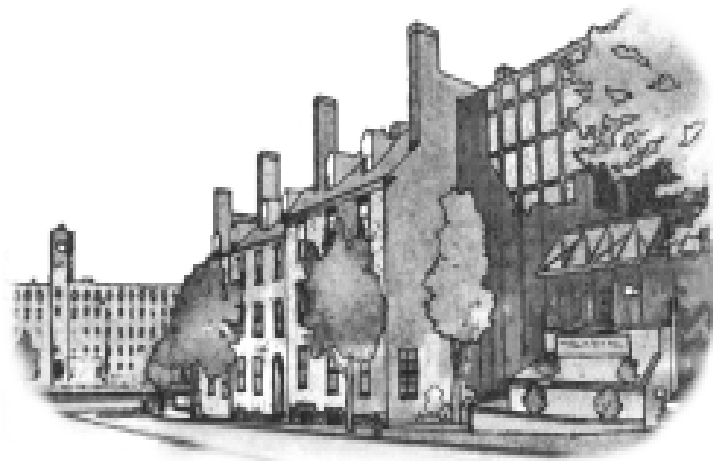


# High Anxiety: Mental Health Issues and the IDEA

Presented to the New Hampshire  
Association of Special Education Administrators

March 12, 2015



***Wadleigh, Starr & Peters, P.L.L.C.  
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### A Word of Caution

No two legal matters are exactly alike. This material is designed to provide educators with information about the law pertaining to student residency and enrollment. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

## **I. Overview**

The purpose of the Individuals with Disabilities Education Act (IDEA) is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A). The IDEA includes a detailed series of procedures that must be followed when evaluating a child and determining whether that child qualifies as a child with a disability under the Act. See e.g. 20 U.S.C. § 1414.

Once a student is identified as eligible for special education and related services, then the IEP Team is charged with developing an IEP and offering a placement in the least restrictive environment.

These materials focus on the two primary intersections between children with mental health issues and educational disabilities: 1) the eligibility determination and 2) the IEP/placement processes. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district’s legal counsel regarding a specific case.

## **II. The Eligibility Determination: Mental Health Issues and Adverse Impact on Educational Performance**

One of the first steps in the IDEA process is identification, which can result in the first major intersection between mental health and the IDEA.

### **A. Child with a Disability Under 34 C.F.R. § 300.8**

The IDEA lists and defines a number of disabilities that qualify a child as a child with an educational disability under the Act. See 34 C.F.R. § 300.8(c)(1) – (13). For purposes of our discussion, the two definitions most relevant to children with mental health issues are “emotional disturbance” and “other health impairment” (“OHI”), which are codified at 34 C.F.R. 300.8(c)(4) and 300.8(c)(9), respectively.

34 C.F.R. § 300.8(c)(4) states:

“(4)(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child'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 behavior or feelings under normal circumstances.
- D) A general pervasive mood of unhappiness or depression.
- E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.”

34 C.F.R. § 300.8(c)(9) defines OHI as:

“(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.”

As we will see in the following analysis, the key phrase, for purposes of determining whether a child’s mental health issues qualify as a disability under the IDEA is whether the condition “adversely affects a child’s educational performance.” However, before determining whether a mental health issue has an adverse effect on a child’s educational performance, the mental health issue must actually qualify as either an emotional disturbance or OHI. If it does not, then one does not reach the question of its impact on the child’s educational performance.

Therefore, any determination of whether a child with mental health issues is eligible for special education and related services involves a two-step process:

- First, the school district must determine whether the child suffers from a condition that is covered under the IDEA, usually either an emotional disturbance under § 300.8(c)(4), or OHI under § 300.8(c)(9).

- If the child does indeed suffer from a covered condition, then the Team must determine whether the condition has an adverse impact on that child's educational performance.

The majority of decisions by courts and hearing officers involving whether a child's mental health issues qualify as a disability center on whether those mental health issues "adversely affect a child's educational performance." Because the IDEA does not define "adversely affect" or "educational performance," some states have enacted laws or regulations defining those terms. In addition, courts and hearing officers have issued decisions that further clarify the terms "adversely affect" and "educational performance." Compare Sanborn Regional Sch. Dist., 48 IDELR 28 (N.H. State Educ. Agency IDPH-FY-07-09-0015 May 21, 2007) (discussing educational performance in the context of an IEP/placement dispute, and noting the "IEP must be a package that must target all of a child's special needs, whether they be academic, physical, emotional or social") with Maus v. Wappingers Cent. Sch. Dist., 688 F.Supp.2d 282 (S.D.N.Y. 2010) (holding that educational performance should only involve "academic performance," rather than social development or integration).

In the simplest of cases, a child with mental health issues whose issues have no adverse impact whatsoever on her educational performance will not qualify as a child with a disability under § 300.8 of the IDEA and thus will not be eligible for special education. Alternatively, if a child's mental health issues cause that child to struggle academically in a clear and meaningful way, then that child will likely be eligible for special education. See e.g. Greenland Sch. Dist. v. Amy N., 2003 DNH 43 (D.N.H. March 19, 2003) (noting that "grades and test results alone are not the proper measure of a child's educational performance," and that the regulations pertaining to evaluations require the team to consider "information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior").

### **B. Mental Health Issue Must Qualify Under § 300.8**

Not all impairments will qualify as a disability under the IDEA. For example, as a general rule, social maladjustment is not considered either emotional disturbances or other health impairments under the IDEA. See W.G. v. New York City Dept. of Educ., 801 F.Supp.2d 142 (S.D.N.Y. 2011). As the U.S. District Court for the Southern District of New York held in W.G., "inappropriate behavior that is attributable to social maladjustment, rather than to an independent emotional disturbance, is insufficient to warrant recognition and accommodation of an emotional disturbance disability." Id. at 174.

In W.G., the student began having "serious academic problems" when he was in 10<sup>th</sup> grade at a private school in New York. He worked hard enough to

qualify for a sports team, was suspended “a few times” for disruptive behavior, and eventually failed several classes and was expelled at the end of the year. He successfully completed summer school and began 11<sup>th</sup> grade in the public school setting. He initially “cooperated,” but when his schedule was changed a few weeks after the school year started, “his emotional state deteriorated, he did not want to attend school any longer, and he would escape through the back door after” his parents had dropped him off and watched him enter the front door.

In October of his junior year, his parents had him privately evaluated, and he was diagnosed with “Bipolar Disorder Depressed.” In November, student dropped out of school, “isolated himself from his family, discussed the futility of life, self-medicated with marijuana and seemed not to care about himself or anyone else.” Over the next few months, student’s parents investigated alternate placements for student. After a second evaluation, they placed him in a residential treatment center with a therapeutic component. They then wrote to the school, indicating that they believed that student required special education and related services, and that they believed that he required a residential placement. Ultimately, the Team determined that the student did not qualify under the IDEA because his “problems stem from his history of substance abuse and maladjusted behavior.” Parents disagreed and requested due process.

The Hearing Officer found for the parents, and the District appealed. The decision was reversed, and the District prevailed on appeal. The court noted that “the distinction between emotional disturbance and other underlying social or behavioral problems is significant – the IDEA does not require school districts to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is neither unable to attend nor impeded by an emotional condition to a marked degree.” The court found that the student failed his classes because he was refusing to go to school, and that his “refusal behavior was principally the product of a conduct disorder, narcissistic personality tendencies and substance abuse, rather than depression.”

*Practice Pointer:* When a child’s poor academic performance stems primarily from his behavior problems such as a disregard for social standards and substance abuse, without evidence indicating that the child has a condition such as anxiety or depression, then it is unlikely that the child would be eligible for special education and related services due to an emotional disturbance or OHI.

Similarly, in Springer v. Fairfax County School Board, 134 F.3d 659 (4th Cir. 1998), the Fourth Circuit found that the child was not eligible for special education and related services because he was socially maladjusted, and did not have an emotional disturbance. The evidence indicated that the child had performed well in school, maintained positive relationships with peers and teachers, and participated in extracurricular activities without incident until the

eleventh grade when he began stealing, sneaking out of his house, skipping school, and using marijuana and alcohol.

Even after this drastic change in the child's behavior, he still maintained standardized test scores in the average to superior range. However, his grades suffered due to his poor attendance and failure to complete assignments. In addition, "the overwhelming consensus" among the mental health professionals who evaluated the child was that he did not suffer from an emotional disturbance.

The Fourth Circuit therefore affirmed the District Court's finding that, not only did the child not suffer from an emotional disturbance, but even if he did, there was no evidence indicating a causal connection between said disturbance and the child's educational performance. The court concluded that "[t]he precipitous drop in [the child's] grades at this time appears to be directly attributable to his truancy, drug and alcohol use, and delinquent behavior rather than to any emotional disturbance" and therefore found that the child was not eligible as a child with a disability.

In contrast, in J.H. v. Republic R-III School District, 632 F.3d 1024 (8th Cir. 2011), the child "received numerous disciplinary referrals over a four-year period for threatening students and teachers, fighting with other students, and treating his peers and teachers with disrespect." During that same time, period student consistently struggled in class, failed a standardized test that he was required to pass in order to progress to seventh grade, and suffered academically because of his diagnosed bipolar disorder. The Eighth Circuit concluded that because the child's educational struggles and behavioral issues were caused by his mental health issues, he qualified for special education under the IDEA.

The most important takeaway from examining and comparing these two cases is that, not only must there be some eligible mental health issue that explains a child's behavioral issues, but the mental health issue must be the cause of any adverse impact on the child's educational performance as well. If a child presents with significant behavioral issues that cannot be explained by an emotional disturbance or other health impairment, then it may not matter if those issues adversely impact the child's educational performance. Likewise, if a child with a qualifying emotional disturbance or other health impairment acts out and has behavioral issues that cause him to struggle academically, there still must be a causal connection between the qualifying condition and the educational difficulties. Otherwise, it is unlikely that the student will qualify as a child with a disability under the IDEA.

*Practice Pointer:* To be eligible for special education as a child with an emotional disturbance, the child must have a condition that is the cause of the adverse impact on her educational performance.

## 1. Maus and M.M., An Evolving Standard

More often than not, when there is a difficult question of whether a child with mental health issues qualifies as a child with a disability, the determination will hinge on whether the mental health issues adversely affect the child's educational performance. Although there have been a handful of cases that address the "educational performance," standard in the context of an eligibility determination, a pair of cases from the U.S. District Court for the Southern District of New York provide particularly strong and elaborate analysis.

In Maus v. Wappingers Central School District, 688 F.Supp.2d 282 (S.D.N.Y. 2010), the parents of a seventh-grader with anxiety and other mental health issues claimed that the child was eligible for special education under the IDEA. During the period of 1998-2003, student was diagnosed and treated by a variety of physicians and specialists, including psychologists, a pediatrician, a pediatric neurologist, a neuro-psychologist, and a language pathologist. She was diagnosed with ADHD, dysgraphia, generalized anxiety disorder, Asperger's syndrome, and pervasive developmental disorder, and was found to have a moderate language-based learning disability, with significant processing deficits in the areas of primary visuo-spatial processing, including perception of spatial orientation, spatial tracking, spatial memory, and visuomotor integration. She received accommodations under Section 504, but was not identified under the IDEA.

In 2003, she began seeing a social worker for weekly counseling due to anxiety symptoms. The next month, she was hospitalized and evaluated for unstable mood and anxiety, and her physician recommended that she be identified as emotionally disturbed and learning disabled.

From 2<sup>nd</sup> through 7<sup>th</sup> grade (1998-2003), student "excelled" in school, earning As and Bs. Before entering 6<sup>th</sup> grade, student's Section 504 accommodations were "significantly reduced." The following year, parents requested an evaluation under the IDEA; the Team determined that she did not qualify and midway through 7<sup>th</sup> grade, her parents removed her from public school and placed her in a private school. While there, she continued to earn As and Bs. Parents requested due process, arguing that student should have been identified.

During the administrative proceedings in the Maus case, the Hearing Officer and the Review Officer disagreed as to whether the student's mental health issues adversely affected her educational performance. The Hearing Officer interpreted "educational performance" to include "non-academic" skills, such as social and emotional difficulties and therefore determined that her anxiety and other issues did adversely affect her educational performance. Alternatively, the Review Officer interpreted "educational performance" to mean "academic performance" and therefore focused on the student's grades and



standardized test scores. Because the student had strong grades and scored in “at least the 91st percentile” on standardized tests evaluating general intellectual capacity, the Review Officer determined that there was no adverse impact.

The Review Officer did make note of the student’s “social and emotional difficulties and areas of weakness,” but ultimately determined that “there is no evidence that these have risen to the level where they are adversely affecting her classroom performance, her ability to learn in class, to function in her classes or to continue in school, or her ability to benefit from a regular education.”

On appeal, the district acknowledged that one or more of the student’s conditions could constitute a disabling condition under the IDEA, but argued that there was no adverse impact on the student’s educational performance. The court noted that “New York’s regulations are the same [as the IDEA] in all material respects,” and determined that the adverse effect on educational performance requires “proof of an adverse impact on academic performance, as opposed to social development or integration.” (citing C.B. ex rel. Z.G. v. Dept of Educ. of the City of N.Y., 322 Fed. Appx. 20, 21 (2d. Cir. 2009) (unpublished opinion) and N.C. v. Bedford Cent. Sch. Dist., 300 Fed. Appx. 11, 13 (2d. Cir. 2008) (unpublished opinion)). “No court applying New York’s implementing regulations has held that a student who has excelled academically nonetheless has a right to special education services under IDEA.” Since student had a “consistently superior academic performance” and performed “far above grade level,” there was no adverse effect and she was not eligible under the IDEA.

About four years after the Maus decision, the Southern District of New York encountered another case that required it to further develop what constitutes “educational performance.” In M.M. v. New York City Department of Education, 26 F.Supp.3d 249, 256 (S.D.N.Y. 2014), the Court determined that “a student’s continued receipt of good grades may constitute evidence indicating that the students’ performance in school was not adversely affected by their emotional problems, but it is not necessarily [conclusive].”

The student in M.M. “began to experience intense depression” in 2000, and had a history of eating disorders beginning in 2004. She was repeatedly hospitalized and was diagnosed with anorexia in 2007; shortly thereafter, she attempted suicide.

Student attended a public school until November 2007. Academically, she did well and received good grades, but she missed several weeks of school that year, and reported that she had difficulty going to school because of anxiety, depression, and fear.

In November 2007, after student’s suicide attempt, parents requested home education; student received home education from November 2007 through January 2008. In January 2008, student travelled to Israel with her father; during

that trip, student attempted suicide again. When she returned in April 2008, she enrolled in a private school in Utah. While there, she continued to receive good grades, and her emotional issues improved.

After she was enrolled in the private residential school, parents referred student for special education. The team concluded that she was not disabled because her psychiatric issues did not adversely impact her academics. Parents requested a due process hearing, and the Hearing Officer determined that the student had a disability under the IDEA because “[a]lthough the student continued to do fairly well grade-wise, there were times when her disorder so consumed her that she was not able to attend school.” Id. at 257.

On appeal, the court noted that “[a] students’ continued receipt of good grades *may* constitute evidence indicating that the students’ performance in school was not adversely affected by their emotional problems, but it is not necessarily conclusiv[e].” Id. at 256 (italics in original). In addition, the court noted that although the student received good grades in the public school setting, they had been declining while she was there, and they had improved while she was at the residential placement. Finally, the court noted that the student’s poor attendance was also indicative of an adverse impact on educational performance, stating “[f]ew things could be more indicative of an emotional problem that ‘adversely affected’ a student’s education than one that prevented her from attending school.” The District was ordered to provide reimbursement to parents.

*Practice Pointer:* The Maus and M.M. decisions illustrate the evolution of the “adversely affects educational performance” standard to the initial eligibility determination. As the court in M.M. noted, the mere fact that a student’s mental health issues prevent the student from even attending school were considered evidence of an adverse impact on that student’s educational performance. This expands the universe of factors that must be considered and indicates that strong grades alone do not necessarily mean that there is no adverse impact on educational performance.

*Practice Pointer:* Grades and test scores are not the only factors to consider when determining whether a child’s mental health issues adversely impact her educational performance. Other factors, such as attendance, may come into play when making an eligibility determination.

## **2. Additional Factors in Determining an Adverse Impact**

The U.S. District Court for the District of Maine has come to a similar conclusion regarding the appropriate standard of what qualifies as educational performance, despite the fact that the Maine regulations provide a more encompassing and liberal definition of “educational performance.” See R.C. v.

York Sch. Dept., 2008 WL 4427194, 30 (D. Me. Sept. 25, 2008) (unpublished opinion).

In R.C., student was diagnosed with ADHD, major depression, unspecified rule out bipolar disorder, and “polysubstance dependence.” She had significant family conflict, a negative peer-network, and high-risk, out-of-control behaviors. Her parents referred her for special education but the team determined that she was not eligible because “she did not display behaviors of emotional disability in school pervasively and did not suffer ‘adverse educational effect.’” Parents disagreed with the determination and ultimately placed the student in a residential facility and requested due process. The Hearing Officer found in favor of the district, noting that student had been suffering from “mild to moderate depression over a period of several years, that her problems were not related solely to substance abuse, and that ‘in comparison to her peers, the student’s emotionally disturbed behavior was more frequent and intense, and therefore, manifested itself to a marked degree,’” but concluded that the student’s condition did not adversely affect her educational performance. Parents appealed.

The Court affirmed the decision, explaining that

“[The child] performed well academically. She had no attendance problems. She worked very hard, completed her work, and worked well independently. She was well-liked by peers and teachers. In school, she displayed excellent social skills, including abilities to transcend cliques and to assume leadership roles. She generally presented in school as happy. She had no difficulty communicating orally or in writing.”

Id.

The Court found that the child’s “drinking, drugging, cutting herself, and promiscuity” did not impact her in-school life in any way and thus her mental health conditions that led to the aforementioned out-of-school issues did not qualify her as a child with a disability. Id. at 26.

In contrast, in N.G. v. District of Columbia, 556 F.Supp.2d 11 (D.D.C. 2008), the court found that the student’s poor grades, attendance and emotional state should have resulted in identification. Student failed 4 of her 7 classes, was diagnosed with ADHD and mood disorder, and had several hospitalizations. The student attended private school and ultimately was successful “in a highly structured environment, with extremely small classes, a high level of direction and supervision, access to crisis counseling, ongoing psychological services, and medication therapy.” As a result, parents were entitled to reimbursement because of the district’s failure to identify and provide appropriate services.

However, if a unilateral private residential placement primarily targets emotional issues manifesting outside of the classroom, then the fact that a

student with mental health issues thrives in such a placement does not mean that he requires similar supports to obtain an academic benefit in a general education setting. See Chicago Pub. Sch. Dist., 55 IDELR 151 (Ill. State Educ. Agency 2010-0265 May 24, 2010). In that case, the student had a history of low frustration tolerance and anxiety that led to him missing classes. Parents enrolled him in a private residential facility. During his senior year of high school, parents referred him for special education, indicating that they were considering enrolling him in the public school. The team determined that the student was not eligible, and parents filed a request for due process. The Hearing Officer found that the student was not eligible because there was no adverse impact on educational performance. Student was thriving in the residential program, and was a “diligent, high-achieving student with good coping skills.” The fact that he was in a residential setting did not automatically mean that he required similar supports to obtain an academic benefit in a general education setting, particularly when the residential program’s supports targeted emotional issues manifesting outside the classroom, and were not necessary for student to make educational progress.

*Practice Pointer:* In addition to reviewing a child’s test scores and grades, school districts should also consider factors such as the child’s attendance at school, her relationships with peers and teachers, and her behavior and conduct when making an eligibility determination.

In a recent case from Pennsylvania, Slippery Rock Area School District, 114 LRP 38151 (Pa. State Educational Agency (“SEA”), Aug. 10, 2014), the student suffered from depression and anxiety and was the victim of a crime during the summer before he entered high school. As a result of the crime, the child’s diagnosed anxiety worsened and he began struggling academically, missing school, and even cutting himself. As a result, the student was placed in a temporary home-based program, but he still failed nearly every class and he repeated ninth grade. Before the start of what would have been his 10<sup>th</sup> grade year, the district evaluated the student and determined that he was eligible due to an emotional disturbance. Parent requested due process, alleging that the district should have evaluated the student earlier.

The Hearing Officer determined that the child should have been evaluated and provided special education services at a much earlier time. Id. However, the Hearing Officer denied the parents’ request for a prospective placement outside the district because it found that there was no evidence that the student would not make progress in the program offered by the district. However, the district was required to provide one hour per day of compensatory education services because of the delay in identifying the student and the lack of appropriate emotional support services during his entire freshman year. See also Berkley Unified Sch. Dist., 114 LRP 17833 (Ca. SEA March 17, 2014) (reported anxiety, 51 absences and 9 tardies, and an agreed-upon independent study, to avoid further truancy, should have led the school district to evaluate and

refer the student for special education. “That Student’s anxiety may have been triggered by the transfer of her best friend to another school, or that her school refusal might have been a learned behavior reinforced by rewards such as Parental attention . . . did not relieve [the district] of its child find duty”).

*Practice Pointer:* Poor grades are not always necessary to establish that a child with anxiety-driven truancy issues has an adverse impact on educational performance. If a child’s condition, such as anxiety, causes her to miss significant amounts of school then that may constitute an adverse impact on her educational performance.

### **C. States May Set Their Own Educational Policy**

Although the IDEA “establishes a basic floor” of education standards for children with disabilities, “it does not displace the states from their traditional role in setting their own educational policy.” Mr. I. v. Maine School Admin. Dist. No. 55, 480 F.3d 1, 10-11 (1st Cir. 2007) (citing Town of Burlington v. Department of Educ. for Com. of Mass., 736 F.2d 773, 788 (1st Cir. 1984)). Therefore, states may create their own educational policies so long as they follow the basic guidelines established by the IDEA.

Some states have adopted their own definition of “educational performance.” See Mr. I., 480 F.3d at 11 (noting that Maine’s educational regulations defined “educational performance” to include “academic areas (reading, math, communications, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments”).<sup>1</sup> The definition adopted by the state of Maine is very broad and

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<sup>1</sup> In this case, student attended the public school until 2003. She excelled academically, but by 4<sup>th</sup> grade, she began to experience anxiety, sadness, and difficulty with peer relationships. In 5<sup>th</sup> grade, she began distancing herself from her classmates. She participated in counseling and began taking an anti-depressant. That year, her grades dropped from “high honors” to honors. As the school year went on, however, her peer interactions and classroom participation improved. At the end of 4<sup>th</sup> and 5<sup>th</sup> grade, student asked her parents if she could be homeschooled. Parents continued to send student to public school for 6<sup>th</sup> grade (2003-04).

Shortly after school started, however, student began “slacking off” in academics and “regularly” missed school. Parents noticed scratches on her arm, which her teachers said might be caused by her “lengthy bathroom breaks” from class. In addition, student continued to have difficulty with peers. Although her teacher considered her to be a very bright student, she also felt that she couldn’t “reach” her because student was refusing to complete assignments.

After student attempted suicide, her parents referred her for special education and also indicated that they were exploring alternate placements for student. Testing established that student had Asperger’s Syndrome and depressed mood. Student was not identified under IDEA, however, because the educational members of the Team did not believe that her academic performance suffered. Parents requested due process, and after a Hearing Officer found in favor of the district, they appealed. The district court reversed the decision, finding that the student was eligible under the IDEA and the district appealed. The First Circuit Court of Appeals affirmed,

includes such factors as extracurricular activities and non-academic areas under the umbrella of “educational performance.” Not all states have adopted such wide-ranging definitions. In the absence of a clarifying definition, courts have found that the Federal standards are not quite as expansive.

To date, no New Hampshire federal court has determined that any of the State regulations set a minimum standard for “educational performance” under the IDEA. See e.g. RSA 186-C:16-c (requiring that the NH Department of Education issue a report each year of rules that exceed the minimum requirements of state or federal special education laws).

Although New Hampshire has not adopted its own definition of “educational performance,” at least one New Hampshire Hearings Officer has relied on the holding in Mr. J in finding that educational performance includes more than just academics. See Sanborn Regional Sch. Dist., 48 IDELR 28, IDPH-FY-07-09-0015 (N.H. SEA May 21, 2007) (finding that a child who earned average grades nonetheless required IDEA services because of nonacademic needs related to his emotional disturbance).

In Sanborn, Student was a 9<sup>th</sup> grade boy, who had initially received special education services, because of OHI, due to a diagnosis of ADHD. While he was in middle school, student began showing “signs of depression, anxiety, low self-esteem,” and a “lack of focus and disruptive, defiant behavior in school and at home.” Student was evaluated in 6<sup>th</sup> grade, and a secondary code of emotional disturbance was added to his IEP, and a behavior plan was implemented.

With the behavior plan, the student’s behavior in school improved, and he earned average grades. However, during 7<sup>th</sup> and 8<sup>th</sup> grade, he began having “chronic” tardiness. He was hospitalized twice, and became “obsessed with violence,” and “in class, was observed to mumble while making drawings depicting violent subjects.” After student was arrested with an incident involving drug paraphernalia, parents enrolled him in a wilderness program in Georgia. Upon completion of the program, student was enrolled in a therapeutic residential school in New Mexico. Parents filed a request for due process, seeking reimbursement for the costs associated with the unilateral placement.

In holding for the parents, the Hearing Officer noted that the “School District has not readily pursued to remedy the whole child but has viewed its responsibility as limited and this is illustrated by its choice not to inquire into causation for isolating and other behaviors and not to give Student a primary code of serious emotional disturbance until just before his departure for” the wilderness program. The Hearing Officer went on to state that the “IEP must be

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noting that the State regulation defining “educational performance” did not require any particular degree of impact on educational performance, and that “any negative impact, regardless of degree, qualifies as an ‘adverse effect,’ under the relevant federal and state regulations.”

a package that must target all of a child's special needs, whether they be academic, physical, emotional or social. Purely academic progress is not the only indicator of educational performance implicated by the IDEA. IDEA services need not address problems truly distinct from learning problems, such as an independent drug problem, but it does not follow that a child without academic needs is per se ineligible for IDEA benefits.”

Thus, the Hearing Officer concluded that “this child's education must include services to address his serious emotional disturbance and secondary problems such as drug use, inappropriate problem solving and disruptiveness.” As a result, parent's received reimbursement for their residential placement. See also Samantha B. v. Hampstead Sch. Dist., 2009 WL 5217035 (D.N.H. Dec. 30, 2009) (noting that “[g]iven the nature of Samantha's non-verbal learning disability, placement at [Hampstead Middle School] might not have been appropriate if it did not foster social and emotional progress as well,” because “the IDEA entitles qualifying children to services that target all of their special needs, whether they be academic, physical, emotional, or social”).

*Practice Pointer.* Sanborn illustrates the application of the adverse impact on educational performance standard to the post-identification, IEP and placement process. In Sanborn, the student had already been identified as both OHI and EH; thus, the Team had already determined that he had a condition that “adversely affected his educational performance.” The issue that the Hearing Officer was asked to resolve involved whether the post-identification adverse impact on educational performance was sufficient to warrant placement in a more restrictive setting.

### **III. The Post-Identification Intersections: IEP and Placement**

As the Sanborn case illustrates, the “adversely affects educational performance” standard also comes into play after the child has been identified, as part of the IEP and placement process. In the majority of those cases, the issue turns on whether the student is being educated in the least restrictive environment.

#### **A. Mental Health Issues and Placement**

There are numerous cases where parents seek alternative placements for their children. In one, Munir v. Pottsville Area School District, 723 F.3d 423 (3rd Cir. 2013), the Third Circuit Court of Appeals concluded that because a parents' decision to unilaterally place their child was primarily motivated by a desire to address the child's mental health needs, and because any educational benefit was “incidental” to that placement, the school district did not need to reimburse the parents for the placement.

The child in Munir was diagnosed as suffering from an emotional disturbance, but was ineligible for special education due to his strong academic performance. The child had no attendance issues, expressed no concerns about school, and received grades in the A to C range in regular college preparatory classes. Over the summer prior to the 2008 school year, the child attempted suicide and was hospitalized. He was hospitalized for suicidal threats on two other occasions as well. His parents thus chose to unilaterally remove him from public school and place him in a private boarding school, which his brother also attended. He eventually left that school and returned to public school for a few months, until he again threatened suicide and was hospitalized for treatment. After this, his parents unilaterally placed him in a therapeutic residential treatment center and then sought reimbursement from the district for the private placement.

The Third Circuit determined that the relevant question was “whether [the child] had to attend a residential facility because of his educational needs – because, for example he would have been incapable of learning in a less structured environment – or rather, if he required residential placement to treat medical or mental health needs segregable from his educational needs.” The Court determined that the child “was enrolled at [the private school] to meet his mental health needs, and any educational benefit he received . . . was incidental.” Id. Therefore, the district was not responsible for reimbursing the parents for the cost of the private placement.

The case of Burbank Unified School District, 114 LRP 36110 (Ca. SEA, Aug. 4, 2014) involved a request for a residential placement. In Burbank, the father of a child who had a history of violent and other negative behaviors at home was concerned about how the child would behave once he transitioned back home after attending a residential treatment facility. The Department of Children and Family Services paid for the child’s residential treatment facility placement for non-educational reasons, and therefore the district did not have to reimburse the father for the costs. Eventually the child transitioned home from the residential placement, but this transition was unsuccessful and involved the child having a “meltdown” and threatening to stab his brothers and his father.

The father placed the child back in a residential private placement that, again, was funded by the Department of Children and Family Services and was geared toward addressing the child’s behavioral rather than educational issues. Once the child reached the maximum amount of continuous months that the Department of Children and Family Services could fund his placement, the Department notified the father that, by law, it could no longer cover the costs of the residential placement. The father then contacted his child’s local school district and requested that his child be assessed for eligibility for a residential placement, at school district expense, as an educationally related mental health service.



The school district IEP team met and determined that the child was eligible under the category of other health impairment due to his medical diagnosis of mood disorder, not otherwise specified, which adversely impacted his educational performance. The district agreed that public school placement was inappropriate, but proposed a private day placement, rather than a residential placement. The father of the child disagreed and believed that, due to the child's extreme behavioral issues at home, a residential placement was the only appropriate option for his child. The father therefore unilaterally placed the child in a residential placement and requested due process, seeking reimbursement.

The Hearing Officer determined that a residential placement was overly restrictive and that the child's in-class behavior was not so severe that it could not be addressed in a day setting. The Hearing Officer also noted that "it was not the district's responsibility to help the student do better at home."

This case provides more insight into what must be required for a private residential placement. In Burbank, the child had severe behavioral issues that adversely impacted his educational performance and were likely best addressed by a residential placement. However, because the child could still thrive educationally in a non-residential private setting, the Hearing Officer determined that a residential placement was unnecessary and that the district would not have to reimburse the father for the unilateral placement.

*Practice Pointer:* Even when a private residential placement addresses educational issues, if a less restrictive placement would also address those same issues, then the residential placement may be overly restrictive.

Eschenasy v. New York City Department of Education, 604 F.Supp.2d 639 (S.D.N.Y. 2009) also involved a parental request for a residential placement. In Eschenasy, the parents of a child with severe behavioral issues placed her in private school from first grade until tenth grade. During her time at the private high school, the child stole, began using drugs, made inappropriate friends on the internet, and ran away from home. Ultimately, she was expelled from the private school in tenth grade because of her behavioral problems. Shortly thereafter, she overdosed on a prescription drug and was hospitalized.

The child then enrolled in two successive private high schools in less than a year, where she was expelled from each because of her behavioral issues. She then ran away from home a second time, which prompted her therapist to recommend that she be placed in a therapeutic boarding school. Her parents unilaterally placed her in two separate private treatment centers and requested an evaluation by the New York City Department of Education's Committee on Special Education (CSE).

The CSE determined that the child was not emotionally disturbed and therefore not eligible as a child with a disability under the IDEA. The parents filed a complaint with the DOE appealing this decision, and the Hearing Officer found that the child was not only “socially maladjusted,” but also “seriously emotionally disturbed.” The Hearing Officer further determined that the unilateral private residential placement was “reasonably calculated to provide [the child] an educational benefit” and therefore ordered that the parents be reimbursed for that particular placement.

The district appealed and the Review Officer reversed, finding that the child was “not properly classified as emotionally disturbed and therefore [the parents] were not entitled to any tuition reimbursement.” The Review Officer based its decision on the fact that although the child exhibited inappropriate behavior, the parents had not shown that these behaviors affected the child’s educational performance to the extent that she needed special education. The parents appealed.

The U.S. District Court for the Southern District of New York determined that, “although [the child] exhibit[ed] conduct disorder, she also me[t] the criteria for emotional disturbance as a student exhibiting inappropriate behavior under normal circumstances and a pervasive depressive state, which adversely affect[ed] her educational performance.”

The next step for the Court was to determine whether the private placement was appropriate and, therefore, whether the parents should be reimbursed for the costs associated with the unilateral private placement. The Court stated that “[u]ltimately, the issue turns on whether a placement – public or private – is ‘reasonably calculated to enable the child to receive educational benefits.’” *Id.* at 650-51 (citing Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 366 (2d Cir. 2006)). A placement meeting this standard is one that is “likely to produce progress, not regression.” *Id.* (citing Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d. Cir. 1998)). The Court concluded that one of the private placements was appropriate, and therefore warranted reimbursement, but the other was not.

The court found that the first private placement, referred to in the opinion as “Dewey,” was not structured and restricted enough to address the child’s needs. The Dewey school gave students ‘a lot of freedom’ and the child’s doctors believed that its loose structure would not sufficiently address her issues. The second school, referred to as “Elan,” was a highly structured, non-voluntary program that addressed the child’s emotional issues as well as academic needs. The Court therefore determined that the Elan school was an appropriate placement that would help the child work through her issues and succeed academically, and awarded parents reimbursement.

*Practice Pointer:* The lesson of these cases is that we must look to the motivation behind a private residential placement to determine if reimbursement is appropriate. If the primary purpose behind a unilateral placement is the child's mental health needs, then reimbursement may not be necessary. However, if one of the primary motivations behind choosing the particular residential placement is the educational benefit that the child will receive, then if the district has failed to provide the student with a free, appropriate public education, it is far more likely that the school district will have to reimburse the parents for the placement.

## **B. Safety Issues**

Mental health-related safety issues can include the potential for danger to the child herself as well as her peers and teachers.

### **1. Danger to Self**

In Crowley Independent School District, 112 LRP 31349 (Tex. SEA, June 1, 2012), the child had a history of mental health issues that manifested in "continued aggressive, self-injurious, behaviors." Over a two-year period, the child received probation through the Juvenile Probation Department and/or psychiatric hospitalization for eight incidents. The district evaluated the child and determined that he was eligible for special education as a child with an emotional disturbance. However, the district ultimately failed to properly address the child's severe and self-injurious behavior. It placed him in a general education setting, and provided him with supplemental aids and services to help his academics improve. However, the child's behavioral issues did not improve. The district then placed the child in an Intensive Behavior Intervention Classroom (Intensive BIC), which, again, did nothing to improve the child's behavioral issues.

The child continued to engage in self-injurious behavior and eventually was hospitalized several times, at least one of which involved the child being hospitalized in a psychiatric unit. Although both sides agreed that the child suffered from an emotional disturbance that required special education, they disagreed on whether the child required a private residential placement. Parents requested due process.

The Hearing Officer felt that since the child's safety issues had escalated to the point where he had been hospitalized in a psychiatric unit, it was clear that "placement in a residential treatment center is essential in order for [the child] to receive a meaningful educational benefit." However, the analysis did not end there. As with other mental health issues, if a child is unilaterally placed in a private residential setting as a result of mental health-related safety issues, the placement must also include an educational benefit.

If the services that a child receives are primarily geared toward addressing his safety issues rather than educational issues, then it is unlikely that the district will have to reimburse the parents for the cost of the placement. In Crowley, the Hearing Officer determined that the services provided by the private residential institution were not primarily geared toward educational purposes. Therefore, despite the fact that the district would be responsible for an appropriate private residential placement, the district was not required to reimburse the parent.

Crowley provides a clear example of when mental health-related safety issues are so extreme as to warrant not only special education and related services, but a private residential placement as well. In Crowley, the Hearing Officer determined that because the child's mental health issues had caused him to be hospitalized in a psychiatric unit, a private residential placement was necessary, as long as that placement was geared toward providing an educational benefit.

*Practice Pointer:* Even when a child is placed in a residential treatment center for his own safety, such placement should also provide an educational benefit.

## **2. Danger to Others**

In extreme circumstances, a district can change a child's placement because the child's behavioral has become a danger to her classmates, teachers, and support staff. See 34 CFR 300.532(a) (authorizing the district to request a hearing to change placement when the LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or other).

In Amanda S., 26 IDELR 80 (Iowa SEA, May 22, 1997) the student was a 12-year old sixth grader who was identified under the IDEA due to an emotional disturbance. Student's behavioral issues dated back to her preschool program, from which she was expelled. In kindergarten, she had "frequent incidents of aggression (kicking and biting) and non-compliance with rules and teacher requests." She was identified that year and placed in a "special class with integration" in her neighborhood public school.

Her behaviors continued and in October of first grade, her placement was changed to another public school district with a "special class with little integration." This change of placement occurred due to "extreme aggressive behavior toward other students and adults in the form of scratching, biting, hitting, and kicking." On one occasion, she slapped her teacher across the face and made her glasses fly across the room.

She did well in this program until September 1995, when she entered 5<sup>th</sup> grade. That year, she was suspended during the first week of school due to

“insubordination, disorderly behavior, intimidation and willful disobedience,” and was suspended on two more occasions that September. As a result, the other school district indicated that it was refusing to provide special education programming for the student, and she was returned to her school district of residence.

However, her district of residence did not have a self-contained program for students with behavior disorders. As a result, she was placed in a “resource teaching program” with a teacher and full-time assistant. In February, her program was changed to reduce the length of the school day.

Numerous behavioral incidents occurred during the 1995-96 school year. Student refused to follow teacher directives, refused to “go where she was supposed to be, hit and kicked a teacher, hit the teacher associate, and wandered away from the classroom.” In addition, on a daily basis, she refused to comply with school rules, used profane language, wandered around the school without permission, and made “paranoid complaints about peers and adults.” In April of that year, student called her teacher a “‘bitch’ modified by various profane adjectives, kicked her causing bruises, threatened to ‘kill’ a peer, and refused to comply with reasonable requests.” Her IEP was amended following those incidents.

She began her sixth grade year in a self-contained special class with integration. In December, it was changed to “with little integration” and a new “behavioral contract” was written. Student’s behaviors were similar to the prior year, with daily occurrences of non-compliance, verbal threats and swearing. On one occasion, she pushed another student and punched him in the eye. She also threw “wooden pumpkins at school personnel, and turned over desks.” On another occasion, she “lost control, became agitated, destroyed a ‘boom box’ in the classroom, ripped a pencil sharpener off the wall, purposely cut her finger with the radio antenna, attempted to cut her wrists with the antenna, ran from the classroom and away from school officials. Police were called, and she attempted to kick the officers, swore at them and verbally abused others attempting to help her.

In February 1997, student ‘attacked another student, saying, ‘I’m going to f---ing kill you,’ grabbed him and threw him to the floor. The assistant principal was summoned,” and student “pushed him, kicked him twice, and punched him in the chest.” During this time, student was described as “in a rage, out of control, irrational, surprisingly strong, unapproachable by gentle touch or reasoned discourse, and threatening to herself as well as to others.” Following this incident, the district proposed to change the student’s placement to a more restrictive day setting. Parents disagreed with the proposal, which led to an administrative hearing.

The Hearing Officer found that the school district's basis for proposing the change in placement was "the apparent futility of their concerted, intensive efforts to assist [the child] in developing more responsible social and emotional behaviors." The Hearing Officer also noted that the district feared that the child's "periodic out of control outbursts" would lead to serious injury to herself or to others in the school environment and, further, that continuation of such disruptive behavior put her at severe risk for negative educational, social, and career outcomes.

The Hearing Officer noted that it was important to reconcile the need for ensuring the safety and educational progress of both the child and her classmates, with the statutory preference for placing the child in the least restrictive environment. To do this, the Hearing Officer relied on the tests established in the case of Board of Educ. v. Holland, 786 F.Supp. 874 (E.D. CA 1992) (9th Cir. 1994). The Holland case looked to several other Circuits and found that the following factors are relevant to determining if a placement is appropriate:

- a) the educational benefits available to the child in a regular classroom (here, the self-contained special education class offered by the school district), supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom (the day treatment program that the district wished to place the child in);
- b) the non-academic benefits to the disabled child of interaction with non-disabled children;
- c) the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and
- d) the costs of supplementary aids and services necessary to mainstream the disabled child in the regular classroom setting.

Id. (citing Holland, 786 F.Supp. at 878).

The Hearing Officer noted that the child currently had relatively little contact with regular education classrooms or regular education students due to her "defiant, non-compliant, and periodic serious outbursts." Ultimately, the Hearing Officer concluded that although the child was receiving educational benefits from being in her current special class, the usefulness of these skills was overshadowed by her behavioral problems, which were "of paramount concern." Therefore, the Hearing Officer ordered that student be placed in the day treatment program. The Hearing Officer also ordered that the district was responsible for all costs of the program, including non-educational costs such as

the clinical-therapy component because the child “needs a program with a clinical-therapy component in order to receive an appropriate education.”

Essentially, the Hearing Officer in In re: Amanda S. determined that the child’s behavioral issues were so severe and presented such a serious risk to herself and others that, even if she were to continue to progress academically, that progress would mean nothing if she could not control her behavior. This reasoning is noteworthy because it stands for the proposition that the child’s academic progress can be overshadowed by severe behavioral issues.

*Practice Pointer:* Even if a child’s current placement allows her to progress educationally, a change to a more restrictive placement can still be warranted if her behavior problems are substantially dangerous and disruptive.

### **C. Substance Abuse**

As the following cases illustrate, substance abuse can impact both the eligibility determination and the post-identification IEP/placement process. The first case, Forest Grove, involves the identification process and a parental request for residential placement.

In Forest Grove School District v. T.A., 638 F.3d 1234, 1236 (9th Cir. 2011), student was enrolled in the Forest Grove School District from kindergarten until the spring semester of his junior year in high school. At that point, he was removed by his parents and enrolled at Mount Bachelor Academy, a private boarding school. While at Forest Grove High School, T.A. received mostly C’s and D’s; however, a school evaluation conducted in 2001 revealed that he did not have a learning disability. Accordingly, T.A. was considered ineligible for special education services.

In fall 2002, T.A. began to use marijuana regularly, and in early 2003, he ran away from home. As a result, T.A.’s parents took him to a psychiatrist to be evaluated, and they enrolled him in a three-week program for troubled youth at Freer Wilderness Therapy Expeditions, where it was also revealed that T.A. had used cocaine. After the psychiatric evaluation, conducted in March 2003, T.A. was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), depression, and marijuana addiction.

T.A.’s parents immediately removed him from public school and enrolled him at Mount Bachelor Academy. On the Mount Bachelor application, T.A.’s father did not mention T.A.’s ADHD or schoolwork in response to a question asking “which specific events precipitated enrollment in the program?” Instead, he cited T.A.’s drug use and behavioral problems.

After enrolling T.A. at Mount Bachelor, in April 2003, his parents filed a complaint against Forest Grove for a failure to provide T.A. with free, appropriate public education and requested an administrative due process hearing. In July 2003, a team of specialists from Forest Grove confirmed T.A.'s diagnosis of ADHD but determined that he was not eligible for services under the IDEA because his ADHD did not have a severe adverse effect on his academic performance.

In 2004, the hearing officer issued an opinion in favor of T.A.'s parents, holding that T.A. was disabled, that the diagnosis had a severe adverse effect on his academic performance, and that Forest Grove had thus failed to provide T.A. with a FAPE. Accordingly, the hearing officer held that Forest Grove was responsible for the costs associated with his placement at Mount Bachelor.

On appeal, the district court reversed, holding that T.A. was statutorily ineligible for reimbursement of private school expenses under 20 U.S.C. § 1412(a)(10)(C) and that principles of equity did not support an award of reimbursement. The Ninth Circuit Court of Appeals reversed the decision that T.A.'s parents were not entitled to reimbursement, holding that, under general principles of equity, students who had not previously been diagnosed with a disability are nonetheless entitled to reimbursement as 'appropriate' relief pursuant to 20 U.S.C. § 1415(i)(2)(C). Additionally, the court rejected the district court's conclusion that "tuition reimbursement is available only in *extreme cases* for parents who place their children in private school before receiving special education services in public school." The Ninth Circuit remanded to the district court to determine whether, after considering all relevant factors, principles of equity applied to the present case. The school district appealed to the Supreme Court, and the Court affirmed that reimbursement under IDEA is not precluded where the child had not previously received special education under the authority of a public agency.

On remand, the district court held that the parents were not entitled to reimbursement because they had unilaterally placed him in private school as a result of his drug abuse and behavioral problems, not due to an educational disability recognized by IDEA. The district court cited the timing of the change in schools and the fact that his father listed T.A.'s behavioral issues, depression, and drug use as the reasons for enrollment at Mount Bachelor as relevant factors in the decision. The parents appealed that decision to the Ninth Circuit Court of Appeals, and the court found for the district.

The Ninth Circuit found that there were ample facts to support the conclusion that T.A. was transferred to Mount Bachelor solely for non-academic purposes. The timing of T.A.'s enrollment directly coincided with the escalation of his drug and behavioral problems and his attempt to run away from home. There was no attempt to transfer the student during the two-year period when ADHD and poor academic performance were the sole issues. Furthermore,



statements made by T.A.'s father on the boarding school application specifically indicated that T.A.'s drug and behavioral problems were the sole reason for his enrollment, and his academic difficulties were not mentioned.

When the statements made on the application were considered in conjunction with the timing of T.A.'s enrollment, it was not illogical, implausible, or without support for the district court to infer that the enrollment was solely for non-academic purposes.

The court reiterated that its decision "does not seek to establish a rule of law which requires parents who seek to address all of their child's needs to answer each and every question with the response: Disability." Rather, a fact-specific weighing of the equities of the case must be conducted, and the particular circumstances of this cases warrant a finding that there was no clear factual error in the determination that T.A.'s academic performance did not play a role in his transfer to Mount Bachelor. Accordingly, the circumstances of this case weighed against reimbursement.

*Practice Pointer.* If the primary purpose for a unilateral placement is not educational in nature, then parents may be precluded from obtaining reimbursement for the costs associated with the placement.

It is also worth mentioning that just because a child's issues seem to relate primarily to his substance abuse, this does not mean that the district can rule out other mental health issues. In Fort Bend Independent School District v. Z.A., 62 IDELR 231 (S.D.Tex. Jan. 29, 2014), the U.S. District Court for the Southern District of Texas found a child eligible for special education services despite the fact that the district believed his issues stemmed primarily from "marijuana-induced laziness."

Student was adopted from a Russian orphanage at age 4. He was diagnosed with ADHD. When he entered school, he had a Section 504 plan due address his ADHD. During 8<sup>th</sup> and 9<sup>th</sup> grade, however, student began exhibiting more significant mental and emotional issues, including suicide attempts and smoking marijuana. Despite this, he did well in school and "bragged to his teachers that he knew exactly how much effort was necessary to pass his courses."

A few months after his suicide attempt, parents requested a special education referral. In the meantime, student completed the year by failing 3 classes and needing to attend summer school. Student was evaluated and it was determined that he experienced significant emotional deficits involving anxiety and depression, that manifested themselves in school as "withdrawal behavior," but that his academic achievement was average or above average in every area tested. His evaluators "concluded that he could pass his classes with preferential seating, frequent breaks, positive reinforcement, behavior-

management plans, and extended times for tests and projects.” Student was identified and an IEP was developed.

When student entered high school, he refused to complete much of his school work and continued to “inform teachers of his aspirations to sell marihuana.” In October of that year, his parents withdrew him from school and unilaterally placed him in a wilderness camp in Utah; student’s outside psychologist recommended this to improve student’s mental-health and substance abuse issues. When student was released from the wilderness program, he was placed in a residential mental-health facility; he was also diagnosed with reactive attachment disorder (RAD). Parents’ requested due process, seeking reimbursement.

The Hearing Officer found that the district had denied the student a free, appropriate public education and ordered the district to reimburse the parents for the residential placement. The district appealed, and the court affirmed the decision. The district appealed to the Fifth Circuit Court of Appeals.

The appellate court reversed, finding that the unilateral placement was not appropriate.<sup>2</sup> The court noted that a residential placement is appropriate when it is “1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education,” and that “two factors are crucial: ‘whether the child was placed at the facility for educational reasons and whether the child’s progress at the facility is primarily judged by educational achievement.’” Here, the court found that the student was placed primarily for non-educational reasons –parents were concerned that student might attempt suicide and were concerned about his drug problem. In addition, student’s progress was measured primarily on his progress in treating his RAD and not on his educational achievement. Thus, the court found that the parents’ placement was not appropriate and reversed the reimbursement award.

These cases should serve as a warning that even if a child’s struggles seem to be caused entirely by the child’s out-of-school behavioral issues, that the child may still be eligible under the IDEA.

In contrast, in P.C. v. Oceanside Union Free School District, 818 F.Supp.2d 516 (E.D.N.Y. 2011), the parents of a teenager who smoked marijuana on a daily basis throughout seventh and eighth grade alleged that their son’s anger, anxiety, depression, and poor academic performance were the result of an emotional disturbance that his school district failed to address. Beginning in the seventh grade, and continuing through the eighth grade, the child struggled academically and received failing grades. However, before beginning the seventh grade, the child earned average grades and showed no significant signs that he was struggling academically.

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<sup>2</sup> The court did not reach the issue of whether the District had offered a FAPE to the student.

The Hearing Officer concluded that the child's struggles and behavioral issues were a result of his substance abuse and, therefore, the child was not eligible as a child with an emotional disturbance under the IDEA. On appeal, the court agreed, noting that this noticeable decline in the child's academic performance corresponded with his abuse of marijuana, alcohol, and prescription medications. The court also noted that once the child began abstaining from substance abuse, "his academic performance improved in a pronounced fashion, with his grades rising and his future academic prospects turning around." Additionally, even during periods of the child's heaviest substance abuse, "his overall cognitive functioning was average; his processing skills were in the borderline range; his decoding, math, spelling, and listening comprehension skills were average; and his oral expression skills were in the superior range."

The Court determined that the child's substance abuse issues were ultimately the cause of his academic and behavioral problems rather than a result of his problems. Therefore, the Court affirmed the Hearing Officer's decision and concluded that the child was not eligible for special education as a child with an emotional disturbance.

This opinion further clarifies what factors must be examined when determining whether a child with substance abuse issues nonetheless qualifies as a child with a disability under the IDEA. In P.C., the child struggled both with his academics and with his behavior, but because the evidence so clearly indicated that the underlying cause of the child's problems was his substance abuse, the Court found that the child did not have an emotional disturbance.

*Practice Pointer:* In cases where a child's decline in educational performance is clearly correlated with his substance abuse issues, a Court is unlikely to find him eligible for special education unless his substance abuse is the result of an eligible mental health issue.

In EK v. Warwick School District, 62 IDELR 289 (E.D.Pa. Feb. 26, 2014), the U.S. District Court for the Eastern District of Pennsylvania found that a parent could not recover the cost of her child's unilateral private placement because the primary goal of the placement was to treat the child's substance abuse problems. The child in EK was evaluated by the school district, which determined that she was "functioning well behaviorally and emotionally in school overall, but that her behaviors at home were out of control." The district also determined that the child did not meet the criteria for a learning disability or an emotional disturbance and was therefore ineligible for special education.

Eventually, the mother learned that her child was using drugs, and, as a result, she unilaterally placed the child at the Caron Foundation for drug addiction treatment. While at Caron, the child excelled in the classroom, and, after four months, she transitioned to a nonpublic catholic school. She left the catholic

school a few months later after being hospitalized for a suicide attempt. After she was released from the hospital, her mother re-enrolled her in the public school district and sought a new evaluation for special education.

At that point, the district determined that the child qualified for special education as a child with an other health impairment. However, not long after her re-enrollment in the public school, the child again had to go to the emergency room for a suicide risk assessment. At this time, her parents decided that she would have to return to a rehabilitation center. After a brief stay at the rehabilitation center, the child left and her mother decided to unilaterally place her at the Family Foundation School, a private residential institution that would help treat her substance abuse problems. Before the mother unilaterally placed her child, she met with the district several times to develop an IEP. The district offered full-time emotional support for the child, but the mother believed that the plan did “not provide the level of therapeutic support [the child] needs at this time.”

The mother then filed a Due Process Complaint, seeking reimbursement for the unilateral placement. The Hearing Officer found in favor of the district and the mother appealed to the District Court. The District Court affirmed the decision of the Hearing Officer, noting that nothing in the evidence indicated that the child’s IDEA disability was the reason for her residential placement. The Court found that it was clear that the child was not placed in the residential setting for educational purposes, but rather to address her behavioral and substance abuse issues. The Court also determined that the district’s offered IEP was appropriate for the child and concluded that “[t]he choice of Family Foundation School, while rational, was a response to [the child’s drug addiction, not her disability.” The Court went further and explained that “[a] school district cannot be held responsible for treating a student’s longstanding drug addiction, familial problems, or delinquent behavior.”

*Practice Pointer:* It is not the responsibility of the school district to provide services to treat a child’s substance abuse issues, familial problems, or delinquent behavior.

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