

State of Maine
Special Education Due Process Hearing Decision

Parents v. Bath School Department, Case No. 02.119

REPRESENTING THE SCHOOL: Eric Herlan, Esq.
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REPRESENTING THE PARENT: Richard O'Meara, Esq.,
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HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, §7207-B et seq., and 20 USC §1415 et seq., and accompanying regulations.

The case involves Student, whose date of birth is XX/XX/XX. He resides with his Parents in Bath, Maine. Until recently, Student was a student at Morse High School. In late January 2002, he was removed from school by his parents, and in February enrolled at Redcliff Ascent in Utah, where he remained until April 2002. In January, and again in May 2002, the PET found him not eligible for special education services as a student with a disability. His parents bring this action to dispute that finding.

The due process hearing was requested on April 8, 2002. The prehearing conference was scheduled for May 1, and the hearing for May 7. At the request of the parties, the prehearing conference was rescheduled and convened on Tuesday, May 7, 2002. The parties exchanged documents and witness lists at that time.

At the prehearing conference the school requested the hearing officer postpone the hearing to allow the school to perform a psychological evaluation of the student. The hearing officer declined to delay the hearing, but by agreement of the parties the PET met on May 13 to consider the student's eligibility for services as a student with an emotional disability, using existing assessments. The parties were unable to resolve the issues in dispute. The school again asked that the hearing be set aside and that they be allowed to evaluate the student. The parent requested the hearing go forward. The dates for hearing were set, and the school's request to conduct its own psychological evaluation became an issue for hearing. The hearing convened on May 29, 2002, and was continued to June 3. Documents numbered P1-P71 were entered into the record by the parent. Documents numbered S1-S58 were entered by the school. Eight witnesses gave testimony. The parties were given until June 10, 2002 to submit closing briefs¹ at which time the hearing record closed. Following is the decision in this matter.

¹ School's attorney included with his closing brief a copy of the Guidelines to Assist School Systems in the Identification of Students with Emotional Disability. Parent's attorney objected to the inclusion of this

I. Preliminary Statement

The student is a XX-year-old high school sophomore who has not been identified as a student eligible for special education services. His parents brought this hearing to challenge the PET's determination that he does not meet criteria as a student with an emotional disability.

The student, formerly a B student in Middle School, was, by the fall of 10th grade, failing all academic subjects. His parents referred him to the PET in October 2001. After an initial evaluation, the PET met in January 2002 and determined that he did not meet criteria as a student with a learning disability. The parents objected to the narrow focus of the evaluation. In February, the parents placed the student in an out-of-state facility where he remained until April 2, 2002. The student returned to the district, but did not return to public school. In May the PET met again to reconsider the student's eligibility for special education services, using the evaluative information obtained by the parent. Again, the PET failed to find the student eligible as a student with a disability.

It was the parent's position that the student exhibits serious emotional and behavioral disorders, which adversely affect his education. They argued that the school erred in January by not conducting a more thorough evaluation that would have assessed his need for special education as a student with an emotional disability. They contend that the student's placement at the private facility was necessitated by his deteriorating emotional condition and that psychological testing performed while he was in that facility supports that contention. They requested compensation for the private placement as well as for the services they have provided since his return from that facility.

It was the school's position that the evaluation conducted in the fall of 2001 assessed all areas of the suspected disability as stated in the referral. They argued that the PET was asked to consider whether the student was eligible for services as a student with a learning disability, and that testing showed he did not meet [sic] criteria. The school does not see the student as a student with an emotional disability. They maintained that, while they were concerned about the student's high absenteeism, reported drug and alcohol abuse and school failure, they do not see the student as exhibiting an emotional disability.

document arguing that it had not been submitted within the five-day disclosure period. He asked that the hearing officer rule it inadmissible. He also objected to it because it was a document developed by the Maine Administrators of Services for Children with Disabilities and did not include parent representatives or input. The document in question contains no specific information about the student named in this case, or the issues in this case. It is not subject to the five-day rule. The document is a published source widely distributed and widely available. That parents or parent groups were not involved in its development is irrelevant. I can see no reason to support the parent's objection.

II. Issues

- Did the school fail to evaluate the student in all areas of his suspected disability before determining he did not meet criteria as a student eligible for special education services?
- Is the student eligible for special education services as a student with an emotional disability?
- Is the family entitled to compensation for services they have provided to the student at their expense?
- Has the parent's failure to give consent for the school to conduct a psychological evaluation impacted the school's ability to make decisions regarding the student's eligibility for services?

III. Findings of Fact

1. The student had a history of above average academic performance until 9th grade. Reports from his early school years show no academic or behavioral concerns. Grades were above average and teacher comments universally complimented him on his achievement and effort. He performed above average in most areas on standardized group achievement tests in 6th, 7th, and 9th grade, scoring highest in reading and lowest in math. After successfully completing middle school with mostly A's and B's, his grades fell to D's and F's in 9th grade. He failed to finish 10th grade. At the conclusion of the first grading period he was making D's and F's. He failed to complete work and performed poorly on tests. (Exhibit S43, S44, S45, S46, P1-P8, P14-P15, P20, P23, P45; Testimony Simpson, Bradley)
2. With the assistance of the student's guidance counselor, the parent made a referral to the PET on October 12, 2001. The referral form, handwritten by the guidance counselor while meeting with the parent, states "...depression and anger issues are indicated. [Student] is seeing Scott Davidson, a psychologist in Brunswick; Scott recommended pursuing a [referral to special education] for testing to rule out LD." Because of the sense of urgency conveyed by the parent, the referral and request for assessment were not considered by the PET, but put on a fast track. The referral form was forwarded directly to the special education department, where the evaluation was coordinated. The typewritten Assessment form forwarded to the evaluator states that the "[p]arents request that [student] be tested for a learning disability... He is also showing signs of depression and anger. Parents would like to know if the depression and anger are a result of a learning disability and frustration with his present level of work, or if there are other issues that need to be investigated with [student's] private psychologist". The Parental Notice of Initial Referral, dated October 22, 2001, states that "[Student] is seeing psychologist Scott Davis in Brunswick and he recommended pursuing a referral to special education to rule out learning disabilities as a cause for [student's] poor grades, depression and

- anger issues". (Exhibits P30-P31, P32, S34-S35; Testimony Bradley, Maynard, Hoch)
3. The student's father signed the Consent to Conduct Evaluations form on October 26, 2001. The form shows that "Academic testing"; "Intellectual testing", "Learning development testing" and "Observation" are checked off, with the father's initials and date next to these sections. "Psychological evaluation" is not checked off, nor did the parent initial this section. (Exhibit S32-S33)
 4. On October 19, 2001, an Informal Reading Inventory was conducted with the student. Results revealed that the student has a solid vocabulary, good word attack skills and accurate and fairly rapid oral and silent reading. The evaluator found that the student did not draw inferences from the reading content, which impacted his inferential thinking. (Exhibit S36)
 5. On November 28, 2001, Stephanie Maynard, special education teacher at the high school, administered the Woodcock Johnson III Tests of Achievement. The student performed within the average range on all sub tests. He obtained standard scores of 102 in Broad Reading, 88 on Broad Math, and 104 on Broad Written Language. A classroom observation of the student in his Spanish class found that the student was unprepared for the class activity, but that his behaviors were unremarkable when compared with other students in class. (Exhibit P34-P36, P37-P39; Testimony Maynard)
 6. A Psycho-educational Evaluation was conducted on December 6, 2001. The evaluator, Linda Hoch, administered the Woodcock-Johnson Tests of Cognitive Ability III (WJ III); conducted interviews with the student, the student's father, and the guidance counselor; and did a records review. In tasks that assess cognitive ability, the student obtained standard scores ranging from 72 for Working Memory to 118 for Auditory Processing. He obtained a score of 98 in General Intellectual Ability, which puts him in the Average range. The evaluator concluded, "since [the student's] short-term and long-term memory scores were average-range, I am not sure exactly how a specific weakness in working memory would impact academic skills. In any event, [student's] grades prior to entering Morse High School were all very satisfactory, and his grades in all subjects after that have been uniformly low, which to me suggests that some factor other than a learning disability is affecting his progress. These could include attention skills, motivation/interest in academics, emotional state, and situational factors at home and at school." The report was mailed to the parent on December 13, and received soon after. (Exhibit S26-S31, Testimony Hoch, Parent)
 7. The PET met on January 25, 2002 to review recent evaluations and consider the student's eligibility for special education. At the meeting the parents notified the school that they had placed the student in the Seton Recovery

- substance program in Waterville on January 24. The PET determined that the student did not meet criteria as a student with a learning disability. The parents were angry² that the school had not performed psychological testing. There was discussion of the school conducting a psychological evaluation, but no determination was made. (Exhibit S8, S22-S23, S19, P46-P47; Testimony Parent, Hoch, Maynard)
8. On January 30, 2002 the student began attending the Summit Achievement program. Progress notes state that he was referred for “substance abuse, oppositional behavior and poor school motivation”. On February 8 he was discharged from the program for violation of rules and rejection of the program. He had attempted to run away, been verbally aggressive toward staff and put his hand through a window. Staff at Summit facilitated his transfer to Redcliff Ascent. (Exhibit S16-S19)
 9. On February 9, 2002 the student was escorted to the Redcliff Ascent program in Utah. Literature describes the program as follows: “The Redcliff Ascent outdoor therapy program is a unique therapeutic experience designed to put youth in touch with their potential. Our main objective is to help your youth understand the problems associated with poor personal choices and to give them the opportunity to develop appropriate skills and abilities that will help them make better decisions in the future. Our treatment focuses on both emotional and behavioral disorders, including: substance abuse, depression, defiance, family conflict, and problems with authority.” The facility is located 560 miles in the high desert. It is licensed by the State of Utah as an outdoor-based therapeutic program, but not licensed by the Utah Department of Education. There is no academic program operated by the school, but they do facilitate academic course-work through Brigham Young University. (Exhibit S51; Testimony Parent, Sanderson)
 10. At the parents’ request the student participated in a psychological assessment conducted by Dr. Christina Durham, and facilitated by Redcliff. The assessment, performed on February 15 and 22, 2002, included a clinical interview with the student, phone call with the parent, intake records, Substance Abuse Subtle Screening Inventory for Adolescent (SASSI-A), Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), Wide Range Achievement Test, Third Edition (WRAT-3), Minnesota Multiphasic Personality Inventory – Adolescent (MMPI-A), Beck Depression Inventory (BDI), TeenAge Sentence Completion (TASC), and the Rorschach. No input

² Perhaps one thing that drove the parent’s anger was the letter they received from the principal, Mr. Pendelton, less than a week before the PET. Mr. Pendelton states in his letter that the student “is not serious about trying to earn his education... If significant improvement has not been demonstrated, I will withdraw [student] for the remainder of the school year. He will have to enroll again next fall or pursue his education through GED or adult education”. In light of the fact that this student was in the midst of a special education referral as a student with a learning disability, awaiting evaluation, this letter was highly inappropriate. (Exhibit P44)

from the staff at the high school or the student's private therapist was included.

Standard scores achieved on the WRAT-3 were 106 in Reading, 108 in Spelling, and 84 in Arithmetic, which put him at grade level in reading and spelling and below grade level in math. Results of the WAIS-III showed the student scored 90 on Verbal IQ, 98 on Performance IQ with a Full Scale score of 93 (plus or minus 6), which puts him within an average range of intelligence. On the Beck Depression Inventory the student scored a 7, "which suggests he is currently experiencing symptoms consistent with the normal ups and downs of daily life". On the TASC the student expressed "regrets about his behavior, the contribution drugs have made to his difficulties and he wanted to have a second chance to correct his behavior". "On the SASSI [student] appeared to respond in an open fashion admitting drug use to the point that he often felt out of control." The student's response pattern on the MMPI-A and the Rorschach led the evaluator to conclude that the student "has an underlying sense of dissatisfaction and unhappiness with his life, and a general apathy and lack of interest in activities". "There is a high likelihood of behaving in a self-sabotaging or self-defeating manner." He "is likely to react to stress and avoid responsibility by developing physical symptoms". "A primary defense mechanism appears to be withdrawal or escapism." He "seemed to turn to smoking marijuana to help control or deny his painful emotions". The evaluator concludes by stating that the student "would certainly benefit from working through issues related to his grandfather's death, increasing his ability to identify and manage emotions, tolerate frustration and develop more adaptive coping skills." She presented a Axis I Diagnosis³ of "Cannabis Dependence", Alcohol Abuse", "Nicotine Dependence", "Disruptive Behavior Disorder NOS" and "Anxiety disorder NOS" in that order. (Exhibit S6-S12; Testimony Durham)

11. Dr. Daniel Sanderson, the clinical director at Redcliff, was the student's therapist for the seven weeks he attended the program. He did not evaluate the student but met with him in session about once a week. Dr. Sanderson noted in the student's Discharge Summary that the student became an exemplary student within the first week of his being in the program. The student was described as having quickly become a model within the first few days, and readily engaged in the process of self-discovery. Dr. Sanderson opines that the student has a high vulnerability for relapse into substance use, and that his long-term commitment to maintain a substance-free lifestyle is somewhat suspect as well. (Exhibit S2-S4; Testimony Sanderson)
12. The student and his family have been in treatment with a private local therapist, Dr. Scott Davidson. The student saw the therapist briefly in the spring of 1999. He began seeing him again in September 2000 and continued until November 2001. His Treatment Plan noted that "impulsivity",

³ From the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV).

- “oppositional/defiant behavior”, “anger”, and “substance use” were “symptoms at the initial evaluation” checked off as “target for treatment”. He also noted that “distractibility” and “impaired judgment” were “moderate”. The Axis I diagnosis was Dysthymia and Oppositional Defiant Disorder. Treatment goals are stated as “appropriate expression of frustration/anger”, “[establish] clear personal priorities and goals”, and “impulse control”. He did not conduct a formal evaluation of the student. (Exhibit P25-P28, S55)
13. The PET met on May 13, 2002 to consider the student’s eligibility for special education services as a student with an emotional disability. The team considered the evaluation conducted by Dr. Durham, and the Discharge Summary from Redcliff prepared by Dr. Sanderson. Teacher reports to the PET summarized the student’s observed behavior in his classes. Teachers reported that he failed most courses because he cut classes, did not come to class prepared, failed to complete assignments and did poorly on tests. The one exception was English where he achieved a B+ for one term. None of his teachers observed him to be unhappy or depressed. The PET was unable to reach consensus about the student’s eligibility as a student with an emotional disability. (Exhibit S554-S57; Testimony Violette)
14. The student’s Individual Discipline Report during the 2001-2002 school year shows that discipline events were confined to tardiness, cutting classes and cutting school, with one suspension for fighting a student who was bullying the younger brother of a friend. (Exhibit P40-43; Testimony Parent)

IV. Conclusions

Did the school fail to evaluate the student in all areas of the suspected disability before determining he did not meet criteria as a student eligible for special education services?

In conducting an evaluation... the student shall be assessed in all areas of the suspected disability or disabilities. Maine Special Education Regulations, §9.5[C]

The law does not require that schools assess every characteristic of every student, but only that the pupil evaluation team (PET) makes judgments about the “suspected disability or disabilities” and designs evaluation strategies accordingly. When evaluations are complete, the results should provide the team with sufficient information upon which to made eligibility determinations and special education plans, if needed.

The parent argues that the district failed to evaluate all areas of the student’s suspected disabilities when it did not order a psychological evaluation to assess the student’s anger and depression. They attribute this failure as contributory to the

student's need to be placed at the Redcliff Ascent program in Utah. Evidence does not support that position.

Upon making the referral to special education, the parent expressed a sense of urgency that the evaluation be done quickly. Because the district has a policy that allows some referrals to go directly to evaluation without convening the PET, an initial PET meeting to discuss the referral and make assessment recommendations did not happen. Instead, at the parent's request, the guidance counselor pushed the referral through the system on a fast track. The district then proceeded with the evaluation, based on their understanding of the request. The initial request for evaluation said very clearly that the purpose of the assessment was, at the direction of the student's private therapist, to rule out a learning disability as a factor in the student's depression and anger. An assessment of the student's depression and anger was not requested. Had the PET met to consider the initial referral of the student prior to his evaluation, the parent would have had an opportunity to relate her concerns. It is likely that Psychological and projective testing would have been part of the evaluation based on the parent's input. In hindsight, perhaps the district should have taken the initiative to broaden the assessment question. But the student did not exhibit anger and depression at school. The referral was being driven by the request of the student's therapist through the parent.

There [sic] parents also bear some responsibility for the limited scope of the evaluation. *Rome Sch. Comm. V. Mrs. B.*, 32 IDELR 33 (2000) (parents' actions put school in poor position to remedy omissions). The handwritten referral form completed by the guidance counselor clearly states, "Scott [Davidson] recommended pursuing a [referral to special education] for testing to rule out LD". The student's mother was present while this form was being filled out. While she might not have reviewed the form, or understood the implications of how that statement was worded, she provided the information to the guidance counselor as he completed the form. Later in the month, the information on the handwritten form was translated onto the Parent Referral Form and sent to the parent. Item number 5 on that form states "Scott Davis...recommended pursuing a referral to special education to rule out learning disabilities as a cause for [student's] poor grades, depression and anger issues". A week later the student's father came to the school to sign the Consent to Conduct Evaluations form. He signed the form, and initialed and dated each separate assessment section being proposed. Each section contained an explanation of what would be included in that section. Psychological evaluation was not indicated as part of the evaluation; he did not initial and date that section nor did he question that it was not included. The completed assessments were sent to the parent soon after completion and well in advance of the PET meeting in January, which had been scheduled to consider the results of the evaluations. The parent did not question the scope of the evaluations, nor request that additional assessments be completed.

The parent may have expected from the beginning that the evaluation [sic] be broader in scope and include a psychological assessment, but there is no evidence

upon which to conclude that the school failed to evaluate the student in all areas of the suspected disability. The school had no reason to determine that they were not assessing the student as requested. The referral form clearly stated that the purpose of the evaluation was to rule out a learning disability as a possible contributing factor to the depression and anger the student was expressing in the home. The form signed by the parent, and material forwarded to the parent later, clearly described the scope of the evaluation. The evaluation, when completed and mailed to the parent several weeks before the PET meeting, did not include any discussion of the student's depression and anger⁴. The district did not see depression and anger exhibited by the student, nor as a component of a suspected disability.

By the time the PET met to consider the initial evaluation, the student was in crisis and had been placed by the parent in a hospital-based substance abuse treatment facility. Clearly the parents' concern for the student's behavior at home caused them to take urgent action. However, his behavior at school had remained unremarkable. The parent may have believed that there should have been a more proactive stance by the school to look for underlying emotional problems, but the evidence supports the school's contention that they did not see the concerns raised by the parent. School staff knew he was failing academically, but they viewed his failure as directly related to his refusal to complete assignments and turn in homework, participate in class and be prepared for tests. His behavior was not bizarre, disruptive, detached or depressed. Evidence supports the teachers' contention that he presented as a student who lacked interest and motivation in his schoolwork, and who was involved in drug and alcohol use. These are behaviors which are unfortunate, but not atypical in students who are experiencing a difficult adolescence.

There were several opportunities between October and January for the parent to alert the district that they wished to request additional testing. They failed to do so. By the time the PET met in January 2002 the student had been placed privately by his parents and was unavailable to the district for testing⁵. Since the student's return to the district in April, the district could have, and based on testimony would have, conducted additional assessments had the parent agreed. They failed to agree. Evidence supports the school's position that they conducted the assessments requested in the initial referral. They stand ready to conduct additional assessments, upon consent from the parent.

⁴ The parent argued that she did not remember if she received copies of the Consent to Evaluate form, or the Notice form. She did acknowledge that she received the Hoch evaluation, but stated she did not read it before the meeting. The school cannot be held accountable for the parent's failure to read and consider material in her possession.

⁵ The parent argued that between January 25 and January 30 the student was in state and could have been made available for evaluation had the school made the effort. This assertion does not seem plausible. By the parent's own admission the January PET ended abruptly, with angry words toward the school staff. The district felt any efforts by them would have been rebuffed. In addition, the student was not being compliant at the Seton program, and would likely have been uncooperative to assessment at that time.

Is the student eligible as a student for special education services as a student with an emotional disability?

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.

Maine Special Education Regulations, §3.5, Also 34 CFR § 300.7(c)(4)

The PET met in May to consider the student's eligibility as a student with an emotional disability. The information available to the team during that discussion was the psychological evaluation conducted by Dr. Durham, the student's Discharge Summary from Redcliff written by Dr. Sanderson, and reports from the student's 10th grade teachers. In addition, the team had copies of Ms. Hoch's evaluation from December 2001. The team was unable to come to consensus that the assessment results were sufficient to find that the student met the criteria as a student eligible for special education services because of an emotional disability.

In order for a student to be considered eligible for special education and related services, he or she must meet at least one of the behavioral criteria listed above, to a marked degree, over a long period of time such that the behavior adversely affects the student's educational performance. There was no disagreement between the parties that the student did not fit the criteria as a student with an emotional disability because of an inability to learn, or an inability to build or maintain satisfactory interpersonal relationship. There was disagreement that the student exhibited inappropriate types of behaviors or feelings under normal circumstances, exhibited a general pervasive mood of unhappiness or depression, or exhibited a tendency to develop physical symptoms or fears associated with personal or school problems.

Does the student exhibit a general pervasive mood of unhappiness or depression?

The parent argues that the student has exhibited a general pervasive mood of unhappiness for some time. There is evidence that the student has been unhappy for some time, certainly since his grandfather's death. However, evidence does not suggest that this mood of unhappiness is to a marked degree. The student did not meet diagnostic criteria for depression in the recent evaluation conducted by Dr. Durham. His scores on both the MMPI-A and the BDI failed to reach clinical significance for depression, and Dr. Durham concluded that he was experiencing "the normal ups and downs of life". Dr. Sanderson, his therapist while at Redcliff, likewise did not suggest that he met criteria as a student who might be determined to be a student with an emotional disability because of a pervasive mood of unhappiness or depression.

His local therapist, Dr. Davidson, indicated on the student's Treatment Plan that the student was Dysthymic, but he did not specify that "depressed mood" was a targeted behavior, or that the student exhibited any "mood/affect disturbance" other than "anger". Since Dr. Davidson did not testify, it is impossible to know his conclusions on this matter; however, the discussions between Dr. Davidson and Mr. Bradley, the guidance counselor, and later Ms. Violette, the Director of Special Education, is revealing. Dr. Davidson told Mr. Bradley that he was advising the parent to have the student evaluated to rule out a learning disability as a contributing factor of the student's anger and depression. He did not advise the school that he had determined that the student exhibited a "pervasive mood of unhappiness or depression" and needed to be evaluated to determine if there was a psychological cause for depression or other mood disorder.

Dr. Davidson told Ms. Violette that he was seeing the student to address home issues, substance [sic] and mild depression, or dysthymia. Dysthymia alone does not meet the criteria of a "pervasive mood of depression" to a "marked degree". Hearing officers and courts have downplayed the seriousness of dysthymia as a condition warranting special education services, let alone an out-of-district placement. *Springer v. Fairfax County School Bd.*, 27 IDELR 367 (4th Cir. 1998), (Court concluded that dysthymia was "sort of a low-grade depression" that would not qualify a student as emotionally disturbed.); *Old Orchard Beach School Dept*, 21 IDELR 1084 (SEA Me. Hamrin 10/10/94) (Student with dysthymia and other conditions is not behaviorally impaired); *Solieu v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997) (Under the Americans with Disabilities Act, court rules that employee with dysthymia is not a person with a disability).

Finally, the student was not observed by his teachers to exhibit a depressed mood. His teachers did not see him as unhappy or sad. To the contrary, he was observed to interact with peers in appropriate ways, to be polite and to be engaged in social interactions. Evidence does not suggest that the student fits the criterion of a student who exhibits a "pervasive mood of unhappiness or depression".

Does the student exhibit inappropriate types of behaviors or feelings under normal circumstances or a tendency to develop physical symptoms or fears associated with personal or school problems?

The parent argues that Dr. Durham and Dr. Sanderson support the student's eligibility as a student with an emotional disability under these criteria. However, even as Dr. Durham seemed to find behaviors that matched the student to the text of the definition, it is difficult to conclude that she found that the student exhibited these behaviors "to a marked degree". Neither the language she used in her report, nor the opinions offered during her testimony, supported a conclusion that these characteristics were exhibited by the student to a marked degree. Dr. Sanderson offered no opinion on how the student might specifically meet the definition.

In her report summary, Dr. Durham stated that personality testing "*suggests* a low tolerance for frustration, limited coping skills and a *tendency* to become disorganized and manifest physical symptoms when stressed. [Student] *appeared* to have difficulty managing emotions and as a result is *more likely* to detach from others or become angry when feeling out of control". (Emphasis added.) Her Axis I Diagnosis gives Anxiety Disorder NOS as the last in a list of five⁶. When asked about her diagnosis of Anxiety Disorder NOS or "anxiety disorder, not otherwise specified", she testified that the student failed to meet the diagnostic criteria for a Generalized Anxiety Disorder, or any of the other specific diagnoses listed in the DSM-IV under Anxiety Disorders. She agreed that she chose Anxiety Disorder NOS "because nothing else seemed to fit". She admitted that it was something of a catchall category for adolescents, like this student, who did not "fit easily in the box".

When asked specifically to comment on the definition contained in the regulations, Dr. Durham testified that the student's presentation upon evaluation and his history contained characteristics of a blending of the two criteria. Her answer was vague and she appeared to grope to make the student's profile fit the definition. She expressed an opinion that the student's anxiety, his poor coping skills, self-defeating behaviors, school failure, and poor relationships were factors that could match this part of the definition. However, Dr. Durham also stated that the student's substance abuse was the major focus of the student's treatment when he arrived. While she offered that it was her opinion that the student turned to substance abuse in an effort to blunt his emotional turmoil, she also agreed that the student's substance abuse could be a contributing factor to his expressions of anxiety, irritability, motivation and school failure. Whether it was the presenting problem or a symptom of some other underlying problem had not been determined at the time of her evaluation.

Dr. Sanderson's testimony was even less specific. He testified at length regarding his concerns about the student's fears and anxieties as core difficulties that were responsible for many of his problems, including his substance abuse. However, his

⁶ Cannabis Dependence, Alcohol Abuse, Nicotine Dependence, and Disruptive Behavior Disorder NOS being numbers 1-4.

discussion of these fears and anxieties as characteristics that made the student eligible for services as a student with an emotional disability were inconclusive. He testified that the student performed significantly above average when compared to other clients in the program. He described the student as having become a model student within days of arriving in the program. While his Discharge Summary reorders the Axis I diagnosis and puts "Anxiety Disorder NOS" first instead of last, when asked why, he stated he was unsure. His description of the student's anxiety was confined to his early days in the program. These symptoms did not reappear throughout his stay in the wilderness experience, which by its very nature could be considered to be anxiety provoking. Finally, in his report and during his testimony, Dr. Sanderson made it clear that his greatest fear for the student was that he might revert to substance abuse.

Dr. Durham and Dr. Sanderson referred often to the student's long-standing separation anxiety and anxiety related to school attendance. But they could cite only one specific event to support that conclusion, an incident from his third grade related by the student's mother. The student does not have a history of poor school attendance, frequent visits to the school health services or frequent visits to the doctor. In fact, school records through sixth grade give the student high marks for school participation and effort.

Both of these professionals express concern for the emotional state and well being of the student. They are right to do so. However, they saw him for a brief and isolated period far from his home and familiar surroundings, and during a difficult time in his life. Dr. Durham saw the student during two testing sessions to conduct her evaluation. She did not seek input from either the student's local therapist or anyone from the school staff in drawing her conclusions. Dr. Sanderson saw him for approximately 6 weekly visits and talked with field staff. He did not evaluate the student. He too lacked the perspective from the student's private therapist or his school professionals. This is not to minimize the problems the student exhibited while at Redcliff Ascent or the events that brought him there, only that their knowledge of him was defined by this brief intense period, colored by his parents' extreme concern around his behaviors in the home and their avowed anger at the school.

There is no basis upon which to conclude, based on the evidence presented by these two psychologists, that the student exhibits any [sic] either of these characteristics to a marked degree that would make him eligible as a student with an emotional disability. Likewise there was insufficient evidence from Dr. Davidson upon which to make such a determination. The Treatment Plan from Dr. Davidson did not suggest a focus on the student's fears or anxiety. He did not diagnose the student with Generalized Anxiety Disorder, or Anxiety Disorder NOS. His reference to treatment for oppositional/defiant behavior is applied to defiance of parental authority. The student did not display similar problems at school. He has had no legal difficulties.

Is the family entitled to compensation for services they have provided to the student at their expense?

There is no evidence to support the parents' claim that they are entitled to reimbursement for the funds they have expended on behalf of the student or compensation for any alleged violation on the part of the school. The district evaluated the student to address the question in the referral, as they understood it. When they became aware of the parents' desire to have additional evaluations done, they offered to do so. There is disagreement whether the offer from the school for a psychological evaluation was available to the parents in January 2002 or not, but there is no dispute that by early April it was.

There is no evidence upon which to draw a conclusion that an earlier evaluation by the school would have resulted in a different outcome. From January to April, the student was placed out of district, and later out of state by the parents. Evidence makes it clear that this placement was not made in response to the student's possible need for special education services. Clearly, the parent was extremely troubled at his school failure, but the driving force for placement was his increasing opposition at home and his substance abuse. There is no dispute that the student and his family were in crisis, but no direct causal link between that crisis and the school's failure to conduct a psychological evaluation in December 2001 is evident.

If, in addition to the psycho-educational evaluation, a psychological evaluation had been conducted by the school and presented to the January PET, it does not follow that the student would have been found eligible as a student with an emotional disability. Given the student's lack of remarkable behaviors at school, it would have been true then, as it is now, that school staff did not consider the student to exhibit the behaviors that would cause a referral to the PET for consideration as a student with an emotional disability. It is far more likely that the PET would have ended in the same impasse as occurred in May 2002. However, if they had made such a determination, it is implausible that such a decision would have resulted in anything approaching the action taken by the parent. *Sanger v. Montgomery Board of Educ.*, 23 IDELR 955 (D. Md. 2/28/96) (rejecting residential placement under IDEA to address student's "history of oppositional behavior at home.") See also *Board of Education of Oak Park v. Illinois State Bd. Of Educ. And Kelly E.*, 29 IDELR 52 (E.D. Ill. 1998) (Court found 24-hour placement was primarily for non-educational reasons including substance abuse, runaway behavior, defiance of home rules), *Board of Education of Montgomery County v. Brett Y.*, 28 IDELR 460 (4th Cir. 1998) (Court concluded that the school need not fund a residential placement if it is required to address "medical, social, or emotional problems that are segregable from the learning process".) The district would have been unlikely to place the student in an out-of-state residential setting not approved for educational purposes such as the one chosen by the parent. The school would have had an obligation to the student to preserve his right to a free appropriate public education in the least restrictive environment.

Has the parent's failure to give consent for the school to conduct a psychological evaluation impacted the school's ability to make decisions regarding the student's eligibility for services?

Given the preceding discussion, it is difficult to make any determination whether the parent's failure to allow the district to conduct a psychological evaluation impacted the PET's ability to make determinations about the student's eligibility for special education services. Certainly, the information currently available does not support a conclusion that the student meets criteria as a student with an emotional disability. If the parent wishes the PET to give further consideration to the student's eligibility for special education services, the school must be allowed to conduct its own evaluation. Case law supports the district's claim that schools have the right to perform their own evaluation rather than rely solely on the parents' evaluation.

In addition to having the absolute right to conduct a reevaluation on this student, the district has a concomitant right to use their own evaluators for that process, as courts have consistently held. In *Andress v. Cleveland Indep. School Dist.*, 64 F.3d 176 (5th Cir. 1995), the Fifth Circuit held that parents who wanted their child to receive special education services under IDEA "must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation." The Andress court further stated, "A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule."

Falmouth School Department, 102 LRP 4426 (SEA ME, 2000)

V. Order

The district shall offer to provide a psychological evaluation to the student. If the parent grants consent for this evaluation it shall be conducted within the time frame required in regulation. The evaluation report shall be forwarded to the parent and to the school. The PET shall be convened to consider the results of this evaluation, and any other relevant information, for the purpose of determining the student's eligibility as a student with a disability.

Carol B. Lenna
Hearing Officer

