

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<i>SARAH CANTIN, et al.,</i>	)	
	)	
<i>Plaintiffs</i>	)	
	)	
<i>v.</i>	)	<i>Docket No. 99-271-P-H</i>
	)	
<i>MAINE SCHOOL ADMINISTRATIVE</i>	)	
<i>DISTRICT NO. 6, et al.,</i>	)	
	)	
<i>Defendants</i>	)	

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION  
FOR SUMMARY JUDGMENT**

The defendants, Maine School Administrative District No. 6 (“the District”), Martha Corkery and Ansel Stevens, move for summary judgment on the remaining counts of the second amended complaint<sup>1</sup> in this action arising out of events at a middle school dance. I recommend that the court grant the motion.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the

---

<sup>1</sup> Count III was dismissed on motion of the defendants. Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 21).

potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The following undisputed material facts are appropriately supported in the summary judgment record.<sup>2</sup> The District operates public schools for several Maine towns, including a middle

---

<sup>2</sup> The plaintiffs filed a document entitled “Plaintiffs’ Response to Defendants’ Statement of Material Facts” (Docket No. 29) that fails to comply with this court’s Local Rule 56(c). Not only does this document fail to admit, deny or qualify the facts by reference to each numbered paragraph in the defendants’ Statement of Undisputed Material Facts (“Defendants’ SMF”) (Docket No. 18), but it begins with the statement “The Plaintiffs’ [sic] object in whole or in part to Defendants’ Statement of Material Facts,” followed by references to some of the numbered paragraphs in the  
(continued...)

school known as Bonny Eagle Middle School (“BEMS”), of which defendant Stevens was principal at all relevant times. Affidavit of Ansel Stevens (“Stevens Aff.”) (Docket No. 19) ¶¶ 1-2. Defendant Corkery was a vice-principal of BEMS at all relevant times. Affidavit of Martha Corkery (“Corkery Aff.”) (Docket No. 20) ¶ 1. BEMS provides education for sixth, seventh and eighth grade students; each grade is housed in a separate wing or floor. Stevens Aff. ¶ 3. During the 1998/99 school year, the District operated a special education program for certain students at BEMS. *Id.* ¶ 4. The program was overseen by a single special education teacher, Rosie Rinaldi, and included both sixth and seventh grade students. *Id.* It was located in the seventh grade wing and all of the students in the program were assigned to the seventh grade “Edinburgh Clan.” *Id.*

Plaintiff Cantin was assigned to this program in the 1998/99 school year, which was her first year at BEMS. *Id.* ¶ 5. During the 1997/98 school year, Cantin was a fifth grade student at the Hollis Elementary School. Deposition of Sarah E. Cantin (“Cantin Dep.”), filed with Motion of Defendants M.S.A.D. No. 6, Martha Corkery and Ansel Stevens for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 17), at 4. Three other students in the program, Lacey, Amanda and Tonya, were also in their first year at BEMS, while students in the program named Melanie and Andrew were in their second year at BEMS. Stevens Aff. ¶¶ 5-6. Plaintiff Kelly Fusco is the mother of plaintiff Cantin. Plaintiffs’ Statement of Material Facts (“Plaintiffs’ SMF”) (Docket No. 28) ¶ 1; Defendants’ Reply Statement of Fact (“Defendants’ Reply SMF”) (Docket No. 31) ¶ 1.

The first school dance of the 1998/99 school year at BEMS was held on October 9, 1998.

---

<sup>2</sup>(...continued)

Defendants’ SMF that are apparently intended to deny or qualify those paragraphs. The quoted statement is not at all helpful to the court and, to the extent that it seeks to preserve some unspecified objection, completely ineffective.

Stevens Aff. ¶ 7. BEMS policy regarding school dances is set forth in the BEMS student handbook as follows:

Dances and activities are a privilege. School dances are held each year for seventh and eighth graders only. Because of limited capacity and our discomfort with supervising students we do not know, guests are not allowed to attend. Dances are from 7:00 - 9:30 p.m.

Student Assignment Book, Bonny Eagle Middle School, Exh. 1 to Stevens Aff., at 7. Students who are not in seventh or eighth grade are not permitted to attend dances and are asked to leave if they attempt to attend. Stevens Aff. ¶¶ 7-8. This is a common occurrence, particularly at the first dance of the school year. *Id.* ¶ 8. All seventh and eighth grade students are permitted to attend, including students receiving special education services. *Id.* ¶ 7.

Defendants Stevens and Corkery both attended the dance. *Id.* ¶ 9; Corkery Aff. ¶ 2. Melanie also attended the dance. Corkery Aff. ¶ 4. Shortly after the dance began, Corkery was told that some sixth graders were present. *Id.* ¶ 3. She reported this to Stevens. *Id.* Stevens told her that sixth grade students could not remain at the dance and instructed her to call the students' parents to have them picked up. Stevens Aff. ¶ 10. Corkery took four girls whom she believed to be sixth grade students, including Cantin and the three other girls who were in their first year in the special education program, to her office where she called their parents. Corkery Aff. ¶ 4. Corkery did not ask Melanie to accompany her to her office because Melanie was in her second year at BEMS. *Id.* At the time she made the telephone calls, and throughout the evening of October 9, 1998, Corkery believed that Cantin and the three other girls were in the sixth grade, as reflected on the student directory Corkery had. *Id.* ¶¶ 4-6 & Exh. 1. Stevens also believed at the time that Cantin was in the sixth grade. Stevens Aff. ¶ 11.

Cantin told Corkery several times that she was a seventh grader. Affidavit of Plaintiff Sarah Cantin (“Cantin Aff.”) (Docket No. 26) ¶ 10. Fusco, after she arrived at BEMS in response to Corkery’s call, made known to Corkery and Stevens that Cantin was a seventh grade student. Affidavit of Plaintiff Kelly Fusco (“Fusco Aff.”) (Docket No. 27) ¶¶ 22, 25. Cantin attended classes and socialized with other seventh grade students. Plaintiffs’ SMF ¶ 10; Defendants’ Reply SMF ¶ 10. She was issued a school identification card identifying her as a seventh grader. *Id.* Her Individual Education Plan identified her as a seventh grade student. *Id.* Neither Corkery nor Stevens made any attempt on October 9, 1998 to determine whether Cantin was in fact a seventh grader or whether she had been invited to the dance by her teacher and teacher’s aide. Plaintiffs’ SMF ¶ 16; Defendants’ Reply SMF ¶ 16.

After the October 9, 1998 dance the District changed its policy to allow students in multi-age groups like the one attended by Cantin during the 1997/98 school year to attend school dances. Stevens Aff. ¶ 12.

### **III. Discussion**

#### **A. Disability (Counts I and II)**

Count I of the second amended complaint alleges a violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* Second Amended Complaint ¶¶ 28-29. Count II alleges a violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Id.* ¶¶ 30-31. In order to recover on either count, Cantin must establish that she was disabled within the meaning of the applicable statute.

Specifically, the ADA provides that:

no qualified individual with a disability shall, by reason of such disability,

be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. A “qualified individual with a disability” is defined as

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The Rehabilitation Act provides that:

No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). The term “individual with a disability” is defined, for purposes of the plaintiffs’ claims in this case, as

any person who —

- (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities;
- (ii) has a record of such an impairment; or
- (iii) is regarded as having such an impairment.

29 U.S.C. § 705(20)(B).

The defendants contend that the plaintiffs cannot establish that Cantin meets either of these definitions.<sup>3</sup> In response, the plaintiffs rely solely on paragraph 32 of plaintiff Fusco’s affidavit. Plaintiffs’ SMF ¶ 5. As the defendants correctly point out, Reply Memorandum in Support of

---

<sup>3</sup> The two statutory schemes are to be interpreted consistently. *Theriacault v. Flynn*, 162 F.2d 46, 48 n.3 (1st Cir. 1998).

Motion for Summary Judgment (Docket No. 30) at 1-3, that paragraph of Fusco's affidavit is composed largely of hearsay. It incorporates by reference several unverified, uncertified documents. Neither the hearsay nor the documents, as submitted, provides evidence that would be admissible at trial. Fed. R. Civ. P. 56(e); *see Larou v. Ridlon*, 98 F.3d 659, 663 (1st Cir. 1996) (hearsay); *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) (documents).

The only statements in paragraph 32 of Fusco's affidavit that are not hearsay are the following:

Sarah has received special education services through M.S.A.D. #6 since she began school there in her early elementary school years. \* \* \* At Sarah's PET in June 1998, all school personnel present and I agreed that Sarah's disability was multi-handicapped; that she functions below-grade [sic] level in all areas except reading; that she would continue to receive special education services; that she would be placed in the seventh grade; that she would be in a full-inclusion program, but that her work would be modified and her grades would be adjusted to take into consideration her abilities.

Fusco Aff. ¶ 32.<sup>4</sup> The plaintiffs argue, in conclusory fashion, based primarily on the documents attached to Fusco's affidavit, that Cantin meets the statutory definition. Plaintiffs' Memorandum of Law in Support of Their Objection to Defendants' Motion for Summary Judgment, attached to Plaintiffs' Objection to Defendants' Motion for Summary Judgment (Docket No. 25), at 6. However, the admissible facts included in the plaintiffs' statement of material facts on this issue do not meet the statutory standard.

While the First Circuit has recognized that learning is a major life activity for purposes of

---

<sup>4</sup> There are other statements in this paragraph of the Fusco affidavit that might not be hearsay if they were not offered for the truth of the matter asserted, but the context makes it clear that they necessarily are offered for that purpose in this instance. No other reason why those statements might have been offered is apparent.

an ADA claim, *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 (1st Cir. 1998), the fact that Cantin was receiving special education services in October 1998 does not necessarily mean that she then had an impairment which substantially limited her learning. The plaintiffs here have offered no admissible evidence that Cantin's unidentified handicaps "substantially impaired [her] basic learning abilities" at that time. *Id.* Similarly, the fact that Cantin "functions below-grade level" in academic subjects other than reading does not necessarily mean that she is disabled; many nondisabled children function below grade level in one or more subjects. *See generally Blackston v. Warner-Lambert Co.*, 10 A.D. Cases 262, 2000 WL 122109 (N.D.Ala. Jan. 26, 2000), at \*4 (deficient performance not sufficient to show substantial limitation on ability to work or think).

Finally, if the agreement of an unidentified group of people and Fusco that Cantin has a disability consisting of being "multi-handicapped" can be taken as a factual assertion that Cantin is in fact "multi-handicapped," that assertion is merely conclusory. It does not identify any impairment that might substantially limit a major life activity. Conclusory factual allegations are insufficient to avoid the entry of summary judgment. *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *accord, Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir. 1999) (ADA case). *See also Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2147 (1999) ("whether a person has a disability under the ADA is an individualized inquiry"). The court "should [not] be put in the position of having to speculate, particularly when the statute requires evidence not just of an impairment, but of a substantial impairment." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (plaintiff claimed substantial limitation on present ability to learn due to attention deficit disorder).

Because the plaintiffs have not established a disputed issue of material fact sufficient to allow

a court or jury to find that Cantin was disabled within the meaning of either federal statute upon which counts I and II are based, the defendants are entitled to summary judgment on those counts.

### **B. Other Counts**

Counts IV through VII of the second amended complaint raise claims based on state statutory and common law. Pursuant to 28 U.S.C. § 1367(c)(3), this court may decline to exercise jurisdiction over state-law claims when it has granted summary judgment on all claims over which it has original jurisdiction. *Cruz-Ramos v. Puerto Rico Sun Oil Co.*, 202 F.3d 381, 386 (1st Cir. 2000). I conclude that the court should do so in this case.

### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** as to Counts I and II of the Second Amended Complaint and that the remaining counts be **DISMISSED** pursuant to 28 U.S.C. § 1367(c)(3).

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 24th day of April, 2000.*

---

*David M. Cohen  
United States Magistrate Judge*

FUSCO v. MSAD 6, et al Filed: 09/03/99 Assigned to: JUDGE D. BROCK HORNBY Jury demand:  
PlaintiffDemand: \$0,000 Nature of Suit: 440Lead Docket: None Jurisdiction: Federal QuestionDkt#  
in other court: None Cause: 42:1983 Civil Rights ActKELLY L FUSCO, Individually KIM  
MATTHEWS, ESQ.and as next friend and parent [COR LD NTC]of Sarah Cantin 97 INDIA  
STREET plaintiff PO BOX 8 PORTLAND, ME 04112-0008 772-2790 v.MAINE SCHOOL  
ADMINISTRATIVE MELISSA A. HEWEYDISTRICT NO. 6 772-1941 defendant [COR LD NTC]  
DRUMMOND, WOODSUM, PLIMPTON & MACMAHON 245 COMMERCIAL ST. PORTLAND,  
ME 04101 207-772-1941