

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

ROBERT N.

V.

A RHODE ISLAND SCHOOL DISTRICT
AND
THE DEPARTMENT FOR CHILDREN, YOUTH
AND FAMILIES

DECISION AND INTERIM ORDER

Held: Robert N. is entitled to an interim protective order to maintain his placement at the Meadowridge Behavioral Center pending an impartial due process hearing on his compensatory education claim.

TRAVEL OF THE CASE

On May 19, 1993 a petition for an Interim Protective Order was filed on behalf of Robert N. The petition alleged both substantive and procedural violations of the Individuals with Disabilities Education Act, 20 USC 1400 et seq. (IDEA). It was requested that the Commissioner issue an interim order under R.I.G.L. 16-39-3.2 to ensure that pending an impartial due process hearing on his claim that he had been denied a free and appropriate public education under IDEA during his last residential placement, he would be returned to that same facility. Robert had been removed from that facility and its educational program on May 13, 1993 just two days subsequent to his request that the respondents schedule a due process hearing on his IDEA complaints.¹

Hearings on the Petition were held on June 10-24, 1993, with the record closing on June 25, 1993 upon receipt of the final transcript.

FINDINGS OF RELEVANT FACTS

- o Robert N. was committed to the care, custody and control of the Department for Children and Their Families by a decree of the Rhode Island Family Court entered on February 13, 1989. The basis for the decree was a finding that Robert was a "dependent" child. DCYF Ex. B.
- o Then, and presently, Robert N. suffers from a severe emotional disturbance which has been diagnosed as schizophrenia, undifferentiated, chronic and schizotypal personality disorder. Appellant's Ex. 1.; DCYF Ex. F.
- o Robert's emotional disturbance has been such that he has required special education throughout his academic history (Tr. Vol. I p. 12). His most recent Individualized Education Program indicates that he is unable to participate in a regular education program and at that time he was assigned to a secondary level, approved private school for social/emotional disturbance. Appellant's Ex. 7.

1. See Appellant's Ex. 5 and 6

- o In addition to his identified special education needs, Robert has been determined to require additional related services, including regular psychological services, according to his most recent IEP. see Appellant's Ex. 7.
- o As part of a utilization review conducted at the request of the Department for Children, Youth and Their Families, a recommendation was made to DCYF that Robert be transferred from the Devereux Foundation, a psychiatric hospital in Pennsylvania, to a smaller facility and a less-restrictive setting closer to Rhode Island. Appellant's Ex. 1.
- o On March 27, 1992 Robert was placed by the Department for Children, Youth and Their Families at the Meadowridge Program in Swansea, Massachusetts. Appellant's Ex. 2.
- o The Placement Agreement executed by DCYF indicates that "Education, including required special education services, will be provided by Meadowridge Program." Appellant's Ex. 2.
- o Meadowridge is a residential treatment facility, designed to provide clinical, educational and residential services to emotionally disturbed children between the ages of twelve and twenty-two. Tr. Vol. II. p. 17
- o Meadowridge operates a special education program licensed by the State of Massachusetts. Tr. Vol. II. p. 17.
- o Meadowridge is a "closed" facility in the sense that none of its twenty-six residents are allowed to leave the facility for educational purposes. Tr. Vol. I. p. 68.
- o The psychiatric and behavioral needs of the children at Meadowridge are such that they could not function in a more mainstream educational setting. Tr. Vol. II. p. 32.
- o During the period he was placed by DCYF at Meadowridge, Robert participated in the special education program. He had a Master Treatment Plan, which included educational objectives and timeframes for accomplishing these objectives. Appellant's Ex. 8.
- o During the period of Robert's placement at Meadowridge, i.e. March 27, 1992 through May 13, 1993 he did not have an Individualized Education Program Tr. Vol. II. pp. 14-15.
- o Robert's placement by DCYF at Meadowridge was pursuant to a determination of his eligibility for services as an "emotionally disturbed child" under the MHSCY program (R.I.G.L. 40.1-7-1 et. seq.) Tr. Vol. V. pp. 4, 12, 22). Funding for his placement there was provided exclusively through the MHSCY program. Tr. Vol. V. pp. 4, 29, 49.
- o A request was made to the school district in which Robert had previously resided, prior to his placement in DCYF custody, that it contribute its

average per pupil cost for special education for the reference year.² DCYF Ex. D. The school district had contributed its per pupil share for Robert's prior placements at the Grove School in Connecticut and the Devereux Foundation in Pennsylvania. H.O. Ex. 3.

- o The school district did not contribute the requested portion of the cost of Robert's placement at Meadowridge, and DCYF paid the entire cost of his placement there. Tr. Vol. V. p. 62.
- o The explanation for the District's failure to forward the requested amount was that it did not subsequently receive a letter of agreement or a bill for Meadowridge. Tr. Vol. III. p. 39.
- o Robert's mother retained her educational decision-making rights during the period in which he was committed to DCYF custody. Tr. Vol. I. pp. 12, 49.
- o Robert's mother did not indicate at any time that she was dissatisfied with, or voice any objections to, the educational program provided to Robert at Meadowridge. Tr. Vol. I p. 58; Vol. II p. 45.
- o Dr. Allen, Director of Meadowridge, testified that in his opinion, most of Robert's individualized academic and vocational needs were met there. Tr. Vol. II pp. 62, 76, 79; Vol. I p. 69.
- o The failure to have an IEP for Robert may have impacted on provisions for his "transition planning." Tr. Vol. II p. 79.
- o Neither Robert nor his mother received written prior notice of the proposed discontinuation of special education services upon his attainment of age twenty-one (21); They also did not receive a notice of the right to contest this change through an impartial due process hearing. Tr. Vol. I p. 43.
- o On May 13, 1993 Robert was moved from Meadowridge to a sheltered care facility licensed by the R.I. Department of Health pursuant to an order of the Family Court. Appellant's Ex. 3; DCYF Ex. L.
- o On May 15, 1993 Robert turned twenty-one years of age.

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2. Although we would note that the actual request was that the school district "fund Robert's educational component at Meadowridge for a cost of \$66.11 per day" Ms. Nicodemus of DCYF testified that the requested amount should actually compute to the average per pupil share for the district. She understood this to be the request. Tr. Vol. V. pp. 28, 54.

POSITIONS OF THE PARTIES

Appellant:

Under the so-called "stay put provision" of 20 USC 1415 (e) (3) Robert N. is entitled to remain in his "then current educational placement" during the pendency of the due process proceedings initiated on May 11, 1993. His counsel argues that even though he has since attained age 21 and become ineligible for services under IDEA and state law, he nonetheless can benefit from the procedural protections of the Act. His counsel argues that DCYF was responsible for his education while Robert was at Meadowridge, and thus this agency has the responsibility to maintain him in that placement pending resolution of the due process proceedings. If DCYF is not responsible, counsel argues that in the alternative, the local school district must assume this obligation, since continuing special education services to Robert must be provided at no cost to his parent.

DCYF:

Counsel for DCYF argues that the "stay put" rule is inapplicable here because (1) Meadowridge was not an "educational placement" for Robert and (2) the reason for his termination from the program was because of his age and resulting ineligibility for services. He argues that when the reason for the termination of services is legal ineligibility (in this case attainment of age twenty-one) the stay-put rule ought not to be implemented. To permit a handicapped individual, soon to be ineligible because of age, to invoke due process proceedings and avail himself of the stay-put provision, creates a "loophole", that would permit extension of services to those not intended to be beneficiaries under IDEA. In this case, counsel argues additionally that the claim of deprivation of a free and appropriate public education is meritless. While at Meadowridge Robert did receive appropriate special education

services, although not pursuant to an IEP. He is thus not entitled to compensatory services or to stay-put pending hearing on this claim.

If Robert is entitled to an interim protective order, it is DCYF's position that the obligation to place Robert back at Meadowridge is the responsibility of the school district. Counsel argues the Title 40.1-7-1 et seq. controls the legal obligations of the two agencies, and squarely places educational responsibility on the school district. Therefore, any continuation of educational services would be at the school district's expense.

The School District:

Counsel characterizes this dispute as, in actuality, a dispute over the appropriateness of the "discharge placement" for Robert, i.e. whether the sheltered care facility in which he has been placed meets his mental health needs. In essence, then, there is no real dispute as to the adequacy of the special education services furnished to Robert at Meadowridge from March 27, 1992 - May 13, 1993. Counsel notes that the petition for interim relief implicitly recognizes this fact, i.e. the appropriateness of the educational services he received at Meadowridge, as it seeks to return him to that placement. Since no adverse effect on Robert's education has been demonstrated, counsel argues he is not entitled to relief, even though the termination of services to Robert was not accompanied by procedural safeguards.

In terms of controlling law, the school district cites R.I.G.L. 16-24-13. Applying this statute, DCYF assumed responsibility for Robert's education at Meadowridge. In the alternative, R.I.G.L. 16-7-20 applies and that statute's specific reference to placements by DCYF in a state-operated or supported community residence gives DCYF educational responsibility for Robert. Counsel argues that placement at a Massachusetts-licensed facility is the practical equivalent of the type of placement described in this section. Although MHSCY

funding was used for Robert's Meadowridge placement, the school district argues that MHSCLE does not apply. Counsel points to DCYF's noncompliance with regulations governing the MHSCY program's operation, especially the involvement of the school district called for in section 5.2 of the Regulations. He argues this noncompliance precludes DCYF from shifting educational responsibility to the school district under the provisions of Chapter 40.1-7.

DECISION

This matter comes to the Commissioner under R.I.G.L. 16-39-3.2 for an interim protective order. The appellant's compensatory education claim is placed, and appropriately so, before a local-level hearing officer who will decide the merits of the claim that Robert is entitled to additional special education services by virtue of the fact no IEP was developed for him during the fourteen or so months he was placed at Meadowridge. Undoubtedly adjudication of that claim will involve consideration of issues such as the appropriateness of the academic, vocational, and transitional services Robert received at Meadowridge and the effect of his mother's approval of the program throughout that period. The hearing officer will decide if Robert was disadvantaged by the failure to provide special education and related services to him:

in conformity with the individualized education program required under section 1414 (a) (5) of this title. See IDEA's definition of free appropriate public education 20 USC 1401 (a).

The limited, yet complex, issues pending before the Commissioner are: (1) during the pendency of Robert's compensatory education proceedings, is he entitled to remain at Meadowridge under the "stay put" provision? (2) if so, which agency is responsible for reinstating him there?³

3. The discussion of both of these issues is substantially shortened by the time constraints imposed on interim orders.

If Meadowridge was his "present educational placement" at the time a due process hearing was initiated, Robert is entitled to remain there pending any administrative or judicial proceedings on his complaint Reg. 300.513. The entitlement to remain in the then-current educational placement is absolute. It is unaffected by the strengths or weaknesses of the due process claim. Counsel argue in essence that the "inequities" of the compensatory education claim should affect Robert's entitlement to interim relief. This argument would, if accepted, require our preliminary determination of the merits of the "pending proceedings" in deciding if Robert is entitled to a stay put order. No such threshold requirement is found in either the IDEA or implementing regulations. These rules require maintenance of the student in the then-current placement. Therefore, even though the educational program at Meadowridge may have met Robert's known academic and vocational needs at that time, we cannot respond to this fact in determining if Robert is entitled to "stay put" at Meadowridge, under Sec. 1415 (e) (3).

Likewise, we reject the notion that a handicapped student's entitlement to remain in the then-current educational placement is extinguished upon the student's attaining age twenty-one. Again the "stay put" rule is absolute and unequivocal. It creates no exceptions for those students with disabilities who, at the commencement of or during the course of proceedings initiated under Sec. 1415, become ineligible because of their age. The reluctance of courts to give anything but a literal interpretation of Sec. 1415 (e) (3) is no more evident than in Honig v. Doe ___ U.S. ___ (1988), 1987-88 EHLR Dec. 559:231. In that case, the United States Supreme Court was asked to read a "dangerousness" exception into the stay-put provision. It refused to do so, noting that this provision was a clear and unequivocal directive without exception.

We do recognize the opportunity this creates for some students to use the provision as a "loophole" for extending special educational services beyond age twenty-one. However, we are constrained to read the statute as it is written.

In determining Robert's entitlement to be reinstated at Meadowridge, then, our focus becomes whether his placement at this facility constitutes his present educational placement as that term is used in 34 CFR 300.513. The record in the case before us contains many references to the fact that Robert's placement at Meadowridge was primarily for psychiatric treatment.⁴ Counsel for DCYF strenuously argues it is not an educational placement under IDEA. Certainly it is clear that his placement there was not made by an educational agency pursuant to IDEA procedures for determining an appropriate placement. Nonetheless, it is our assessment that Meadowridge was Robert's "present educational placement" under Sec. 300.513 of the Regulations. Furthermore, this educational placement was governed by the provisions of the contractual arrangement between Meadowridge and DCYF. We find that DCYF was the public agency responsible for Robert's education during the relevant time period.

The conclusion that Meadowridge is Robert's current educational placement and that DCYF is the responsible public agency is premised on our analysis of Title 40.1-7 of the General Laws and the responsibilities that flow from that statute. Robert's placement at Meadowridge was in fulfillment of DCYF's obligation to provide services for emotionally disturbed children under the MHSCY program. Under that program, specifically as set forth in 40.1-7-3 the department is charged with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children.

4. Without citing statements by each and every witness, we recollect the witnesses testimony was in general agreement: his placement there was not purely an educational placement, but was primarily to meet his needs for residential psychiatric care.

The statute defines "care and treatment" to include:

those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for elementary and secondary education. Sec. 40.1-7-4 (1)

Using this definition, the Rhode Island Supreme Court has ruled that the obligation of the department to provide educational services under the MHSCY program arises:

when the services that the school committee must provide are no longer accessible to an emotionally disturbed child as a consequence of the psychiatric care and treatment he is receiving in the program.

See Smith v. Cumberland School Committee, 415 A 2d 168 (R.I. 1980). Therefore, once a child is admitted to the MHSCY program and no longer has access to the programs provided by the school committee, his educational services become the responsibility of DCYF.⁵ Robert's placement in a "closed" residential treatment facility cut off his access to programs provided by the school committee of his former residence.

Consistent with its legal obligation, DCYF contracted with Meadowridge to provide not just social, medical and psychiatric services to Robert. Its placement agreement (Appellant's Ex. 2) specifically states that:

1. Education, including required special education services will be provided by the Meadowridge program.

Again, consistent with its responsibilities for care and treatment of Robert under Title 40.1-7, DCYF executed a case plan agreement with his mother on January 4, 1993 indicating that the department would provide placement, education, medical, dental, medication... until Robert's 21st birthday". see DCYF Ex. G. The fact that the school district in question was requested

5. Current Rules and Regulations on Mental Health Services for Children and Youth (School District Ex. A) seek to redefine (and further limit) educational services for which DCYF is responsible under this statute. However, the construction of the statutory language by our state Supreme Court in Smith, supra, makes any inconsistent regulatory definition invalid.

only to provide its average per pupil cost for special education for the reference year (and not to perform any of the typical LEA tasks for the child, such as IEP development) is quite telling. The school district had not even participated in the development of Robert's prior IEP at Devereux.⁶ The testimony of the social caseworker assigned to Robert's case was that she understood that Meadowridge would be developing Robert's IEP, that this facility was going to be responsible for its development. (Tr. Vol IV p. 10)

Unfortunately, confusion reigned at Meadowridge as to which agency was officially responsible for Robert's educational planning. In addition there was miscommunication as to the status of a current IEP for Robert. The result of the confusion and misunderstanding was not just the failure to develop an IEP for him, but failure as well to provide him with procedural safeguards upon termination of special education services. The public agency ultimately responsible for all elements⁷ of Robert's education at Meadowridge was DCYF.⁸

Robert N's placement by DCYF primarily for residential psychiatric treatment operated as an educational placement because:

- (1) DCYF was statutorily charged with furnishing educational services to the student under the MHSCY program.
- (2) Robert was entitled to FAPE under IDEA and state law while in DCYF care. see 42-72-15 (0) of the General Laws. His placement in a closed, private facility did not suspend this entitlement to a free, appropriate public education. See also the discussion of a public agency's responsibilities

6. see testimony of the special education director at Vol III pp. 18-19.

7. except the community contribution required under sec. 40.1-7-7.

8. note the comment to 34CFR300.341 which supports this conclusion as well.

for compliance with IDEA's provisions in placing children in private schools and facilities in 34CFR300.2 (c) and 300.11.

- (3) DCYF determined the appropriateness of the facility to meet his educational, as well as other needs, prior to his placement there.
- (4) But for the confusion on the existence of a current IEP and DCYF's understanding that Meadowridge had or would develop an IEP for Robert, his educational services there would have been provided pursuant to an IEP.

In both the definition of public agencies and its discussions of the requirements imposed on public agencies placing children in private facilities, IDEA and the regulations convey the notion that in some instances a child's "educational placement" would be controlled by a non-education agency "involved" with the child's educational program. Stated another way, in some limited instances, a child's educational placement will be predetermined by other factors in that child's life, e.g. the need for medical or psychiatric care. In those limited situations, the child's residential placement does not mean that the child has no educational placement. It simply means that they are one and the same.

We, therefore, direct that DCYF reinstate Robert immediately at the Meadowridge program, as this is Robert's present educational placement for which DCYF was, and continues to be, responsible.

July 6, 1993
DATE

Kathleen S. Murray
Kathleen S. Murray
Hearing Officer

Peter McWalters
Peter McWalters
Commissioner

9. Kathryn Nicodemus of DCYF testified that prior to placement of Robert at Meadowridge the department ascertained that it was a state of Massachusetts' licensed special education facility.