

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

January 13, 2003

Case # 02.354, *Parents v. M.S.A.D. # 22*

REPRESENTING THE FAMILY : The family was pro se.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

The hearing was requested by Mother on December 5, 2003. The case involves Student, whose date of birth is xx/xx/xxxx. He currently resides in a Spurwink group home in Augusta, Maine. Student's parents and siblings live in Winterport. Prior to placement in the group home in September, or early October, 2002, Student lived with his family in Winterport, attended Hampden Academy and was in the xx grade. He was eligible for special education services under the category of Multihandicapped – Learning and Speech/Language Disabled and received services under an I.E.P dated May 29, 2002.

On September 26, 2002, Student told the School Resource Officer at Hampden Academy, Officer Chris Bailey, that he intended to kill his (Student's) brother. Following further discussion with Student, and discussions with other school and law enforcement personnel, Officer Bailey arrested Student.

Parent contends that the arrest of Student on that day was a violation of Student's Behavior Plan and I.E.P. and was therefore a violation of the Individuals with Disabilities Education Act (I.D.E.A.). The school denies this contention.

The parties held a prehearing conference on December 20, 2002, to clarify the issues for hearing. Documents and witness lists were exchanged in a timely manner. One hundred and fifty (150) pages of documents were jointly entered into evidence. Five witnesses testified.

Following is the decision in this matter.

I. Preliminary Statement

This case involves a xx-year-old male student, who is eligible for special education services under the category of Multihandicapped – Learning and Speech/Language Disabled. Student is currently placed in a Spruwink [sic] group home in the Augusta School District, having been placed there subsequent to an arrest on September 26, 2002. Prior to that arrest, student attended xx grade at Hampden Academy and received services under an I.E.P. dated May 29, 2002. Under this I.E.P., student had a full-time aide and received direct instructional services, psychological services, speech and language services, counseling and extended school year.

On September 26, 2002, student arrived at school in a very agitated state, apparently having had a serious argument with his older brother the night before. Upon arrival at school, student sought out the School Resource Officer (S.R.O.), Chris Bailey. When he located Officer Bailey, student told him that he had fought with his older brother and that he wanted his brother arrested for assault. Student then stated that he would get a gun and shoot his brother.

Officer Bailey became concerned about this threat and spoke to school personnel with whom student had contact that morning. He also spoke with a representative from the Penobscot County District Attorney's office and a caseworker from the Department of Corrections. Eventually Officer Bailey took student into custody, transported him to the police station and prepared paperwork for a conditional release. However, the family refused to agree to all of the terms of conditional release and student was subsequently transported to jail.

The family requested this hearing. They contend that student's arrest on September 26, 2002 was a violation of his I.E.P. and therefore a violation of the I.D.E.A.

The School Department denies this contention.

II. Issues to Be Decided by the Hearing

- **Did Student's arrest on September 26, 2002, violate Student's I.E.P., dated May 29, 2002, and therefore violate the I.D.E.A.?**

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx. (Exhibit: 10)
2. On September 26, 2002, student was in the xx grade at Hampden Academy and was eligible for special educational services under the category of Multihandicapped – Learning and Speech/Language Disabled. He was receiving direct instructional services, psychological services, speech and language services, and extended school year services under an I.E.P. dated May 29, 2002. This I.E.P. included a Transition Plan and a Behavior Intervention Plan (B.I.P.)

and student also had a full time aide. Student's B.I.P includes the following language:

If [student] does make a threatening remark or extreme statement he will receive ONE verbal cue from the Ed Tech and he will comply to [sic] that request immediately without arguing. If he does not comply, he will be removed from the class/situation until such time as he can demonstrate he is under verbal control and can follow directions. If he cannot get under verbal control [Mother] will be called and he will be taken home.

(Exhibit: 10-30, 18)

3. Student's file also includes the following statement, dated September 13, 2002 and signed by the Mother on September 18, 2002: "[Mother] has agreed that if [Student] gets out of control, it is okay to call the Hampden Police and have them take him to EMMC emergency room." (Exhibit: 34)
4. Student has been identified with a fixation and a fascination with weapons and thoughts of violence. In an Acadia Hospital evaluation dated August 2, 2001, Student's treating psychiatrist states, "I think his potential to become violent is quite real if he feels threatened and if his defenses are challenged during one of his more vulnerable periods." Likewise, Student's B.I.P states, "[Student] will not be allowed to make any objects that resemble weapons while at school or while in any class or while at U.T.C." (Exhibits: 12, 111)
5. On September 26, 2002, Student arrived at school in an agitated state, having had a fight with his older brother on the night before. (Testimony: C. Bailey, Mother)
6. Soon after arriving at school, Student sought out the School Resource Officer (S.R.O.), Chris Bailey. Officer Bailey is a member of the Hampden Police Department and is assigned, during school hours, to Hampden Academy. In addition to dealing with safety and other related issues at Hampden Academy, the officer also teaches occasional classes on law and safety related topics when requested to do so by the Superintendent. When school is not in session, he works on police duties in Hamden [sic]. His supervisor is the Hampden Chief of Police, Joe Rogers. Although M.S.A.D. #22 contributes an annual amount, equal to one-half of Officer Bailey's salary and benefits, to the town of Hampden, the officer receives his paycheck from the town of Hampden and is covered by a collective bargaining agreement with the town. (Testimony: C. Bailey, R. Lyons)
7. Student told Officer Bailey that he had had a fight with his brother and wanted his brother arrested for assault. Officer Bailey told Student that he would need to contact the Waldo County Sheriff's Department since Winterport, where student was residing, was in Waldo County. Student next told the officer that he would get a 9 mm gun and shoot his brother. (Testimony: C. Bailey)

8. Officer Bailey became concerned about this threat to Student's brother, and he spoke with Student's aide, Steve Brown. The aide confirmed that Student appeared very agitated and that he seemed to have stopped taking his medication. (Testimony: C. Bailey)
9. The officer next called the Waldo County Sheriff's Department and discussed Student's prior involvement with the Sheriff's Department. He then called a representative from the Penobscot County District Attorney's office and discussed moving forward with a terrorizing charge against Student. (Testimony: C. Bailey)
10. Officer Bailey next spoke with Student's special education teacher, Sedena McAvoy. Ms. McAvoy stated to the officer that earlier that morning Student had made a gun gesture and said that he had made that gesture towards his brother. He then asked, "why he couldn't kill a family member, why he couldn't kill his brother." (Exhibits: 4-5; Testimony: C. Bailey)
11. In a memo dated September 27, 2002, Ms. McAvoy further states that Student "did appear genuinely concerned that he was going to hurt his brother. [Student] repeated [these types of] comments on and off until he was arrested." (Exhibits: 4-5)
12. Subsequent to the above discussions, Officer Bailey spoke with David Greenier, Hampden Academy's assistant principal. During that time, the Mother called and both Mr. Greenier and Officer Bailey spoke with her. She confirmed that Student was not taking his medication and stated that Student had no access to the family's guns, but also said that his friends had guns. (Exhibit: 6; Testimony: C. Bailey, D. Greenier, Mother)
13. Officer Bailey next spoke with a caseworker from the Juvenile Division of the Department of Corrections. The caseworker told the officer that Student was not currently under the supervision of the Department of Corrections but that in 2000 he had been adjudicated on a concealed weapons charge. The caseworker suggested some items that the officer should include on a conditional release form. (Testimony: C. Bailey)
14. Officer Bailey next called the Mother and informed her that Student was about to be arrested. He stated that Student could be released under a conditional release, which would include conducting an immediate psychological evaluation and removing the firearms from the family's home. (Testimony: C. Bailey, Mother)
15. Student was taken into police custody and transported to the police station. Ms. McAvoy accompanied him there and stayed with him until his parents arrived. (Exhibit: 5; Testimony: C. Bailey)

16. When Student's parents arrived at the police station, they reviewed the conditions of release, but refused to remove the guns from the home. Student was therefore transported to a juvenile facility at the Penobscot County Jail. (Testimony: C. Bailey)

17. On December 17, 2002, Student pled guilty to a charge of terrorizing. He is currently residing in a Spruwink [sic] group home in Augusta, Maine. (Exhibit: 2; Testimony: Mother)

IV. Discussion and Conclusions

- **Did student's arrest on September 26, 2002, violate student's I.E.P., dated May 29, 2002, and therefore violate the I.D.E.A.?**

There is little disagreement about the facts of this case, and what disagreements there were centered around minor details of the events on September 26, 2002. Therefore, the issue in dispute, whether student's arrest on September 2002 was a violation of his I.E.P., and of the I.D.E.A., is a purely legal one.

At issue is not whether student's arrest was a valid one. The forum to address that question is the courtroom. Nor is the issue whether student's I.E.P or B.I.P were appropriate. That issue was not raised.

If the consequences that student experienced on September 26, 2002 were educational ones, rather than legal ones, the analysis would be different. For example, if student were suspended, expelled, placed in an alternative educational setting or put on home schooling, there is a procedural process that the school would be required to follow. To fail to do so would, in fact, be a violation of I.D.E.A.

However, the decision to arrest student was not an educational decision. The decision was not made under the authority of any school administrator and was not carried out by a school employee. Although Officer Bailey is deployed to Hampden Academy as part of his police duties he is neither an employee nor an independent contractor of M.S.A.D. #22. He is not an agent of the school district. Although he does teach some classes at the school, and would be under the authority of M.S.A.D. #22 when doing that teaching, the officer is independent of M.S.A.D. #22 when he is carrying out traditional law enforcement duties.

In this matter, Officer Bailey concluded that student's statements and conduct on September 26, 2002 were serious enough for him to arrest student. The officer was taking his authority from the Maine Criminal Code and the I.D.E.A. provides no language that can be interpreted as preventing "State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C.

§1415(k); 34 C.F.R. §300.529. Likewise, a recent Texas hearing officer decision held that a parents' complaint against the actions of the police department who arrested

student for in-school behavior is outside the jurisdiction of the state hearing officer.
Spring Branch Independent School District, 102 LRP 12464 (SEA TX April 8, 2002).

Therefore, under the facts of this case and the applicable law there are no special education issues to consider and consequently no I.D.E.A. violation.

VII. Decision

The arrest of student on September 26, 2003 did not violate student's I.E.P. and there was therefore no violation of the I.D.E.A.

VIII. Order

Since MSAD #22 committed no substantive or procedural violations of the I.D.E.A., no order is issued.

Lynne A. Williams, J.D., Ph.D.
Hearing Officer

Date

Index of Documents

- 1 Note from Parent, dated November 6, 2002
- 2 Conditions of Release by District Court, dated November 5, 2002
- 3 E-mail regarding phone communication with Parent, dated September 30, 2002
- 4 Summary by Ms. McAvoy regarding incident of September 26, 2002
- 6 Notes by Assistant Principal Greenier regarding September 26, 2002 incident
- 7 P.E.T. Minutes, dated October 11, 2002
- 10 I.E.P., dated May 29, 2002 (with attached Behavior Plan at page 18)
- 31 P.E.T. Minutes, dated September 18, 2002
- 34 Agreement by Parent regarding calling the police, dated September 13, 2002
- 35 P.E.T. Minutes, dated July 2, 2002
- 39 P.E.T. Minutes, dated May 29, 2002
- 41 P.E.T. Minutes, dated April 5, 2002
- 44 Key Math Evaluation results, dated March 25, 2002
- 56 I.E.P. Amendments, dated December 7, 2001
- 62 P.E.T. Minutes, dated December 7, 2002
- 66 I.E.P., dated September 28, 2001 (Revisions)
- 71 P.E.T. Minutes, dated September 28, 2001
- 73 I.E.P. Revisions, dated September 5, 2001
- 75 P.E.T. Minutes, dated September 5, 2001
- 78 Acadia Hospital Evaluation, dated Summer 2001
- 119 Discharge Recommendations, dated September 20, 2001

- 121 Observation Report, dated May 22, 2000
- 123 Speech and Language Triennial Evaluation, dated May 5, 2000
- 129 Psychological Evaluation, dated March 10, 2000
- 135 Academic Evaluation, dated March 2000
- 142 Physical Therapy Evaluation, dated November 1999
- 145 Letter from Parent to Mr. Lyons, dated October 11, 2002
- 148 Letter from Parent to Ms. Thurston, dated October 15, 2002
- 149 Conditions of Probation, dated December 17, 2002

Witnesses

Officer Chris Bailey, School Resource Officer

Carrie Thurston, Director of Special Services

Mother

David Greenier, Principal of Hampden Academy

Richard Lyons, Superintendent, M.S.A.D. #22