

07.100H—Parent & Parent v. York School Department

REPRESENTING THE FAMILY: **Richard O’Meara,
Esq., & Nicole Bradick, Esq.**

REPRESENTING THE SCHOOL: **Eric Herlan, Esq.**

HEARING OFFICER: **Shari Broder, Esq.**

This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on June 4, 2007 at the Department of Health and Human Services in Sanford, Maine, and on June 7, June 12, and June 20, 2007 at the Department of Health and Human Services in Biddeford, Maine. In addition to counsel and the hearing officer listed above, those present for the entire proceeding were the parents, Jean Beetz, Director of Special Education for the York School Department (“District”), and Susan Macri, Assistant Director of Special Education. Testifying at the hearing were:

The mother

The father

Jean Beetz

Director of Special Education

Susan Macri

Assistant Director of Special

Education

Eilean Mackenzie

Clinical Director, New Horizons for

Young Women

Mark Evan Tucker

Associate Academic Dean, King

George School

Sarah Kingsbury

Therapist, Clinical Social Worker

Joshua Carpenter

Clinical Director, King George

School

Kerry Hoag, Psy.D.

Psychologist

Nancy Stevens School	French teacher, York High
Kevin Wyatt	Math teacher, York High School
Elizabeth Bacon	Science teacher, York High School
Katherine Daley	English teacher, York High School
Georgina Brodsky School	Wellness counselor, York High
Diane Tennes , Ph.D.	Psychologist

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

The parents requested this due process hearing on April 20, 2007. The case involves their daughter (henceforth “the student”), whose date of birth is xx/xx/xxxx.

On May 25, 2007, the parties and their counsel attended a prehearing conference. Participating in the conference were: the mother, the father (by telephone); Jean Beetz, Director of Special Education (by telephone); Richard O’Meara, Esq., and Nicole Bradick, Esq., counsel to the parents; Eric Herlan, Esq., counsel to the York School Department; and Shari Broder, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner. The parents submitted 439 pages of exhibits, and the District submitted 412 pages of exhibits.

The hearing took place, as noted above, over the course of four days. Both parties requested and were granted leave to file written closing arguments, which were submitted on July 9, 2007, and the record closed at that time. The parents submitted a 60-page memorandum, and the District submitted a 37-page memorandum.

II. ISSUES:

- a. Did the District violate the student’s rights under Maine or Federal special education laws when it failed to identify

her as eligible for special education and related services in May 2006, January 2007, or February 2007?

b. If so, is the family entitled to either reimbursement of the costs incurred in connection with their unilateral placement of the student at the King George School since February 2007, or to compensatory education? This issue also encompasses whether the family met the notice requirements for reimbursement of private school tuition.

III FINDINGS OF FACT

1. The student is xx years old. She lives with her mother in York, Maine. The mother is an elementary school teacher in the District. The student's father lives in Cape Neddick, Maine, and is a middle school teacher in Massachusetts. Although the parents separated in 1999, both are very involved in the student's life, and maintain an amicable relationship.

2. The student has always been a very spirited child. She was a very bright young girl with a theatric flair, and a bubbly personality. She has always required a lot of attention from her parents, and has had a defiant nature her whole life.

3. The student attended Coastal Ridge Elementary School in the District. During xx grade, the student's parents and teacher referred her for testing [S-204]. Dr. Eva Powers conducted a psychological evaluation of the student in September 1998 [S-197]. On the Wechsler Intelligence Scale for Children-III ("WISC-III"), the Student obtained a Verbal Comprehension Index (VCI) of 122, a Perceptual Organization Index of 100, a Freedom from Distractibility Index (FDI) of 81, a Processing Speed Index of 93, a Sequential Ability Index of 78, a Long Term Memory Index of 109, and a Short Term Memory Index of 79 [S-199]. Although the derived score for the student's Full Scale IQ was 112, the 40+ point scatter in her index scores was highly unusual. Her comprehension score was in the 99th percentile, while her digit

span score was in only the 5th percentile [199]. Dr. Powers concluded that the student had difficulties with memory and attention.

4. At a PET meeting in October 1998, the PET did not find the student eligible under the learning disability category [S-189]. The parents disagreed with the team's determination of ineligibility. [S-191].

5. In xx grade, the student began attending York Middle School. According to the mother, the student had a fabulous year academically. [Testimony of mother] The student loved her teacher, and earned straight As, with excellent marks for social development and work habits. [Testimony of mother, S-164, 158, 159]

6. The student was well liked by her peers and teachers, and interacted well, as she had excellent social skills. [Testimony of K. Daley, G. Brodsky] Although she always had friends, she changed friends periodically. [Testimony of mother]

7. During xx grade, the student began to mature physically, which caused boys to pay attention to her. [P-221] She began feeling depressed, and started cutting herself. [P-221] She became edgy and sassy to her parents. [Testimony of mother] The student had her first alcoholic drink in xx grade. [P-221] In school, she did very well, achieving all As and Bs, and she had excellent attendance and behavior. [S-157]

8. The student's feelings of depression became worse during xx grade. [P-221] She began dressing provocatively to continue to get attention from boys, and had her first boyfriend. [P-222] She began experimenting with sexual activity, and her boyfriend broadcasted their intimate relations through the school, which made the student feel "disgusting." [P-222] The student continued cutting herself, began sneaking out of the house to see her boyfriend, and tried marijuana for the first time. [P-222] She even wrote a suicide note, and considered this year to be her most difficult emotionally. [P-223] In school, her attendance was good, and she earned mostly As and Bs, with an occasional C in physical

education. [S-153-154, testimony of mother] That year, she received four behavior reports: two for public displays of affection with her boyfriend, one for being in an unauthorized area of the school, and a third for going swimming without permission during a school picnic. [Testimony of mother, S-173-175, P276] The student also played sports, and was on the track team. [Testimony of K. Wyatt] When her mother learned about the student's cutting, the student began attending therapy with Bobbie Gray in April 2003. [Testimony of mother, P-321] Her mother explained that the purpose of counseling was to work with the student's relationship with her father, and the parents' concern about the student's choice of friends. [P-322, 324, 325] The student expressed her continuing feelings of loss about her parents' divorce. [P-323]

9. Because the student was cutting herself, Bobbie Gray recommended that the student see Joshua Gear, M.D., a psychiatrist [sic] [P-279, 281] The student began seeing Dr. Gear in May 2003. [P-300] At that time, Dr. Gear diagnosed the student with Major Depressive Disorder, anxiety, and Attention Deficit Hyperactivity Disorder (ADHD). Dr. Gear prescribed medication for the student's depression and ADHD. [P-298, 285]

10. In xx grade, the student was no longer seeing the boyfriend, but continued to use her sexuality to obtain attention from boys. [P-224] She wore sexually provocative clothing, used marijuana regularly and snuck out of the house at night. [P-224, testimony of mother] She got in trouble at school a few times: for not bringing home a progress report [P-265]; cutting chorus class [P-266]; and being disrespectful to her teacher [P-257]. Academically, she continued to earn As and Bs, although she received a C in English during the second and third grading periods.

[S-149-150] The student and her English teacher had a personality conflict. [Testimony of mother] The student participated in track and basketball that year, and did well with both sports. [Testimony of K. Wyatt]

11. In January 2004, during xx grade, the school DARE officer met with the student, the mother and assistant principal to confront

the student about sneaking out of the house and smoking pot. [Testimony of mother] The student ran out of the meeting, raged out of control and had to be physically restrained. [Testimony of mother] Following this incident, the student was hospitalized at Spring Harbor Hospital. [Testimony of mother] While there, Michael Broderick, Ph.D., conducted a psychological evaluation of the student. [S-178-184] Cognitive testing results were consistent with her previous testing, with a Full Scale IQ of 122. Again, there was considerable scatter in her Verbal IQ score, as the VCI was a 124, which is superior, and the FDI was 87, which is low average. [S-179] Dr. Broderick felt there was sufficient evidence to warrant the Major Depressive Disorder diagnosis, but thought there may also be “a double depression with an underlying Dysthymic Disorder that she chronically self-medicates with drugs and vis a vis the cutting behavior.” [S-183] He also thought the diagnosis of cannabis abuse and possible alcohol abuse were warranted. [S-183] Dr. Broderick’s recommendations centered on psychological treatment and dealing with substance abuse. [S-183-184]

12. The student transitioned to York High School for xx grade. She had a new boyfriend who did not use illegal substances and treated her with respect. [P-224, testimony of mother] Consequently, the student stopped using drugs and alcohol, and stopped cutting herself. [P-224] When she became tired of this boyfriend, she began seeing a different boy, with whom she smoked marijuana regularly. [P-224-224A] As part of her academic schedule, the student participated in the learning and resiliency program (LRP), a program for children who have potential but are at risk. [Testimony of mother, G. Brodsky] The student did exceptionally well with this program, and it had a stabilizing effect upon her. [Testimony of mother, G. Brodsky] She was a bright spot in the group, enthusiastically participating in the projects. [Testimony of G. Brodsky] Academically, the student earned As and Bs, with a C+ in Algebra. [S-130] There was no evidence that she violated school rules or was disciplined during xx grade.

13. The student began xx grade at the Emma Willard School in Troy, New York, which was where her mother's family lived. [Testimony of mother] The student liked the academic challenge, feeling intelligent and that she was working to her potential. [P-225] Her grades were very good: she earned As and Bs, and a C in biology. [S-136-143] While initially it seemed like a good fit, the student was very homesick. [Testimony of mother, P-224A, 225] On January 21, 2006, during a school trip to New York City, the student was arrested for shoplifting. [Testimony of mother, P-250] She was allowed to return to school on probation, but drank heavily in the dormitory on her birthday, and began cutting herself again, thus causing the Emma Willard School to dismiss her. [P-1] The student then returned to York High School. [Testimony of mother] Although the student was allowed to rejoin LRP, she refused. She attended the Options program at the Cottage Program for teens with substance abuse problems, and successfully completed it in April 2006. [P-245] Andrea Warren, the substance abuse counselor, recommended that the student continue with substance abuse counseling. [P-245]

14. On March 10, 2006, the parents referred the student to the PET to consider whether she was eligible for special education and related services, either as a student with a specific learning disability, emotional disability, or other health impairment. [S-127] The mother signed a consent to evaluate on March 29, 2006, and evaluations were done. [S-125, 116-124] Daniel Scuccimarra administered the WISC-IV, and again, there was a scatter in the student's subtest scores. [S-122] Her VCI was a 119, again in the superior range, her Perceptual Organization Index was a 112, high average, but her Working Memory Index score was an 83, which is low average. [121]. On the Behavior Assessment System for Children ("BASC"), the student scored in the clinically significant range for attention problems, conduct issues, and depression [123]. The student's composite achievement test scores placed her in the 94th percentile, but she scored in the 55th percentile for word reading and pseudoword decoding. [S-116-117] When the PET

met on May 19, 2006, it evaluated the student for an emotional disability, and used a form which asked the following questions:

Whether the student exhibited one or more of the following characteristics that adversely affected her educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behaviors or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; or (E) a tendency to develop physical symptoms or fears associated with personal or school problems.

The PET noted that the student had a general pervasive mood of unhappiness and depression.

[S-114] It then evaluated whether this behavior had been demonstrated over a long period of time, or was displayed to a marked degree in school. [S-114] The PET answered the first question in the positive, and the second in the negative. [S-114] The PET did not feel that the student's behaviors in the school setting adversely affected her educational performance, as she was attentive in class, and earned good grades. [S-114] The PET determined that the student did not have an emotional disability because her educational performance was not adversely affected by her anxiety and depression. [S-112[1], 114] The team then determined that the student should have a 504 plan [S-112]. The student's father, Susan Macri, and special educator Matt Gats remained after the PET meeting ended, and developed a list of accommodations for the student, which was revised in August 2006 in a meeting between the student, her mother, and Sue Randolph, the District's 504 liaison [109[2]]. The student ended her xx year earning As and Bs, and a C+ in biology. [S-130] She was not cited for breaking any school rules during her xx year at York High School.

15. The student was glad to return to school in the fall to start

her xx year. [P-226] She was happy to be at home, and did not drink during September. [P-226] During the first quarter, the student's grades were very good: she earned As in all subjects except a B+ in marine science and a C+ in geometry. [S-130] The student thought her depression was under control, and that things were better. [P-226] Her parents, however, disagreed. [Testimony of mother] The mother and student participated in the Youth Alternatives mediation program, where they discussed the possibility of the student attending the Hyde School in Bath, Maine, and other options. [Testimony of mother, P-311]

16. The student then interviewed at the Hyde School. [Testimony of mother] During the interview, the student became angry and walked out of the meeting. [Testimony of mother]

17. On October 2, 2006, the parents met with Sue Randolph, and Alalia Thaler, a guidance counselor at York High School, to discuss the student's 504 plan. [Testimony of mother, S-100]

18. The parents remained concerned about the student's safety, and were not convinced that they could keep the student safe at home, so they arranged for a wilderness intervention with New Horizons for Young Women (NHYW). [Testimony of mother] NHYW is licensed as an outdoor camp and an outpatient mental health program. [Testimony of E. Mackenzie] Participants learn how to manage challenging situations in the wilderness, and they each have a treatment plan. [Testimony of E. Mackenzie] The family notified the District that they would be doing this, and the District agreed to place the student on leave for the time being. [S-94]

19. Upon the student's arrival at NHYW on November 15, 2007, Pam Braley, LCSW, conducted a comprehensive mental health evaluation. [P-230-239] The student described her strengths as academics and love of languages and history, being friendly, outgoing, attractive and engaging. [P-238] She described her weaknesses as ADHD, depression, having a bad temper, lethargy, a negative attitude and becoming easily frustrated. [P-238] She added, "I guess my drinking is also a weakness." [P-238] Her Axis

I diagnoses were “substance abuse, alcohol and pot” and depression, NOS. [P-239] Axis IV diagnoses were “severe stress, peer relationship problems, depression, family conflict, very low self-esteem.” [P-239]

20. The Student remained at NHYW for three months, during which time she wrote “truth letters,” in which she confessed her feelings and behaviors to her parents. [P-219-229] Although she made considerable progress, her counselors considered her to be still in the early stages of her recovery. [Testimony of E. Mackenzie] The discharge summary dated January 4, 2007, written by Ms. Braley said

[The student] is capable of making an excellent presentation. Underneath this false presentation is a child who suffers with low self-esteem, lack of confidence and spiraling issues of shame due to her behaviors and failures. In school she presents a façade of a capable and confident student but feels very inadequate and highly threatened by fear of failure. . . She constantly copes with severe mood swings. Her academic success comes at a high price and has a compulsive nature to it. This teen is at high risk for further behavioral, mental health and substance abuse problems. [The student’s] complex array of behavioral and psychological difficulties require a structure [sic], contained setting with firm limits and 24 hour supervision. . . In a residential, educational program with a strongly integrated clinical component [the student] will have the the [sic] greatest chance of working through the significant issues that compromise her daily functioning and to be able to achieve her social, emotional and educational potential. The NHYW team strongly recommends a residential placement to contain [the student], maintain her safety and allow her to internalize healthy positive strategies to deal with her psychological/behavioral difficulties.

[P-177]

21. Upon receiving the discharge summary, the parents forwarded it to the PET. They made a new special education referral on December 20, 2006 [S-78, 91]. At the January 4, 2007 PET meeting, the PET discussed the student in the classroom. The student's teachers all liked her very much, and agreed that the student always did quality work, and that they did not have problems with her at school. [S-70] While the PET "saw an emotional disability," it did not find the student eligible for special education due to a lack of adverse educational impact. [S-67] The District used the same eligibility analysis in making this determination as it did at the May 19, 2006 PET meeting. [S-77] The parents indicated their disagreement with this decision. [S-76]

22. The parents began looking at residential therapeutic placements for the student. By letter dated January 24, 2007, the parents notified the District that they would be removing the student from District schools and placing her in a residential therapeutic facility. [P-42] They rejected the District's failure to find the student eligible for special education, and informed the District that they would be seeking reimbursement of the costs associated with the student's placement. [S-42-43]

23. On February 1, 2007, Diane Tennes, Ph.D. performed a psychological evaluation of the student. [P-194] Dr. Tennes diagnosed the student with Major Depressive Disorder, Polysubstance Dependence, and Attention Deficit Disorder. [P-197] The student did not present with anxiety symptoms, and was not diagnosed with an anxiety disorder. [P-194, 197] Dr. Tennes added that she agreed with Ms. Braley's recommendation of a contained residential placement to solidify the student's treatment gains, based upon her difficulties with mood management, impulsivity, irritability, and containing her emotional outbursts, and previous psychiatric hospitalization. [P-197]

24. On February 8, 2007, while the student was at NHYW, the District asked Kerry Hoag, Psy.D., to evaluate the student. She noted that the student presented well, and that her engaging

personality could easily be misinterpreted to indicate that she was happy and well adjusted. [S-14] The results of her testing showed that the student was struggling with a dual diagnosis of substance abuse and depression, with evidence of low grade Dysthymia and Major Depression. [S-18, testimony of K. Hoag] She also obtained a clinically significant score on borderline tendency, indicating that she might be developing Axis II traits of a personality disorder. [S-15] Dr. Hoag performed the Behavior Assessment System for Children (BASC) with six of the student's teachers and the student. [S-16-17] The student did not present many behavioral or emotional concerns at school. [S-18] Dr. Hoag concluded that the student's good grades demonstrated her ability to benefit from her education, despite experiencing significant emotional turmoil. [S-18] She noted that the student's success in sports and academics were areas about which she could feel good, which was different than how she felt most of the time. [S-18, testimony of K. Hoag] Dr. Hoag did not believe the student met the criteria for an emotional disability under the IDEA because she has [sic] not demonstrated inappropriate behaviors or problems in school. [Testimony of K. Hoag] She also felt that the student suffered from two kinds of depression, and that her Major Depression came from being removed from her family.

[Testimony of K. Hoag] For this reason, she did not recommend a residential placement for the student. [Testimony of K. Hoag]

25. The student's teachers all described her in positive terms. According to French teacher Nancy Stevens, the student was an excellent student, earning a 98 in the first quarter of her xx year. [Testimony of N. Stevens] The student consistently produced excellent quality work, and turned it in on time. [Testimony of N. Stevens] At times, she seemed sad, and did not engage with her peers in class. [Testimony of N. Stevens] Her xx grade science teacher, Elizabeth Bacon, thought the student was very capable, participated well, and "was on the higher end of the spectrum," earning a 91 in her class. [Testimony of E. Bacon] She interacted well with her peers, and Ms. Bacon had no problems with her in

class. [Testimony of E. Bacon] Katherine Daley, the student's xx grade English teacher, agreed that the student participated well and got along with her peers. [Testimony of K. Daley] Ms. Daley thought the student had strong writing skills, was very articulate, and completed her work. [Testimony of K. Daley] The student earned a 79 in that class during the fourth quarter of xx grade.

26. The parents decided to enroll the student in the King George School (KGS) in Vermont's Northeast Kingdom because it offered an "integrated emotional growth curriculum," a focus on the arts, and a secure, supportive environment. [Testimony of mother] KGS has a coeducational population of 38 students, most of whom are there for emotional reasons. [Testimony of M. Tucker] KGS teaches students self-regulation, self-sufficiency and self-esteem. [Testimony of M. Tucker] Students progress through different phases, and are usually there for 12-15 months. [Testimony of M. Tucker] The student left NHYW on February 13, 2007 and arrived at KGS on February 14, 2007.

27. The PET met again in York on February 15, 2007 to consider the student's eligibility for special education. The parents attended by conference call, as they were snowed in while in Vermont. [Testimony of mother] Dr. Hoag discussed the results of her evaluation, and several of the student's teachers discussed their experience with the student. [S-6-9] This time, the team determined that the student did not display any of the characteristics listed in paragraph 14 above, and decided that the student did not have an emotional disability under the IDEA. [S-9] The PET also discussed whether the student was eligible as a student with a learning disability or other health impairment, and decided in the negative. [S-9-10]

28. At KGS, the student has a therapist, and attends both individual and group therapy sessions, and is making progress. [Testimony of S. Kingsbury] She attends Alcoholics Anonymous and Narcotics Anonymous meetings regularly, and has not had access to alcohol or drugs since November 2006. [Testimony of S. Kingsbury] Alan Zaur, M.D., a psychiatrist who treats students at

KGS, initially diagnosed the student with alcohol dependency and dysthymic disorder [P-143], but on April 27, 2007, changed the latter diagnosis to Major Depressive Disorder, Single Episode, Moderate[3]. [P-22]

29. During the spring of 2007, the student took the following courses and earned the following grades: algebra IIA-B; art history-A; diseases and history-A-; photography I-B+; studio art-A; and U.S. history-A+. Her teachers all commended her for her work. [P-30]

30. As of the date of the hearing, the parents have paid KGS \$44,091.62 for the student to attend the program through August 2007, and have incurred transportation expenses of \$3,180.49 through mid-May 2007. [Testimony of father, P-138, 304]

IV. DISCUSSION AND CONCLUSIONS

Brief summary of the position of the parents: The District violated the student's rights by failing to find her eligible for special education and related services. The student has an emotional disturbance as defined under Federal and Maine special education law. She has a consistent record of depressed mood and numerous diagnoses of both Dysthymia and Major Depression over the past six years. She also has exhibited a number of inappropriate behaviors or feelings under normal circumstances for a long period of time and to a marked degree. As the U.S. District Court for Maine recently ruled, "any adverse effect on educational performance, however slight," is sufficient to meet this prong of the eligibility determination. The term "educational performance" is not limited to academic growth. There is no authority that eligibility is limited to students who display depression or inappropriate behaviors or feelings in a school setting. A major part of "educational performance" is appropriate emotional, social and behavioral development, but the student demonstrated through her behavior in all settings that her emotional disability adversely affected her overall educational performance.

King George School is meeting the student's needs in a way that the District did not. The parents gave timely notice of the

student's withdrawal from the York schools, her unilateral placement, and their intent to seek reimbursement. The weight of the evidence supports a conclusion that the student's placement at KGS is highly appropriate, and that the family is entitled to full reimbursement for this placement.

Brief summary of the position of the District: The District correctly determined that the student was not emotionally disabled under state and federal special education laws. This is not another *Mrs. And Mrs. I v. M.S.A.D. No. 55* case, but involves eligibility under the multifaceted Emotional Disability category of the IDEA, a category that clearly requires a significant degree of impairment on a number of different grounds before a child will qualify under it. The student does not fall within any of the five categories of characteristics of an emotional disability, but reveals characteristics of social maladjustment. Additionally, her social problems have not filtered into her life at school. At school, the student has earned very good grades, and has not exhibited behavioral problems. She is well liked by teachers and peers. The student has repeatedly demonstrated that she does not require special education to make progress educationally. Consequently, the hearing officer should uphold the PET's decision, and reject the family's request to sharply expand Maine eligibility criteria in this area.

Should the hearing officer find the student eligible, she should send the matter back to the PET for development of an appropriate IEP. This means the hearing officer should reject the parents' request for ongoing placement at King George School. Any reimbursement claim should also fail because the King George School is not an appropriate placement under the IDEA.

I. Did the District violate the student's rights under Maine or Federal special education laws when it failed to identify her as eligible for special education and related services in May 2006, January 2007, or February 2007?

This case presents an unfortunate situation in which a lovely,

personable and intelligent adolescent girl from a caring and supportive family has engaged in behaviors and activities of great concern to her parents, who seriously fear for their daughter's safety. The central issue in this hearing is whether the District should have identified the student as eligible for special education under the exceptionality of emotional disability. The burden of proof is on the parents, as they are the parties challenging the District's decision. *See Shaeffer v. Weast*, 126 S. Ct. 528 (2005).

Section 3.5 of the Maine Special Education Regulations (MSER) (and 34 CFR 300.8(c)(4)(1)[4]) defines a student with an emotional disability as follows:

A student with an emotional disability has 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 inability 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.

The term includes schizophrenia. The term does not apply to students who are "socially maladjusted," unless it is determined that they have an emotional disability.

Lastly, the student's disability must require the provision of special education and related services. MSER §3.1(C), 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. §300.8(b)(2).

The parents do not contend that A, B & E above are applicable in this case. As noted in the language quoted above, the student need only exhibit one of these five characteristics.

There is ample evidence that the student has been suffering from depression throughout her high school years, and during much of her middle school years. In addition to the student's own descriptions of her depression, the PET concluded at its May 2006 meeting that the student had a general pervasive mood of unhappiness or depression. [Fact #14] In January 2004, while the student was at Spring Harbor Hospital, Dr. Broderick diagnosed her with Major Depression. [Fact #11] When she entered NHYW, she was diagnosed with depression, NOS. [Fact #19] In February 2007, psychologists Diane Tennes and Kerry Hoag both diagnosed the student with Major Depression. [Facts #23, 24] As the District pointed out, these evaluations were all done while the student was away from home and in a state of crisis. Perhaps during these times, the student's depression was worse than at other times.[5] Nonetheless, the evidence supports a conclusion that the student has suffered from a mild to moderate depression over a period of several years.

Mood, behavior, or academic problems related solely to drug abuse do not make a student eligible as emotionally disturbed. *See, e.g., Child v. Sequoia Union High Sch. Dist.*, 559 IDELR 133 (N.D. Cal 1987). Here, however, the student was using drugs and alcohol in an effort to self-medicate her depression. Her problems were not solely related to substance abuse.[6]

Neither the IDEA nor its regulations define what it means for a student's qualifying behavior to manifest itself "to a marked degree." The Office of Special Education Programs (OSEP) has taken the position that it generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of her peers. *Letter to Anonymous*, 213

IDELR 247 (OSEP 1989), *Maine School Administrative District #49*, 35 IDELR 174, n. 9. Terms such as acute, continuous, and/or pervasive are sometimes employed for clarification. *Letter to Anonymous, supra*. Because the student did not appear depressed at school does not mean her depression did not manifest itself to a marked degree. As Dr. Hoag, among others, noted, the student “presents well and her engaging personality could easily be misinterpreted that she is a happy, well adjusted adolescent without much emotional distress.” [S-14] Dr. Hoag felt that the student was in distress, however, and presented an accurate depiction of her emotional struggles. [S-14] In comparison with her peers, the student’s emotionally disturbed behavior was more frequent and intense, and therefore, manifested itself to a marked degree.

The District contends that the student’s behaviors are actually the product of social maladjustment. Courts and special education authorities have routinely declined to equate conduct disorders or social maladjustment with serious emotional disturbance. *Springer v. Fairfax County School Board*, 27 IDELR 367, 134 F.3d 659 (4th Cir. 1998). The fact “[t]hat a child is socially maladjusted is not by itself conclusive evidence that he or she is seriously emotionally disturbed.” *A.E. v. Independent Sch. Educ.*, 753 F.Supp. 65, 71 n.8 (D. Conn. 1990). As the *Springer* court explained,

the regulatory framework under IDEA pointedly carves out “socially maladjusted” behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a “bad conduct” definition of serious emotional disturbance might include almost as many people in special education as it excluded.

Springer, supra, at 663.

Nonetheless, the *Springer* court makes it clear that a student can be both socially maladjusted and emotionally disabled. *Id.* Therefore, as the evidence supports a conclusion that the student has depression, whether she is socially maladjusted is irrelevant to her eligibility determination.

As the parents correctly point out, the law in Maine regarding whether the student's disability adversely affects her educational performance is not a high hurdle. The U.S. District Court has ruled that "any adverse effect on educational performance, however slight . . ." is sufficient to meet the prong of the eligibility definitions that incorporate this term. *Mr. and Mrs. I v. Maine School Administrative District #55*, 416 F. Supp. 2d 147, 160 (D.Me. 2006), *aff'd* 480 F.3d 1 (1st Cir. 2007). Assuming, however, no adverse impact on educational performance, a student's out-of-school behavior is not a basis for eligibility, no matter how disordered. *See, e.g., Letter to McNulty*, 213 IDELR 108 (OSEP 1987). This is particularly true if the student is not unduly disruptive in school, like the student in the case at hand. *See, e.g., Farquier County Pub. Sch.*, 20 IDELR 579 (SEA VA 1993).

The difficulty in this case, however, is determining what the U.S. District Court and First Circuit Court of Appeals meant by "educational performance." On the one hand, the evidence portrays the student as very bright, and capable at school. She described her academic abilities as one of her strengths, and she was successful in both academics and extracurricular sports. She achieved good grades, both at York High School and the reportedly more academically challenging Emma Willard School. At York High School, the student behaved well in class, with rare emotional outbursts not unusual for a teenager.^[7] Her depression did not have any adverse effect upon these educational performance factors. During the first quarter of her xx year at York High School, which was the last time she attended school there, the student felt that she was doing well in that her depression

was under control and she was earning good grades.

The parents point to the *Mr. and Mrs. I* case, however, as interpreting “educational performance” much more broadly than that.

In affirming the District Court decision, the First Circuit stated

Maine's broad definition of "educational performance" squares with the broad purpose behind the IDEA: "to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (emphases added). We have likewise held that the IDEA entitles qualifying children to services that "target 'all of [their] special needs,' whether they be academic, physical, emotional, or social." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993) (quoting *Burlington*, 736 F.2d at 788). It is true that we have also stated that IDEA services need not address "problems truly 'distinct' from learning problems." *Gonzalez v. P.R. Dep't of Educ.*, 254 F.3d 350, 352 (1st Cir. 2001); see also *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n.3 (1st Cir. 2001) . . . But it does not follow, as the hearing officer wrongly concluded, that a child without "academic needs" is per se ineligible for IDEA benefits, especially when the state has conditioned eligibility on a standard that explicitly takes "non-academic areas" into account.

Mr. and Mrs. I, 480 F. 3d. 1, 21-22. We also know that the IDEA does not require schools to address behaviors that have minimal, if any, impact upon the student at school. In *Gonzalez v. Puerto Rico Department of Education*, 254 F. 3d 350 (1st Cir. 2001), the First Circuit explained that, “It is true that we have also stated that IDEA services need not address "problems truly 'distinct' from

learning problems." *Gonzalez v. P.R. Dep't of Educ.*, 254 F.3d 350, 352 (1st Cir. 2001); *see also Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n.3 (1st Cir.2001). Although *Gonzalez* addressed primarily the placement of a student who was eligible for special education, due to his learning needs, the court stated that, in determining the appropriateness of residential placement, the court "must determine whether such placement is necessary for the child's education, ... rather than for any social, medical, or emotional problems distinct from his learning problem. ... Although a child may have severe behavior problems at home which make it difficult for his parents to control, the educational agency is not necessarily responsible to remedy this problem. *Gonzalez, supra.*

The parents assert that social, behavioral and emotional issues are as much a part of educational performance as academic issues. It is certainly true that a student learns much more at school than what is taught in the academic curriculum. Yet in *Gonzales*, the First Circuit was clear that the IDEA need not address problems truly distinct from learning problems. The student in the case at hand has not demonstrated a learning problem affecting educational performance. She suffers from depression, which has led her to abuse drugs and alcohol, and engage in other undesirable behaviors outside of school. These are mental health problems that have not damaged the student's ability to succeed in school.

The parents point to the part of the *Mr. and Mrs. I* decision in which the Federal District Court recites portions of the Maine Learning Results regulations that list the many goals of the Learning Results program, including such things as explaining "the relationship between healthy behaviors and the prevention of injury," understanding, "how to reduce their health risks through the practice of healthy behaviors," demonstrating "ways to avoid or change situations that threaten personal safety," and "distinguish[ing] between healthy and unhealthy stress

management techniques.” *Mr. and Mrs. I, supra*, at 12-13.

Understanding these things and actually putting them into practice are two very different things.[8] For example, high school students smoke cigarettes and eat junk food at a proportionately higher rate than the rest of the population, but this does not mean they do not understand or have not learned how to reduce their health risks through the practice of healthy behaviors. This is not a learning problem, but a failure to incorporate one’s knowledge into one’s daily life. Cases cited above support a conclusion that Congress did not intend that the IDEA be interpreted so broadly that a failure to use healthy practices learned in school constitutes a failure to learn.

The student’s inability to cope with her depression is not an educational issue, but a medical one. Citing *Springer*, the District points out that there must be a causal connection between the student’s condition and her educational difficulties. *Springer*, 134 F. 3d at 666. As the student was not experiencing educational difficulties, there is no such connection. The evidence does not support a conclusion that her depression has adversely affected her educational performance.

The parents make an alternative argument that the student had inappropriate behaviors or feelings under normal circumstances, which is characteristic “C” in the definition of emotional disability set forth above. "Inappropriate behaviors under normal circumstances" has been defined by a number of States as including those behaviors which are psychotic or bizarre in nature or are atypical behaviors for which no observable reason exists. *Letter to Anonymous, supra*. As OSEP wrote,

Running away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition. This definition might include behavior such as assaulting teachers or students for no

apparent reason.

Based upon this authority, the student's conduct does not fall within category C.

Another barrier to finding the student eligible for special education is that the evidence does not support a conclusion that she needs special education and related services. *See* 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. §300.8(b)(2). There was no showing that the student needed specialized education to benefit from the curriculum. As discussed above, the student was doing very well with the educational curriculum and related activities. Her parents placed her at NHYW and KGS because they had difficulty preventing her from sneaking out of the house, using drugs and alcohol, and being sexually promiscuous. The student undisputedly needs treatment for her depression and substance abuse problems. When the student was at Spring Harbor Hospital, and her depression was worse than it is currently, Dr. Broderick's recommendations were for psychological and substance abuse treatment. Recommendations of other psychologists have focused on the student's need to address her depression and substance abuse, not on her education. This falls squarely within the category of medical treatment, not educational services.

As the District did not err in finding the student ineligible for special education, it is not necessary to address whether the family is entitled to reimbursement for the student's tuition at KGS.

V. ORDER

After consideration of the evidence presented during this due process hearing, the hearing officer orders as follows:

1. The District did not violate the student's rights under Maine or Federal special education laws when it failed to identify her as eligible for special education and related services in May 2006, January 2007, or February 2007. It is therefore not responsible for the cost of the student's

unilateral placement at the King George School.

SHARI B.
BRODER.
ESQ.
Hearing
Officer

[1] The parents did not receive minutes for this meeting, as they were lost. [Testimony of S. Macri]. Ms. Macri created the minutes in S-112 from memory about half a year later.

[2] Neither parent was sent a copy of this plan. [Testimony of mother]

[3] This is code 296.22 in the DSM-IV-TR

[4] Under Federal law, this is referred to as a “serious emotional disturbance,” but with the exception of the different name, the criteria are identical to the MSER.

[5] According to the student, her most difficult year emotionally was xx grade.

[6] *See Maine School Administrative District #49*, 35 IDELR 174 (SEA August 24, 2001)

[7] The student was placed on “social probation” at Emma Willard prior to her dismissal because she was arrested for shoplifting on a field trip to New York City. While on probation, she got drunk in the dormitory on her birthday, and cut her arms, which prompted the school to dismiss her. [P-1] These were all behaviors that took place outside the classroom. There was no evidence of problem behaviors during the school day.

[8] This is true for adults as well as adolescents!