

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

February 13, 2003

Case 03.001X, Parent v. SAD #59

REPRESENTING THE FAMILY: The family appeared *pro se*.

REPRESENTING THE SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

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This hearing was held, and this decision was written, pursuant to 20 USC 1415 et seq., 20-A MRSA 7202 et seq., and accompanying regulations.

Parent requested this hearing on January 2, 2003, on behalf of her son (DOB: x/xx/xx), who lives with her within SAD # 59. Student is a x grade student and is eligible for special education services under the category of Other Health Impaired with the specific diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). The prehearing conference was held on January, 17, 2003, and the hearing was held on January 24, 2003. Both parties submitted written closing arguments. The record in the case was closed on February 3, 2002.

### I. Preliminary Statement

This matter arises out of an incident which occurred on the afternoon or early evening of November 24, 2002, a Sunday, when the student was staying with his grandparents. The student had a conversation with a classmate, via a computer program called Instant Messenger, in which he stated his plans to bring a gun to school, with the intention of killing several other students and two teachers. He gave some reasons for doing what he was proposing. Sometime after the conversation on the computer ended, the student called the same classmate on the telephone and continued the discussion about his plans. In this conversation, which lasted approximately 45 minutes, he said he had a gun, described the gun, and gave a date for carrying out his threats at school.

Both the school and the local police were informed of the student's statements. The student was taken into custody later on November 24 and was in custody until December 20 when the school's Christmas vacation began. On December 4, 2002, the school convened a Pupil Evaluation [sic] Team (PET) meeting to consider whether the behavior at issue, the events of November 24, was a manifestation of the student's disability. The PET concluded, over the mother's objection, that the student's behavior on November 24

was not a manifestation of the disability. The student had not returned to regular classes at the time of the hearing, but was receiving educational services from the school in an [sic] placement which was developed by a PET meeting held on January 2, 2003. The student was suspended from school on that date, and the school scheduled an expulsion hearing for January 13. That hearing was not held because the student's mother requested this due process hearing.

The mother presented several issues for consideration at the prehearing conference. After discussion, the parties agreed to separate the issues and first decide the question of whether the December PET correctly determined that the threats the student made on November 24 were not a manifestation of his disability [sic], ADHD.

## II. Issue

Was the Pupil Evaluation Team correct when it concluded, on December 4, 2002, that the threats the student made on November 24, 2002 were not a manifestation of his disability?

## III. Findings of Fact

1. The student was born [sic] on xx/xx/xxxx and is a x grade student in SAD # 59; he is eligible for special education services under the category of Other Health Impaired with a specific diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). (S 11)
2. The student has average intelligence as measured by the WISC III; he scored 94 on verbal IQ, 90 on performance IQ and had a full scale IQ of 92. In the Achenback Behavioral Checklist, the student was rated in the clinical range for aggressive behavior and overactivity, and borderline clinical for inattention. There is no evidence of cognitive impairment. The student scored on the low side of the average range for social judgment, the ability to distinguish right from wrong. (S 32, 41, 139, 159, Christopher)
3. The student experienced some success in his x grade year, school year 2001-2002. After the third quarter of x grade, he was in a position to earn credit in all of his courses. The then current behavior plan was effective to the point that no behavioral issues were discussed at a PET meeting held on April 10, 2002. The PET determined that his behavior plan was to be carried over into the IEP the next year. (S 89-90)
4. The student's Individualized Educational Program (IEP) for school year 2002-2003 was initially developed by a PET which met on May 29, 2002. It provided that the student would be in the general curriculum for 7 of 8 classes, would have 40 minutes each day of Structured Study Hall, called for biweekly monitoring with the guidance counselor, and contained a behavior plan aimed at modifying certain target behaviors. Those target behaviors were (1) remaining on task, (2) disrespect toward teachers, (3) swearing, (4) harassment, and (5) put-downs. (S 80-88)

5. The student encountered difficulty almost immediately upon beginning the x grade. His discipline record contains many behavior referrals in September and early October, 2002. The student was cited for the following behaviors: profane language (9/6), profane language and verbal threat to “kick the shit” out of another student (9/10), being argumentative, defiant, and using profane language in class (9/10), willful subordination/open defiance in class (9/17), failing to turn in an “emergency card” (9/18), disrupting a class, defiance and profanity (9/19), a detention for failing to report to detention (9/20), talking in class after being told to be quiet (9/24) disruptive behavior and profanity toward office staff and the principal (9/24), willful insubordination and open defiance by refusing to stop talking when told to be quiet (10/3), and disrupting class by making excessive noise, being rude and disrespectful (10/3). (S 171-189)

6. At the initiative of his family, the student spent approximately three weeks in October, 2002, out of school attending a treatment program.(S 71-72)

7. Upon the student’s return to school, his disciplinary problems continued. He received disciplinary referrals for the following behaviors: leaving the lunchroom without permission - had to be lead [sic] back in to lunch (11/8), willful insubordination and open defiance - he asked permission to leave classroom to go to the bathroom, went instead to the lockers to talk with another student, used profanity toward the teacher when told to return to class (11/15). (S 168-170)

8. Outside of school, the student appears to have been able to behave in a manner that generally conforms to social norms. His pastor, who has known the student for three to four years both at church and in a church run summer camp, described the student as a friendly, active boy who sought attention appropriately and was full of fun. At church and camp, the student was not rude, defiant, insubordinate, profane nor violent. The student had some involvement with drugs and discussed that with his pastor. The student was reluctant to tell his mother about his drug use, feeling that she would be hurt, but eventually asked his pastor to tell her. The student had a reasonably well developed sense of right and wrong, and knew that his drug use was wrong. (Weigelt).

9. With his grandparents, the student was also well behaved. He wasn’t rude or defiant, didn’t swear, and was rarely even angry. On November 24, 2002, he was with his grandparents, had been hunting with family members earlier in the weekend and was in good spirits. He did not seem angry or disturbed in any way; he used their computer, got on the internet and carried on the Instant Messenger conversation, and then got off the internet when he was asked to. He left the living room and made a phone call. Then he went to bed. The police came [sic] the house later that night and took the student into custody. (Grandparents)

10. During the Instant Messenger conversation with a school friend, the student told her that he was going to bring a gun to school on December 3, 2002, and that he was going to shoot other students that day. He named about a dozen students as targets. He said, “...life

ends December 3.” When he was asked if he was going to kill them, he said, “yuo [sic]are so smart...u [sic] are right...death to them allllllllllllll [sic] “ In reference to a student he had just named, he said. “she will die.” He also threatened to kill himself. Toward the end of the conversation, he said, “DECEMBER 3 IS THE DAY...u [sic] know...u [sic] happy now...now maybe someone will take me serious [sic] ?” (S 63-65A)

11. Shortly after concluding the Instant Messenger conversation with his friend, the student called her on the telephone and talked for about 45 minutes. He restated his plans to go through [sic] his plans on December 3rd, his father’s birthday, and said that nothing and no one could do anything about it. He also said that his father had bought him a gun, a 9 mm Beretta, because his father loved him. He said that he had told others, including his older sister and his mother, of his plans but that none of them believed him. (S 66-68A)

12. When asked if she thought the student was “joking” when he threatened to bring a gun to school and kill other students and staff, his grandmother answered, “I don’t think he was joking...he wanted them to take him seriously...nothing else had worked for him, so he had to do something.” In response to a similar question, his grandfather said, “I don’t know...it must have been one of those stupid things you do when you are really frustrated.” Shortly after the incident itself, while at the hospital, his grandfather asked him why he did it; the student replies [sic], “They’ll listen to me now.” After the student was released from custody, about December 20, he apologized to his grandfather for what he had done. (Grandparents)

13. After the incident on November 24, 2002, a student at the high school came to the school guidance counselor to report that the student had said to her that he was “going to come to school with a gun and they were going to be sorry”. This occurred about two weeks prior to November 24. ( Collins)

14. At the meeting held on December 4, 2002 to determine whether the behavior at issue was a manifestation of the student’s disability, the PET received and reviewed an incident report prepared by the high school principal, reviewed, discussed and completed a document entitled “The Manifestation Determination Checklist”, consulted the most recent evaluations of the student, obtained the mother’s consent for a psychological evaluation of the student, and reviewed the student’s current IEP. A functional behavior assessment was also conducted. The PET concluded that “The incident in question is not a manifestation of (the student’s) disability.” (S 28- 40)

15. Andrew Kahn, Ph.D. in Clinical Psychology, was a witness for the family. Dr. Kahn has worked with approximately 70-80 ADHD children in his career. He had not met or interviewed the student. ADHD children are often characterized by an inability to stay on task, have difficulty in organizing/planning activities, can’t wait their turn in group games, engage in out of turn talking, are fidgety, are impulsive and often act before they think, may swear inappropriately, and often are too energetic socially. ADHD as a diagnosis does not necessarily explain the behavior displayed by a child suffering from ADHD; no causative claims are made for ADHD. When asked if ADHD children are

likely to create elaborate schemes or threats, Dr. Kahn responded very carefully, stating, “I do not draw an assumption of that kind of behavior from ADHD kids.” (Kahn)

#### IV. Discussion

The question that this case presents is whether the December 4, 2002, PET meeting was correct when it concluded that the threats made by the student were not a manifestation of his disability, ADHD. The family asserts now, as on December 4, that the PET’s manifestation determination was incorrect. Regarding manifestation determinations, federal law and regulations, as well as state regulations, require that a PET first consider all relevant information, including evaluations, observations and the student’s IEP, and then determine that:

1. In relationship to the behavior subject to disciplinary action, the IEP and placement are appropriate, and the services in the IEP are being provided; and
2. the student’s disability did not impair the student’s ability to understand the consequences of the behavior at issue; and
3. the student’s disability did not impair the student’s ability to control the behavior at issue.

If any of these standards are not met, the behavior must be considered a manifestation of the student’s disability. MSER 14.6(C). In essence, the family argues that the PET erred on all three prongs of this test.

As to the first prong, the family’s argument is that because the PET determined that the behavior at issue - the student’s threats to bring a gun to school and shoot students and staff, made off school grounds and on a weekend - was not an IEP issue, the PET did not comply with the regulations. I disagree. In my view, the PET’s conclusion that the incident was not an IEP issue does not violate the IDEA because the regulations on this point require that the IEP be examined “in relationship to the behavior subject to disciplinary action.” The IEP does not contain any reference to behavior even approaching the behavior at issue; under the facts presented here, the threats made by the student are simply beyond the scope of his IEP.<sup>1</sup>

For reasons which are discussed below, I conclude that the PET’s manifestation determination did not violate either the second or third prong of the regulatory test. The family argues that the student’s disability impaired both his ability to understand the consequences of his behavior, the second part of the test, and his ability to control his behavior, the third part of the test. Essentially, the family argues that the student’s ADHD makes him behave impulsively, therefore impairing both his ability to consider the consequences of his action and his ability to control the behavior at issue. There is no disagreement that the student suffers from ADHD. Further, based on the evidence presented here, there is a clear connection between impulsivity and ADHD. The connection is revealed in the nature of the conflicts the student had at school during the

fall of 2002. Nearly all of the disciplinary referrals the student received involved quick, in the moment, reactions to external stimuli. He was told to sit down and he refused, often with inappropriate language; he was told to be quiet and he laughed out loud; he was told to return to the lunch room and he argued about it. He was frequently defiant and insubordinate to teachers. These are impulsive actions; probably it is more accurate to call them impulsive reactions. They are typical of ADHD children.

The behavior at issue here, however, is qualitatively different. It is not reactionary behavior. It is not a quick response to some external stimuli. It involves thought and planning. It was carried out, repeated, over a relatively long period of time. On November 24, the student talked [sic] his plans to shoot classmates at length in the Instant Messenger conversation with his school friend; as the school argued, the student had many opportunities to back away from the plot he was describing. Instead, he again and again reasserted his intention to do great damage at school, giving names and reasons why he was going to do it. He gave a date on which he was going to carry out his plans; December 3, which was more than a week away and happened to be his father's birthday. Then, after he ended the Instant Messenger conversation, he telephoned his school friend back and continued to discuss his plans for another 45 minutes. In this conversation, he mentions [sic] that he has [sic] already told both his sister and his mother of his intent to get a gun and go to school to shoot people, and that they won't take him seriously. Further, on the day after the incident, a student at the high school went to the school's guidance counselor and told him that the student, about two weeks earlier, had told her of his plan to get a gun and bring it to school and make everyone sorry. Finally, the principal did an investigation on November 25. He spoke to another student who had been warned not to come to school on December 3 because something terrible was going to happen. While some of this evidence is second or even third hand, taken as a whole it is clear that the student had conceived and had been planning and discussing his scheme for weeks prior to November 24. Nothing about the student's dark plan to shoot classmates and teachers is impulsive. It is pre-conceived, pre-planned and calculated

For several reasons, I find that the student could, and very likely did, appreciate and understand the impact and consequences of the threats he made on November 24. His tests indicate that he was of average intelligence, and was capable of making social judgments regarding the distinctions between right and wrong. The adults who knew him, both in and out of school, uniformly believed him to be capable of understanding such differences. For instance, the student knew that his mother would be upset and hurt if she learned of his use and involvement with illegal drugs; it took him a while to allow his pastor to tell her. Clearly, he was able to understand the consequences of his behavior. And there is some indication that he had, in fact, considered the impact of his threat even while the Instant Messenger conversation was going on when he said, "now maybe someone will take me serious [sic]" This is mirrored by his response to his grandfather while in the hospital after November 24. His grandfather asked, "Why did you do it?"; the student replied, "They'll listen to me now." His grandmother offered her explanation for his behavior: "...he wanted them to take him seriously...nothing else had worked...he had to do something." For these reasons, in addition to the utter absence of impulsivity

displayed in this behavior, the PET correctly determined that the student's disability did not impair his ability to understand the consequences of his behavior.

For many of the same reasons, I conclude that the PET correctly determined that the student's disability did not impair his ability to control his behavior on November 24, 2002. As discussed above, the behavior cannot be explained as "impulsive". It was conceived and carried out over too long a time; it was too complicated; it was repeated too many times to too many people; the student rejected too many opportunities to abandon the plan. The student's behavior is not the result of one single impulsive decision; it involved many individual decisions made over a long period of time. Farrin v. MSAD #59, 165 F. Supp 2d 37 (Me, 2001) Further, there was no evidence presented that ADHD children are somehow predisposed to conceiving relatively complex schemes and then executing them over a period of weeks; to the contrary, Dr. Kahn, the family's ADHD expert, testified that he "did not assume that kind of behavior from ADHD kids." The PET correctly concluded that the student's ability to control his behavior was not impaired by his ADHD.

#### V. Order

After consideration of the evidence and arguments presented during this due process hearing, I find that the Pupil Evaluation Team correctly concluded that the behavior at issue in this proceeding - the threat made by the student to bring a gun to school for the purpose of killing students and teachers - was not a manifestation of his disability, Attention Deficit Hyperactivity Disorder. To the extent that this decision [sic] leaves any other issues [sic] unresolved, those issues are dismissed without prejudice. In view of these conclusions, no further order is required.

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Peter H. Stewart Date  
Hearing Officer

#### WITNESS LIST

##### FOR THE FAMILY:

Andrew Kahn, Ph.D., Clinical Psychologist

Earl E. Weight [sic], Pastor and Camp Leader

Student's Grandmother

Student's Grandfather

FOR THE SCHOOL:

Irene Christopher, Special Education Director, SAD #59

Colin Campbell, Principal, Madison Area Memorial High School (MAMHS)

Thomas Maines, Assistant Principal, MAMHS

Dean Collins, Guidance Counselor, MAMHS

Chris Leblanc, Special Education Teacher, MAMHS

### **DOCUMENTARY EVIDENCE**

Parent's Exhibits 1 - 115

School's Exhibits 1 - 189

Joint Exhibits 1 - 56

<sup>1</sup> For good reason, no one has argued that the IEP should have included services designed to discourage the student from making such threats. Nothing in the student's history indicated that such behavior was even a remote possibility. An IEP must be judged based upon what information is available to it at the time it was developed. Roland M., 910 F 2d. at 992, as cited in 36 IDELR 249. In our case, the school simply had no reason to expect such behavior from this student; there is no reason that the IEP should have included any provisions relating to that behavior.