

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....
Student C :
v. :
St. Andrews School :
.....

DECISION

Held: It has not been demonstrated that St. Andrews School discriminated against Student C on the basis of disability in disciplining him for misconduct. There is no evidence that the school failed to follow the rules and procedures set forth in its handbook or treated him unfairly, an issue more appropriately presented to a court of competent jurisdiction.

DATE: June 8, 2001

Travel of the Case

On May 11, 2001 Student C filed a request for an expedited hearing before Commissioner Peter McWalters to bring before the Commissioner the issue of the propriety of the disciplinary action taken against him by St. Andrews School. Student C had been suspended from school for consuming alcohol on the class trip and had been advised that although he would receive his diploma upon the completion of certain conditions, he would not be permitted to attend graduation ceremonies. His appeal to the Commissioner alleged that due process had not been accorded to him in the disciplinary procedures utilized by the school and that the process and decision did not take into account the fact that he has a disability. The matter was referred to the undersigned hearing officer for hearing and decision on May 18, 2001 at which time a hearing was scheduled by agreement of the parties. Expedited hearing took place on May 23, May 25 and May 30, 2001. The record was reopened on motion of the petitioner and additional evidence submitted on June 8, 2001. Graduation is scheduled for tomorrow night, June 9, 2001.

Positions of the Parties:

The Petitioner:

Counsel for the Petitioner argues that Student C is a disabled student and that federal and state statutes place special needs disciplinary appeals directly within the Commissioner of Education's jurisdiction. Specifically R.I.G.L. 42-87-1 et seq. applies to private educational institutions such as St. Andrews and confers upon the Commissioner the responsibility to investigate allegations of violations of the rights of disabled students enrolled in such schools. Even though the Commissioner may not generally have authority to review the disciplinary actions of private schools, when discipline is imposed on a disabled student, and certain procedural safeguards have not been followed, the Commissioner must intervene.

In addition, the argument is advanced that in its contract St. Andrews specifically incorporates by reference the procedural safeguards pertaining to discipline of disabled students. This contractual commitment is reinforced in the description of due process policies and dismissal hearing procedures used by St. Andrews School and which were provided to the Petitioner prior to his disciplinary hearing. Despite his request to have the issue of disability reviewed by a team convened to determine if his misconduct was a manifestation of a disability, this request was denied. Counsel for the Petitioner asserts that in denying Student C the opportunity to link his disability to the incidents giving rise to the disciplinary charges, St. Andrews breached its contract and violated his rights under state and federal law.

Even though Student C may not have been regarded or identified as a disabled student at the time of the infractions he was charged with, counsel alleges that the school should have been on notice of his disability because of concerns expressed by his father

when he experienced academic difficulties during his junior year. The petitioner asserts that Student C would have had documentation of a disability at the time of his disciplinary proceedings but for St. Andrews' failure to follow up on those concerns. The petitioner argues that St. Andrews should have conducted an evaluation of Student C, or referred him for one at that time. In any event, the testimony in this case confirms that the behavior for which Student C has been disciplined is atypical for him, and school officials should accept that this aberration in his behavior is the result of a disability.

The petitioner takes the position that if he had been afforded the procedures required under the Regulations of the Board of Regents and Section 504, a St. Andrews team would have found that his misconduct was a manifestation of his disability and there should not have been a dismissal hearing. At the very minimum the impact of the disability on his misconduct should have been taken into account in determining what his punishment should be.

Counsel for the petitioner stressed during the hearing, if such was not the focus of his closing argument or memorandum, that deprivation of "due process" rights such as the right to receive adequate advance notice of the disciplinary charges and the right to cross examine witnesses who appeared before the St. Andrews' disciplinary committee rendered the school's decision fundamentally unfair. He notes that the decision and findings of the disciplinary committee were not even reduced to writing and provided to the petitioner. He argues that even if such rights might not be available to all students enrolled at the school, special needs students are entitled to such "due process" under the extra protections afforded to disabled students.

Finally, counsel for the petitioner takes the position that the punishment is unduly harsh and disproportionate to the offense. Given this student's lack of any prior serious disciplinary infractions, his academic record, and the ambiguous nature of the situation in which he found himself on the class trip where the misconduct occurred, his exclusion from graduation ceremonies is unduly harsh. The imposition of this sanction, he argues is unfair and in violation of applicable laws and regulations which would have required that consideration be given to his disability.

St. Andrews School

As a threshold argument, counsel for the school states that the Commissioner has no authority to review discipline imposed by private schools. While it may be that a right of appeal exists for a student enrolled in a public school who is subjected to suspension or other discipline, such is not the case with a private school student. St. Andrews submits that it has fairly applied the rules relating to student conduct found in its "Student and Parent Handbook-Upper School 2000-2001". These rules, which prohibit the consumption of alcohol by students at the school or during school-supervised activities, indicate that any alcohol violation will lead to a dismissal hearing. This rule was emphasized in the course of preparing for the trip, and again prior to departure for Italy. Student C has admitted that he was aware of and understood the rule prohibiting alcohol

consumption by students on the class trip. The credible testimony of two of the chaperones confirms that he violated this rule not once, but three times, the school submits.

A disciplinary tribunal was convened under the school's dismissal procedures. Prior to convening this panel, the petitioner's father was provided with a document which listed the infractions which would be the subject of the hearing. A second, revised document was provided to the petitioner, just prior to his appearance before the panel, but counsel argues that it did not substantially differ from the one provided well in advance of the hearing. At the hearing, information was received from school personnel, the petitioner and his father, and a recommendation made by the Dean of Students. Although the petitioner's counsel was not permitted to participate directly in the hearing, he was able to advise the petitioner and his father. Counsel submits that this process is consistent with that set forth in the handbook and complies with any and all procedural requirements imposed on private schools. The tribunal's ultimate decision, to dismiss Student C from school, was appealed to the headmaster, who modified this penalty to permit Student C to receive his diploma so that he might take advantage of a college scholarship. Thus, even if the process and decision were subject to the Commissioner's review, there has been no showing that St. Andrews has acted in a manner inconsistent with its rules and handbook, or that its procedures were unfair. If a court of competent jurisdiction were to have reviewed this matter under its general jurisdiction over "private associations," counsel argues that St. Andrews would be found to have complied with court-established guidelines as they relate to a private secondary schools. See Hernandez v. Don Bosco Preparatory High, 730 A.2d 365 (N.J.Super. A.D. 1999). Both the procedures it used, and the penalty imposed were fair, the school submits.

St. Andrews argues that it was not required to consider Student C as a disabled student for purposes of adding an additional element to this process - a meeting to determine whether the misconduct was a manifestation of the student's disability. St. Andrews acknowledges that it is contractually required to make a "manifestation determination" for students with disabilities prior to proceeding with the general discipline process. (St. Andrews' memorandum at page 8). It did not do so in Student C's case because he did not have a documented disability and did not have an IEP or a 504 plan.

As to the issue of disability, St. Andrews notes that it first received the evaluation submitted as evidence of a disability on May 18, 2001, some two months after the misconduct and one month after the headmaster made his final decision. The school does not agree that the May 10, 2001 evaluation of University Medical Group establishes that Student C has a learning disability and even if it did, the school takes the position that this learning disability does not constitute a "disability" as that term is used in federal and state anti-discrimination laws. The school's expert witness disagreed with the test selected as the measure of cognitive ability by the diagnostician who performed Student C's evaluation. The school argues that if his full scale I.Q. score is used as the measure of his cognitive ability, in accordance with guidance provided by the state Department of Education, Student C does not have a severe discrepancy between cognitive ability and

academic achievement in the areas of mathematics and written expression. His diagnosis also failed to take into account other relevant evaluative data, including his record of progress in the general curriculum at St. Andrews School.

Relevant federal and state statutes require more than just evidence of a learning disability for a student to qualify as “disabled.” Under special education law the learning impairment must be to such an extent that it interferes with the student’s ability to make academic progress. Under Section 504 the impairment must substantially limit a major life activity (including learning). Noting Student C’s ability to perform “quite well during several periods of his time at St. Andrews” without classroom modifications and without specialized instruction, counsel argues that the record more clearly establishes the absence of a legally-cognizable disability. Counsel submits that we have been presented with a case in which there are and were no indicators of disability. The school views the petitioner’s appeal as merely an attempt to establish disability “after the fact” of the school’s imposition of supportable discipline. Further, under 29 U.S.C.705 (20)(C) (iv) counsel argues that his use of alcohol prevents Student C from invoking the protections of any additional due process procedures such as a manifestation determination even if it were established that he was disabled under federal law.

Findings of Relevant Facts:

- St. Andrews School is a private, coeducational boarding and day school serving students in grades six through twelve who may have learning disabilities or may have experienced frustration or failure in other academic settings. Handbook, App.Ex.6, p.1; St. Andrews has a regular, college preparatory curriculum, in addition to providing special education services outside the regular curriculum. Tr. 5-25, pp.76-77.
- About forty percent of the students at St. Andrews have special education needs which are met by the school (Tr. p.40); the school does not itself conduct evaluations or assessments to determine the nature and extent of a student’s disability. Such students are referred to their parents for outside evaluation. Tr. 5/25 p.102.
- St. Andrews School does not receive federal funds Tr. 5-25, p.41; however, it incorporates procedural safeguards for disabled students under Section 504 of the Rehabilitation Act of 1973 and the Board of Regents Regulations Governing the Education of Children With Disabilities (December 14, 2000). Handbook, App.Ex.6 p.23, Resp.Ex.B1 and B2; Tr. 5-25 p. 41.
- Student C has attended St. Andrews School for three years and was enrolled as a senior during the 2000-2001 school year. He enrolled at the school as a sophomore after attending two other high schools in Rhode Island, repeating his sophomore year at St. Andrews. Tr. 5-25 p. 127-129. He did not receive special education services from St. Andrews, nor did he have a Section 504 plan.

- Prior to the class trip to Italy on March 8, 2001, Student C was a responsible, dependable and active member of the St. Andrews community. He had previously committed no serious infraction of school rules. Tr. 5-25, p. 120-121; App. Ex. 8.
- While in Italy on a St. Andrews class trip, Student C violated the school rule prohibiting the consumption of alcohol on March 8, 9 and 10, 2001. Tr. 5-23, pp. 91-92, 95,98, 128, 143, and 155. He was thereupon sent home while the rest of the trip members proceeded on the remainder of the trip. Two other St. Andrews students who had violated the rule on alcohol consumption were also sent home. Tr. 5-23, p.106.
- Following their return to St Andrews the three students were disciplined under the terms set forth in the Student Handbook (App.Ex.6) and the school’s Dismissal Hearing Procedures (Resp. Ex. B1) and Due Process Policies (Resp. Ex. B2) which are incorporated into the Student Handbook.
- Student C was dismissed from the school by the disciplinary panel, but after appeal to the headmaster, it was determined that this penalty would be modified. The headmaster decided that Student C would be excluded from school for the remainder of the year, permitted to finish his academic work and receive his diploma, but not allowed to participate in graduation activities or other functions such as the prom and awards night. See decision of the headmaster dated April 19, 2001. App. Ex.1. ¹
- On May 18, 2001 St. Andrews was provided with a neuropsychological evaluation performed on Student C on April 30, 2001 by University Medical Group of Providence Rhode Island. Tr. 5-25 p.199.
- Student C has learning disabilities² in the areas of written expression and mathematics, as well as a “cognitive inefficiency” in the speed with which he processes information. App. Ex. 5. Tr. 5-25, pp.9-28.
- Despite the presence of learning disabilities, Student C’s learning and academic progress have not been substantially limited over the course of his academic career at St. Andrews School. Tr. 5-25, pp. 94-95.

¹ The headmaster’s decision also required that Student C perform 70 hours of service to the school and write letters of apology to the trip chaperones.

² defined by the Board of Regents Regulations Governing the Education of Children with Disabilities (December 14, 2000) as a “severe discrepancy between achievement and intellectual ability” in one or more specified areas of learning. See Section 300.541 of the regulations.

DECISION

Given that graduation ceremonies at St. Andrews School are scheduled for this weekend, we must of necessity be brief in describing our conclusions in this matter, which are drawn after full review of the extensive record submitted and applicable law.

The Commissioner's jurisdiction to review the actions of private schools in their relationship with students is limited to instances in which the school's actions are alleged to have violated R.I.G.L. 42-87-1 et seq., entitled "Civil Rights of People With Disabilities". This state law prohibits discrimination on the basis of disability by any person or entity doing business in our state and incorporates in its definition of discrimination the prohibitions found in Section 504 of the Rehabilitation Act of 1973 as well as the Americans With Disabilities Act, 42 USC 12101. Under Section 42-87-5 the Rhode Island Department of Education is empowered and directed to hear all complaints of violations in the area of elementary and secondary education, pursuant to the hearing process utilized by the department for general educational appeals under Title 16, Chapter 39.

Of the many issues identified by the Petitioner, it is only the claim of discrimination on the basis of disability to which the department's jurisdiction applies in this matter. Therefore, the claims related to the school's failure to follow its handbook or fairly apply its provisions are not within our purview. Even the claim that expanded due process procedures for disabled students are required under the St. Andrews contract is not a matter over which the department of education has jurisdiction.³ We have nonetheless included in our findings of fact those facts which are relevant to these claims in the event that these matters are brought to a different forum, to facilitate expedited hearing. To the extent it may help resolve the differences between the parties, we would note that St. Andrews School provided sufficient due process to comply with the procedures and policies described in its handbook. It did not have a contractual obligation to accord Student C the extra step of a "manifestation hearing" for a disabled student because at the time of the hearing and even at the time of the appeal to the headmaster, Student C did not have disability status or a "documented disability".⁴ Counsel's contention that but for St. Andrews' failure to follow up on concerns expressed during the prior year by Student C's father he would have established his disability status and received a manifestation hearing are without merit. As counsel for St. Andrews has noted at footnote 2 of her memorandum, although St. Andrews provides special education services to some of its students, it is not responsible for the identification and evaluation of special education students under the law. The responsibility to follow up on concerns with respect to the presence of a disability was the responsibility of Student C's parents and his local school district. Thus, we find no merit to the claim that St. Andrews failed

³ We recognize that students whose placement under special education law by their school district or LEA is St. Andrews School have an entitlement to the protections of IDEA pursuant to state regulation. See Section 300.401 of the Board of Regents Regulations Governing the Education of Children With Disabilities. The record in this matter indicates that Student C was not at St. Andrews because he was placed there by his local school district.

⁴ This is not meant to imply that Student C has been shown to meet the definition of a disabled student under federal and state law. This subject will be dealt with later in this decision.

to provide Student C that to which he was entitled under his contract with St. Andrews School, a matter which as we have said is more appropriately placed before a court of competent jurisdiction. We would note that in the exercise of their discretion, school officials have invoked a harsh penalty which deprives this student and his family of participation in a very important ceremony, and one which in his case would celebrate the academic success he achieved in his senior year. However, as we have indicated this is a decision over which St. Andrews has clear discretion, and is an exercise of discretion on which even the courts seldom intrude. Given the serious nature of his misconduct, the penalty is supportable.

The question remaining and one over which the Commissioner does have jurisdiction is whether or not Student C has, subsequent to disciplinary process, established that he is a “person with a disability” as that term is used in 42-87-1(7) and whether St. Andrews’ refusal to modify his penalty to permit him to attend graduation constitutes unlawful discrimination under 42-87-2. R.I.G.L. defines a person with a disability as any person who:

- (i) Has a physical or mental impairment which substantially limits one or more major life activities;...42-87-1 (7)

Learning is included as a major life activity, and specific learning disabilities are included within the scope of the definition of “physical or mental impairment”. Thus, if Student C has been shown to have a specific learning disability, and the record indicates that this disability “substantially limits” his learning, he qualifies as a person with a disability and is protected from discrimination by this statute, as well as Section and 504 and the ADA, all of which use the same definition of “person with a disability”.

As our findings of fact indicate, we have accepted the testimony and report of Dr. Margaret A. DiCarlo, a clinical neuropsychologist who performed an evaluation of Student C, and whose report is submitted in evidence as Appellant’s Exhibit 5. This testimony and report provide documentation that Student C has learning disabilities, i.e. a severe discrepancy between intellectual ability and achievement in specific areas, and some difficulty with the speed with which he processes information. While we acknowledge the competent testimony of St. Andrews’ expert witness that the results of his evaluation do not demonstrate such severe discrepancy, the rationale of Dr. DiCarlo for choosing the indicators that she did has not been undermined in this record to such extent to render her opinion invalid. What Dr. DiCarlo did not address in her testimony, and which Mrs. Rosemary Grant did testify to at length was the fact that there is no indication that learning disabilities, if they are present, substantially limited Student C’s learning or academic progress at St. Andrews. Mrs. Grant noted that Student C had been able to attain honor roll status in his senior year, despite previous “ups and downs” in his academic career. Therefore, on the basis of this record, we are unable to find that Student C is a “person with a disability” under the law, despite our factual finding that the presence of learning disabilities was established by Dr. DiCarlo.⁵

⁵ We are constrained by the weight of the evidence in the record in this case and must observe that there is some indication that Student C has longstanding academic difficulties which were addressed by his

Even if it were established that Student C is a person with a disability and entitled to protection from discrimination under the laws we have cited, we cannot find that St. Andrews has discriminated against him solely by reason of his disability as prohibited by 42-87-2. The imposition of discipline was based on his infractions of the school's "no alcohol" rule. Although counsel argues that his violation of this rule was caused by and was a manifestation of his disabilities, the evidence submitted on this point was unconvincing. It is argued that the situation in Italy was "complex" and "ambiguous" and that Student C as a nineteen year old student, of legal drinking age in that country, was surrounded by others who were consuming alcohol. The trip was not alcohol-free. Non-student adults and chaperones not on duty were not restricted from drinking. It was established that there was wine on the dinner tables Friday night in Venice, and that one other student consumed wine at the table (with his mother's permission) that night. It is not clear that a trip chaperone sanctioned this student's alcohol consumption that night. In any event, this does not contradict the testimony of the St. Andrews witnesses who described essentially the same situation in Venice. This situation would not have sent a signal that the no alcohol for students rule would be disregarded or that there would be no punishment for violations of the rule. It certainly would not have authorized students to go out and drink alcohol in the bars of Venice that night or any other.

Testimony was presented that "he had a hard time processing all of this" and "he certainly didn't follow his best judgment". This does not establish that Student C's decision to drink was a manifestation of a disability, and in fact the weakness referred to is identified in the record as a difficulty with speed of processing information, not the ability to comprehend information. The record in this case, which demonstrates advance notice of the no alcohol rule, and repeated warnings with respect to its applicability to the class trip, negate any nexus between Student C's information processing inefficiency and his violation of the school rules.

For the foregoing reasons, the appeal is denied.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

June 8, 2001
Date

decision to undertake less demanding coursework in his senior year and put more effort into his academics. The testimony presented by St. Andrews was the only evidence presented as to whether the learning disabilities were severe enough to substantially limit Student C's learning or academic progress.