disability when his behavioral problems included sneaking out of his house, staying out all night, stealing, breaking school rules, and skipping school. Springer, 134 F.3d at 661. The Student’s school performance suffered as a result of his truancy and poor study habits, but he scored in the average to superior range of intellectual ability on

social maladjustment with serious emotional disturbance.” Springer v. Fairfax County Sch. Bd., 134 F.3d

standardized tests. Id. Evaluators found no evidence of depression or anxiety and consistently diagnosed the Student with Conduct Disorder. Id. at 664. The Court found that the Student did not have an emotional disability independent from his social maladjustment that would qualify him for special education. Id. at 665-66.

Cases where a student was found to be social maladjusted and also have an emotional disability are less prevalent. In Syracuse City School District, 37 IDELR 232 (N.Y. SEA 2002), the hearing officer found that a student was emotionally disabled when she was diagnosed with Major Depressive Disorder and Dysthemia as well as Oppositional Defiant Disorder. Psychologists found that she exhibited significant anger, guilt, pessimism, hopelessness, despair, and moodiness. Further, the Student's low self-esteem and fear of loss led her to consider suicide. Although the Student's absences were a major problem, they involved more than truancy and lasted for an extended period of time despite the fact that she was receiving help from a therapist, guidance counselor, and school personnel.

And in Parent v. MSAD 49, Case No. 01.159 (Me. SEA 2001), the Student's treating psychiatrist diagnosed her as having Bi-polar Disorder and found that the Student had not made any long-term friendships and overreacted in normal circumstances. The hearing officer found that the Student was both socially maladjusted and had an emotional disability based on the concurring testimony of three mental health professionals. The Student was not able to discriminate between public and private environments in her actions, as evidenced by intensely oppositional behavior without regard for consequences.

659, 664 (4th Cir. 1998)

1. Whether the Student Has an Inability to Form Satisfactory Interpersonal Relationships

With regard to the Student's relationships with peers, as the Parent points out, none of the teachers who testified were [sic] able to identify any of the Student's particular friends, although they all testified that he was able to interact easily with all other members of his class despite the fact that the Student was two years older than most class members. This shows that the Student can "engage in seemingly appropriate conversations with peers," but does not necessarily support a finding that he is able to build or maintain satisfactory relationships with them. MSAD 49, Case No. 01.159 at n.4.

Other credible evidence, when combined with the testimony of his teachers, confirms that the Student has been able to form satisfactory relationships with peers. First, the Student reported to nearly all evaluators that he had friends, enjoyed playing music with them, going out, and riding in cars. (S-22; S-67; S-189.) Second, although the Parent disputed the Student's reports of a full social life, she acknowledged that he had maintained friendships with two individuals for approximately a year. She also reported to Dr. Broderick that the Student had "no problems with peers in class or making friends in school." (S-22.) And third, Dr. Broderick, Dr. Hoch, and Dr. DiRocco all agreed that the Student's social skills were good. (S-33; S-246; Testimony of Scott Hoch.) Dr. Broderick also concluded that The Student showed "as much interest in others as most his age do and he is interested in being around others and paying attention to what they say and do." (S-33.) Dr. DiRocco found that the Student had "the adaptive ability to fit in with a group of his peers." (S-246.) Although Dr. Broderick also concluded that the Student had "a limited capacity for his age in forming close

attachments” and suspected that most of the Student’s relationships “are likely superficial, transient or at arms length,” even these conclusions do not support a finding that the Student has no capacity to form satisfactory relationships, the standard in special educational law. (S-33-34.)

With regard to teacher relationships, the three classroom teachers who testified at the hearing found the Student greeted them with a smile, waved at them, engaged them in conversation, and was polite. (Testimony of Holly Corrigan; James Morin; Jeremy LaRose.)

Thus, the Student has relationships with peers as well as teachers that go beyond the superficial. The school takes issue with Dr. Broderick’s definition of a satisfactory relationship as one that is “mutually gratifying” and includes healthy communication in which both people leave the conversation feeling that their needs were met. The law does not provide a definition of “satisfactory,” but it is clear that a student who is able to form peer relationships, even with students who tend to be delinquent or anti-social, is capable of forming relationships that satisfy the legal standard. See Portland Pub. Schs., 25 IDELR 1247 (even though student’s friendships were based on alcohol use, they showed that the Student was capable of forming satisfactory relationships with peers). Here, the evidence is that the Student is sociable, has at least two friends, and interacts appropriately with teachers and thus he is capable of forming satisfactory relationships with peers and teachers.

2. Whether the Student Exhibits Inappropriate Types of Behaviors Under Normal Circumstances

The Student’s teachers’ [sic] report the Student to be a polite and appropriate student in the classroom. In sharp contrast is the extremely high number of disciplinary

actions against the Student for behaviors mainly occurring outside the classroom, which clearly constitute [sic] inappropriate behaviors.⁵ At issue is whether the Student has an emotional disability that causes these behaviors.

One consideration is whether the Student is able to control his inappropriate behaviors, an indication that he does not suffer from emotions that interfere with his behaviors. See Springer, 134 F.3d at 665-66. Dr. Hoch, Dr. Broderick, and Dr. DiRocco all concluded that the Student has the ability to control his behaviors. (S-32; S-66; S-246.) Based on the Student's own reporting as well as the psychological testing, Dr. Hoch concluded that the Student chose certain negative behaviors in a willful manner. He found that "The Student's behavior at school appears to be a personality and behavioral style which he chooses to engage in and tends to bring him the rewards and excitement that he enjoys." (S-66.) Dr. Broderick reached the same conclusion, finding that the Student simply decided not to control himself at times. (S-32.) He found that the Student was capable of functioning appropriately but that his deeply entrenched antisocial attitudes and profound immaturity caused him to make poor interpersonal choices. Dr. DiRocco concluded that the Student controlled his behaviors when it was in his best interests to do so. (S-246.) Although the Student's inappropriate behavior also took place in the Outreach classroom, he had made known his preference not to be in that classroom. The Student himself explained his classroom and non-classroom behavior was different because of his reluctance to swear at his teachers but his willingness to swear at the school staff because he did not want to be in xx grade or in any type of

⁵ Although the school argues that the Student's behaviors are not out of the range of the ordinary for boys his age, relying on testimony of Ms. Violette that it was not uncommon for middle school students to fail to do homework, skip detention, and swear at the principal, the Student's extreme behavior has resulted in a very high number of disciplinary actions.

special program. (S-66.) Although Dr. Broderick felt that the Student tended “to be less accurate in his perceptions when forming impressions of uncommon and unclear situations,” which would lead to his frequent behavioral disruptions outside of the classroom when spontaneous peer and school administrator interaction was common, he did not conclude that this caused the Student to lose control. (S-33.) Further, the Student’s ability to remain compliant throughout the series of tests and evaluations affirms his ability to maintain appropriate behavior when he so desires, even in new situations.

None of the evaluators other than Dr. Broderick concluded that the Student had an emotional disability. Although Dr. Broderick opined that the Student had a “pervasive social disability,” he identified the characteristics of such disability as immaturity, making choices that are not constructive or adaptive, and having a negative attitude toward the rest of the world, which are the very hallmarks of social maladjustment as courts have interpreted the phrase.

Although the Parent compares this case to Syracuse City School District and MSAD 49, in Syracuse City School District, the Student was diagnosed with Major Depressive Disorder and Dysthemia and in MSAD 49, the Student was diagnosed with Bi-polar Disorder. Bd. of Educ. of Syracuse City Sch. Dist., 37 IDELR 232; MSAD 49, Case No. 01.159. Further, in MSAD 49, the Student acted without awareness of the consequences or the situation. MSAD 49, Case No. 01.159. The facts here more closely match those cases where a student was socially maladjusted but did not have an emotional disability since the Student has good social skills, displays inappropriate behaviors that he chooses and that are situationally motivated, understands the

consequences of his behavior, and suffers poor grades due to excessive absences and failure to do homework. See, e.g., Springer, 134 F.3d at 664-66; Old Orchard Beach Sch. Dept., 21 IDELR 184; Portland Pub. Schs., 25 IDELR 1247. Thus, I hold that the Student does not qualify for special education under the classification of emotional disability.⁶

Although the Student is not eligible for special education, of concern is the conclusion of several evaluators that the Student has a poor prognosis for staying out of trouble. (S-34; S-67; S-249.) Dr. DiRocco reported that the Student must be assisted to “make beneficial changes in his life that will divert him from a path that is leading him towards delinquency and school failure.” (S-249.) The Student’s intolerance to rules and boundaries suggest that he will continue to push the limits of acceptable behavior. (S-67.) His lack of motivation is also a critical issue. (S-75.) Evaluators’ recommendations include holding the Student accountable for his behavior, through implementation of a behavioral intervention plan with clear and concrete consequences, understanding that the Student does not regard suspension as a “high stakes” consequence. (S-35; S-37; S-68; S-75.) Family and individual therapy may also help to address The Student’s anti-social behavior. (S-37; S-68.) Despite The Student’s ineligibility for special education, the school is encouraged to provide the Student additional supports and reinforcements that he will surely need in order to curb his behavior and succeed in school.

ORDER

⁶ Although the school suggests that in order for a student who is socially maladjusted and also has an emotional disability to qualify for special education, the manifestation of the student’s emotional disability must include identifiable behaviors or feelings that are separate from those behaviors that result from the social maladjustment, the hearing officer does not need to reach this issue since the Student does not have an emotional disability.

Because the actions of the school did not violate state or federal special education law, no order need be issued.

Rebekah J. Smith, Esq.
Hearing Officer