

**IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

APPELLATE DOCKET NOS. 668 MDA 2005 & 669 MDA 2005

IN THE INTEREST OF D.A.S., A MINOR

APPEAL OF D.S.

Appeal from the Order of the Honorable Louise O. Knight Of The Union County Court Of
Common Pleas, 17th Judicial District, Juvenile Division Entered March 22, 2005
Juvenile Docket Nos. 040JV04 & 041JV04

Brief of PA Protection & Advocacy, Inc.
Amicus Curiae

In support of Appellant

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INTEREST OF *AMICUS* PA PROTECTION AND ADVOCACY, INC.

Amicus Pennsylvania Protection and Advocacy, Inc. (PP&A) is a private, non-profit corporation designated by the Governor of Pennsylvania to promote the rights of children and adults with disabilities throughout the Commonwealth pursuant to the Development Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15043, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801-10851, and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act, 29 U.S.C. § 794e. PP&A works to remedy discrimination encountered by persons with disabilities in Pennsylvania and to ensure, to the fullest extent possible, that children and adults with disabilities can participate fully in society alongside persons who do not have disabilities.

To this end, staff from PP&A and its subcontractors interact each year with thousands of children, families, and child-caring professionals who are seeking education and other special supports for children with disabilities and their families. Over the years, a frequent complaint has been that school districts refer children to the police and Juvenile Justice system for disability-related behavior rather than providing those students with the “free appropriate public education” and procedural safeguards mandated by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.*, and state law.

To ascertain the extent to which this was happening and where, PP&A’s Children’s Project reviewed the School Year 2001-2002 state-mandated forms on which school districts are required to report to the Office of Safe Schools all student acts of violence, possession of weapons, and the use or purchase of controlled substances, alcohol, or tobacco.¹ 24 Pa. Cons. Stat. § 1303-A. Those forms indicate whether the student was receiving special education services, whether law enforcement was notified, whether the student was arrested, and the

¹ The Office of Safe Schools is part of the PA Department of Education.

resulting fines, convictions, or adjudications.² The results of that study were published in a July, 2004 report entitled *Arrested Development: Students with Disabilities and School Referrals to Law Enforcement in PA* [hereinafter Report]. See Appendix A.

The Report concludes that students with disabilities are disproportionately referred to the police or the Juvenile Justice system: “In PA, students with disabilities comprise approximately 13% of the school-aged population, yet they represent 24% of all students referred to the police or Juvenile Justice system.” Report, *supra*, at 1.

The disproportions are far more dramatic in some schools than in others. The Report concluded that, in the year studied, *45 schools were responsible for 35% of the statewide total students with disabilities referred to local law enforcement.* Report, *supra*, at 12 (bullet 7). In fact, in 11 of those 45 schools, *more than 60% of the students referred were students with disabilities.* Report at 14-15. PP&A’s Report concluded:

The Individuals with Disabilities Act, or IDEA, outlines extensive procedural protections designed to prevent school officials from unilaterally removing students with disabilities from school. However, these statistics show that many school systems have achieved the same result – without affording these protections – by labeling disability-related behaviors as “crimes,” and referring the child to the police and juvenile court. Most often, the incidents precipitating referrals are relatively minor, a manifestation of the disability, and a direct result of the school’s failure to provide an appropriate education and behavioral program. The results are often tragic for the child and family.

Report, *supra*, at 1.

PP&A believes that Appellant D.S. – a child with Autism Spectrum Disorder – is a poster child for this troubling pattern. D.S. is a student who needs special services to learn how to control his behaviors and to interact appropriately with peers and adults. His school district

² Specifically, the forms note whether the child had an Individualized Education Program, which is the education plan required for all children identified as having a disability and needing special education. 20 U.S.C. §1414(d) (2005 Supp.). See Report, *supra*, at 21.

failed to meet its legal obligation to provide him appropriate services, and then referred him to the police for relatively minor behavior that was related to his disability.

PP&A is filing this brief because it believes that the lower court must have the authority to admit expert testimony at the adjudication stage to establish that D.S. is a child with Autism Spectrum Disorder and to explain the relationship between his disability and the conduct for which he is charged. The lower court must also have the authority to admit, and must admit and carefully consider evidence of the school district's failure to meet D.S.'s educational needs in compliance with federal and state law – in this case the decisions of the Special Education Due Process Hearing Officer and the PA Appeals Panel.

A decision that a child with a serious disability is a “delinquent child” should be based on a record that allows and requires the Juvenile Court to take into account these factors. Otherwise, we will continue to “criminalize” children for behavior they cannot control, while exculpating school districts who have not met their legal obligations. It is to ensure that this does not happen to D.S. and other similarly situated children that PP&A files this *amicus* brief.

JURISDICTION

Amicus PP&A incorporates by reference the jurisdictional section from the Brief of Appellant D.S.

ORDER IN QUESTION

Amicus PP&A incorporates by reference the Order which is included at length in the Brief of Appellant D.S. and in the Appendix to that brief.

SCOPE OF REVIEW AND STANDARD OF REVIEW

Amicus PP&A incorporates by reference the statement of the scope and standard of review from the Brief of Appellant D.S.

STATEMENT OF THE QUESTIONS INVOLVED

Amicus PP&A incorporates by reference the statement of the Questions Involved from the Brief of Appellant D.S.

STATEMENT OF THE CASE

Amicus PP&A incorporates by reference the Statement of the Case from the Brief of Appellant D.S.

SUMMARY OF ARGUMENT

The lower court committed an error of law by concluding that it did not have the authority to admit at the adjudication stage the testimony and evaluation report of a highly trained neuropsychologist, which would have explained that D.S. is a child with Asperger's Syndrome, a neurological disorder that affects his ability to interact appropriately with peers and adults and sometimes results in explosive behavior that D.S. cannot control. Had it been admitted, this evidence would have rebutted the Commonwealth's position that D.S. had the necessary *mens rea* to commit a delinquent act, and would also have been relevant to D.S.'s defenses that his actions were "involuntary" and were in "self-defense."

The lower court also erred by failing to find relevant and failing fully to consider the decisions of a Special Education Hearing Officer and a PA Appeals Panel that had concluded that D.S.'s school district, during the period the alleged delinquent acts were committed, had failed to meet its legal obligation to provide D.S. with appropriate special services to help him overcome the behavioral symptoms of his disability. This evidence, and a fuller understanding of state and federal special education law, might have led the lower court to conclude that the school system, and not the Juvenile Justice system, is the most effective route for D.S. to receive the "supervision and treatment" he needs to prevent a recurrence of this school-based, disability-related behavior.

Amicus contends that, had all of this evidence been admitted and carefully considered by the lower court, it may well have concluded that the delinquency petition should have been

dismissed. Any other conclusion has the effect of punishing D.S. for his disability, and will not lead toward the goal of “rehabilitation and treatment” that is the core of the Juvenile Justice System.

ARGUMENT

I. THE COURT ERRED BY REFUSING TO ADMIT FOR ADJUDICATION PURPOSES DR. DOWELL’S TESTIMONY THAT HE HAD DIAGNOSED D.S. WITH A NEUROLOGICALLY BASED DISORDER AND THAT THIS DISORDER INHIBITED D.S.’S ABILITY TO CONTROL THE BEHAVIOR FOR WHICH HE WAS CHARGED

The juvenile court legally erred in holding that the testimony of a pediatric clinical neuropsychologist, Richard E. Dowell, Jr., Ph.D., was inadmissible for the purposes of challenging the Commonwealth’s evidence that D.S. intended or attempted to harm others while engaging in the physical acts described in the delinquency petitions. The court should have permitted Dr. Dowell to testify—at the adjudication phase—that D.S. has been diagnosed with Asperger’s Syndrome, a neurologically based autism spectrum disorder and thus, *under the specific circumstances surrounding the incidents charged in the delinquency petitions*, D.S. may have been incapable of controlling his actions. Tr. (9/28/04) p. 167-68. That Dr Dowell’s testimony would have been directly relevant to the question whether D.S. committed a “delinquent act,” *see* 42 Pa. Cons. Stat. § 6302, is demonstrated by the educational and psychological literature describing Asperger’s Syndrome, the information in Dr. Dowell’s Neuropsychological Assessment of D.S.,³ and the testimony Dr. Dowell was permitted to present at the disposition hearing. Had the court considered D.S.’s neurological impairment and the profound effect that this impairment can have on his ability to control his behavior, it may have

³ Richard E. Dowell, Jr., Ph.D., *Neuropsychological Assessment* (Sept. 24, 2004) [hereinafter *Assessment*]. The juvenile court admitted this report into evidence at the December 17, 2004 disposition hearing. Tr. (12/17/04) p. 40. This report appears in full in Volume 2 of the Reproduced Record, beginning at page 435a.

concluded that the Commonwealth had not borne its burden of showing, beyond a reasonable doubt, that D.S.'s conduct rose to the level of "delinquent" acts.

In September 2004, Dr. Dowell diagnosed D.S. with Asperger's Syndrome, a condition that falls within the autism spectrum of disorders. *See generally Assessment*. (R. 435a) Autism spectrum disorders are complex neurological disorders characterized by "varying degrees of impairment in communication skills, social interactions, and restricted, repetitive and stereotyped patterns of behavior." Nat'l Inst. of Mental Health, *Autism Spectrum Disorders (Pervasive Developmental Disorders)*, NIH Pub. No. NIH-04-5511 (2004), available at <http://www.nimh.nih.gov/publicat/autism.cfm> [hereinafter NIH Pub. No. NIH-04-5511]. The social deficits, language impairments, and behavioral symptoms associated with autism spectrum disorders can usually be detected in patients by three years of age, can range from quite mild to severe, and have been linked through recent scientific studies to abnormal brain development and possible genetic defects in brain growth factors. NIH Pub. No. NIH-04-5511, *supra*.

While children with Asperger's Syndrome—like D.S.—have social and behavioral symptoms similar to others within the autism spectrum, they may be diagnosed later in life because these symptoms are not accompanied by clinically significant delays in language development or cognitive functioning. Diagnostic and Statistical Manual of Mental Disorders (Am. Psychiatric Assoc. 4th ed.) § 299.80, at 73-74 (1994) [hereinafter DSM-IV]. As this Court explained in *In re C.M.T.*, 861 A.2d 348, 351 (Pa. Super. Ct. 2004),

Asperger's Syndrome is a high-functioning form of autism that affects a person's social interactions and ability to understand instructions. Among its many symptoms are a failure to develop peer relationships, a lack of social reciprocity and significant impairment of social and occupational functioning.

(*citing* DSM-IV § 299.80).

All individuals with autism spectrum disorders, including those with Asperger's Syndrome, demonstrate deficits in social interaction and develop repetitive behaviors and restricted interests to some degree. NIH Pub. No. NIH-04-5511, *supra*. Common indicators that a child has one of these disorders include: difficulty expressing needs, insistence on sameness and resistance to change, showing distress (including tantrums) for reasons not apparent to others, difficulty socializing with others, sustained odd play, inappropriate attachments to objects, over- or under-sensitivity to pain, and a preference for being alone. Autism Soc'y of Am., *Common Characteristics of Autism*, at <http://www.autism-society.org> (last visited Aug. 1, 2005).

One of the most challenging and frustrating characteristics of autism spectrum disorders, which affects a subset of diagnosed individuals—including D.S.—is an inability to regulate one's emotions. NIH Pub. No. NIH-04-5511, *supra* (reporting that some people with autism spectrum disorders “have a tendency to ‘lose control,’ particularly when they're in a strange or overwhelming environment, or when angry or frustrated. They may at times break things, attack others, or hurt themselves.”). Because this inability to control oneself is associated with the autism spectrum, Dr. Dowell's expert testimony on the epidemiology of D.S.'s disability, and his opinion whether the events leading up to D.S.'s allegedly delinquent conduct could have caused D.S. to lose control on the dates in question, would have been highly probative of the question whether D.S. acted voluntarily and intentionally, knowingly, or recklessly harmed or attempted to harm his classmates and teachers—key elements of the offenses with which he was charged.

In the summer of 2004, while this case was being prosecuted, the Lewisburg Area School District hired Dr. Dowell, a pediatric clinical neuropsychologist with professional training from the Baylor College of Medicine's Department of Neurology, to evaluate D.S. Tr. (9/28/04) at

167, 200-02.⁴ In his Neuropsychological Assessment Report, Dr. Dowell concluded that D.S.’s “history, clinical presentation and test findings” met the diagnostic criteria for Asperger’s Syndrome. *Assessment, supra*, at 8. At the close of the adjudication hearing, D.S. called Dr. Dowell to the stand to explain this diagnosis, offering to prove “that the behaviors [charged in the petitions] in the circumstances that have been outlined . . . are consistent with manifesting his disability” and, thus, D.S. was “incapable of producing the intent to cause harm” during the allegedly delinquent acts. Tr. (9/28/04) at 167-68.

Citing *In re G.T.*, 597 A.2d 638 (Pa. Super. Ct. 1991) (*en banc*), the court did not allow Dr. Dowell to testify at the adjudication hearing and held that expert testimony rebutting the Commonwealth’s evidence of *mens rea* is “irrelevant” to the question whether D.S. committed a delinquent act. Tr. (9/28/04) at 172.⁵ Nonetheless, the court did conclude that Dr. Dowell’s testimony was “highly relevant to the dispositional phase” of the proceeding. After entering its order of adjudication, the court permitted Dr. Dowell to describe the etiology of D.S.’s disability and the probable effects that this condition had on D.S. under the circumstances leading up to the incidents in question. *Id.* at 174; *see id.* at 202-52.

An examination of Dr. Dowell’s assessment report and disposition testimony shows that his evidence was relevant to the questions whether D.S. was in control of his behavior, had the intent necessary to commit delinquent acts, and was not simply acting in self defense on February 24, 2004 and March 30, 2004. The juvenile court should have had the authority to consider this evidence for those purposes, particularly here, where several of the “delinquent acts” with which D.S. was charged include: tipping over a flower pot, calling a teacher names,

⁴ As the next section of this brief explains in more detail, by not hiring Dr. Dowell or obtaining any detailed neuropsychological assessment of D.S. earlier in the 2003-2004 academic year, the School District violated federal special education law.

⁵ *See also id.* at 173 (“I find that diminished responsibility and any of those kinds of defenses are not relevant to a juvenile proceeding insofar as they determined whether there is to be a finding of commitment of a delinquent act.”).

and turning the lights on and off in the nurse's office. While these actions might portend incorrigibility and the need for juvenile court intervention in a child without disabilities, as Dr. Dowell would have explained, they are quite predictable responses in an eleven-year-old child with a form of autism whose schedule has been unexpectedly altered, who believes he is being threatened by those around him, and whose school has violated its obligation to provide him with appropriate behavioral supports since he entered kindergarten.

Dr. Dowell's disposition testimony and assessment report cast doubt on the Commonwealth's assertion that D.S. was in control of himself during the allegedly delinquent acts, which it purported to prove simply by demonstrating that D.S. performed the physical conduct described in the indictment. In his assessment report, Dr. Dowell noted that D.S.'s neuropsychological presentation involved a hallmark profile associated with Asperger's Syndrome: impairment of both the lower- and higher-level executive functions. *Assessment, supra*, at 6-7. At disposition, Dr. Dowell clarified that because D.S.'s lower-level executive functions are impaired, he has "difficulties in terms of attending, concentrating, inhibiting external stimuli, [and] inhibiting [his] own motor output." Tr. (9/28/04) at 204. In addition, the "frontal lobe" of D.S.'s brain, responsible for the higher-level executive functions of adapting, changing and modifying his behavior in response to social rules, is also inhibited. *Id.* at 205. In combination, these factors create in D.S. a disconnect between the heightened limbic system (which is responsible for fight or flight behaviors, aggression, and other primitive responses to negative stimuli) and the frontal lobe, which would normally reign in the limbic responses to negative external stimuli in accordance with social cues and rules. *See id.* at 205-09.

In summary, Dr. Dowell testified that when individuals like D.S. who exhibit this Asperger's-related disconnect are exposed to "what we would imagine from our perspective is a

rather minute stimulus,” (for example, an unanticipated change in routine or teasing comment) “[t]hey tend to make responses that are either fight or flight. They try to escape often times, and if they can’t, they tend to have very aggressive responses to defend themselves.” *Id.* at 209-10.⁶ Critically, due to the social and behavioral deficits associated with this disability and the fight or flight response that may be triggered by the circumstances surrounding the individual, Dr. Dowell’s report warned the Lewisburg Area School district:

It’s important to remember that the person with AS perceives the world very differently. *Therefore, many behaviors that seem odd or unusual are due to those neurological differences and not the result of intentional rudeness or bad behavior and most certainly not the result of “improper parenting.”*

Assessment, supra, at 7 (quoting Barbara Kirby, *What is Asperger Syndrome?*, at www.aspergersyndrome.org (emphasis added)). (R. at 441a)

The “disconnection phenomenon” discussed by Dr. Dowell, which affects a subset of individuals with Asperger’s Syndrome and other autism spectrum disorders, has been preliminarily linked to a malformation of certain areas of the brain. Tr. (9/28/04) at 221-22; *see also* NIH Pub. No. NIH-04-5511, *supra*. Traditional attempts to quell behavioral outbursts that are designed to ensure the safety of the individual or others—for example, restraining the individual by his arm—are often counterproductive for children with Asperger’s Syndrome, because the child may perceive the intervention as a heightened threat, leading to a more intense fight or flight response. Tr. (9/28/04) at 215-16. A FBI publication cautions that, if approached in such a threatening manner, individuals with autism spectrum disorders:

may escalate into tantrum-like behavior (e.g., screaming, pushing, kicking, hitting) from fear, frustration, or confusion. They can not conceptualize meanness or acts of purposeful injury

⁶ In his report, Dr. Dowell recommends that School District further identify the antecedents (i.e., triggering events) for D.S.’s outbursts would as part of its special education planning, and notes that some of D.S.’s triggers have already been identified, including an “inflexible adherence to schedules/routines with distress under change in conditions.” *See Assessment, supra*, at 2, 6-7. This rigid need to follow established routines, which D.S. has demonstrated for many years, is another hallmark feature of Asperger’s Syndrome.

to others. They just want the circumstances to change but do not know how to implement that change.

Dennis Debbaudt & Darla Rothman, Ph.D., *Contact with Individuals with Autism: Effective Resolutions*, FBI L. Enforcement Bull. Soruk 2001, at 20, 22, available at <http://www.fbi.gov/publications/leb/leb.htm>.

Special education literature is replete with similar cautions, warning of the potential crises that may arise when a situation that begins when a student with Asperger's reacting "differently or more intensely to a disturbance or unexpected event" is unwittingly mishandled by a classroom teacher. See John S. Safran, *Supporting Students with Asperger's Syndrome in General Education*, TEACHING Exceptional Child. May/June 2002, at 60, 63. The literature also attempts to correct society's mistaken tendency to fault a child like D.S.—whose disability is not associated with mental retardation but with a superior intellectual capability, *Assessment, supra*, at 6; DSM-IV, *supra*, § 299.80—as intentionally misbehaving in these situations. Safran, *supra*, at 61 ("Because we anticipate a match between cognitive and social acuity, [these students] may even be perceived as *deliberately* aggravating: 'He is smart enough to know better!'"");⁷ Francine Falk-Ross et al., *Teaching and Learning Approaches for Children with Asperger's Syndrome*, TEACHING Exceptional Child. Mar/Apr 2004, at 48, 53 ("Teachers may

⁷ This article contains the following hypothetical case study that opens a window into the world of a child with Asperger's Syndrome who is confronted by a "perceived threat" at school:

Ben feels himself getting agitated. His breathing is getting heavier and his temper shorter; his foot tapping louder and faster. The teacher, Mrs. M., keeps insisting that the software was installed correctly when he knows there is no chance that it was—she just won't listen and keeps telling him to get back to work. What to do? What to do? Need to get out of here before I explode! "Mrs. M., can I go to the bathroom?"

"No, Ben, I told you to get back to work."

"But it's urgent. . . . Then can I see my guidance counselor?"

"NO! You can take care of that on your own time!"

"Mrs. M., I really need to go."

"How many times do I have to tell you?"

He hits his limit. Gets out of is seat and starts pacing around the classroom, muttering to himself and clapping his hands. The voice of the teacher and laughter of the other kids is deafening. Got to block it out. Starts banging his head against the wall. Teacher sends someone to go get the principal, QUICK.

Safran, *supra*, at 63.

misinterpret the behaviors due to the student's high functioning with literal material; in fact, teachers are often blinded by the student's strengths."); see Susan J. Moreno, Maap Servs., *Tips for Teaching High-Functioning People with Autism*, at http://www.maapservices.org/MAAP_Sub_Find_It_-_Tips_For_Teaching.htm (last visited August 17, 2005) ("The high-functioning person with autism is not a manipulative, scheming person who is trying to make life difficult. Usually misbehavior is the result of efforts to survive experiences which may be confusing, disorienting, or frightening. People with autism are, by virtue of their handicap, egocentric and have extreme difficulty reading the reactions of others. *They are incapable of being manipulative.*" (emphasis in original)).

In the case at hand, D.S. was charged as a delinquent child for conduct that occurred on February 24, 2004 and March 30, 2004. Although not fully developed for the purposes of discussing the *mens rea*, voluntariness, and self-defense issues (since adjudication was over), the testimony Dr. Dowell gave at the disposition hearing suggests that at least some of D.S.'s actions may have been part of a fight or flight response to a "threatening" situation in which D.S. was placed during the school day. For example, when asked by the prosecutor whether the evidence presented by the fact-witnesses suggested that D.S. was acting involuntarily when he raised a chair above another student (Kane Stiffler) on February 24, Dr. Dowell opined:

[W]hat I heard is that [D.S.] had been removed from a preferred activity and pulled out of math class, in a regular class.

And by Kane's description [D.S.] was having a bad day.

From my perspective, you know, it tells me bad day means he's already kind of running in an irritable background. He's kind of—his seesaw, his limbic system/frontal lobe seesaw, is already running pretty high. It's already running pretty high and then you've got someone coming up to you saying—a perceived threat of saying something about your brother.

...

[A]t that point—I think at that point in time he grabbed the chair, he's in fight or flight....

...

I think he has voluntary actions along the way that he does things. I think at some point in time he clicks in and loses it and he's no longer really running the show.

I think after the fact—It’s a great thing after the fact his limbic system slows down, his frontal lobe is now running the show, he’s riding the horse again, and then he apologizes.

Tr. (9/28/04) at 233-35; *see also Assessment, supra*, at 9 (recommending interventions to alleviate D.S.’s “explosive behavior” in response to perceived threats, and indicating that “[f]ollowing removal to a safe and secure environment, [D.S.] should be provided with about 20-30 minutes to shift from an arousal state to higher level (voluntary) control . . .”).

By explaining the manner in which D.S.’s behavior was a manifestation of his disability, Dr. Dowell’s testimony was directly relevant to the questions whether D.S. was acting voluntarily and whether he intentionally, knowingly, or recklessly attempted to harm others—or was merely defending himself from a perceived threat—on February 24 and March 30, 2004. Thus, the court erred in concluding that Dr. Dowell’s testimony was irrelevant and could not be admitted to rebut the Commonwealth’s evidence that D.S. was in control of his behavior on the dates in question.

II. THE COURT’S REFUSAL TO CONSIDER THE SCHOOL DISTRICT’S FAILURE TO PROVIDE D.S. WITH MANDATED SPECIAL SERVICES PREVENTED IT FROM CONCLUDING THAT THE SPECIAL EDUCATION SYSTEM IS THE ONLY APPROPRIATE FORUM FOR ADDRESSING HIS SCHOOL-BASED, DISABILITY-RELATED BEHAVIOR

A. The Special Education System is Uniquely Competent to “Treat and Supervise” D.S. and to Help Him Learn How to Control His Disability-Related Behavior

Given the Juvenile Act’s mandate that the court determine whether D.S. was “in need of treatment, supervision or rehabilitation” by the juvenile justice system before entering a finding of delinquency, 42 Pa. Cons. Stat. § 6341(b); *In re Dreslinski*, 386 A.2d 81, 82 (Pa. Super. Ct. 1981),⁸ the lower court should have admitted and carefully reviewed the decisions of the Special

⁸ Because D.S. presented evidence in his Motion for Reconsideration to rebut the presumption that he required juvenile court treatment, supervision or rehabilitation, the court was required to address the issue even though it had found that D.S. committed the felony aggravated assaults alleged in the juvenile petitions. *See* 42 Pa. Cons. Stat. § 6341(b) (“*In the absence of evidence to the contrary*, evidence of the commission of acts which constitute a felony

Education Hearing Officer and the PA Appeals Panel submitted by D.S.⁹ Had she done so, she would have concluded that the appropriate forum for addressing D.S.’s disability-related behavior was the special education system, and not the juvenile justice system.

It is unclear whether the lower court believed that she did not have the authority to admit this evidence; whether she believed it was not relevant to whether he should be adjudicated delinquent; or whether she did not fully appreciate the importance of the School District’s adjudicated failure to meet its legal obligation to provide appropriate special services to D.S. For whatever reason, her opinion makes no reference to the special education records, the school district’s legal failures, or the relationship between these failures and the conduct for which D.S. was adjudicated delinquent.

The special education records demonstrate: that D.S. is entitled by federal and state laws to be taught how to control his behaviors and to be provided with appropriate behavioral supports that will alleviate future outbursts at school, that the Lewisburg Area School District was disregarding its legal obligations during the incidents in question, and that the School District has been ordered to rectify its deficiencies in the future. The records and an

shall be sufficient to sustain a finding that the child is in need of treatment, supervision or rehabilitation.” (emphasis added)). Dr. Dowell’s unchallenged disposition testimony demonstrates that Asperger’s Syndrome is not a condition from which D.S. can be rehabilitated or “cured.” Tr. (9/28/04) at 228. Thus, D.S. meets the definition of a “delinquent child” only if the supervision and treatment of the juvenile justice system are necessary to address his disability-related behaviors.

⁹ *In re The Educational Assignment of David S.*, Pa. Spec. Educ. Opinion No. 1555 (Dec. 20, 2004) (final admin. review) [hereinafter Appeals Panel]. The opinion appears in Volume 2 of the Reproduced Record at page 472a. The opinion has been made publicly available by the Pennsylvania Department of Education’s Office of Dispute Resolution, at <http://www.pattan.k12.pa.us/ODR>. Because this decision was not rendered until after the disposition hearing, D.S. first asked the juvenile court to consider the PA Appeals Panel findings as part of his Motion for Reconsideration. Unfortunately, the court’s order affirming the adjudication after the motion for reconsideration does not make clear whether the PA Appeals Panel decision was admitted to the adjudication record.

The PA Appeals Panel decision reviewed and substantially upheld the opinion of an administrative hearing officer, who also concluded—on November 11, 2004, after the adjudication hearing—that the School District was violating D.S.’s federal and state rights to appropriate behavioral support during the period in question, D.S. was permitted to introduce this decision at the disposition hearing. See Tr. (12/17/04) at 41-43; *David Schuster*, File No. 3740/03-04 (Nov. 11, 2004) [hereinafter Hearing Officer Decision]. The opinion appears in Volume 2 of the Reproduced Record at page 447a.

understanding of the federal and state legal infrastructure governing school districts' responsibilities to students with disabilities would have clearly demonstrated that it is the special education system—and not the Juvenile Justice System—which has both the legal duty and the capacity to “supervise and treat” a child like D.S.

As this Court explained in *In re C.M.T.*, a dependency proceeding, a trial court’s failure to consider the role of a school system is error because it “frustrate[s] the purpose of the Juvenile Act, which is to seek treatment, reformation and rehabilitation.” 861 A.2d 348, 357 (Pa. Super. Ct. 2004) (citation and internal quotation marks omitted). In *In re C.M.T.*, a student with Asperger’s Syndrome, anxiety, panic attacks, depression and obsessive compulsive disorder, was adjudicated a “dependent child” after a juvenile court concluded that she was habitually and without justification truant from school. *Id.* at 350-51; 42 Pa. Cons. Stat. § 6302.

The student appealed. She asserted that the juvenile court had impermissibly barred her from presenting the expert testimony of a school psychologist who would have stated that the school district’s failure to provide her with an appropriate special education program was an underlying cause of her truancy. 861 A.2d at 354-55. A unanimous panel of this Court agreed and reversed the adjudication, holding that the court erred as a matter of law in excluding this evidence which was directly relevant to whether the student had a legitimate justification for not attending school. *Id.*

While the specific holding of *In re C.M.T.* is not directly apposite to the present case, which involves a delinquency not a dependency adjudication, its overarching principle has clear applicability. In explaining why special education information must be considered by the juvenile court, *In re C.M.T.* explained:

[W]e fail to see how [a child’s] ‘treatment, reformation and rehabilitation’ can proceed without a full and thorough inquiry into the circumstances of her disabilities and her very

specific needs. Certainly a disposition that does not take into account the unique circumstances of this case may be harmful to the child.

Id. at 357.

A full and thorough inquiry into a child’s disability and the resources available within the special education system to alleviate his disability-related behaviors is equally important in a delinquency proceeding. Like the student in *In re C.M.T.*, D.S. asserts that the School District’s violation of its legal responsibility to provide him with appropriate special education services was an underlying cause of his conduct and that future misconduct can best be avoided if he receives appropriate special education programming. As in *In re C.M.T.*, this Court should direct the juvenile court to admit and to consider these records, including the PA Appeals Panel’s admonition to the School District that it must begin to fulfill its special education obligations to D.S. Consideration of these records and other information about the special education system will, we believe, compel the lower court to conclude that “treatment and supervision” for D.S. through the juvenile court are not needed because the special education system is uniquely competent (and legally required) to perform this function.¹⁰

B. D.S.’s School District has the Legal Responsibility to Provide Him with the Special Services, Provided by Trained Personnel, Needed to Curb the Disability-Related Behavior that Resulted in The Delinquency Adjudication

As is explained in detail in the PA Appeals Panel decision, under the Individuals with Disabilities Education Act (IDEA), school districts must provide a “free appropriate public education [FAPE] . . . to all children with disabilities . . . between the ages of 3 and 21.” 20 U.S.C. § 1412(a)(1)(A). Integral to the provision of FAPE is the requirement that school

¹⁰ In its opinion dismissing a delinquency petition in a similar case, at least one Pennsylvania court has agreed that the juvenile justice system is not the best forum for addressing the challenges of a special education student’s behavior because “the system it is presently in – the school and mental health areas - . . . should have in place specific methods and programs to deal with just this type of case.” *In re J. G., A Minor Child*, Nos. JU-98-119, 120, 121, 122, Slip. Op. at 2, 4 (C.P. Northumberland County August, 6, 1998). See Appendix B.

districts must conduct thorough assessments of children in all areas of the suspected disability. 34 C.F.R. § 300.532(g). Based on the evaluation, which must be updated whenever a school suspects that not all of the child’s educational needs are being met, the school district must meet with the child’s parents to develop an Individualized Education program (IEP), which “consists of a detailed written statement . . . summarizing the child’s abilities, outlining goals for the child’s education and specifying the services the child will receive.” *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988). The IEP that is developed does not satisfy the IDEA’s FAPE requirement unless it is “reasonably calculated to enable the child to receive meaningful educational benefits.” *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

The PA Appeals Panel opinion also explains that special education services must be made available to children whose disabilities are primarily behavioral in nature. “[I]n the case of a child whose behavior impedes the child’s learning or that of others,” the IEP team must, in order to ensure that FAPE is provided, “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2)(i). State regulations clarify that the behavior support program developed by the IEP team must include a variety of techniques to develop and to maintain skills that enhance the student’s opportunity for learning, based on the use of positive reinforcements to shape the student’s behavior. 22 Pa. Code § 14.133(a), (b).

State law prohibits schools from using physical and mechanical restraints to punish a student; these “aversive” techniques may only be applied in emergency situations. 22 Pa. Code § 14.133(c). If restraints are used with a student, state law requires that the school district convene the IEP team to review the IEP and behavior support program for appropriateness and

effectiveness. *Id.* This is particularly pertinent in this case, where several of the charges against D.S. resulted from a February, 2004 incident during which D.S. was unexpectedly physically restrained by school staff. Yet the school district did not convene an IEP meeting to review the circumstances and revise the student's education plan. This failure was noted in the PA Appeals Panel decision. Appeals Panel, *supra*, at 9.

C. The State Special Education Administrative Process Has Determined that the School District Failed to Meet its Legal Obligations to D.S.

On December 20, 2004, after reviewing the administrative record, the PA Appeals Panel held that the School District had failed to provide D.S. with FAPE during a significant portion of the 2003-2004 school year in large part because it had not fulfilled its federal and state obligations to address D.S.'s behavior at school. Appeals Panel, *supra*, at 7. This decision is relevant to the delinquency adjudication because it demonstrates that the School District was violating D.S.'s rights to receive appropriate behavioral support (including the right to have trained professionals respond in an appropriate manner to the outbursts caused by his autism) during the incidents that led to the delinquency adjudication.

Of the PA Appeals Panel's many findings that the School District violated D.S.'s rights under the IDEA and state law, some the most significant violations that prevented D.S. from learning to control his school behavior include:

- Even though D.S.'s symptoms became prominent during kindergarten, the School District did not complete an evaluation that was sufficiently comprehensive to identify all of his special education needs until September 2004 (after fifth grade), when Dr. Dowell finally diagnosed D.S. with Asperger's Syndrome; *id.* at 7;
- Although the School District had known since 1998 that D.S. "required a consistent and supportive behavior plan to enable him to develop the necessary skills of self-control and self-regulation," the IEPs in place for D.S. from the beginning of the 2003-2004 school year through January 20, 2004 had no behavior support plans and did not contain "any plan for the systematic and consistent instruction [D.S.] would need in order to accomplish his [behavior] goals"; *id.* at 8;

- The School District’s development of the IEP in place on February 24, 2004 and March 30, 2004 (the dates of the conduct charged in the delinquency petitions), violated D.S.’s IDEA rights because D.S. was moved to a highly restrictive setting, an emotional support classroom, without first conducting a functional behavior assessment or other evaluation to determine what type of services and supports were needed to support D.S. appropriately in the previous setting; *id.* at 9;

Additionally, the PA Appeals Panel found that the School District committed at least two significant procedural violations of special education law that resulted in a loss of educational opportunity and therefore violated D.S.’s right to FAPE: (1) a new teacher assigned to D.S.’s emotional support classroom shortly before the incidents in question implemented a new behavior management plan without consulting with the IEP team or obtaining the required parental consent, *id.* and (2) the School District failed to convene the IEP team to discuss the appropriateness of D.S.’s behavior management plan after D.S. was physically restrained in class, *id.*

To remedy this substantial denial of FAPE, which had led to D.S.’s “severely deteriorating behaviors,” the PA Appeals Panel awarded D.S. “one full school day of compensatory education for each day that school was in session between November 5, 2004 and the close of the 2003-2004 school year.” *Id.* at 11. After granting such extraordinary relief¹¹ in an attempt to compensate D.S. for the extensive violations of his rights under federal and state law, the PA Appeals Panel took a second extraordinary step: it provided detailed advice to the School District on what it must (and must not) do to prevent future transgressions:

[The School District] may not institute rules and procedures that restrict the educational rights of a student [like D.S.] entitled to special education and related services. . . . We further advise the District that it may not fail to provide specially designed instruction or related services that are required by law. For example, the District must consider, when appropriate, positive (and specifically not negative) behavioral interventions, strategies

¹¹ This relief can be characterized as extraordinary because, in essence, it implies that D.S. received absolutely no educational benefit from his IEP throughout the duration of this time period.

and supports to address behavior that impedes a student's learning when developing or revising a student's IEP; We urge the District to obtain technical support and in-service training for its supervisors, administrators, and support staff in order to assure that students like [D.S.] are provided with appropriate educational programs.

Id. at 10. The PA Appeals Panel concluded: "Implicit in the foregoing is the recognition that *the District must teach [D.S.] how to interact appropriately* with peers and adults in varying school contexts *and not simply punish him for failing to act appropriately.*" *Id.* at 11 (emphasis added).

The PA Appeals Panel decision enumerates some of the types of positive behavioral supports and accommodations that could be implemented by the School District to meet its legal obligations. *Id.* at 10. For example, the PA Appeals Panel affirmed the Special Education Hearing Officer's order requiring the school district to conduct a functional behavioral assessment of D.S., and to use this assessment to develop a program of positive behavioral supports for D.S.. *Id.* at 11; Hearing Officer Decision, *supra*, at 25.¹²

In summary, the PA Appeals Panel decision, viewed through the prism of Dr. Dowell's testimony and the literature on autism spectrum disorders, demonstrates not only that the school district's violations of D.S.'s right to appropriate behavioral supports contributed to his allegedly delinquent conduct, but also that juvenile court intervention was neither necessary nor sufficient

¹² The findings of the PA Appeals Panel parallel and support the recommendations Dr. Dowell provided to the juvenile court at the disposition hearing regarding the most appropriate way to ensure that D.S. learns to control his disability-related conduct and to decrease the possibility that D.S. will be placed in a situation that might cause him to pose a safety risk to others at his school in the future. For example, in his report, Dr. Dowell explained that the School District could minimize the safety risk associated with D.S.'s "flight or fight" response and also prevent negative reinforcement of his aggressive behavior by not restraining him during an outburst (as was done in February 2004), and by implementing a "safe place" response: This involves moving D.S. to a safe and secure environment for 20-30 minutes where teachers do not approach him or question him in a manner he will perceive as threatening so that he can de-escalate from his "arousal state." *Assessment, supra*, at 10-11; Tr. (9/28/04) at 213-15.

Dr. Dowell's recommendations are well-grounded within the special education literature's guidelines for educating children with Asperger's Syndrome and other autism spectrum disorders and follow the general precepts of "positive behavioral support" required by federal and state law. *See, e.g.*, G. Sugai et al., U.S. Office of Special Educ. Programs Ctr. on Positive Behavioral Interventions & Support, *Applying Positive Behavioral Support and Functional Behavioral Assessment in Schools: Technical Assistance Guide 9* (1999), available at <http://www.pbis.org/files/TAG1.doc>; Ann Turnbull, et al., *A Blueprint for Schoolwide Positive Behavioral Support: Implementation of Three Components*, 68 *Exceptional Child*. 377, 388 (2002); NIH Pub. No. NIH-04-5511, *supra*.

for supervising and treating D.S. in the future. On the one hand, efficacious, research-based practices are available and can be implemented by the School District to prevent and to lessen the severity of future autistic outbursts by D.S. The PA Appeals Panel decision (which has not been appealed to federal court) ordering the School District to evaluate D.S. and implement this type of appropriate behavioral program for him is legally binding and enforceable through the Pennsylvania Department of Education's complaint management system. *See* 34 C.F.R. § 300.661(c)(2), (3). On the other hand, the juvenile court lacks any authority to enforce the PA Appeals Panel decision or to assert jurisdiction over the School District and order it to implement an effective program of positive behavioral supports for D.S.¹³ Therefore, the juvenile court's determination that the PA Appeals Panel decision was irrelevant to its determination whether D.S. required juvenile court supervision, treatment, or rehabilitation was legally unsupported.

D. The Special Education System and Laws Provide the School District with the Flexibility Necessary to Ensure the Safety of D.S.'s Teachers and Classmates

Without carefully considering the special education system's unique resources for addressing D.S.'s schooltime behaviors, the juvenile court felt constrained to conclude that D.S. was a delinquent child who needed some form of treatment, supervision or rehabilitation from the Juvenile Justice system. Clearly a concern for the lower court was that, without its intervention, D.S. presented a safety risk in the classroom setting. Thus, the Court opined in its decision, community safety concerns made it impossible "simply to let [D.S.] go." Yet, had the juvenile court viewed the special education system as the appropriate forum for "supervising and

¹³ Nevertheless, the juvenile court believed it could obtain the same result by charging the probation office with insuring that D.S. "is actually receiving the treatment and evaluation represented to the court to be taking place, and to serve as a reporter to the court of the results and efficacy of any ongoing evaluation and treatment." *Opin.* at 6-7. This order begs the question of what the court would have done if it discovered that the School District was not complying with the PA Appeals Panel's order. It would be manifestly unjust for the juvenile court to determine that D.S. should be placed in an institution in the future (a disposition the court found was inappropriate at the time of disposition), for example, simply because the School District continued to violate his legal right to appropriate (i.e., efficacious) behavioral support programming.

treating” D.S. (i.e., teaching D.S. how to control his responses to perceived threats), federal special education law would have provided the School District with sufficient flexibility to suspend, to expel, or to transfer D.S. to an alternative education program whenever he presented a legitimate safety risk at school—while still protecting D.S. against school discipline for behavior that he could not control.¹⁴

Federal law further provides that the School District may immediately suspend D.S. for up to ten school days whenever he violates a school rule and may even expel D.S. if his behavior is not caused by his disability and is not the direct result of the school district’s failure to implement his IEP. 20 U.S.C. § 1415(k)(1)(B), (C), (E). The school can even repeatedly suspend him for up to 15 total days in a school year, regardless of the relationship between the conduct and D.S.’s disability or IEP program. 22 Pa. Code § 14.143(a). If a Special Education Hearing Officer determines (at the School District’s request) that D.S. poses a risk to himself or other children, he may immediately place D.S. in an alternative educational setting for up to 45 school days without the parents’ consent. 20 U.S.C. § 1415(k)(3)(B)(ii)(II). If D.S. actually inflicts serious bodily injury upon another person at school, the School District may “without regard to whether the behavior is determined to be a manifestation of [his] disability” remove him to another educational setting for up to 45 school days. 20 U.S.C. § 1415(k)(1)(G). In either case, a hearing officer may extend D.S.’s stay in the alternative educational placement if he continues to pose a safety threat to those around him. *Id.* Finally, if the School District believes that D.S. has committed a crime, it may report his conduct to law enforcement. 20 U.S.C. § 1415(k)(6).¹⁵

¹⁴ Cf. U.S. General Accounting Office, *Student Discipline, Individuals With Disabilities Education Act*, GAO-01-210 at 7 (January 2001), available at <http://www.gao.gov/new.items/d01210.pdf> (investigating the proposition that special education laws pose a safety risk to school populations and concluding that the IDEA “plays a limited role in affecting schools’ ability to properly discipline students” with identified disabilities).

¹⁵ Interestingly, just like D.S. contends that the juvenile court should consider his special education history in making a delinquency determination, the IDEA itself requires that school officials who report a suspected crime by a

Thus, other than its power to order D.S. placed in a facility for juvenile delinquents—which the court found to be an inappropriate disposition in this case—it is difficult to understand how the juvenile court’s supervision of D.S. could have provided more safety for the staff and students at Linntown Elementary School than was available to the school district under existing law.

Accordingly, the juvenile court erred in failing to admit or adequately consider D.S.’s special education records in determining whether D.S. was a “delinquent child.” The court should have found that this evidence was both relevant and admissible because, by considering this decision in combination with the other evidence adduced at the disposition hearing, the juvenile court might well have concluded that it is the school system, and not the Juvenile Court system, that has both the duty and the capacity to “supervise and treat” D.S.

While many children with disabilities who commit allegedly delinquent actions at school will require juvenile court supervision, treatment, and rehabilitation, the decision of the PA Appeals Panel in D.S.’s case demonstrates that his situation is manifestly distinct from the ordinary scenario. Here, the school district repeatedly violated D.S.’s legal right to receive appropriate behavioral supports at school throughout the year leading up to and including D.S.’s allegedly delinquent conduct. Dr. Dowell’s disposition testimony clarifies that, without these supports, D.S. was inevitably bound to engage in out of control conduct at school. Psychological research, special education law, and Dr. Dowell’s testimony also demonstrate that D.S.’s future disability-related outbursts can be substantially decreased if the appropriate supports are put in place. Further, if an occasional outburst does occur, the special education system provides the

student with a disability must “ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities.” 20 U.S.C. § 1415(k)(6)(B); *see also Valentino C. v. Sch. Dist. of Phila.*, No. CIV.A. 01-2097, 2003 WL 177210, at *11 (E.D. Pa. Jan. 23, 2003) (“The logical reading of this statute is that such records are to be sent to the proper authorities so that the student’s disabilities can be properly considered in evaluating what punishment, if any, should be sought against the child.”).

school district with a myriad of tools to protect the safety of other students and faculty at D.S.'s school. Therefore, the PA Appeals Panel decision was not only relevant but provides essential support for concluding that D.S., who is already under the aegis of the state's special education system, does not require additional juvenile court treatment, supervision or rehabilitation.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* on behalf of the defendant-appellant, D.S., respectfully requests that this court reverse the juvenile court's order of adjudication and remand with instructions for the juvenile court to admit and to consider the expert testimony of Dr. Dowell and the decision of the special education PA Appeals Panel when deciding whether D.S. should be adjudicated a "delinquent child" under the Juvenile Act.

Respectfully submitted,

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DATED: *August 19, 2005*

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on August 17, 2005 she personally caused to be served two copies of the foregoing *Amicus* Brief, via first class mail, postage pre-paid, upon:

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August 19, 2005

VIA U.S. POSTAL SERVICE

Patricia A. Whittaker, Deputy Prothonotary
Superior Court of Pennsylvania, Middle District
100 Pine Street, Suite 400
Harrisburg, PA 17101

RE: IN RE D.A.S., A MINOR
668 MDA 2005; 669 MDA 2005

Dear Ms. Whittaker:

I represent PA Protection & Advocacy, Inc. a party interested in the matter captioned above. Please find an original and six copies an *Amicus Curiae* Brief, with a certificate of service appended, for filing in the above-captioned matter.

If you have any questions or concerns please feel free to contact me or my co-counsel, Janet Stotland. Thank you for your assistance in this matter.

Very truly yours,

Janet Stocco, Esq.
Counsel for *Amicus Curiae* in Support of Appellant

Enclosure

cc (via first class mail):

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