

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

June 25, 2004

Case # 04.059 (*Parents v. M.S.A.D. #55*)

REPRESENTING THE FAMILY : Richard O'Meara, Esq.

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.

This due process hearing was requested by the parents, on April 23, 2004. The case involves Student, whose date of birth is xx/xx/xxxx. Student currently attends the Community School in South Tamworth, New Hampshire and has recently completed the xx grade.

A prehearing conference call was held on May 12, 2004. Present on the prehearing conference call were the parents; Richard O'Meara, Esq., counsel for the family; Jim McDevitt, Director of Special Services; Eric Herlan, Esq., counsel for the school department; and Lynne Williams, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner.

The hearing was held on May 26 and May 28, 2004, in Sanford, Maine. The family submitted 157 pages of documents, and the school district submitted 253 pages. Ten witnesses testified. Written closing arguments were submitted on June 9, 2004, and the record was closed at that time. Due to technical issues, this decision is being issued later than fifteen days following close of the record.

Following is the decision in this matter.

**I. Preliminary Statement**

Student is a xx year-old female, who recently completed the xx grade at the Community School in South Tamworth, New Hampshire. She was unilaterally placed by her parents at the Community School, having attended Cornish Elementary School until the beginning of October 2003. Student has been diagnosed with Asperger's Syndrome and clinical depression; however, she is not currently determined to be eligible for special education services.

Student has always done well academically but has had consistent problems with peer relations. She has also frequently questioned the reasonableness of various school rules, although she always obeyed the very rules that she questioned.

In early October 2003, Student attempted suicide while at home alone. She was hospitalized briefly and began receiving therapy upon her release from the hospital. Prior to, and immediately following, her suicide attempt, Student expressed deep dissatisfaction with Cornish Elementary School and she was informed by her parents that she would not have to return to that school. Student was briefly home schooled by her mother, and in January 2004 she began taking one class at the Community School in Tamworth, New Hampshire. In late January 2004, she began attending that school for full days, four days a week. In March 2004, Student was determined to be ineligible for special education services, but eligible for a Section 504 plan, and such a plan was developed.

The family seeks a determination of eligibility for special education services, either under the category of Emotional Disability, Autism or Other Health Impaired. They also seek reimbursement for tuition and other costs associated with Student's placement at the Community School as well as compensatory educational services to make up for the educational services that she did not receive during the 2003-2004 school year.

## **II. Issues to be Decided by Hearing**

- Did M.S.A.D. #55 violate Student's rights under the I.D.E.A. by failing to find her eligible for special education services as a student with a disability?
- If M.S.A.D. #55 did commit this violation of the I.D.E.A., is Student entitled to a remedy of compensatory educational services?
- If M.S.A.D. #55 did commit this violation, is Student entitled to reimbursement for tuition and other costs incurred in connection with her placement at the Community School in South Tamworth, New Hampshire?

## **III. Findings of Fact**

1. Student's date of birth is xx/xx/xxxx, and she is currently xx years old. (Exhibits: Due Process Request)
2. Student has been determined to be ineligible for special education services. (Exhibits: S19; Testimony: Mother)
3. Student began attending Cornish Elementary School in xx grade and she did well academically during her xx and xx grade years. (Testimony: Mother)

4. During her xx grade year, Student began exhibiting some emotional issues, including anxiety and sadness, as well as difficulties with peer relationships. (Exhibits: S68, P71; Testimony: D. Wentworth, Mother)
5. During the summer of 2002, Student began asking her mother to home school her, stating that she did not want to return to Cornish Elementary School. Mother refused this request and Student did return to Cornish. At the beginning of xx grade, the 2002-2003 school year, her teacher, Ms. Wentworth, noticed that Student “seemed to be exhibiting signs of depression [sic] and “sat at a distance from her peers whenever possible.” Student had a very narrow group of male friends at this time, although she did have one girl friend that shared her particular interest in Japanese anime.<sup>1</sup> Ms. Wentworth also noted that certain school rules were a problem for Student, although she never disobeyed the rules. During this school year, Student did meet with the school counselor, Amanda Benoit, and carried on a sporadic letter writing exchange with Ms. Benoit. (Exhibits: S69, P70, P71; Testimony: D. Wentworth, A. Benoit)
6. At this time, Student began taking Prozac, which did little to help her. She likewise began seeking [sic] a counselor, but since she was unable to form a therapeutic relationship with the counselor, the counseling was ended. (Exhibits: S66; Testimony: Mother)
7. At the beginning of Student’s xx grade year, she attempted to improve her social relationships with the other students. Student began dressing in a more feminine manner and she began slacking off on her academic assignments, believing that the other students would like her if she were not so academically successful. She also missed four days of school during the first three weeks of the school year. (Exhibits: S58, P71, S163; Testimony: Mother)
8. On September 18, 2003, Mother and Student met with Cyrene Slegona, Student’s teacher. Together, Mother and Ms. Slegona crafted a contract for Student, which specified that if Student completed her assignments during the month of October in a satisfactory manner, she would be permitted to study more advanced topics in her area of interest during the month of November. (Testimony: Mother, C. Slegona)
9. At this time, Mother noticed red cuts or scratches on Student’s arms. When she questioned Ms. Slegona about these marks, the teacher informed Mother that Student had been taking lengthy bathroom breaks and may have begun to carve into her arms during these periods. (Testimony: Mother, C. Slegona)
10. It was also noted by Ms. Slegona that during this period Student did exhibit difficulties with peer relationships, perhaps due to a “serious lack of awareness of

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<sup>1</sup> Japanese anime is a form of animation art. It is currently very popular and there are a number of magazines, fan clubs and web sites dedicated to this art form.

the social and emotional ‘state’ of her peers and perhaps adults.” (Exhibits: S166; Testimony: C. Slegona)

11. As the date to sign the contract drew nearing [sic], Student became resistant to sign it and she remained home from school on September 30 and October 1, 2003. During the afternoon of October 1, while Mother was out doing errands, Student deliberately ingested numerous tablets of Celexa, which she was now taking, numerous Tylenol tablets and a half-bottle of cough syrup. (Exhibits: P75; Testimony: Mother)
12. Student was taken to the emergency room at Maine Medical Center, where she remained until that evening. The parents were told by the hospital social worker to have a discussion with Student, in which they would share with her something that would change in her life, and produce a positive impact on her emotional functioning. Since Student had been telling hospital personnel about hating school, her parents informed her that upon her release from the hospital, she would not have to return to Cornish Elementary School. (Exhibits: P74, P76, P93; Testimony: Mother)
13. While at the emergency room, Student met with counselor Rose Northrop, who she continues to see on a regular basis. Following their first meeting, Ms. Northrop suggested that Student might have Asperger’s Syndrome and she arranged for neuropsychological testing to be done by Dr. Ellen Popenoe. (Testimony: R. Northrop)
14. On October 10, 2003, Student’s parents forwarded an e-mail to Jim McDevitt, Director of Special Services for M.S.A.D. #55. In this e-mail, they informed him of Student’s suicide attempt, possible diagnosis of Asperger’s Syndrome and the pending neuropsychological evaluation. They also stated that Student would not be coming back to M.S.A.D. #55 “for the time being,” and that they were looking at alternatives. Mr. McDevitt subsequently telephoned the family and shared information about possible alternative placements, such as the Aucocisco School. He explained the process that they would need to follow if they decided to seek a private placement at public cost. Mr. Mc Devitt then e-mailed the family on October 16 and informed them that a P.E.T had been scheduled for October 30, 2003. (Exhibits: P69, P70; Testimony: Mother, J. McDevitt)
15. The P.E.T. met on October 30, 2003, and included the parents; Ms. Slegona; Tracy Neilson, the special education teacher; Becky Carpenter, Cornish Elementary School principal; Jim McDevitt, Director of Special Services; Amanda Benoit, school counselor; Janet Findlen, social worker; and Amanda Moulten, central intake worker from Sweetser. After hearing a report from Ms. Slegona, detailing Student’s failure to complete academic assignments at the beginning of xx grade and her self-injurious behavior, the P.E.T. determined that Student would be tutored outside of school for up to ten hours per week until the

team could review Dr. Popenoe's findings and recommendations. (Exhibits: S52-55)

16. Dr. Popenoe completed her neuropsychological examination on October 28 and November 3, 2003. In a report dated November 18, 2003, Dr. Popenoe noted that even though Student's W.I.S.C.-IV Full Scale IQ was 124, she "experiences significant limitations in many areas of adaptive skills." Dr. Popenoe also noted that her weaknesses are primarily in executive skills, "which likely contribute to her behavioral and emotional difficulties." She also demonstrated sensory processing difficulties, particularly on the right side. After cataloging Student's behavioral difficulties, such as poor pragmatic language skills that adversely affect social relationships with peers, and a restricted range of special interests, Dr. Popenoe suggested a diagnosis of Asperger's Syndrome. She also recognized signs of depression and postulated an additional diagnosis of Adjustment Disorder with Depressed Mood. (Exhibits: S39-49; Testimony: E. Popenoe)
17. Dr. Popenoe's recommendation included use of a social skills coach, to help build social skills and develop social judgment and use of a cognitive behavioral approach to treatment, by a therapist familiar with Asperger's Syndrome, who would teach Student skills for coping with depression and changing negative thought patterns. She also recommended a speech-language evaluation. (Exhibits: S39-49; Testimony: E. Popenoe)
18. The speech-language evaluation was completed by Amber Lambke, M.S., CCC-SLP, of Mark R. Hammond Associates, on January 15 and January 29, 2004. Ms. Lambke concluded that Student presented with "significant social understanding deficits which impact her overall emotional and social well being." She further noted that Student interprets situations as either black or white, lacks understanding of the reasoning behind particular actions and has problems tolerating conversations outside of her particular areas of interest. Ms. Lambke recommends [sic] "[I]n order to improve her social understanding in these areas, [Student] will require direct teaching of these skills. [sic]" (Exhibits: S35)
19. As of mid-December, the district had still not provided a tutor for Student. Mother attempted to contact a tutor that she was acquainted with. This option did not pan out, so on November 4, 2003 Mother contacted Jim McDevitt, who stated that he would call other tutors and get back to Mother. Not hearing from him by November 10, 2003, Mother began teaching Student at home. (Exhibits: P66, S189; Testimony: Mother, J. McDevitt)
20. At the family's request, a P.E.T. meeting planned for late November was postponed. Mother expressed concerns about the participation of a particular staff person in the P.E.T. process, and decided to seek an advocate to accompany her to the meeting. (Testimony: Mother, J. McDevitt)

21. In late December 2003, Student expressed and [sic] interest in attending the Community School, which her sister attended. In January 2004, Student began attending on a trial basis, taking a single morning block class. (Exhibits: S219)
22. On January 5, 2004, Mother sent a letter to Mr. McDevitt, in which she noted the district's failure to provide Student with a tutor and stated that Student would be "beginning private school this month." (Exhibits: P59; Testimony: Mother)
23. When Student began attending her class at the Community School, she appeared withdrawn and isolated from her peers. However, she successfully completed the class and in late January 2004, she began attending four full days of classes at the Community School. She made excellent progress in all of her classes and, over time, developed some positive peer relationships, all the while becoming less withdrawn. (Exhibits: P61; Testimony: Mother, M. Carlson, C. Thelemareck, D. Polhamus)
24. The Community School is not an approved special education placement. It is a small school, with an 8:1 student-teacher ratio. The school currently enrolls one publicly placed student with Asperger's Syndrome and had previously enrolled other students with various disabilities. (Testimony: Mother, M. Carlson)
25. On February 9, 2004, Mother requested a P.E.T. meeting, in order to discuss Student's eligibility for special education services. The P.E.T. meeting was held on March 3, 2004, to consider Dr. Popenoe's and Ms. Lambke's findings and recommendations and to make a determination about eligibility. The team reached consensus on Student's dual diagnoses of Asperger's Syndrome and Adjustment Disorder with Depressed Mood. There was also consensus that Student needed social skills and pragmatic language instruction and access to a program that recognizes her cognitive strengths. The team determined, however, that Student did not qualify for special education services since there was no adverse impact on her academic progress. The family disagreed with this determination and the team agreed to meet on March 8, 2004, to consider the development of a Section 504 plan. (Exhibits: S 17, S18, S26, P49, P51-52; Testimony: Mother, J. McDevitt)
26. The team met on March 8, 2004, at which time there was consensus that Student met the criteria for Section 504 eligibility. The team developed a plan that included close supervision, two hours per week of speech/language therapy services per week, two half-hour sessions of social work services per week and access to the district "Gifted and Talented" offerings. If necessary, Student could be tutored by an education technician for three hours a day at home while she made a gradual transition back to public school. The family rejected this plan and Student continued to attend the Community School through the conclusion of the 2003-2004 school year. (Exhibits: S7-9, P5; Testimony: Mother, J. McDevitt)

27. On April 23, 2004, the family filed a request for a Due Process hearing.  
(Exhibits: Due Process Request)

## V. Discussion and Conclusions

There is agreement among the parties that Student has Asperger's Syndrome and a depressive disorder. However, all of the eligibility categories that were considered at the March 3, 2004 P.E.T. meeting – Autism, Emotional Disability and Other Health Impairment - require more than just the presence of a disability in order to make an eligibility determination. The Maine Special Education Regulations require that the disability “adversely affect” a student’s educational performance. M.S.E.R. §3.2, §3.5, §3.10. The question at issue, therefore, is what constitutes such adverse impact and whether it is present in this case.

The I.D.E.A. does not specifically define “adversely affect educational performance.” However, the Maine regulations specifically state that the term “educational performance” encompasses more than just academic proficiency. “The term ‘educational performance’ includes academic areas (reading, math, communication, 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.” [M.S.E.R. §2.7]. Case law, too, has utilized a broad definition of “educational performance.” See *Town of Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff’d*, 471 U.S. 359 (1985); *Roland M. v. Concord School Comm.*, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990) (“purely academic progress...is not the only indicia of educational benefit implicated by either the Act or by state law”).

As the First Circuit held in *Burlington*, an I.E.P. must target “all of a child’s special needs, whether they be academic, physical, emotional, or social. [sic] 736 F.2d at 788. The students in *Burlington* and *Roland M.* had needs in addition to their academic needs; however, the non-academic needs negatively impacted the students’ academic progress.

The family compares the facts in this case with those in Baltimore City Public Schools, a case in which the student was identified with Asperger’s Syndrome and was initially denied eligibility based upon the district’s conclusion that there was no adverse impact on his educational performance. The hearing officer found the student eligible for special education services based on his “impairments in social cognition and social skills,” which left him at “high risk for misperceiving and inappropriately responding to social cues.” She concluded student needed social skills training in order to address his social difficulties. [37 IDELR 210 at 926-927]. However, the facts in the *Baltimore* case indicate that the student was at risk for academic failure, due to issues that were in fact closely predictive of academic failure. His executive functioning problems were likely to interfere with task completion, time management, completing multi-step projects, having the correct materials, taking tests and completing homework independently. In addition, this student made repeated requests for teachers’ attention. Even when he transferred to a small, supportive educational setting, his disabilities continued to impact his academic performance. [37 IDELR 210 at 926-927].

The student in the case at hand exhibits none of these difficulties. She completes homework independently, is well behaved in class, is successful at test taking and successfully completes projects. The question at the heart of this dispute, therefore, is not whether a school department is required to address all of a student's needs, including social and emotional, as well as academic, but whether a school department is required to address social and emotional needs when there *are* no academic needs.

Student is obviously a troubled young woman. She has a depressive disorder as well as a disability that challenges her in social situations. She is receiving mental health services and will apparently need to continue those services for quite some time. She will probably always have some difficulties in social situations, but the social progress she has shown at the Community School bodes well for her continuing positive social development.

However, neither the I.D.E.A. nor the Maine Special Education Regulations require [sic] a school district to provide special education services to address what is essentially a mental health issue. Certainly they must accommodate Student's disabilities and M.S.A.D. #55 has done this. They have offered a Section 504 Plan that essentially includes services and supports addressing all of Dr. Popenoe's recommendations. The plan includes close supervision, instruction in social pragmatics, access to the "Gifted and Talented" programming, a choice of district schools, access to the school social worker and, if deemed necessary, a plan to gradually transition Student back to public school.

There is no evidence that the district either could not, or will not, implement this plan. The sole stumbling block appears to be Student's serious resistance to returning to Cornish Elementary School. However, no one suggested that Student has a school phobia that renders her emotionally *incapable* of attending a district school. Neither Dr. Popenoe, nor Ms. Northrop, rendered any opinion on whether, for mental health reasons, Student needs to be placed in a small, private school. Nor did either of them suggest that Student could not be successfully educated in public school.

It is therefore decided that M.S.A.D. #55 did not violate Student's rights under the I.D.E.A. by failing to determine her to be eligible for special education services.

#### VI. Order

Since there were no statutory or regulatory violations, no order has been prepared.

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

Dated: \_\_\_\_\_



## **PARENTS' DOCUMENT INDEX**

- P1            Assessment from Dr. Ellen Popenoe, dated May 6, 2004
  
- P2-43        Minutes of 504 Meeting prepared by Merrywing Corp, dated March 8, 2004
  
- P44-52      Minutes of P.E.T. Meeting prepared by Merrywing Corp, dated March 3, 2004
  
- P53-54      Progress Reports from the Community School, dated March 2004
  
- P55-56      Progress Reports from the Community School, dated February 2004
  
- P57         Letter from Mother to Sylvia Pease regarding request for qualifications of Karen Neidlinger, dated January 20, 2004
  
- P58         Letter from Rose Bradshaw Northrop, LCSW, to the Community School regarding treatment assessment, dated January 14, 2004
  
- P59         Letter from Mother to James McDevitt regarding tutor, dated January 5, 2004
  
- P60         Letter from Mother to Becky Carpenter requesting copies of records, dated January 5, 2004
  
- P61         Progress Report from the Community School, dated January 2004
  
- P62         E-mail from Jamees [sic] McDevitt to Mother regarding speech/language evaluation, dated December 4, 2003
  
- P63         E-mail from James McDevitt to Mother regarding tutor, dated December 4, 2003
  
- P64         E-Mail from Tracy Neilson to Mother regarding tutor, dated December 3, 2003
  
- P65         E-mail from Tracy Neilson to Mother, regarding speech/language evaluation, dated December 3, 2003
  
- P66         E-mail from James McDevitt to Mother, regarding tutor, dated November 4, 2003
  
- P67-68      Handwritten notes of P.E.T. meeting, dated October 30, 2003

- P69 E-mail from James McDevitt to Mother, regarding evaluation, dated October 16, 2003
- P70 E-mail from Mother to James McDevitt, regarding suicide attempt, dated October 10, 2003
- P71-72 E-mail from Becky Carpenter to Mother, regarding teasing and harassment, dated October 5, 2003
- P73-101 Medical records from Maine Medical Center, dated October 2003
- P102 Letter from Diane Wentworth "To Whom it May Concern," dated October 2003
- P103-104 E-mail messages exchanged between Diane Wentworth and Father, dated October 23, 2002
- P105 Chronology of Events, dated October [sic] 2003 – February 2004
- P106-115 Application for Admission to Community School for 2003 – 2004 school year, undated
- P116-135 Pamphlet on the Community School, undated
- P136-140 Article entitled *Understanding the Student with Asperger Syndrome: Guidelines for Teachers*, written by Karen Williams, undated
- P141-149 Maine Medical Center Progress Notes and Psychiatric Clinic Notes, dated November 13, 2003 – December 22, 2003
- P150-152 Letter from Cyrene Slegona, M.S. Ed. and Diane Wentworth, M.S. Ed., to Director, Community School, with attached recommendations, dated January 30, 2004
- P153-157 2003 – 2004 Tuition Invoices from the Community School, dated January 2004 – May 2004

### **PARENTS' WITNESS LIST**

Mother

Rose Bradshaw Northrop, Counselor

Claes Thelemarck, Math Teacher/Adviser, The Community School

Donna Polhamus, English Teacher, The Community School

Martha Carlson, Founder and Headmistress, The Community School

**SCHOOL DEPARTMENT'S DOCUMENT INDEX**

- A1 Letter from Eric Herlan to Richard O'Meara, dated May 5, 2004
- S1 Letter from Superintendent Sylvia Pease to Martha Carlson, dated April 28, 2004
- S2-6 District's Procedural Safeguards Statement, undated
- S7-11 504 Meeting Minutes with attached 504 plan and rights, dated March 8, 2004
- S12 Letter from James McDevitt to Parents, dated March 24, 2004
- S13 Waiver of seven days notice, dated March 3, 2004
- S14-18 P.E.T. Minutes, dated March 3, 2004
- S19 Prior written notice, dated March 8, 2004
- S20-24 E-mail from Parents to Superintendent Pease, dated March 2, 2004, with statement of parental concerns, dated March 3, 2004
- S25 Letter from Mother to Superintendent Pease, dated February 10, 2004
- S26 E-mail from Parents to Becky Carpenter, dated February 9, 2004
- S27 Letter from Mother to James McDevitt, dated February 4, 2004
- S28 Letter from Mother to James McDevitt, dated January 28, 2004
- S29-37 Communication evaluation, dated January 2004
- S38 Request for records from the Community School, dated January 5, 2004
- S39-49 Neuropsychological evaluation, dated October and November 2003
- S50 Letter from James McDevitt to Parents, regarding recent P.E.T., dated November 26, 2003
- S51 Notice of P.E.T. meeting, dated October 17, 2003
- S52-54 Parent referral, dated October 30, 2003

- S57 Consent to discuss issues with Sweetser, undated
- S58 Attendance records for 2003 – 2004 school year
- S59-65 Rank cards for grades xx through grade xx and M.E.A. test results for grade xx
- S66-68 E-mail communications between Mother and Diane Wentworth, dated December 4, November 21, and October 23, 2003
- S69 Letter from Diane Wentworth “To Whom it May Concern,” undated
- S70-72 Letter from Amanda Benoit “To Whom it May Concern,” undated
- S73 Maine Medical Center problem list
- S74-85 Earlier draft of Ellen Popenoe evaluation, with appendix
- S86-93 Maine Medical Center initial assessment
- S94-95 Maine Medical Center treatment plan
- S96-97 Maine Medical Center review of plan of care
- S98 Maine Medical Center medication list
- S99-112 Northrop progress notes
- S113 Hinkens clinic note, dated January 15, 2004
- S114-115 Additional psychotherapy progress notes
- S116-137 Scoring report for neuropsychological assessment, dated October 26, 2003
- S138-162 Other test protocol material from neuropsychological evaluation
- S163-166 Teacher questionnaire
- S167-253 Extensive e-mails between Amanda Benoit and Mother, between November 3, 2003 and March 15, 2004

**SCHOOL DEPARTMENT’S WITNESS LIST**

James McDevitt, Director of Special Services

Cyrene Slegona, Teacher Diane

Wentworth, Teacher Amanda

Benoit, School Counselor

Ellen Popenoe, Ph.D., Neuropsychologist