

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

JANE, D. DOE

vs.

THE GRODEN CENTER

D E C I S I O N

March 7, 1989

INTRODUCTION

The law in this case is easy enough to state. A special education student's placement may not be changed except as the result of a due process hearing or as the result of parental consent to such a change of placement. The Rhode Island regulations which implement this Federal statutory mandate (20U.S.C.1415) read as follows:

4.0 Prior notice; parent consent

4.1 Notice. Written notice which meets the requirements under 5.0 must be sent by certified mail to the parents of a handicapped child at his or her last known address a reasonable time before the agency;

4.4.1 Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or

13.0 Child's status during proceedings

13.1 During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

In Rhode Island private special education schools are bound by these re-

gulations. (R.I.Regs. Sec. One, XI) See also: Woods Schools v. Commonwealth Dep't of Educ., 514 A.2d 686 (Pa. Cmwlth. 1986) and Council of Private Schools for Children with Special Needs v. Cooperman, 501 A.2d 575 (N.J.Super, A.D. 1985).

In the case at hand we must determine two points (1) was the placement of this student changed and (2) assuming that it has been changed, what remedy can we prescribe?

Findings of Fact

Jane D. Doe is an autistic student. In accordance with the Education for All Handicapped Children's Act, and with the consent of her parents, she was placed at the Groden Center by the East Greenwich School District. At the Center, Jane was placed in a program called Secondary One. Her parents were quite satisfied with her progress at the Groden Center until this year. Jane's mother testified, however, that from the start of this school year she began to notice changes in Jane's at-home behavior. Jane was less communicative about what she was doing at school. She seemed not to be as communicative as before. Another problem developed. As part of her program, Jane would bring home a notebook which contained staff notes concerning what she had done in school that day and how she was progressing. While in the past year the staff took the initiative in writing in the notebook it seemed that now the staff seemed to limit itself more to merely responding to the questions which Jane's mother wrote in the notebook. Upon further inquiry, Jane's mother found that Jane had been moved from the program entitled Secondary One

to a program entitled Secondary Two. This change had taken place without any real notice to Jane's parents.

The Secondary Two program is located across the street from the Groden Center in the basement of a church. The Groden Center rents these premises to supplement its classroom space. This basement classroom is not as bright as the Secondary One classroom located at the Groden Center. The basement classroom is also dustier than the classroom located at the Groden Center. Still, we find that these two classrooms are reasonably comparable. Few of Jane's prior classmates from Secondary One are members of Jane's Secondary Two class. The staff members in Jane's program have also changed.

The record establishes that the year before Jane had a work program which consisted of folding towels at Miriam Hospital and helping at a Food Bank. This program was changed to one where she worked at the Roger Williams Bank Greenhouse. She now appears to be once again working at Miriam Hospital.

Finally, we find that there has been some diminution of the academic component of Jane's program. The record on this point is, in our view, not very clear. We do find, however, for purposes of this hearing, that Jane Doe is now receiving somewhat less instruction in reading and writing than she was receiving in Secondary One.

Conclusions of Law

We think that the correct standard of review in cases of this nature is set forth in DeLeon v. Susquehanna Community School District, 747 F.2d 149, (3d Cir.1984). While DeLeon involved a question of transportation its holding is equally applicable to the case at hand. The Court stated:

The threshold question is whether the change in Lorin's method of transportation amounts to a change in "educational placement." Section 1415(b)(2) entitles parents to an impartial due process hearing" with regard to any

complaint presented to a school district concerning the treatment of their special education child. Subsection (e)(3) of the same section provides that "[d]uring the pendency of any proceedings conducted pursuant to this section. . . the child shall remain in the then-current educational placement" If the change in transportation which the District has sought to impose on Lorin is not a "change in educational placement" within the meaning of subsection (e)(3), then the District was free to proceed with the change before completing the mandated due process hearing. If, however, there was a change in educational placement, the actions of the District may have violated the EHA.

The question of what constitutes a change in educational placement is, necessarily, fact specific. The EHA provides for "due process" hearings in order to involve parents in important educational decisions affecting their children. See Board of Education v. Rowley, ___ U.S. ___, 102 S.Ct. 3034, 3050 (1982); Smith v. Robinson, ___ U.S. ___, ___, 52 U.S.L.W. 5179, 5184 (1984). Thus, in determining whether a given modification in a child's school day should be considered a "change in educational placement," we should focus on the importance of the particular modification involved.

* * * * *

In this case, the decision involved is one that affects the educational program of an individual child. We believe that, given the remedial purposes of the Act, the term "change in educational placement" should be given an expansive reading, at least where changes affecting only an individual child's program are at issue. The educational program of a handicapped child, particularly, a severely and profoundly handicapped child such as Lorin, is very different from that of a non-handicapped child. The program may consist largely of "related services," such as physical, occupational, or speech therapy. The basic constituent elements of the program will be incorporated in the IEP, and the elimination of one of those elements may significantly affect the ability of the child to learn.

It is clear that the "stay put" provision does not entitle parents to the right to demand a hearing before a minor decision alters the school day of their

children. The touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience. In some areas it may be possible to draw bright lines: for instance, replacing one teacher or aide with another should not require a hearing before the change is made. On the other hand, there are areas where such bright lines will be impossible to draw.

In the light of the above cited case we find that the fact that this student's teachers, and some of her classmates have changed, does not constitute a change in placement. DeLéon, supra. We also find that a change in location of the class, particularly when the move is merely across the street, does not constitute a change in placement. Our position here is supported by the Second Circuit Court of Appeals in a decision entitled "Concerned Parents and Citizens for the Continuing Education at Malcom X (PS 79) v. The New York City Board of Education", 3 E.H.L.R. 552:147. This decision merits extensive quotation. The Court wrote in finding that a change in staff and in geographic location did not amount to a change in placement that:

The primary purpose of the Act is to encourage States, through the use of fiscal incentives, to provide a "free appropriate public education" for all handicapped children. See, e.g., 20 U.S.C. §1412(1). In furtherance of this goal, the Act also embodies a range of procedures designed to ensure that fundamental decisions concerning the education of handicapped children are made correctly and with appropriate input from the parents or guardians of such children. See generally Note, Enforcing the Right to an "Appropriate Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L.Rev. 1103 (1979). The interpretation of one such procedural mechanism is at issue here. Pursuant to 20 U.S.C. §1415(b)(1)(C), whenever an educational agency covered by the Act

(i) proposes to initiate or change, or

(ii) refused to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education to the child, (emphasis supplied)

it must provide the parents or guardians of the child with prior written notice. Other subsections of §1415(b) require the agency to provide parents or guardians in such cases with an opportunity for "an impartial due process hearing." See §§1415(b)(1)(D), 1415(b)(2). The statute fails to define "change. . . [in] educational placement." The district court, in concluding that the Board's action violated these procedural requirements, construed the term to encompass the transfer of handicapped students between schools in the same district, as well as any other significant alteration in the curriculum, extracurricular offerings, support services, class composition, or teacher assignments provided to handicapped children. Although this is a possible reading of the section, we nonetheless believe that the term "educational placement" refers only to the general type of educational program in which the child is placed. So construed, the prior notice and hearing requirements of §1415(b) would not be triggered by a decision, such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the same district.

Several factors support this conclusion. First, in §1415 (b)(1)(C) the term "educational placement" is used in the context of changes in the "identification, evaluation, or educational placement" of the handicapped child. This language suggests that the full notice and hearing requirements of §1415(b) were limited to certain fundamental decisions regarding the existence and classification of a handicap, and the most appropriate type of educational program for assisting a child with such a handicap. The legislative history of the Act supports this interpretation, for it indicates that a primary concern of Congress in enacting these procedural protections of §1415(b) was to prevent the erroneous identification or classification of children as handicapped and the impairment of their subsequent education by ensuring that parents would be afforded prior notice and an opportunity to participate in such fundamental determin-

ations. The Senate Report, for example, notes that the Committee on Labor and Public Welfare was "deeply concerned about practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions." S. Rep. No. 94-168, 94th Cong., 1st Sess. 26 (1975, reprinted in [1975] U.S. Code Cong. & Admin. News 1450-51. Thus the reference to "educational placement" in §1415 (b)(1)(C) would appear to refer to the general educational program in which a child who is correctly identified as handicapped is enrolled, rather than mere variations in the program itself, which the district court apparently believed could constitute a change in placement.

The regulations implementing the Act also interpret the term "placement" to mean only the general program of education. The Act embodies a statutory preference for "mainstreaming," or the maximum possible integration of handicapped children with non-handicapped children, 20 U.S.C. §1412(5)(B), and the regulations implementing this preference provide in pertinent part:

§121a.551 Continuum of alternative placements

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under §121 a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instructions and instruction in hospitals and institutions).

45C.F.R. §121a.551. Thus, the regulations use the term "placement" to refer only to the general educational programs provided for handicapped children, and the reference to a "change" in "educational placement" in §1415 (b)(1)(C) would therefore apparently encompass only decisions to transfer a child from one type of program to another. For example, a decision to transfer a handicapped child from a special class in a regular school to a special school would involve the sort of fundamental alteration in the child's education requiring prior

parental notification under §1415(b).

Finally, strong policy considerations support a restrictive interpretation of the meaning of "educational placement" in §1415(b)(1)(C). As previously noted, in concluding that the transfer of students from P.S. 79 had violated that section, the district court ordered the Board to make numerous minor alterations and additions in their educational programs of the handicapped children at their new locations. For example, the court ordered the Board to provide the transferred students with, among other things:

- a. A peer tutoring program in which handicapped children shall have the opportunity to tutor non-handicapped children;
- b. The Afro American Caravan Program;
- . . .
- d. The Young Audience Program;
- e. The World Poets Resource Center;
- f. A science fair;
- g. Choral groups;
- h. Assembly programs in which the handicapped children participate as well as observe;
- i. Dance and art festivals;
- j. A library trip program;
- k. An audio-visual squad;
- l. A school book fair;
- m. Weekly radio broadcasts in conjunction with a local radio station;
- n. The President's Physical Fitness Program;
- o. Basketball and track teams;
- p. Cheerleading squads;
- q. Boy and Girl Scout troops;
- r. Queens College Teacher Corps Program;
- s. City University student-teacher program;
- t. Flower Fifth Avenue On-Site Developmental Disabilities program;
- u. A full-equipped resource room;
- v. Title I and Title VI reading programs;
- w. Physical education classes.

While not explicitly stated, it appears that the district court considered the removal of any of the above programs, some of which were privately sponsored rather than provided by the Board, to constitute a change in "educational placement" requiring prior notice and a hearing under §1415(b). Such an interpretation of the Act

would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs provided for its students; that interpretation would also tend to discourage the Board from introducing new activities or programs or from accepting privately sponsored programs. Further, the educational agency would lack any workable standard for assessing whether a particular contemplated decision might constitute a change in "educational placement." Moreover, given the full hearing required by the section and the right to obtain judicial review of adverse decisions, see §1415(e)(1), the implementation of such changes could be forestalled indefinitely. More explicit statutory language is required to justify an interpretation that would so constrain the discretion of educational agencies as to when such determinations should be put into effect.

Thus, we conclude that the term "educational placement" refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretions, may determine to be necessary. Given this interpretation, we do not believe on the record before us that the transfer of students from P.S. 79 constituted a change in placement sufficient to trigger the prior notice and hearing provisions of §1415(b). The transferred handicapped students remain in the same classification, the same school district, and the same type of educational program --- special classes in regular schools. Moreover, although the classes at the new schools may vary in some respects from the somewhat unusual program formerly provided at P.S. 79, there is no suggestion in the record that the Board intended or attempted to alter the placement of any handicapped students by transferring them to other schools within the district. Indeed, the record indicates that the Board, in making the decision to close one school and then planning the transfer of the handicapped students to various other schools in the same school district, made a good faith effort to preserve intact as far as possible the basic educational programs that the transferred children had formerly enjoyed at P.S. 79. Accordingly, we conclude that the Board was not required under the Act to give parents of handicapped children at P.S. 79 prior notice and a full due process hearing before the transfer of such students to other regular schools within the district.

Conclusion

We do not think that changes in location, staff or classmates can constitute a change in placement. Students graduate or change programs, staff members leave and different classrooms may have to be used. Such matters, which are beyond direct control, cannot amount to a change in placement. The same may be said about schedule changes. The key question is whether the nature of the program which the student has been receiving has been changed.

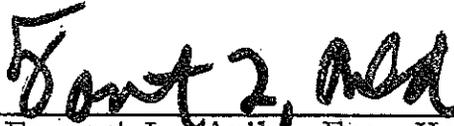
In the present case we find that there has been a change in the academic component of Jane's program. We, therefore, direct that Jane receive additional instruction in reading and writing. If agreement how this strengthening is to take place cannot be agreed upon we ourselves will formulate the appropriate remedy.

We decline to order Jane's return to Secondary One because such a return would appear to amount to ordering that class size regulations be violated. We also believe that strengthening the academic component of Jane's program is what would constitute a return to the status quo placement. Merely moving her back to the Secondary One program would not necessarily have this effect.

This is an Interim Order. Our conclusions today are in no way binding on the decision of the Special Education Hearing Officer who has been appointed to decide this matter on the merits.

March 7, 1989

Approved:


Forrest L. Avila, Esq, Hearing Officer


J. Troy Earhart, Commissioner