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STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF
EDUCATION

Donna F.

V.

Burrillville School Committee

DECISION

Held: District's Attendance Policy is unreasonable because it (1) imposes drastic academic consequences when a student is absent from class more than four times in a marking period. (2) lacks objective standards for determining which absences are excused, and (3) fails to give students adequate notice of how the policy is administered.

DATE: January 10, 2000

TRAVEL OF THE CASE

On November 19, 1998 Donna F. requested that Commissioner Peter McWalters review an attendance policy in effect at Burrillville High School. Mrs. F. had appeared before the Burrillville School Committee on November 17, 1998 to present her arguments and to request that the School Committee abolish the policy, which provides that students who accumulate more than four (4) class absences during a marking period will receive a grade of 50% in the class unless they file a successful appeal with an attendance appeals panel. The matter was referred to the undersigned hearing officer for hearing and decision on December 2, 1998. Because the Burrillville School Committee had not yet acted on Mrs. F's request, a hearing date in late December was proposed by the hearing officer. On December 8, 1998 counsel for the School Committee moved to dismiss the appeal based on the fact that the Committee was in the process of reviewing the policy, had requested a report from the principal of the high school, and would need time to consider the anticipated report prior to taking any action. At that time, counsel also raised the issue of Mrs. F's standing to bring an appeal to the state level, since the policy's application to her daughter had not been the subject of an appeal to the Burrillville School Committee.

Upon being advised that the policy was under review by the School Committee and that the appellant's daughter had been adversely affected by the policy, the hearing officer proposed a hearing date in late January so that the School Committee would have additional time to take any action it deemed prudent at its next meeting, and there could be an effective remedy, if the appellant prevailed. The School Committee subsequently

requested that hearing again be deferred to give a committee consisting of high school administrators and parents (including the appellant) time to complete its review of the policy and make recommendations to the Superintendent. The request was granted, with the proviso that if the review process were not completed by the end of February or the dispute was not resolved by any revisions to the policy at that time, hearing of the appeal would proceed.

Mrs. F. subsequently notified the hearing officer that the dispute had not been resolved, and hearings were held on March 24 and 31, 1999. At the conclusion of the March 31, 1999 hearing, the parties requested that further hearing be deferred so that they could work on an agreed-upon resolution of the issues. The hearing officer was later notified by the appellant that an agreed-upon resolution had not been achieved, and further hearing concluded on June 10, 1999. The record in this matter closed on July 6, 1999 at which time counsel for the school committee filed a memorandum (with attachments) and mailed a copy to the appellant.

ISSUES

1. Does the Appellant have standing to raise the issue of the validity of the “Administrative 50” policy ?
2. Is the “Administrative 50” policy valid as a reasonable exercise of the Burrillville School Committee’s authority under R.I.G.L. 16-2-9 and 16-2-16? ¹

¹ At the close of the hearing, two other very significant issues were presented in this case. These issues were whether the appellant’s daughter was entitled to a free appropriate public education pursuant to the Individuals With Disabilities Education Act, 20 USC Section 1400 et seq. or entitled to protection from discrimination under Section 504 of the Rehabilitation Act of 1973, 29 USC Section 794. Especially with regard to the latter statute, and Subpart D of the regulations governing educational programs, substantial issues were presented as to whether or not the district fulfilled its obligation to identify the appellant’s daughter as a child with a disability and provide her with an appropriate educational program, including such modifications to the regular school program at Burrillville High School as might be required under the circumstances. These issues have been rendered moot by the subsequent identification of Sarah as a qualified student with a disability and by the parties’ agreement to a 504 plan which provides, in part, for

FINDINGS OF RELEVANT FACTS

- Mrs. F. is the parent of Sarah, a student enrolled at Burrillville High School. During school year 1998-1999 Sarah's earned grades in several of her classes were reduced because of an attendance policy which requires that a grade of 50%, or the lower earned grade, be given in any class in which a student accumulates more than four (4)² absences during any marking period. Appellant's Ex. E.;S.C. Ex. 3.
- Sarah did not avail herself of the appeal procedure set forth in the student handbook, and as a result, the "administrative 50's" remained as her grades until June 16, 1999. At that time the school principal determined that because she suffered from a disability which substantially affected her ability to function in school throughout the 1998-1999 school year, she was entitled to receive incompletes in all of her failing subjects and be given opportunity to do make-up work to receive course credit. See Minutes of 504 Meeting held on June 16, 1999, copy attached to Memorandum of Law submitted on behalf of the School Committee; See also Tr. Vol.I pp. 20-23, 128-131.
- Although the 504 Plan implemented for Sarah at the end of the 1998-1999 school year removes the failing grades she received because of the application to her of the attendance/administrative 50 policy, the 504 plan does not address the policy's application to Sarah's absences in school year 1999-2000.
- The basic elements of the Burrillville High School attendance policy as set forth in the handbook are as follows:
 - A student who is absent from class more than four times receives a grade of 50% or the lower earned grade for the marking period.
 - A student may regain his/her earned grade by filing a successful appeal to the Attendance Appeal Panel.
 - A student appealing his "administrative 50" must establish through documentation that all of the absences were legitimate; the handbook does not specifically describe the reasons or categories of absences which will qualify as excused absences. The handbook does state that a signed doctor's letter will establish an excused absence, and that in-house suspension and field trips will not be counted in calculating whether a student has exceeded four absences. Additional language at page 16 of the handbook indicates that

the removal of the failing grades she received pursuant to the Administrative 50 policy. Documentation concerning the district's finding of eligibility and agreement with respect to removal of the "administrative 50's" was attached to the Memorandum submitted by the School Committee. The 504 Plan and minutes of the 504 meeting do resolve the issue of the policy's application to Sarah in school year 1998-1999; however, the plan does not address any future application of the attendance policy to Sarah. This is an issue better addressed initially by a team of qualified individuals reviewing and/or revising the 504 Plan pursuant to 34 CFR Sec. 104.35.

² Although Page 4 of the Student-Parent Handbook 1997-1999 (S.C.Ex.3) states that the grade of 50 will be given if a student is absent four (4) or more times, at page 15 of the Handbook, in other documents and throughout the testimony, the policy was described as proscribing absences in excess of four.

school-related activities and trips will not be counted in calculating a student's absences, or will establish sufficient excuse for such absence.

- A student who has "cut" a single class is not eligible to have an appeal processed for that class.
- A student who receives an "administrative 50" in the first, second or third quarter may reclaim his or her academic average by having no more than two (2) absences from class, excused or unexcused, during the subsequent quarter.

(See School Committee Ex.3)

- A defacto attendance policy is currently in effect at the high school. It provides that a student absent from class in excess of four (4) times during a marking period will receive a grade of 50%, or the earned grade, if lower and further provides that a student who has cut a single class is not eligible to appeal for that class. The de facto policy is much more complex than the written policy and varies substantially from the policy described in the handbook. Additional elements of the de facto policy are:
 - absences caused by out-of-school suspensions are not calculated in determining the number of days a student has been absent from the class; absences for which the school nurse has received a doctor's note are not counted in determining if a student's absences exceed four. S.C. Ex. 5. Also, absences due to approved family vacations are not counted. Tr. Vol. I p.91-92.
 - when total absences (other than those described above) exceed four in number, a student must, in most cases, appeal to the attendance appeals panel. All absences must be verified by parental note. They are then reviewed by the appeals panel to determine if there is a "medical or emotional" reason legitimizing the student's absence.S.C.Ex..5
 - There is no list of specific reasons or categories of absences which are excused under the de facto policy. Tr. Vol. I p. 104; S.C.Ex.5
 - If a student has filed an appeal form which does not contain documentation satisfactorily explaining all of the absences, the names of these students are circulated to school administrators and counselors. If any of them is aware of a good reason for these absences, and this information is conveyed to the Assistant Principal, the earned grades are then substituted for the administrative 50's. Tr. Vol.I p.99-100.
 - If the Assistant Principal is aware, or becomes aware, of a situation which she feels excuses a student's absences, she will direct that the earned grade replace the administrative 50, even without an appeal by the student. This has occurred at the time she receives the initial list of students who have received 50's pursuant to the attendance policy. Tr. Vol.II p. 116.
 - A student who has received an "administrative 50" in the first, second, or third quarter can nonetheless receive the earned academic grade by having no more than two (2) absences, excused or unexcused, in the subsequent quarter. If the Assistant Principal determines that extenuating circumstances are present, a student will be permitted to reclaim the earned academic grade despite having more than two absences in the marking period. Vol. I. p. 114
 - Students who have received "administrative 50's" sometimes reclaim their earned academic grade by entering into a contract with the Assistant Principal.

The provisions of the contract may call for improved attendance in the subsequent quarter, as well as other obligations of the student, but may permit more than two absences in the quarter. Tr. Vol. I pp. 119-120. Vol. II p.28.

- If an academic teacher misapplies the “administrative 50” policy at Burrillville High School, and as a result a student receives his/her higher earned grade, the mistake is not corrected even if detected. Tr. Vol. II p.101-102.³
- In any course in which a student receives an “administrative 50”, unless the earned grade is reclaimed, the student receives a failing grade for that quarter. S.C.Ex.3.⁴
- The purpose of the attendance policy is to encourage students to come to school, to accept responsibility and be accountable for their actions, and to identify students who need extra support from school staff to achieve regular attendance. Tr. Vol. I pp.83-86, Vol. II. pp.65-66 .
- The Burrillville School Committee is anticipated to act on a revised “Administrative Attendance Procedure”, which substantially reduces the penalty for absences in excess of four. The proposed revised policy provides for a five (5) point deduction from a student’s class average for each absence exceeding the permitted limit. The proposed revised policy also gives students a one-time option to recapture their earned grade if their absences do not exceed six (6) by attending a Saturday school program. S.C.Ex. 15. As of the close of the record in this case, the School Committee had not yet acted on proposed revisions. See the Memorandum of Law of the School Committee at pages 9-11.

POSITIONS OF THE PARTIES

The Appellant

The arguments made by Mrs. F. are substantially the same as those placed before the Burrillville School Committee on November 17, 1998 when she addressed the members of the School Committee and argued that the Administrative 50 policy should

³ Given the complexity of the defacto policy, it is not surprising that in this case two teachers misapprehended the rules and incorrectly gave Sarah her earned grade when she should have received Administrative 50’s.

⁴ The policy requires teachers to give a letter grade of “F” to students because of their excessive absences (see page 15 of the handbook); however the policy is referred to as the Administrative 50’s policy, consistent with the statement at page 4 of the handbook that students accumulating four (4) or more class absences will receive the grade of 50%. According to the marking system in effect at the school an F has a numerical equivalent of 60% (see page 30 of the handbook).

be abolished. (Petitioner's Ex. A.)⁵ Mrs. F. argues that taking away a student's earned grade and replacing it with a 50 is a drastic and illogical measure which is counterproductive to legitimate educational goals. First, a student who has exceeded the number of permitted absences and become subject to the policy has lost the incentive of his/her earned grade and the anticipated recognition for doing well on the academic work required for the course. She argues that attendance should have nothing to do with a student's earned grade, beyond a reasonable pro-rata deduction for the portion of the grade attributable to class participation. Absence from class has natural consequences which should not arbitrarily be replaced by the assignment of a grade of 50. The 50 (or F) for the marking period is so low as to be unrecoverable, she argues, and the prospect of losing course credit is so discouraging that many students affected by the policy simply drop out of school.

With regard to the appeals procedure, she argues that it is unclear and ineffective at eliminating the drastic sanctions imposed on students affected by the policy. First, the rules governing appeals are not clearly set forth in the handbook. She argues that the handbook implies that doctors' notes are required for all absences caused by illness. Even though this is not the case, effective communication of the fact that parental notes are sufficient to establish a student's illness has not taken place. The handbook does not describe all of the other opportunities a student may have to establish a legitimate reason

⁵ At the final day of hearing Mrs. F's arguments also addressed the additional issues raised at this level with regard to the application of the policy to her daughter, her eligibility for modifications to the regular school program, the connection between her disability and her absences from school, and the discriminatory effect of the policy, given that it was her position that all of her daughter's absences were due to a disability. As stated earlier, the district made a post-hearing determination that the appellant's daughter is eligible for modifications to the school program because of a disability. The district also decided to replace her administrative 50's for the 1998-1999 school year with Incompletes and permit her to do makeup work during the summer. Evidence of these actions was submitted by way of attachments to the school

for his or her absence or to reclaim his/her earned grade. In fact, many of the steps of the Administrative 50 procedure are not in writing. Mrs. F. argues that an unwritten policy does not give students and their parents notice of the way the policy is actually administered. An unwritten policy, especially one that does not spell out which reasons for absence are legitimate, enables the decision maker to use his or her own subjective judgement on this issue. This, she argues, subjects students to arbitrary decisions on matters which will substantially affect their academic progress and standing in their high school. It may also ultimately affect whether a student remains, or drops out, of school.

Although she has participated with the group of parents, students and teachers providing input for revision of the policy, amendments to the policy have not been forthcoming despite the proposed revised policy submitted for consideration. Under the circumstances, it is her position that the Commissioner should exercise his authority to decide this case.

Burrillville School Committee

Counsel for the School Committee presented oral argument at the close of the hearing and submitted a written memorandum with respect to the legal issues raised in this case. In the memorandum, the School Committee renewed its request that the appeal be dismissed because of Mrs. F.'s lack of standing and her failure to present an individual appeal to the school committee with respect to application of the policy to her daughter. The Committee argues that Mrs. F. is not a "person aggrieved" by any decision of the Burrillville School Committee, and points out that the Committee is still considering her request to abolish the policy, in the context of its review of the entire policy. Counsel

committee's memorandum, a step discussed and approved by the parties at the time of hearing. For this

notes that the district is not acting hastily in making revisions to the policy, but rather is soliciting input from teachers, students, parents and administrators. When the Superintendent is ready to make her recommendation, the matter will be placed on the School Committee's agenda for action. As of the time of submission of its memorandum, counsel argues that the district administrators were considering significant changes to the policy. Until the Committee acts, the appellant lacks standing, and the Commissioner lacks jurisdiction.

Interrelated to this jurisdictional argument is the School Committee's position that formulation of an attendance policy is specifically within the school committee's authority under R.I.G.L. 16-2-9 and 16-2-16. The Commissioner should not overturn or invalidate an attendance policy except when it violates students' rights to a free and appropriate education. The Committee argues that local control of schools would otherwise be undermined.

The School Committee's position is that the Administrative 50 policy has a sound educational basis and teaches students responsibility for their actions. The district also argues that the policy is an effective measure for encouraging students to have regular school attendance. As to the concern⁶ that such an attendance policy might violate the rights of students to substantive and procedural due process, counsel cites cases which support the proposition that due process does not apply in this situation in that students do not have a vested property right in a certain grade. Even if constitutional due process considerations were implicated by Burrillville's policy, he argues that the appellant has

reason, we confine our summary of the arguments to those related to the illegality of the policy itself.

⁶ An issue raised by the hearing officer with the request that any case law which might bear on the issue be submitted.

not met the heavy burden of proof that must be met by one alleging a violation of constitutional rights. The Committee takes the position that its policy, both as written and as implemented, is a reasonable exercise of its authority.

DECISION

Jurisdiction and Standing

The General Laws of Rhode Island, Section 16-39-2 provide that:

any person aggrieved by any decision or doings of any school committee ...may appeal to the commissioner of education who, after notice to the parties interested of the time and place of hearing, shall examine and decide the appeal without cost to the parties involved.

On this record, Mrs. F. is clearly a person aggrieved under the statute. Mrs. F. presented the issue of the attendance policy's validity to the Burrillville School Committee over one year ago and at that time clearly set forth the reasons she believed the policy to be invalid. The record in this matter indicates that the subsequent review process resulted in an administrative proposal for a revised policy. At the time the record in this matter closed, the members of the Committee were still considering the proposed revised policy. Although at the time this appeal was filed with the Commissioner hearing was deferred in order to give the School Committee sufficient opportunity to review the policy, at this point in time consideration of the matter at this level is not premature, as counsel has argued. The record and travel of this case do not indicate that Mrs. F. has attempted to circumvent the School Committee. We don't doubt that the School Committee is still actively reconsidering its policy in good faith, but at some point the lapse of time with no action must constitute a decision. We construe twelve months without action as a "decision." To rule otherwise would remove from review at the

Commissioner's level any educational issue which is the subject of dispute, but argued to be "pending" School Committee decision. With all due deference to the School Committee, we rule that this matter is now ripe for review and our decision is consistent with our statutory duty to hear appeals under R.I.G.L. 16-39-2.

We find further that Mrs. F. is a "person aggrieved" by the School Committee's decision to retain the Administrative 50 policy. She is the parent of a child in the district who was adversely affected by the policy in school year 1998-1999. Although her daughter's failing grades for 1998-1999 school year were removed, it is not unlikely that the attendance policy will affect Mrs. F's daughter in the future, given the nature of her disability. As was noted in our findings of fact, the 504 Plan submitted as part of the record in this appeal does not address the issue of how future absences will be treated, or whether any modification of the attendance policy is necessary to accommodate Sarah's disability. While we do not mean to imply that such a modification is necessary or appropriate, the prospect of future application of the policy to her daughter does have the effect of preserving Mrs. F's standing to challenge it.

Our General Laws do accord to local school committees the prerogative to establish attendance policies. These statutes must, however, be read consistently with those statutes conferring broad de novo authority to the Commissioner to hear appeals in education matters. As discussed in recent cases⁷ the Commissioner has used his independent judgement consistent with the notion of local control by exercising restraint and by acting to overturn the decision of a local school committee only when the committee's decision is not reasonable, is contrary to state law, regulation, or statewide

⁷ Spohn v. Newport School Committee, decision of the Commissioner dated October 7, 1998 and Lusignan v. East Providence School Committee, decision of the Commissioner dated June 17, 1999.

educational policy. The notion that the Commissioner will overturn local educational policies simply because they are not “progressive” (a concern expressed in the Committee’s memorandum) is not well founded or substantiated by the Commissioner’s past exercise of this authority.

Merits of the Case

The “Administrative 50’s” policy as described in the handbook and as implemented by school officials is a well-intentioned attempt to link a student’s absence from class with certain consequences that will encourage students to have regular school attendance; however the provisions of this particular policy and the manner in which it is administered do not establish a reasonable nexus between absence from school and lowering a student’s grade⁸. An unwritten de facto policy, with its additional and sometimes inconsistent provisions, creates flexibility for those implementing the policy. It exists so that legitimate absences will not subject a student to a failing grade, and so that a student receiving an administrative 50 will have opportunities to reclaim an earned grade; however the resulting system is so complex and confusing that teachers incorrectly implement the policy. It is not surprising that one element of the defacto policy is that mistakes in its application will not be corrected if they result in the student “escaping” the Administrative 50.

Important provisions of the policy exist only in the minds of certain school administrators. These include the reasons for which absences will be excused and the existence of an option to enter into a “contract” for reclaiming the earned grade. Such

⁸ We do not address the larger issue of whether any impact on a student’s grade is appropriate as a consequence for absence from class, beyond a reduction for points accorded to failure to participate in class.

unwritten rules raise the possibility of subjective judgement, rather than objective standards, controlling whether a student will pass or fail a course, obtain credit, or ultimately graduate from high school. A de facto policy also creates the possibility of unfair or inconsistent application of the rules.

We will briefly describe those provisions of the Administrative 50 policy which, taken collectively, and in some instances viewed in isolation, are unreasonable. First, the policy requires the lowering of a student's grade to 50% if the student is absent more than four times in a marking period.⁹ Thus, at least initially, a student absent from class in excess of four times is adversely affected even if all of his absences were for a very good reason. That student must then embark on an appeal process to gather documentation which will demonstrate his or her good excuse to the appeals panel (unless exempted from this process by decision of the Assistant Principal). The student does so without clear guidelines as to which reasons for absence are legitimate. Although certain absences, including suspensions¹⁰, are not counted in determining whether a student has been absent more than four times, it is unclear what other reasons constitute a legitimate excuse, except for an illness supported by a doctor's letter¹¹ and approved family vacations.

⁹ Such a policy is distinguishable from those policies which provide that a student will automatically fail a course, or receive no credit if they have "excessive" absences, usually a high number of absences which cause a presumption that the student has not been present a sufficient number of days to receive the essence of a course or any educational benefit from the instruction. The number of absences addressed by such policies is usually higher in number than four per quarter, and the student is usually required to repeat the course, or attend extra instructional days. Such policies usually count excused and unexcused absences in calculating the number of days of "excessive" absence.

¹⁰ Even though the handbook says that out of school suspensions are counted and must be appealed, with a subsequent determination on a case by case basis as to whether the absence is excused. See page 16 of the Student-Parent Handbook, S.C. Ex. 3.

¹¹ While the handbook indicates that illnesses supported by doctors letters should be the subject of an appeal, the defacto policy provides that absences of this category are waived. See S.C. Ex.5.

The testimony of the Assistant Principal, together the written description of the Administrative 50's Procedure (School Committee Exhibit 5) present a system in which parental notes documenting the reason for a student's absence, and submitted in support of the student's appeal, do not "excuse" the absence, but merely "verify" it. The appeal committee then reviews the notes to determine "if there are reason (sic) medically or emotionally those students who have verified all absences could have legitimately been absent". See S.C.Ex.5. Thus, determination of legitimacy of a student's absence is after the fact and without any clear standards governing such determinations. Procedurally, such an arbitrary system is unreasonable.

The imposition of an administrative 50 has disastrous consequences to a student who has cut a single class during the marking period. Such student is ineligible to utilize the appeal process. This is a consistent and clear element of both the written and defacto policy. As a sanction for misconduct, or as an academic penalty, imposition of a failing grade for the quarter for one class cut is an extreme measure. We find that it unreasonably places in jeopardy a student's entire academic career. The committee argues that such dire consequences are averted because a student can "reclaim" his/her earned grade by being absent no more than two times in the subsequent quarter. This "buy back" mechanism is, we find, insufficient to remedy the unreasonableness of the initial sanction. First, the "buy back" is not available to a student who has received an administrative 50 in the last quarter. For this student, there is no subsequent quarter in which to demonstrate improved attendance. Secondly, if the student is absent more than two times in the subsequent quarter, even if both of the absences were for a legitimate reason, e.g. serious illness, death in the family, etc. that student is ineligible to reclaim the

earned grade. See S.C.Ex.3 page 5. Although the record does contain testimony that there have been occasions when the assistant principal made determinations that absences in excess of two were due to extenuating circumstances and permitted certain students to reclaim their academic grades, there is no evidence that this is a consistent practice. There is also no indication that students are made aware of this option so that they might make the assistant principal aware of such extenuating circumstances when they exist.

Under these circumstances, reclaiming the earned academic grade may be unattainable by all but a few very healthy or lucky students. It is unreasonable to have circumstances beyond students' control determine their grade, course credit, or graduation from high school. Also, we might point out that the "buy back" provision permits up to two absences, excused or unexcused in the subsequent quarter. Thus, the student who found himself in this predicament conceivably because of one class cut, can, under the terms of the "buy back" provision cut two classes with impunity in the subsequent quarter. The behavior intended to be circumscribed (class cutting and truancy) would appear to be the focus of the attendance policy and subjects the student to the extreme sanction of a failing grade; yet this same behavior is permitted in the remedial, or "buy back" phase.

In summary, the attendance policy referred to as the Administrative 50 policy, currently in effect at Burrillville High School, is invalid as it is not a reasonable exercise of the discretion of the School Committee. While the goal of the policy is laudable, and consistent with Board of Regents Comprehensive Education Strategy, the measures

currently utilized to secure regular student attendance are not reasonably related to those goals.¹²

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

DATE: January 10, 2000

¹² Issues of substantive and procedural due process are implicated by the attendance policy currently in effect as well. In keeping with the guidance of our Supreme Court, we have resolved this dispute on a non-Constitutional basis; but we feel constrained to note that the student interest at stake here is not just a grade, but rather potential loss of course credit and the high school diploma. Our reading of Goss v. Lopez, 419 U.S. 565, 95 S.Ct.729, 42 L.Ed. 2d 725 (1975) leads to the conclusion that such deprivation implicates Constitutional property and liberty rights of students. Our analysis of the issue of reasonableness of the attendance policy parallels the analysis that would be made in determining if substantive and/or procedural due process rights were violated.