**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

# In Re: Lynnfield Public Schools BSEA #12-1425

##

## **DECISION**

 This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”, 20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) and the Massachusetts Administrative Procedures Act (MGL c. 30A), as well as the regulations promulgated under these statutes.

The issue here whether the Lynnfield Public Schools acted correctly when it determined that the Student, who is nineteen-year-old high school senior with disabilities, is ineligible for special education because his disabilities do not prevent him from making effective progress in the general curriculum.

The adult Student filed the hearing request in this matter on August 19, 2011. After several postponements granted for good cause at the request of the parties, a hearing took place on January 25, 2012. At the hearing, the Student proceeded pro se, and the School was represented by counsel. Both parties had an opportunity to examine and cross examine witnesses, to submit documentary evidence, and to make oral and written arguments.

Those present for all or part of the proceeding were:

Student

Student’s Father

Kara Mauro Director of Special Services, Lynnfield Public Schools

Kathryn Moody Student’s Guidance Counselor, Lynnfield Public Schools

Maryellen Ianabelli Student’s AP English Teacher, Lynnfield Public Schools

Thomas Nuttall, Esq. Attorney for Lynnfield Public Schools

Michael Joyce, Esq. Attorney for Lynnfield Public Schools

The official record of the hearing consists of Student’s Exhibits P-1 through P-8, and P-10 through P-18; School’s Exhibits S-1 through S-15, and several hours of tape-recorded oral testimony and argument. All final closing arguments were received by February 5, 2012, and the record closed on that day.

### ISSUES PRESENTED

The sole issue presented for hearing is whether the Lynnfield Public Schools was correct when it determined that the Student was ineligible for special education pursuant to the IDEA.

#### POSITION OF STUDENT

Although Student is highly intelligent, he has disabilities from multiple diagnoses, including ADHD, Asperger’s Disorder, and Bipolar Disorder. These disabilities interfere with his ability to make effective educational progress commensurate with his potential. He has earned good grades, but only because he spends an inordinate amount of time studying. His math skills are at a seventh or eighth grade level, below his current grade placement, and he currently struggles with his anatomy class. The Lynnfield Public Schools are effectively penalizing Student for his intelligence and diligence by denying him the specialized instruction to which he is entitled. Student needs an IEP, with measurable goals and benchmarks, as well as access to an in-school academic support classroom, to make effective progress. [[1]](#footnote-1)

#### POSITION OF LYNNFIELD PUBLIC SCHOOLS

 Student has made excellent progress within the Lynnfield Public Schools, as well as historically, in his former non-special education private school. While there is no dispute that Student has disabilities, he does not require specialized instruction to access the curriculum or make effective educational progress. The School agrees that Student is entitled to a Section 504 Accommodation Plan (“504 Plan”), and such a plan is in place. Student has declined to use many of the accommodations on the Plan, however, because he believes that he does not always need them in order to make educational progress. Even if Student were to receive an IEP, the only actual service he is seeking is an academic support class at the high school. In fact, this class is available to Student whether or not he has an IEP.

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**FINDINGS OF FACT**

1. Student is a nineteen years old and is his own guardian. He has filed and litigated this matter on his own behalf. Student is a senior at Lynnfield High School.
2. The parties agree that Student is a very intelligent, articulate, hard-working young man who is highly motivated academically, responsible, and self-starting. In addition to carrying a full course load at Lynnfield High School, Student works at a part-time job which he has held for several years and participates in a school-based academic club. Student plans to graduate from high school in June 2012 and to proceed to a four-year college. He has been accepted at four colleges, and has made his selection. He has been offered scholarships. (Student, Father)
3. The parties also are in substantial agreement regarding Student’s disability profile. Student carries diagnoses of Bipolar Disorder NOS, Asperger’s Disorder, a “rule out” diagnosis of ADHD, and Learning disorder NOS. (S-14) Additionally, Student has a statistically significant difference between his language-based cognitive skills (in the high average range) and visuospatial cognitive skills (in the borderline range). (P-5, Student, Moody)
4. Historically, this constellation of disabilities has caused Student to have difficulties with social interactions, mood swings, anxiety and attention, for which Student has received outside medical and counseling treatment. From 2008 to the present, in addition to receiving counseling, Student has been treating with a psychopharmacology nurse provider, Rebecca Nisby, who is supervised by a psychiatrist, Dr. Chantal Nouvellon. (Neither Ms. Nisby nor Dr. Nouvellon testified at the hearing, but the record contains letters written by each of them.) Student’s social and emotional issues had improved significantly as of the time of the hearing, but he still had some academic struggles, particularly with math and science, which he finds to be much more difficult than English or social studies. (Student, S-4)
5. Student attended Lynnfield Public Schools from Kindergarten through eighth grade. Other than some occupational therapy services in early elementary school, Student did not have an IEP or Section 504 plan during that period. Student repeated first grade, but, after that point, earned good grades because he worked very hard in and outside of class. He continued to have social and emotional struggles, as well as difficulty with math and science. (Parent, Student)
6. Student attended a private, regular education high school for ninth and tenth grades (2008-2009 and 2009-2010). Student transferred to Lynnfield High School at the beginning of eleventh grade (2010-2011), and remains there to date. (Moody, S-9)
7. At his private high school, in ninth and tenth grades, Student earned numeric grades corresponding mostly to A’s and B’s, with an occasional C (e.g., in Honors Biology) in his academic courses, many of which were classified as “Honors” or “Accelerated.” For Math, his weakest subject, Student was in a lower level course, designated as “College Prep.” or “CP.” Student’s final grades in his weakest subjects during ninth and tenth grade were 88 in Algebra I-CP, 92 in Geometry-CP, 78 in Honors Biology, and 87 in Accelerated Chemistry and Physics. (S-15) According to Student’s Father, Student spent many hours on homework and studying while in attendance at the private school. (Father)
8. Upon entering Lynnfield High School in September 2010 for eleventh grade, Student enrolled in Honors English, and Advanced Placement US History II, as well as College Prep (CP) Advanced Algebra, Chemistry, Latin 2, and Personal and Business Law. (S-1, Moody)
9. At the time of Student’s enrollment in Lynnfield, neither he nor the Parent sought accommodations or special education services, but they did make the School aware of his disabilities. (Moody)
10. Student first sought special education eligibility in late November of 2010, after he had turned 18 years old because of his continued difficulty with focusing and concentration on schoolwork despite medication and counseling. Student’s providers had suggested an evaluation to determine if he had a learning disability that was interfering with his educational progress. Student provided the School with a letter from Rebecca Nisby dated November 18, 2010 that stated “[i]t is not clear now whether his attention difficulties are the result of ADHD, of anxiety related to unaddressed issues relating to Asperger’s, of anxiety related to learning disorders frequently associated with Asperger’s even if the child is high functioning and intelligent, or of his mood disorder.” (S-14) Ms. Nisby recommended psychological testing, which never had been done, and stated also, “it is imperative that he receive accommodations appropriate for a student with Asperger’s Disorder, a Mood disorder, and problems with distractibility and sustained attention. He will be at risk as he transitions to higher education without these accommodations.”(S-14)
11. Lynnfield conducted an evaluation during January 2011. The psychological evaluation, conducted by school psychologist Lydia Rundell-Gjerde, consisted of review of records, an interview of Student, and standardized testing with the Wechsler Adult Intelligence Scale, 4th Edition (WAIS-IV) and the Behavior Assessment System for Children, 2d Edition, Self Report. (BASC-2). (S-10)
12. On the WAIS-IV, Student’s overall cognitive performance was in the average range, but there was a significant split between his “high average” Verbal Comprehension score (86th %ile) and “low” Perceptual Reasoning score (6th %ile). Student’s Working Memory and Processing Speed scores were in the “Average” and “Low Average” ranges, respectively. (S-10) These scores indicated that Student had much better developed verbal skills than visual, non-verbal reasoning skills.(S-10)
13. Student’s responses on the BASC-2 indicated that he continued to experience symptoms of anxiety, depression, and trouble paying attention. (S-10)
14. In his interview with the school psychologist, Student stated that English and History were easy for him, Latin was going well, but that Math and Science had always been more difficult. Student reported staying after school for extra help in those subjects, especially before tests. Student reported spending about 1.5 hours per night on homework.[[2]](#footnote-2) Student wanted help with study strategies. (S-10)
15. The psychological report contained no recommendations other than for a Team meeting, and a few accommodations such as repetition or clarification of questions or instructions, subtle cueing from the teacher if Student’s attention was wandering, encouragement to ask for help from teachers, and ongoing positive feedback for persisting with difficult tasks. (S-10)
16. Lynnfield’s educational testing also was conducted in January 2011 by a special education teacher, Jill Guerriero, who administered the WIAT-III and observed Student in class. On the WIAT-III, Student’s composite scores were in the “average” range for Oral Language, Mathematics, and Math Fluency, and in the “superior” range for Basic Reading. Although Math was not Student’s strongest area, he still scored within the “average” range on all subtests and had solid skills. (S-9) Although Student’s math scores were “average” in terms of percentile rankings, the corresponding grade equivalencies were below Student’s eleventh grade placement, and ranged from grades 7.7 to 10.8.
17. The educational assessment contained no recommendations, other than for Student to continue on his then-current academic track, receive positive feedback, and take academic risks such as challenging himself with higher-level math classes. The evaluator felt that Student was more capable than he thought he was, especially in math. (S-9)
18. After a Team meeting held on February 14, 2011, at which the School considered the evaluation reports, grades, Ms. Nisby’s letter and input at the Team meeting, and teacher reports,[[3]](#footnote-3) the School issued a finding of “no eligibility.” (S-6)
19. In May 2011,[[4]](#footnote-4) the School issued a Section 504 Student Accommodation Plan (504 Plan) which provided for extended time (1.5x) for tests and quizzes, preferential seating, teacher cueing, and repetition and clarification of questions and/or directions. Student accepted this 504 Plan. (S-6) The Plan was implemented for the remainder of eleventh grade; Student used some of the accommodations, such as preferential seating, but did not use the extended time for tests. (Moody)
20. Student’s final grades for his junior year (2010-2011) were “B’s” for Honors English/Research Paper, and AP History, “B+” for Business and Personal Law, “B-“ for Advanced Algebra-CP and Chemistry-CP, and “A-“ in Latin 2-CP. Teacher comments on Student’s report card indicated that Student “effectively” read, comprehended and analyzed information, and “effectively” communicated in written, oral and visual forms. In Chemistry, the teacher commented that Student solved problems creatively and showed “significant improvement.” In Math, Student showed “proficient use of technology.” Student’s Latin teacher commented that he “shows aptitude in this area.” At the end of eleventh grade, Student’ cumulative GPA was 3.26, and he was on the Honor Roll “Credit List.” (S-1)
21. After a meeting held on September 15, 2011, at the start of Student’s twelfth grade year, the School issued another 504 Plan. This Plan contained the same accommodations as the Plan issued in May 2011, and, in addition, called for encouraging Student to self-advocate, providing Student with access to the Student Support Program for his study period, allowing Student to take exams, quizzes and tests in a small group, separate environment as needed, and submitting paperwork to Student to be considered for extended time on the SAT’s. (S-5) Student did not sign this Plan. As of the hearing date Student had not yet really tried the accommodations. (Student)
22. In October 2011, the Student underwent an outside neuropsychological evaluation conducted by Donna F. Jenkins, Ph.D. Dr. Jenkins conducted standardized tests to further assess Student’s visuospatial processing, memory and learning, attention and executive functioning, and social-emotional functioning. (S-4) Cognitive testing confirmed previously-documented visuoperceptual deficits, which can “compromise an individual’s performance in subjects such as math and physics that are spatial in nature.” Student’s verbal and visual memory skills were also weak, as were aspects of executive function. (S-4)
23. Dr. Jenkins administered some math portions (Numerical Operations and Math Problem Solving) of the WIAT-III to update the assessment of Student’s math skills. All percentile scores were in the average range; however, his performance was slightly to well below grade level, with grade equivalencies ranging from 11.7 (Math Fluency-Addition and Multiplication) down to early or mid eighth grade (Numerical Operations, Math Problem Solving, Math Fluency—Subtraction). (S-4) Student was able to use the four basic operations, and had trouble with multi-step problems, long algebra equations, and geometry. (S-4)
24. Projective testing revealed that Student had deficits in understanding social situations and interactions that involve nonverbal cues and information. Dr. Jenkins found more concerning that Student’s social understanding “looked good” because he could understand in “a global overall manner;” however, he had limited ability to perceive nuances and to integrate and organize information in order to “make sense of his world.” Student’s thoughts could become “stuck,” making it hard to shift focus from a single idea or topic or think flexibly. (S-4)
25. Dr. Jenkins report concluded that Student displayed “cognitive rigidity and inefficient information processing that can compromise his ability to think flexibly and effectively, particularly when information is visuospatial (nonverbal) in nature.” The report further concluded that Student’s cognitive profile could make him have “idiosyncratic and inaccurate perceptions/thoughts that are difficult for him to dislodge,” and could cause social interactions to be confusing. (S-4)
26. Dr. Jenkins recommended the following in addition to continued medication monitoring and counseling:
* Access to a structured, teacher supervised study period, staffed by a certified special education teacher.
* Multisensory instruction, supplementing visual information with oral presentation, especially in math or other spatially-oriented subjects.
* Extended time for tests, quizzes, and standardized testing
* During math instruction, help to break down complex information into components, identify connections between components, and understand their relation to the whole; focused and remedial instruction in math.
1. Dr. Jenkins concluded that if the foregoing recommendations could not be provided under a Section 504 Plan, that the School should provide them pursuant to an IEP. (S-4)
2. The Team convened on January 5, 2012 and issued a revised Section 504 Plan, which incorporated Dr. Jenkins’ recommendations except for “focused and remedial instruction in math.” Specifically, the 504 Plan provides for the following accommodations: (S-2)
* Extended time for tests and quizzes (1.5x);
* Preferential seating;
* Repetition and clarification of questions and/or directions;
* Teacher cueing to maintain focus;
* Encouragement to self-advocate and use alternative support opportunities offered by teachers;
* Multisensory instruction, supplementing visual information with oral presentation, especially in math or other spatially-oriented subjects;
* Access to a structured, teacher supervised study period, staffed by a certified special education teacher;
* Break down complex information into manageable parts as needed, support Student in identifying connections between components and understanding their relation to the whole;
* Opportunities to take exams/quizzes/tests in a small group, separate environment as needed;
* Paperwork has been submitted to the College Board to consider extended time on the SATs.
1. As of the hearing date, the Student had not signed the 504 Plan. Student testified that he wanted an academic support class different from the one offered under the 504 Plan; Ms. Mauro testified that this class would also be available to the Student.
2. As of the hearing dates, Student, who is now a twelfth grader was enrolled in the following courses, and had received the following first quarter grades and comments:
* AP English—A-; “Written expression of ideas is excellent. Oral expression of ideas is excellent.”
* World Studies H—A-; “Is a pleasure to have in class. Contributes positively to class/school environment.”
* Psychology—B[[5]](#footnote-5); “Is a pleasure to have in class. Class participation is excellent.”
* Topics in Advanced Algebra CP—A-; “Class preparation is good. Cooperative work is good.”
* Anatomy and Physiology CP—B; “Contributes positively to class/school environment.”
* Latin Prose CP—A-; “Test/quiz grades are excellent. Discipulus optimus.” [sic]
1. As of November 2011, Student had a cumulative grade point average of 3.83 and “High Honors” honor roll status. (S-1)
2. Student testified that despite his high grades, he was having a very difficult time with Anatomy, especially with the memorization required, and felt he was doing poorly despite much work on his part. In math, Student testified that his good grade was the result of much hard work and doing extra credit problems, and that he continued to struggle to understand multistep problems. Student felt that he needed more 1:1 assistance in both subjects. (Student)
3. Several staff from Lynnfield High School testified as to Student’s performance, particularly during twelfth grade. Ms. Kathryn Moody, Student’s guidance counselor, testified that she had attended all of Student’s Team and 504 meetings, had met with Ms. Nisby, and had met with all of Student’s teachers to inform them of his 504 Plan. She had known Student since spring 2010, and was familiar with the courses he was taking and his second quarter grades. Ms. Moody testified that in Honors World Studies, Student was earning a B in a course requiring writing and class presentations. She described his performance as “excellent.” In Psychology, Student was also earning a B, was an active participant, was well-organized, and did his homework. In Math, Student was earning an 88 (B)during the second quarter. In Anatomy, Student was earning a C, asked many questions, and got extra help after school from the teacher. In Latin Prose, Student was a “model student,” who went “above and beyond” the course requirements. (Moody)
4. Ms. Moody testified that the accommodations on the 504 Plan were offered in each course; Student used some but not others depending on his needs. For example, Student might sit in the front of a class with many students, but did not want or need preferential seating in a small class like World Studies. In other classes (such as math and Anatomy) Student used all for the accommodations except for extended time on tests. (Moody)
5. Ms. Moody spoke with Student periodically about difficulties in various classes and helped him and teachers work on solutions. (Moody)
6. Testimony also was provided by Ms. Kara Mauro, who is Lynnfield’s Director of Student Services. Ms. Mauro testified that Student could access any of three student support programs[[6]](#footnote-6) which are staffed by special education teachers, as long as he can fit them into his schedule, and does not require an IEP to do so. (Mauro) She further testified that Student did not use all of the accommodations offered him, including any of the student support classes. While Lynnfield submitted paperwork for extended time on the SATs, Student did not submit his portion of the application. [[7]](#footnote-7) (Mauro)
7. Finally, testimony was provided by Student’s AP English teacher, Ms. Ianabelli. Ms. Ianabelli testified that Student was earning a “B” for the second quarter, was reading novels, plays, and poetry, doing very well with homework and projects (including regularly assigned, in-class timed essays), was a “methodical, high-level thinker,” and was one of the top 5 students in class for class participation. (Ianabelli) Student was offered but did not use accommodations other than sometimes asking for clarification of instructions. (Ianabelli).
8. All School witnesses felt that Student was not eligible for special education services because despite his disabilities, he was able to make effective progress with the accommodations offered. (Moody, Mauro, Ianabelli)

###  FINDINGS AND CONCLUSIONS

After reviewing the testimony and documents on the record, I conclude that Student has not proved[[8]](#footnote-8) that Lynnfield’s decision to find Student ineligible for special education services was inappropriate. I conclude further that Student is appropriately served under his current Section 504 Accommodation Plan, which, of course, is always subject to adjustment. My reasoning follows.

Eligibility for special education is defined by federal and state law. Under the IDEA, a student is eligible for special education if he or she has one or more disabilities in various categories and, “by reason thereof, needs special education and related services.” 20 USC Sec. 1401(3)(a). The federal law defines “special education” as “specially designed instruction…to meet the unique needs of a child with a disability.” 20 USC Sec. 1401(29).

State regulations define a student as eligible for special education if he/she has not reached age 22 or has not attained a high school diploma or equivalent, and “has been determined by a Team to have a disability(ies), and as a consequence is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.” 603 CMR 28.02(9). (Emphasis supplied)

The state regulations further define “progress effectively in the general curriculum” as follows:

[T]o make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the District. 603 CMR 28.02(17).

Thus, the Team must make a two-step inquiry. First, the Team must determine, based on evaluations and other input from teachers, parents, and others knowledgeable about the student, whether or not the student has one or more qualifying disabilities. If so, the Team must inquire as to whether as a result of such disabilities, the student cannot progress effectively in the general curriculum, with our without accommodations, unless the student has specially designed instruction. If a student has a disability but is able to make effective progress, as defined above, without specialized instruction, then he or she is not eligible for special education as defined above.

In the instant case, there is no dispute that the Student has one or more disabilities, including Aspergers Disorder, Bipolar Disorder, ADHD, and an unspecified learning disorder. There also is no dispute that on standardized tests, Student scores significantly higher on tests of verbal abilities (which are at least high average), versus visuospatial, non-verbal abilities, which are borderline to low average. Additionally, there is no dispute that Student’s combination of disabilities result in his finding math and science more difficult than humanities courses. Further, Student is vulnerable to finding social interactions to be confusing, and to sometimes having trouble with focus and concentration. Finally, there is no dispute that Student is entitled to an accommodation plan under Section 504 of the Rehabilitation Act, to remove barriers to his full participation in the curriculum.

Student’s difficulties in some subjects and relative weaknesses do not make him eligible for special education, however, because the evidence is overwhelming that with minimal accommodations, Student has “progressed effectively” in the general curriculum, including in very demanding, challenging courses. There is no dispute that Student always has excelled in courses that rely on language skills, such as English, Latin, History, Social Studies and the like. Even in courses such as math and science, which Student finds more difficult, he has made progress in the general curriculum, again with minimal accommodations. There simply is no evidence on the record that Student needs “specialized instruction” to make such progress. That Student has strengths and weaknesses, and does better in some courses than others, does not give rise to a need for specialized instruction where, as here, he has made “documented gains in the acquisition of knowledge and skills” within the general education curriculum, even in his weakest areas.

 I conclude further that Student has been appropriately accommodated under his Section 504 Plans at all relevant times. The plan for 2010-2011 was accepted and implemented. The current plan augments prior plans to fully incorporate the recommendations of Dr. Jenkins. As of the hearing date, the Student had not found it necessary to even use all of the accommodations offered, and still was progressing very well. Finally, the only service for which Student believed he needed an IEP was access to a support program known as “CIL;” the record indicates that Student does not need an IEP to make use of this resource.

**CONCLUSION AND ORDER**

 Based on the foregoing, the Student has not demonstrated that the School was incorrect when it determined that he was not eligible for special education. On the other hand, Student has been and is appropriately accommodated by the Section 504 Plan offered by the School.

By the Hearing Officer:

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Sara Berman Date: March 14, 2012

1. Student initially requested that Lynnfield be ordered to fund tutoring from a private vendor; however, he indicated on the record that while he would not decline an offer of such services, he was not explicitly pursuing this relief. (Student) [↑](#footnote-ref-1)
2. Father testified that at times, Student has spent has much as 6 hours per day on homework. (Father) [↑](#footnote-ref-2)
3. As of the Team meeting date, Student had first term grades of A’s and B’s. [↑](#footnote-ref-3)
4. The School had provided unspecified Response to Intervention (“RTI”) accommodations before issuing a Section 504 Plan. (Moody, Mauro) [↑](#footnote-ref-4)
5. This course was described as similar to an entry-level college course, and college credit is available for students who pass a national exam given in May 2012. (Moody) [↑](#footnote-ref-5)
6. The support programs referred to are the “Student Support Classroom,” and the “CIL” program. CIL offers 2 classes, one for language-focused subjects, and one for math/science. (Mauro) [↑](#footnote-ref-6)
7. Student’s SAT scores were 430 in Math (23d %ile), 600 in Writing (82d %ile) and 660 in Critical Reading (91st %ile). (P-4) He took the SAT test one time, without extra time. (Mauro) [↑](#footnote-ref-7)
8. Pursuant to the U.S. Supreme Court’s decision in Schaeffer v. Weast, 546 US 49; 44 IDELR 150 (2005), the moving party in a special education case has the burden of persuasion. Here, the Student must prove by a preponderance of evidence that the School’s determination of ineligibility was incorrect. [↑](#footnote-ref-8)