

# MASSACHUSETTS LAWYERS WEEKLY

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## Important Opinions

### Civil Rights

#### Removal From School - Learning Disability

A preliminary injunction will issue preventing a private school student who received an unsatisfactory grade from being forced to withdraw from school, where the student and his mother have demonstrated a likelihood of succeeding on the merits of their claim that the student's disability (Attention Deficit-Hyperactivity Disorder) was not reasonably accommodated by school officials, says a U.S. District Court judge. . . . . page 9.

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### ■ U.S. DISTRICT COURT

#### **Civil Rights** Removal From School - Learning Disability

Where a defendant private school has required that a plaintiff student withdraw after the plaintiff earned a "U" (for unsatisfactory effort) in a biomedical ethics class, a preliminary injunction should now be issued to prevent the plaintiff's removal from school, as the plaintiff and his coplaintiff mother have a likelihood of succeeding on the merits of their claim that the student's disability — Attention Deficit/Hyperactivity Disorder — was not reasonably accommodated by the defendant.

The defendant is ordered to re-admit plaintiff Nicholas Panagopoulos as a student in good standing pending resolution of the case on its merits.

#### Likelihood Of Success

"The Court finds it reasonably probable that, as of August 4, 1997, the Defendant Phillips Academy was on notice that Nicholas suffered from ADHD, the consequence of which was the inability to concentrate on and to organize his studies and procrastination and delay in completing his academic work. [Teacher Dianne] Moore had been advised by memorandum on September 24, 1998 that Nicholas had specific learning *differences* that entitled him to receive certain accommodations in classes, such as receiving extra time to complete his assigned academic tasks. Ms. Moore was alerted that 'many students who are entitled to extra time do not request it on a regular basis, so you may not receive such a request from *this student*.' (Emphasis supplied). This exhortation was an acknowledgment that a teacher of a high school student, especially of a student who boards at school away from his parents, is placed in relation to that student *in loco parentis* and must be vigilant in seeing that the rights of the student placed in her charge are fully respected. Yet, Dr. [Larry] Seidman's specific findings as to the nature and symptoms of Nicholas' disorder had not been shared with her by the administration of Phillips

Academy. She didn't even learn that Nicholas suffered from ADHD until December 2, after she had already given him a 'U' for effort.

"The Court finds that Ms. Moore told Nicholas on November 21 that he could remove the effect of the 'U' by demonstrating 'a clear effort to meet the remaining requirements' and reminded him that the latest draft of his paper was due on November 23. Her formal letter of November 23 stating that his effort was unsatisfactory was to motivate him to meet those 'remaining requirements' so as to have the 'U' removed. Nicholas did not meet the November 23 deadline, but Ms. Moore was in possession of the draft paper on November 24. Nicholas turned in a poor, *albeit a passing*, final paper on time on December 4 and received a passing grade for the course.

"The Court finds it reasonably probable that [plaintiff Nancy] Axelrod spoke to Ms. Moore after learning that Nicholas was about to be expelled as a result of Ms. Moore's giving him a 'U' for effort. Ms. Axelrod asked Ms. Moore whether she had considered that, because of her son's ADHD, he was unable, rather than unwilling, to get his assignments done on time. Ms. Moore's response was that, if this was a medical issue, Ms. Axelrod should speak to [Dean of Studies] Avery,

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and that Ms. Moore would not object to her 'U' being removed if it were the result of a medical condition.

"The Court finds it reasonably probable that Ms. Moore had indicated to Nicholas that she did not know that he had ADHD and when he tried to explain the nature of his condition and its manifestations and limitations, Ms. Moore told him that it made no difference to her, and she concedes that she did not know of his condition until December 2.

"The Court finds that Ms. Moore did not know that Nicholas suffered from ADHD when she gave him a 'U' for his effort grade, and, thus, was unaware of the exact nature and symptoms of Nicholas' disability, although the administration at Phillips Academy did know and had failed to advise her. Therefore, she did not even have the opportunity to assess whether any further reasonable accommodation should be given to him. It is reasonably probable that Nicholas' failure to meet assignment deadlines and his submission of careless work was the result of his having too little time to complete his assignments and this was a consequence of his learning disorder.

"When Ms. Moore admonished Nicholas on November 21 that his effort was unsatisfactory and attempted to motivate him by exhorting him that the 'U' could be removed if he demonstrated 'a clear effort to meet the remaining requirements,' the only requirements remaining were the submission of the draft paper on November 23 and the final paper on December 4.

"Nicholas did submit his draft paper by November 24 at the latest and his final paper was submitted on time on December 4.

"Since Nicholas had submitted his draft paper a day late, he did not have Ms. Moore's comments on his draft paper for incorporation in his final paper during the entire Thanksgiving holiday period when he was in the process of composing the final paper.

"The reason why Ms. Moore was unable

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to make her comments on his draft paper prior to the start of the holiday period is not clear and has not been fully explained by her. However, as a consequence, Nicholas had only two days after the holiday period ended in which to complete his final paper and to incorporate her comments therein. His failure to incorporate her comments resulted in his final paper receiving a poor, but passing, grade. And he did earn a passing grade for the entire course.

"If Ms. Moore had been aware of the nature and symptoms of ADHD at the time when she gave Nicholas a 'U' for effort, and if he had been aware that Dr. Seidman had requested that Nicholas be given extra time to complete his academic tasks, the Court believes that a reasonable accommodation would have been for Ms. Moore to have given Nicholas an extra day to submit his draft paper.

"And, if she was unable to make her comments on his draft paper prior to the start of the holiday period, the Court believes that a reasonable accommodation would have been for Ms. Moore to have given him a reasonable period of time, more than two days, in which to fully complete his final paper. The one-day delay in submitting the draft paper resulted in Nicholas' not having available the holiday period in which to complete a more carefully drafted final paper.

"Again, it is noted that the final paper, although carelessly done and lacking the incorporation of Ms. Moore's comments on his draft paper, was timely submitted and received a passing grade. And again he did receive a passing grade for the course.

"If the reasonable accommodation of allowing Nicholas extra time to complete his two post November 21 paper assignments had been granted, the extra time requested by Dr. Seidman, of which request Ms. Moore had not been made aware by the administration of Phillips Academy, Nicholas would have demonstrated 'a clear effort to meet the only remaining requirements'

warranting the removal of the 'U'

"The Court believes that it is reasonably probable that the apparent lack of effort on Nicholas' part was a natural and probable consequence of his learning disorder, rather than an unwillingness to complete his poor, but passing, paper assignments on time. Since his failure to meet his assignment deadlines could reasonably be found to have been caused by his learning disability, Ms. Moore, in accordance with her statement to Ms. Axelrod, should have reasonably 'reversed' the 'U' for effort.

"If Nicholas had failed Ms. Moore's course, which he did not, or if he had been a disciplinary problem, which he was not, this would have been a different case. The Court grants this preliminary injunction because the Court is deeply troubled that Nicholas was expelled from Phillips Academy after the first trimester of his senior year for his perceived lack of effort, even though he passed all of his classes. Given that ADHD affects Nicholas' attention, organization, and planning, and that Ms. Moore did not know that Nicholas had ADHD when she gave him the 'U' for effort, the Court finds a reasonable probability of success on the merits to warrant keeping Nicholas at Phillips Academy until the merits of the case can be resolved."

*Axelrod, et al. v. Phillips Academy, Andover (Lawyers Weekly No. 02-027-99) (16 pages) (Harrington, J.) (USDC) (Civil Action No. 99-10054-EFH).*