

**Katherine A. Neale, M.Ed., J.D.**

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September 3, 1998

To: Parent

Barbara Eretzian, Supt.  
Auburn School Department  
23 High Street, P.O. Box 800  
Auburn, ME 04212

From: Katherine A. Neale, Hearing Officer

Subject: Hearing Decision #98.113, Parent v. Auburn

This is to provide you with my decision in the Special Education Due Process Hearing involving Parent and the Auburn School Department on behalf of the student.

Either party may appeal this decision by filing a petition for review in Maine Superior Court or Federal District Court within thirty (30) days of receipt of this decision. The petition for review in Superior Court must be filed in the county in which the child resides or the county in which the Administrative Unit is located.

The Administrative Unit shall submit to the Commissioner of the Department of Education, with a copy to the Due Process Coordinator, documentation that the Unit has either complied with this decision or that an appeal is pending. Such documentation shall be submitted no later than forty-five (45) days after the receipt of this decision.

The parent may request the Department of Education to review the Unit's compliance with this decision by filing a written complaint with the Commissioner of the Department of Education.

Any questions regarding this decision or the record of the hearing should be directed to: Due Process Coordinator, Division of Special Education, Department of Education, State House Station #23, Augusta, ME 04333.

cc: Dr. Michael Opuda, Due Process Coordinator  
Peter Rice, Esq.  
Eric Herlan, Esq.  
Sharon Rice, Director of Special Services

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

September 3, 1998

**Case # 98.113, Parent v. Auburn**

Counsel for the Parent: Peter Rice, Esq., Maine Disability Rights Center

Counsel for the School: Eric Herlan, Esq., Drummond Woodsum & MacMahon

Hearing Officer: Katherine A. Neale, M.Ed., J.D.

**THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, M.R.S.A., §7207 et. seq.; TITLE 20 USC, § 1415 et. seq.; AND IMPLEMENTING REGULATIONS.**

On August 4, 1998, the Department of Education received a request for an Expedited Due Process Hearing from the Parent on behalf of her child.

The pre-hearing was held on August 14, 1998 at the Androscoggin County Probate Court. Exhibits submitted by the parent are numbered P-1 through P-6 and exhibits submitted by the school are numbered A-1 through A-70 and 1 through 304. The hearing was held on August 24, 1998 at the Androscoggin County Probate Court in Auburn, ME.

**I. PRELIMINARY STATEMENT**

The student is a x year old boy (DOB x/xx/xx) who began receiving services as a pre-schooler through Child Development Services to address his pervasive developmental delays. While in kindergarten, the student was diagnosed as having Asperger Syndrome, a pervasive developmental disorder which falls typically within the high functioning area of the autism spectrum.

Following an increase in behavioral incidents during the 1997-98 school year, the student was suspended with tutorial services. The parent and school agreed to continue tutorial services through the end of the school year and to have a comprehensive evaluation completed to assist the parties in determining an appropriate program. Due to series of delays outside the school's control, the evaluation is still not completed. This hearing was requested to resolve the dispute over an appropriate interim placement for the student until the PET reviews the evaluations and an appropriate program is developed.

The parent requested an expedited hearing as the new school year was beginning on September 2, 1998 and the parent wants the student back in school by then and specifically wants the student placed back in a regular education class. It is the school's position that the student should continue to receive tutorial services as agreed by the parties last April. The issue in this case is not one for which Congress provided the expedited hearing process under Individuals with Disabilities Education Act Amendments of 1997, § 1415(k)(7)(C). Nonetheless, the parent requested a speedy hearing. To accommodate that request, the procedure used was as follows: each party was given 15 minutes to make an opening statement; each party was given 2 hours in which to present witnesses; each was given a limited time to cross examine witnesses; and each was given 15 minutes in which to make closing remarks. The hearing lasted one full day. The parent's counsel wanted the record to reflect their objection to the format used as they felt that it limited their ability to fully present their case.

The parties were faxed the decision (not the full report) on August 26, 1998 so as to maximize the preparation and planning time prior to the start of the new school year.

## **II. ISSUES**

1. Is the tutorial program the appropriate interim placement for the student?
2. If not, what program is an appropriate interim placement?

## **III. STIPULATIONS**

1. There are no procedural violations at issue in this case.

## **IV. SUMMARY OF TESTIMONY**

1. Asperger Syndrome is a developmental disorder along the mild to high functioning end of the autism spectrum. It is characterized by deviations or abnormalities in three broad aspects of development: social relatedness and social skills, the use of language for purposes of communication, and certain behavioral and stylistic characteristics involving repetitive or perseverative features and a limited but intense range of interests. [Testimony: Dr. Marsha Clark; Exhibits: P-3; P-4; P-5]
2. In May 1996, the PET met to develop a plan for the student to transition into kindergarten in the fall. The evaluative data was examined and fifteen professionals joined the parents in developing a program. In addition to the

related services of speech/language and occupational therapy, the student was provided with a one-on-one rehabilitative assistant/education technician. The substantial data maintained by school personnel evidences a generally successful year. Despite a turn over of rehabilitative assistants (four in one year), the kindergarten teacher worked very well with the student and he made good progress relative to acquiring academic skills. By all accounts, transition times are difficult for this student causing increased anxiety which results in behavioral outbursts. The behavior in question includes: hitting, pinching, kicking, naming calling, bolting from the room, building or supervised areas, biting and throwing objects. During the kindergarten year, 15 Incident Reports document physically assaultive behavior toward staff and other students. [Exhibits: 67-113; 201-265]

3. The same rehabilitative assistant, Diann Edmunds, worked with the student from February 1997 (kindergarten) through early June, 1998 (1st grade), including the extended school year services during the summer of 1997. By all accounts, Ms. Edmunds was very skilled in working with the student and it was a positive match for him. She had a background as a guidance counselor, received "positive supports" training, consulted with Dr. Marsha Clark (expert in autism and Asperger Syndrome) and the Department of Mental Health and Mental Retardation, and educated herself about Asperger Syndrome. The 1st grade teacher, Sandy O'Connell, reported that she participated in staff support meetings on a daily basis in the fall and at least monthly in the spring. She too had received training and had consultations pertaining to strategies for educating the student. [Testimony: O'Connell; Stevens; Rice; Exhibit: P-6]

4. The documents and testimony all indicate that by February, 1998 the student's behavior was rapidly deteriorating. Not only was there an increase in physical assaults on staff and other students, but Ms. Edmunds' reports also noted academic regression. The student was choosing to spend more and more time out of the classroom. During 1st grade, the record reflects that there were 35 Incident Reports filed regarding 25 different incidents of assaultive behavior (35 victims). On at least three occasions, staff members sought medical attention for their injuries. The Principal, Barbara Rivera, testified that from February to April there were 48 incidents of aggression. Parents of other students were expressing their concerns about their children's safety and ability to learn in a class with constant disruptions. Following an incident on April 2, 1998 involving a large rock, the school suspended the student for 10 days with tutorial services. [Exhibit: A49-A53, A64-A70, 148-242; Testimony: O'Connell; Stevens; Rice; parent; Rivera]

5. On March 31 and April 2, 1998, Dr. Marsha Clark conducted educational observations of the student and issued a report with recommendations for staff. Testimony from the staff indicated that much of Dr. Clark's suggestions were already being implemented, i.e. use of a quiet room, social stories, scripts, cue cards, prior notice of transitions, etc. [Testimony: O'Connell, Stevens; Exhibit: 14-29]

6. On April 7, 1998, the PET met following the April 3rd suspension, conducted a Manifestation Determination and concluded that the student's behavior was related to his disability. The school proposed a diagnostic placement at the Renaissance School at St. Mary's Hospital for a comprehensive evaluation. The parent refused the proposed placement and requested a due process hearing. In May, 1998, the parties reached a settlement agreement whereby the student would continue receiving tutorial services through the end of the school year and a multidisciplinary evaluation would be conducted by mutually agreed upon evaluators. Apparently the parent did not agree to use any of the evaluators proposed by the school. After much delay, there was agreement to have the evaluation completed at Sweetser despite further delays due to a long wait list. Additional delays have resulted due to the parent rescheduling an evaluation date. The last evaluation is scheduled for late September.  
[Exhibits: 2-8, 30, A1, A9-A33; Testimony: Rice, parent]

## **V. CONCLUSIONS OF LAW**

### **1. Is the tutorial program the appropriate interim placement for the student?**

The Individuals With Disabilities Education Act (IDEA) provides that "all children with disabilities have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(c).

At the core of IDEA lie two broad mandates, one substantive and one procedural. First, IDEA seeks to secure the educational rights of disabled children by requiring policies of inclusion. The law provides that schools must

assure that, to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily....

*Id.* §1412(5)(B). Second, IDEA mandates procedural protections and administrative safeguards. The parent and school have stipulated that there are no procedural violations at issue here.

In the present case, the student was expelled from school on April 3, 1998 due to behavior which "threatened the safety of both staff and students at Washburn,

with resulting impact on his own safety” and tutoring was initiated. The PET met on April 7, 1998 and recommended that the interim tutoring continue two hours per day, five days per week until a diagnostic placement began. The parents rejected the diagnostic placement at St. Mary’s Hospital. Following a request for due process hearing, the parties mediated an agreement whereby the student would continue receiving tutorial services and related services through the end of the school year and a multidisciplinary evaluation would be provided by mutually agreed upon evaluators. Due to a series of delays outside the control of the school, the evaluation has yet to be completed and will not be completed until 6 to 8 weeks into the 1998-99 academic year. It is the school’s contention that the student should continue to receive services through tutoring as per the mediation agreement until such time as the PET can review the results of the comprehensive evaluation.

This student has already received nearly three months of tutoring services, i.e. early April through the end of the school year in June. Not only has he received a shortened academic day during this period of delays, i.e. 2 -3 hours per day versus the 6 hour school day received by his peers, but equally important, he has been receiving his education in isolation. By all accounts, one of the stated criteria of Asperger Syndrome is a severe impairment in social interactions. One of this student’s unique educational needs is to learn to cope with complex social interactions with adults, peers and students of other age levels. One-on-one tutoring does not address this need. The child has a right under the law to be educated with his peers to the maximum extent appropriate. For these reasons, the current tutorial program is not found to be the appropriate interim placement for this student while awaiting the results of the evaluations.

## **2. If not, what program is an appropriate interim placement?**

IDEA includes a “stay-put” provision, under which a student with a disability remains in the then current educational placement during the pendency of an administrative review, unless the school and parent otherwise agree on an interim placement. 20 U.S.C. § 1415(c)(3). In the present case, the school and parent did agree on the interim tutorial placement through the end of the school year. At the same time, a comprehensive evaluation was to be conducted. However, with the evaluations incomplete as the new school year begins, the parent seeks a return to the placement status prior to the suspension, i.e. the regular education classroom, and the school seeks stay-put in the interim tutorial placement as agreed upon last spring.

As stated above, the interim tutorial placement is found to be inappropriate. To address the parent’s assertion that the student belongs back in a regular education classroom pending the results of the evaluation, an analysis of the situation at the time of the suspension is required.

The Supreme Court outlined the standard for intervention when the school asserts that a student is dangerous:

...§ 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury to himself or herself or to others.

Honig v. Doe, 484 U.S. 305, 328 (1988). This test looks only to the objective likelihood of injury and not to whether the child intended to cause injury.

The 8th Circuit has added a second essential test to the threshold standard outlined above in Honig and states the following:

...a school district seeking to remove an assertedly dangerous disabled child from [his] current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury.

Light v. Parkway C-2 School District, 41 F.3d 1223, 1228 (8th Cir. 1994)

In the present case, there is undisputed testimony that the student hit, kicked, pinched, bit, spit, and threw objects (stick) at staff and other students, and bolted from the building or supervised areas. There is also disputed testimony about a rock throwing incident. A documentary review of the Incident Reports produced by the school from the 1997-98 school year alone shows approximately 25 incidents of hitting, pinching, biting, spitting, and/or throwing objects and 35 victims affected by the behavioral incidents, i.e. a single incident sometimes involved injury to two or three people. While a majority of the incident reports (23) date from February through June, 1998, a significant number of incident reports (12) date from September through November, 1997. Whereas, a significant change in the student's behavior was noted in the spring by all who testified, there were still an alarming number of incidents of injurious behavior towards others in the fall. Further, there was testimony that on at least three occasions, the injuries required medical attention.

In reviewing whether the school took reasonable steps to minimize the student's propensity to cause injury, we look to teacher certification, advanced training, physical space and involvement of consultants versed in the area of the student's disability. While this is not an exclusive list, these factors weigh heavily in the school meeting the burden of showing reasonable efforts to minimize injury. *Id.* In the present case, the staff working with the student were properly certified. The Education Technician (Diann Edmunds) working directly with the student from February, 1997 through early June, 1998 was also a guidance counselor by

training and by all accounts was a very good match with this student. Staff members had received training with Dr. Marsha Clark, a recognized expert in the area of autism and Asperger Syndrome, and implemented her recommendations. Staff members met regularly, i.e. daily during the fall and then one or more times a month during the spring, to discuss the student's needs and develop consistent response strategies. A quiet or calming room for the student was recommended and despite a severe lack of available space, the school provided such a room for the student. Ideally the room should be located next to the student's classroom to facilitate a speedy response to increasing anxiety and unfortunately, in the present case, the quiet room was located down the hall from the student's classroom. Nonetheless, the provision was made for the unique needs of this student in an overcrowded facility. In short, the school has met the burden of the two part test outlined above in Light v. Parkway.

The record amply supports the contention that at the present time, the student's placement back into a regular education classroom is substantially likely to result in injury to himself or to others. While there is speculation about what may have caused the student's behavior to rapidly deteriorate during the second half of last school year, e.g. disruption of the Ice Storm and winter vacation, there is no clear reason known to the parties. Location, staff and strategies used were consistent throughout the year and yet by February, the student's behavioral outbursts escalated substantially. By placing the student back in the regular classroom without the benefit of information from the comprehensive evaluation and without the proposed staff (2nd grade teacher and new Ed. Tech.) having the benefit of training in the area of the student's disability, it is unlikely the student will be provided with a free appropriate public education (FAPE) as required under the law.

This is a complicated student with unique and challenging needs. Some of his needs include: staff with specialized training in the area of autism (Asperger Syndrome), a physical space with a quiet room located nearby, a routine with minimal transitions, meaningful opportunities to interact with non-disabled peers, and to be safe. Equally important, staff and other children also need to be safe. A self-contained special education class with mainstreaming opportunities in the 2nd grade class will hopefully address the student's needs during this interim period while awaiting the PET's review of the comprehensive evaluation still in progress. If the interim placement in the self-contained behavior impairment class fails to provide the student with a FAPE, the PET must convene to determine if a more restrictive placement is required to ensure that the student, staff and other students are safe and to assess any negative effects of the student's placement on the other children in the class.

## **VI. ORDER**



1. The school shall provide a placement in a self-contained behavior class, such as the Developmental Growth 1 class at Sherwood Heights, with a low ratio of teachers to students and a quiet room next door.
2. For optimum consistency and to the extent possible, the school shall attempt to provide the student with the related service specialists he has worked so successfully with in the past, i.e. the same speech/language and OT providers.
3. The school shall make genuine efforts to program meaningful opportunities for the student in the regular education 2nd grade class. For example, an academic area in which he functions at grade level.
4. The school shall provide the special education staff and 2nd grade teacher consultation time with Dr. Marsha Clark or another expert in the area of this student's disability as soon as possible. The school shall immediately provide these same staff members with Dr. Clark's "Educational Observation" and the articles on Asperger Syndrome produced for this hearing.
5. It is recommended that the staff document the student's progress during this interim placement.

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Katherine A. Neale, M.Ed., J.D.  
Hearing Officer

### **LIST OF WITNESSES**

#### **Witnesses for the Parent:**

Dr. Marsha Clark, expert witness  
Jessica Richardson, Care and Comfort Aide  
Parent

**Witnesses for the School:**

Sandra O'Connell, 1st Grade Teacher  
Barbara Rivera, Principal  
Susan Stevens, Guidance Counselor

**INDEX OF DOCUMENTS**

**Parent production:**

- P-1 Marsha Clark Vita
- P-2 Letter dated 8/17/98 from Tri-County Mental Health Services
- P-3 "Asperger Syndrome", Stephen Bauer
- P-4 "Asperger Syndrome: Treatment and Intervention", Klin & Volkmar
- P-5 "Consideration for Administrators...", Young Exceptional Children
- P-6 "Positive Supports...", Center for Community Inclusion

**School production:**

1 to 304 (attached)

- A1 Terms of settlement agreement reached in May, 1998
- A2 Letter from Sweetser to parent, dated 8/12/98 re: evaluation postponement
- A3 E-mail dated 5/15/98 re: summer camp program

- A4-A8 Assorted letters, faxes, notes and invoices from the school regarding the summer camp program
- A9-A33 Assorted letters and handwritten notes by school personnel regarding attempts to schedule the multidisciplinary evaluation
- A34-A35 Teacher reports of student's progress
- A36-A39 Summary Reports of performance and progress
- A40-A45 Student's work product
- A46-A48 Report of Occupational Therapist dated 6/17/98
- A49-A53 Final Report of Diann Edmunds
- A54-A56 Report of Speech Clinician dated 5/27/98
- A57-A63 Tutorial Program Weekly Academic/Behavioral Reports
- A64-A70 Assaultive or Abusive Behavior in the Schools, Incident Reports



