

# **Disabilities Project Newsletter**

## **Autism and the Courts** **by Richard McNally**

There has been a significant escalation in the number of children being diagnosed with Autism Spectrum Disorder (ASD) in the United States. ASD includes classical autism in its various severities and Asperger's Syndrome. Fifteen years ago, the incidence of the condition was estimated to be 1 in 10,000. Currently, the U.S. Center for Disease Control and Prevention estimates the incidence to be 1 in 166. Fifteen years ago, few people had heard of autism; now most people know a family that has been affected.

The causes of this increase are a matter of debate, but the one thing that is clear to our courts is that there are many people with ASD (PASD), now minors, who will be coming into contact with the judicial system. In the article entitled "Training Criminal Justice Personnel to Recognize Offenders with Disabilities" by K. Curry, M. Posluszny, and S. Kraska, it is mentioned that PASD have up to seven times more contact with law enforcement during their lifetimes than members of the general population. ASD also disproportionately affects males.

Although individuals with ASD share several common traits that complicate their contacts with the justice system, those with classic autism can be distinguished from those with Asperger's Syndrome. Those with autism usually have significant difficulties with verbal and non-verbal communication, while those with Asperger's Syndrome are often quite verbose, sometimes to the point of seeming to be overbearing. The expressive language skills of people with Asperger's Syndrome, however, may mask the fact that they also have difficulty understanding language spoken to them. Both groups can require significant amounts of time to process what is said to them and respond meaningfully. Both groups often exhibit apparently bizarre behavior, including lack of eye contact, fascination with objects, a lack of appreciation of danger, inappropriate laughing or outbursts, a narrow set of interests, and repetitive unusual actions. Both groups usually have significant sensory sensitivities, most frequently of sight, sound, or touch, which can be overwhelming to them. Finally, both groups are highly anxious in unfamiliar surroundings or circumstances.

The transition of PASD into adolescence and adulthood presents special problems. They no longer are viewed sympathetically as children. While in physical appearance they aren't kids anymore, they are still, and always will be, children at one level.

When communicating with PASD, there are several considerations to keep in mind:

- Speak slowly and simply.
- Avoid slang, open-ended questions, and phrases with dual meanings.

- Remember that that it may take time, often more than a minute, for the person with ASD to hear, process, and respond.
- Find an environment with few sensory distractions.
- Use very basic questions requiring a yes or no answer, or multiple-choice questions to obtain a response upon which one can rely.
- Consider using a topic within the person's narrow set of interests to get to the relevant topic.

Before addressing more specific types of judicial contacts, a threshold issue is that of the ASD person's competency as a witness as governed by MRE 601. Due to the communication deficits often found in persons with classic autism, significant efforts may be necessary to simply establish a means for the court and the person with ASD to understand one another. It may require the assistance of a third party trusted by both the person with ASD and the court to facilitate communication. It is common for a person with ASD to be so distracted by the unfamiliarity of the court environment that meaningful communication is difficult. When cross-examination is added to the mix, the issue is further complicated. For example, towards the end of the movie "*Rainman*," even though the proceedings were very informal, the examining doctor's questioning of Dustin Hoffman demonstrated that the thrust of Hoffman's testimony depended on who got to ask the last question. Although PASD tend to be scrupulously honest, their lack of guile makes them malleable witnesses.

#### *PASD as Victims of Crime*

Because of their lack of guile, PASD are often the victims of crime. They are a population vulnerable to bullying and are usually easy marks for theft. Children with ASD are a child molester's dream. They are compliant, sexually unsophisticated, easily manipulated, and difficult witnesses.

#### *PASD as Criminal Defendants*

The behavior of PASD often brings them into contact with the judicial system as criminal defendants. They often attract attention to themselves through verbal outbursts in public and other inappropriate behavior, leading onlookers unfamiliar with their conditions to conclude that they are intoxicated or psychotic. A call to the police follows, and an untrained law enforcement officer may jump to the same conclusion, leading to an unnecessary escalating confrontation. When agitated by unfamiliar surroundings or something in the environment that is offensive only to him, a person with ASD may become non-compliant, and an arrest, or worse, often results.

As a result of their vulnerability to manipulation, PASD can be enticed into criminal activity that they would never pursue on their own. It is common for one or a group of young people on a lark to provoke a person with ASD to commit an anti-social act just for the group's own entertainment. This can lead to a criminal charge.

Due to their lack of social and sexual sophistication, PASD may unwittingly compromise themselves in inappropriate sexual situations, particularly on the Internet.

The overriding theme is that PASD, as a result of a disability over which they have little control, rather than a criminal intent on their own part, can find themselves the subjects of a criminal prosecution. Courts need to be able to make this critical distinction.

### *PASD in Divorce and Custody Proceedings*

About 80 percent of parents of PASD eventually divorce, due largely to the personal and financial stress of raising a child with this disability. See “It’s All In How You Look At It,” Maureen Bennie, *Western Parent*, December/January 2002-2003, Vol vii, No 9. Consequently, young PASD are often caught up in divorce, although in many cases custody is not contested in that one parent may abandon the child to the other. When custody is contested, the court, if it interviews the child, must be sensitive to the communication issues already discussed. In addition, in fashioning a parenting schedule, the court must take into consideration the particular needs of young PASD for consistency and continuity.

### *PASD in the Probate Courts*

PASD often become the subjects of probate court proceedings such as guardianships and other protective proceedings. The parents of minor PASD face a profound choice as the child approaches adulthood: should the parents apply for legal guardianship and/or conservatorship over their soon-to-be adult? The thought that their child may soon be able to make important personal and financial decisions on his/her own can be frightening. It is tempting to go to probate court and ask for guardianship or conservatorship in the interest of protecting the young adult from potential mistakes. While this is a legitimate concern, it requires a judicial finding of and tends to perpetuate the idea that the person with ASD is incompetent to manage his own affairs (as opposed to being incompetent as a witness, as discussed above). An alternative is to have the young adult execute a durable power of attorney granting defined powers to a responsible adult. This course avoids the stigma of a finding of incompetence; rather, it presumes the competence of the young adult. It allows the attorney-in-fact the flexibility to guide, rather than dictate the decisions in the life of the young adult, and provides a means for the young adult to gradually take control over his life as his individual circumstances warrant. One danger, of course, is that the power of attorney is revocable at any time. This danger is tempered, however, by the option of subsequent protective proceedings if the young adult demonstrates true incompetence. It makes the protective proceeding the last resort rather than the first.

*Richard McNally is an attorney practicing in Flint. He is a former assistant prosecuting attorney and currently advocates for individuals and families affected by Autism Spectrum Disorder. He is a member of the board of directors of the Autism Society of Michigan and served as president from 2002-2005.*