

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

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DAVID and DIANA K

vs.

MIDDLETOWN  
SCHOOL COMMITTEE  
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D E C I S I O N

September 26, 1991

Held: Parents' revised Home Instruction Proposal should be considered on Remand by School Committee, which may require evaluation of children to determine nature of their learning disabilities and whether home-instruction program will address their needs.

### Travel of the Case

Mr. and Mrs. David K were notified of the Middletown School Committee's disapproval of their home instruction proposal on December 18, 1990. In the same communication, Mr. and Mrs. K were ordered to give evidence that their children (J age 11, and Z , age 8) were enrolled in an approved private, parochial, or public school.

The K appealed the School Committee decision to Commissioner J. Troy Earhart by letter of January 16, 1991. Contained in their letter of appeal was the request for time to provide additional information to the School Committee regarding the content of the curriculum and their position with regard to annual evaluations of the instruction of their children, two issues which had entered into the Committee's rejection of their proposal. Counsel for the School Committee took the position that the matter was before the Commissioner, and could not summarily be remanded for the purpose of providing more information for the Committee's consideration.

The designated Hearing Officer, by letter of January 24, 1991, urged counsel "to confer and choose a hearing date which would permit (time for) a possible resolution of this matter at the School Committee level." Thereafter, counsel for the K wrote to Superintendent of Schools, Dr. D. William Wheatley, to request a specification of what additional information the Committee sought with regard to the K 's curriculum. While the letter stated that such information was requested so that the matter would be resolved without appeal to the Commissioner, counsel for the K reit-erated that they would not agree to provide information on the childrens'

educational background nor agree to have the children tested. Apparently determining that the parties' positions were irreconcilable on the testing issue, counsel for the School Committee notified the K's attorney that, in essence, it would be necessary for the Commissioner to resolve this matter on appeal.

Thereafter, the matter was heard by the undersigned Hearing Officer on May 21, 1991 and the record on appeal closed on June 4, 1991.

Jurisdiction to hear the appeal lies under R.I.G.L. §16-39-1, §16-39-2 and more specifically under §16-19-2.

#### Issues

- (1) Does the program of home instruction proposed by the K meet the requirement of §16-19-2 and other relevant statutes setting forth additional curriculum components<sup>1</sup> for home instruction programs in Rhode Island?
- (2) Can the Middletown School Committee condition its approval of the K's home instruction program on the requirement that the children submit to (a) baseline testing, (b) annual standardized testing in the required subjects, including health and physical education?
- (3) Should the School Committee have specified the deficiencies in the curriculum proposed by the K so that they could supply additional information concerning the program and/or materials to be used?
- (4) Was the Middletown School Committee guilty of bad faith in disapproving the K's proposal, and if so, are the appellants entitled to an award of reasonable attorneys fees?

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1] Other Rhode Island statutes supplement §16-19-2, i.e. §16-22-2 and §16-22-4.

Findings of Relevant Facts

- Diana and David K are residents of Middletown, Rhode Island and have two children of compulsory school age - - J age 11 and Z age 9.
- Other than last year when they both attended St. Michael's School in Middletown, both children have been taught at home. (TR. pp. 81-83, 131).
- The Middletown School Department received a "truancy tip" at the beginning of the 1990-91 school year and it was only after school officials contacted Mr. and Mrs. K that a home education proposal was submitted for the children. (TR. p. 82).
- On or about October 11, 1990 the K submitted to Superintendent Wheatley their proposal for home instruction for J and Z. (Joint Ex. I).
- Following the Middletown School Department's receipt of the proposal, the parents met with Dr. Wheatley and other administrators to discuss the proposal.
- On November 8, 1990 the Middletown School Committee met to consider the K's proposal and, after hearing, rejected it. A notice detailing the reasons for the School Committee's action was sent to the K from Dr. Wheatley on or about December 18, 1990. (Joint Ex. III).
- Thereafter, on January 16, 1991 Mr. and Mrs. K, through counsel, filed an appeal with the Commissioner, while at the same time contin-  
2] in an unapproved home instruction program.

uing to seek approval for their program before the School Committee (see the description of the subsequent communications in the "Travel of the Case").

- The proposal submitted by the K to the School Committee identifies J as being at a Grade 4 instructional level and Z at a Grade 2 level. (Joint Ex. I).
- The proposal further indicates that the children will be taught by the parents, will receive instruction in the required subjects for a period substantially equivalent to that of the public school and that daily attendance records will be kept.
- Also contained in the K 's written proposal was the list of subjects to be taught and the materials to be used.
- The K 's proposal indicated that documentation of the childrens' academic performance would be provided at the end of the school year.
- The basis for the School Committee's rejection of the proposal was:
  - a) failure to provide information on the children's educational background,
  - b) an inadequate and cursory curriculum,
  - c) refusal to permit baseline testing and annual standardized testing, and
  - d) unwillingness to cooperate in health and physical education testing. (Joint Ex. III).

- J            and Z            are actually being instructed by two tutors, in addition to their parents. (Tr.p.59).
- Linda Atamian is tutoring both children one hour per week in kinesthetic mathematics. (Tr.p.61).
- Barbara Philbrick is a tutor in specific language disabilities and tutors both children four times per week in reading and language skills. (Tr.pp.60-61).
- The instruction provided by Mrs. Atamian and Mrs. Philbrick is designed to address what their parents have perceived as a learning disability.
- Mrs. Philbrick advised the K            (after working with the children for several months) that J            and Z            have dyslexia. (Tr.p.104)
- Because of the children's apparent learning disabilities, the K            object to any baseline or annual testing requirements which would not take this into account. <sup>3</sup> (Tr.pp.80, 90).
- J            was tested by a Linda Cari at St. George's School in January of 1990 in order to determine his learning strengths and weaknesses at that time. (Appellants Ex.A).
- The tests administered by Linda Cari indicated that J            "has weaknesses in sequencing and visual perception (that) are crippling his attempts to master the rudimentary reading and arithmetic skills."
- These test scores indicated that J            had already fallen well behind his peers in terms of academic achievement. Ms. Cari recom-

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3] Their position prior to the hearing was that they would not permit any baseline testing (Appellants Ex. B). Their proposal with regard to annual evaluations was to provide school officials with a portfolio of the children's work. (Joint Ex. I and Appellants Ex. B).

- mended a program of instruction that was intensive and individualized and she made some specific suggestions in this regard for J .
- In September of 1990 when Mrs. Philbrick began tutoring J and Z she found both boys to be non-readers. (Tr.p.106). Since that time, the boys have made some progress working with her and utilizing the Orton & Gillingham method of remedial reading techniques. (Tr. pp. 106-110).
  - At time of the hearing, she testified that both children are on approximately a Grade 1 level in reading, spelling and handwriting. (Tr. pp113-115).
  - Mr. and Mrs. K wish to continue instructing the children at home, and utilizing the services of tutors, because they believe this is the best way to provide for the childrens' specific learning styles and because they believe it is their God-given responsibility to provide for the children's education.

### Decision

Rhode Island's General Laws (§16-19-2) provide for the Department of Education to resolve home education disputes appealed to it from local school committees. Customarily a hearing de novo is conducted and a decision rendered. A decision to remand the matter to the school committee is a course we feel appropriate in this case, however, although we are mindful of the position of both parties that the record before the Commissioner supports a decision either to approve or reject the home instruction proposed by Mr. and Mrs. K .

In this case the program outlined to the school officials and the program

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4] Commissioner and Board of Regents, the decision of which is final in these matters.

as presented in testimony before us differ substantially. In addition very crucial information was presented to the Commissioner, i.e., the fact that both children have learning disabilities, but yet this was not presented to the Middletown School Department officials. The position of the appellants with regard to sharing educational background information and consenting to testing of the children has been modified as well.

Under the circumstances, a decision on the merits of the proposal would effectively deny the local school officials the opportunity to review and analyze the proposal and place their findings on the record at the hearing before us. Likewise, a Commissioner's decision approving or disapproving the program would be based on a record which is devoid of an informed analysis of the parents' proposal by educational experts whose task would include identification of any deficiencies<sup>6</sup> in the proposed program of home instruction. Therefore, this matter is remanded to the Middletown School Committee for their reconsideration of the K proposed program of home instruction for J and Z.

Our remand is not to be unaccompanied by the guidance which was requested by both parties when the difficulties inherent in the record were raised by this Hearing Officer.

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5] Differences which should be apparent in our "Statement of Relevant Facts."

6] By deficiencies we mean educational deficiencies such as inconsistency of the program with the district's coverage of the required subjects or questions as to grade level appropriateness, etc.

We offer guidance on the following issues raised in the appeal as presented to the Commissioner.

(1) Adequacy of the Written Proposal:

The written proposal submitted by the K did not give the Middletown school officials any direct information on the special learning needs of their children. Further, it did not identify Mrs. Atamian and Mrs. Philbrick as being involved in their instructional programs or describe what exactly these tutors, and the parents, would be doing to address the childrens' apparent learning disabilities. A review of the written proposal also indicates that the time allocations for each subject are not given, therefore, one cannot confirm that they are substantially the same as the time allocated by the public schools. In terms of the curriculum materials and grade levels indicated in the K 's written proposal, we would question, given the testimony presented before us, the completeness and accuracy of the description of both the materials and grade levels contained in the written proposal.

Our suggestion is that on remand to the School Committee, Mr. and Mrs. K submit a new proposal which, at a minimum, addresses the deficiencies noted in this decision.

(2) Requirement that the K Children Undergo Baseline Testing and Annual Standardized Testing

The issue of annual standardized testing and its requirement as a condition of approval for home instruction has been dealt with exten-

7] To the extent the parents knew them at that time.

sively in prior decisions of the Commissioner. Certainly these cases make clear the proposition that when parents raise a constitutionally-based objection to the method of annual evaluation proposed by the School Committee, the School Committee must show that no adequate less restrictive alternative has been proposed by the parents, using the analysis of "least restrictive means" set forth in New Life Baptist Church Academy v. Town of East Longmeadow, et al, 885 F.2d 940 (1st Cir. 1989). Any testing conditions or other methods of evaluation required by the School Committee to determine the thoroughness and efficiency of the K's home instruction program would, in the face of a constitutionally-based objection and offer of an alternative means by the parents, have to be shown as the least restrictive means.<sup>9</sup>

As to baseline testing as a condition of approval, the appellants have presented on appeal before us evidence of learning disabilities of both J and Z. The only formal evaluation provided in the record was for J and that testing procedure resulted in findings of both the presence of a disability and achievement at a level well below his peers. Given this information in the record, we anticipate that on remand the school officials will insist on some type of appropriate evaluation for both children for the purpose of determining the nature and extent of their learning disabilities. In this case and on the record before us, such evaluation is both reasonable and essential. Any disputes which may arise due to the

8] See: Thifault v. North Smithfield School Committee, July 2, 1990; Gargano v. Exeter-West Greenwich School District, July 3, 1990 and Gauvin v. Scituate School Committee, July 5, 1990.

9] We are assuming that any evaluative instrument proposed by the school officials would take into account any learning disabilities the children may have.

parents disagreement with the choice of evaluation procedure proposed by the School Committee must be resolved under the least restrictive alternative analysis previously discussed.

It may very well be that only one test or evaluative procedure is adequate or appropriate to diagnose or measure the childrens' disabilities. This does not make inapplicable the least restrictive alternative analysis. In that situation, any alternative proposal by the parents would fail because it would not provide the school district with the necessary information for them to make critical <sup>10</sup> decisions as to the sufficiency of the home instruction program.

The final issues raised concern the appellants' request for an attorneys fee award based on what they perceive as bad faith on the part of the School Committee. The K point to the refusal of the School Committee to specify the deficiencies in the curriculum described in Superintendent Wheatley's letter as cursory and inadequate.

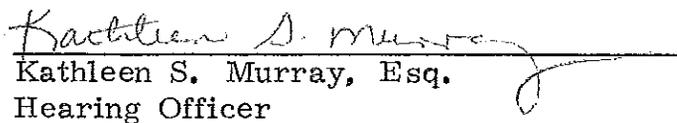
Generally speaking, implicit in a reasonable approval process is the need to detail the reasons for the rejection of the proposal and to give the parents opportunity to revise the proposal to remedy any inadequacies. See: Care and Protection of Charles, 504 NE.2d 592 (Mass. 1987). While the School Committee did not respond to the parents requests to specify the deficiencies in their curriculum here, it did so in the context of identifying issues of dispute between them on which the parents indicated no compromise at that time. Its action was not, we find, in bad faith, and

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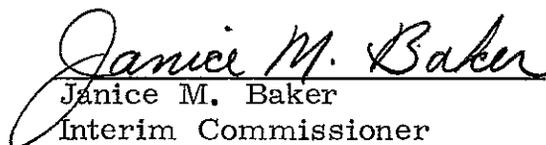
10] Especially critical in the case of J

and we need not reach the issue of the Commissioner's authority to award attorneys fees.

On remand, we urge both parties to set about the task of getting in place immediately an appropriate instructional program for J and Z

  
Kathleen S. Murray, Esq.  
Hearing Officer

Approved: September 26, 1991

  
Janice M. Baker  
Interim Commissioner