

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF EDUCATION

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In Re Student D. :
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Interim Order
And
Final Decision

Held: The process used by the North Providence School Department to select students for its 8th grade Advanced Placement Program has not been shown to be arbitrary and capricious; however, the process is inconsistent with applicable regulations governing the “Education for Gifted and Talented Children”.

DATE: October 5, 2001

Travel of the Case

On September 17, 2001 the attorney representing Student D. and his family filed an interim order request, challenging an administrative decision of the school department that he was ineligible for an eighth grade advanced placement program operating at the Birchwood School in North Providence. The request submitted to Commissioner McWalters sought Student D.'s immediate admission to the Birchwood advanced placement program, together with other relief and attorney's fees and costs. The matter was assigned to the undersigned hearing officer for hearing and decision. Hearings were held on September 24 and September 25, with the record closing on September 27, 2001 upon the submission of additional written argument by the parties. Given the time constraints applicable to interim order requests, the decision in this matter is based on the hearing officer's notes, the exhibits, and the post-hearing submissions of the parties.

Issues:

- Is the selection process and criteria used for admission to the Advanced Placement Program arbitrary and capricious?
- Is the selection process subject to the requirements found in The Regulations of the Board of Regents entitled "Education For Gifted and Talented Children" Adopted 1982, Reprinted 1992?
- If so, is the selection process consistent with the requirements of these regulations?

Findings of Relevant Facts:

- ◆ The school department operates a program known as the "North Providence School Department's Grade 8 English/Language Arts and Mathematics Advanced Placement Program" at the Birchwood School.
- ◆ The program is designed to meet the needs of eighth grade students throughout the district who demonstrate excellence and proficiency in math and English. Their program is accelerated in these areas in the eighth grade so that they can take high school math and English a year before it is traditional for them to do so.
- ◆ Enrollment in the program is limited to twenty-five students selected from throughout the North Providence school district. This is because there is only one class designated for the program, and the class size limitation in the collective bargaining agreement applicable to this grade level is twenty-five students.

- ◆ Students selected for the program take Algebra I, ninth grade English and a course in comparative cultures in the eighth grade at the Birchwood School, but are heterogeneously grouped for their other subjects. Their coursework at the high school level continues in sequence, with most of the students taking Calculus and a college course which satisfies their English requirement in the senior year. There is no foreign language component of the program. There are no Carnegie Units awarded to students for the Algebra and 9th grade English they take in the eighth grade.
- ◆ Students are selected for the program according to an academically competitive process, beginning with a review of their cumulative averages in math and English for the first three quarters of the seventh grade. Students with at least a 90 cumulative average in both English and mathematics proceed to the next steps of the screening process, with the written consent of their parents. These students are then tested in Math and English, and written nominations are solicited from their teachers and parents. The final pool of eligible candidates is then ranked by the assistant superintendent based on application of all the selection criteria pursuant to a formula. See Appellant's Ex. 1.
- ◆ After the selection and enrollment of the first twenty-five candidates, the remainder of the ranked seventh grade students are maintained on a waiting list, in the event any of the first twenty-five students should decline his or her place.
- ◆ Since Student D. had not achieved a cumulative grade of at least 90 in both math and English (he had received math grades of A-, B and B for the first three quarters of the seventh grade) he was not deemed eligible for further testing and did not proceed to the next step in the selection process. His mother's written request for an exception to the selection criteria was denied in writing by the Assistant Superintendent on May 1, 2001, but the Superintendent later permitted Student D. to participate in the testing component of the selection process as a "professional courtesy" to his mother, who is an administrator in the Warwick school system.
- ◆ At the completion of this testing process, the Superintendent indicated to Student D's mother in mid-June that he was number 30 or 31 on the list of students eligible for the Advanced Placement Program; however, sometime in late August the Assistant Superintendent indicated to Student D's mother that he was not on the waiting list because he was not a viable candidate, based on his mathematics average for the first three quarters of the seventh grade.
- ◆ The North Providence School Department receives no state funding for "gifted and talented" programs.¹
- ◆ Although Student D's mother testified that she felt that the grades he received for the second two quarters in math were due to complaints she had made to the school

¹ We take administrative notice of the fact that funding at the state level targeted for gifted and talented educational programs has not been provided in a number of years.

principal about certain inappropriate teaching practices of his math teacher, she did not initiate a process to invalidate these grades.

- ◆ There is only one math teacher in the seventh grade at the Ricci School where Student D. attends. Of the 100 students enrolled in the seventh grade at Ricci last year, only 8 were eligible for consideration for the Advanced Placement Program.² There were 170 students in the seventh grade last year at the Birchwood School and of those, 23 were eligible for consideration for the Advanced Placement Program.

Positions of the Parties

The Appellant

Counsel for the appellant submits that exclusion from the Advanced Placement Program on the basis of a single measure of academic aptitude constitutes arbitrary and capricious treatment by the North Providence school department. Screening students for the program on the basis of their cumulative math grade is arbitrary and invalid for several reasons, it is argued. First, there is a demonstrated disparity in the proportion of students eligible for consideration for the program from the Birchwood and Ricci schools this year. This disparity is attributable to the fact that all the Ricci students have a single teacher for math and those in her classes receive lower grades than their counterparts at the Birchwood school. Assuming a proportionate distribution of students according to their ability level in both schools, the inference should be drawn that an arbitrary grading system causes the disproportion in numbers of students eligible for consideration. Either the math grades of seventh graders at the Birchwood School are inflated, or those at the Ricci School are depressed. Reliance on such measures of proficiency is, therefore, unreasonable and arbitrary.

With respect to Student D's individual mathematics performance, counsel argues that his grade went from an A- to a B in the second and third quarters because of complaints his mother had lodged with the principal of the Ricci School. Student D's mother had expressed concern to the school principal with respect to classroom practices that she believed to be inappropriate and in violation of students' rights. In addition, there was an incident in which her son had fallen and been injured in the math teacher's class. There had been no adequate response to what was later assessed to be a serious injury, according to his mother. Student D's mother testified that she feels that his math grades for the second and third quarters are not, therefore, reflective of his true level of performance.

Counsel argues that reliance on Student D's grade in mathematics to screen him (as well as other students at the Ricci School) out of the Advanced Placement Program elevates the math teacher to the status of a "gatekeeper" of the program. The subjective assessment by a single individual of a student's performance operates to exclude the

² The record does not indicate how many students at Ricci were ineligible based only on their cumulative averages in math, rather than their averages in both subject areas..

student from the program. This is argued to result in a narrow, subjective, and potentially inaccurate, basis on which to make such important decisions about students. In Student D's case, counsel takes the position that consideration of other factors, such as his scores on the aptitude tests he was permitted to take, indicate that he is in fact well qualified for the Advanced Placement Program. In fact, he scored higher on these tests than some of the students who have been admitted to the program.

Student D argues that the process used to select students for the Advanced Placement Program is inconsistent with that set forth in the Board of Regents Regulations for Education of Gifted and Talented Students. The regulations require that districts use a minimum of three identification devices in selecting students for a proposed program. Counsel acknowledges that the regulations contain introductory language which limits their applicability to districts receiving funds from the state for gifted and talented programs. He argues, however, that the regulations must be read in pari materia with the statute, R.I.G.L. 16-42-1 et seq. Review of the present statute reveals no such limitation. The requirements set forth in regulation are, therefore, binding on all districts operating programs designed for gifted and talented students.

Even if the process set forth in regulation were not imposed as a requirement, it should nonetheless serve as a guide for what a reasonable, non-arbitrary selection process is. It is only through use of a minimum of three selection criteria that districts can insure that no student is overlooked and insure that sufficient data are provided on each student to substantiate decision making. Thus, in eliminating students on the basis of their grades alone, North Providence relies on inadequate information. Counsel submits that to make such important decisions with inadequate information is arbitrary and capricious and should be invalidated.

The North Providence School Department

Through counsel, the School Department submits that the Advanced Placement Program is not a program for "gifted and talented students". Our attention is directed to testimony which established that "gifted and talented" programs are typically designed to provide academic "enrichment" experiences to students who remain on their grade level. In contrast, the North Providence program accelerates the grade level of selected students in the two subject areas of English and mathematics. The sequence of their regular academic program is thus broken to permit these students to move on to grade nine work. This is argued to be equivalent to "skipping" a grade in these two subjects, to be distinguished from participating in enrichment activities at grade level.

Even if the program were considered a program for gifted and talented students, and governed by R.I.G.L. 16-42-1 et seq., the regulations promulgated by the Board of Regents pursuant to the statute do not apply to North Providence, which receives no state funding for this program. The regulations state specifically that they apply to programming for gifted and talented children conducted by school districts "only if such programs receive state funds appropriated to the Rhode Island Department of Education

for the specific purpose of implementing 16-42". It is undisputed that the town of North Providence receives no state funding for the purposes of implementing Chapter 16-42. Thus, counsel for the school department submits that the district is not subject to the regulatory requirement that it use a minimum of three identification devices to select students for the program. School officials are thus free to exercise their own professional judgement in developing a selection process and criteria for selection. School officials exercise the statutory authority given to school committees by R.I.G.L. 16-2-9 and 16-2-16 in doing so.

Counsel argues that the North Providence School Department has the flexibility to implement this program without intervention, absent a showing of arbitrary and capricious decision making on their part. Counsel argues that there has been no showing of arbitrary and capricious action, but only sound professional judgements. Our attention is directed to testimony that the screening process is designed to identify which seventh grade students have the academic aptitude to move ahead to Algebra I and Grade nine English in the eighth grade. The criteria measure, among other things, the student's readiness to study Algebra, since long-term negative effects have been found to result from moving students beyond their readiness for this subject. Testimony of the Assistant Superintendent was that the best indicator of success is the students' classroom performance. Further testing performed on those initially identified on the basis of their grades is a "safety net" to provide further data on the group initially identified. The ranking of students according to all of the selection criteria, including classroom performance, acknowledges the reality that the class size is limited to twenty-five students and therefore not all the students identified as eligible can ultimately be selected for the program. For students not accommodated by the program, the opportunity to take Calculus in the senior year of high school is not ruled out, but requires "doubling up" on two math courses in one year. Such students would also have the opportunity to take an Advanced Placement English course during the senior year. The school department takes the position that its program, as outlined in this record, is reasonable.

In the case of Student D, school officials found no basis to deviate from the procedures governing student selection. Although Student D's mother had registered complaints with the principal regarding his math teacher, there was no basis for those in charge of the program to conclude that his grade was inaccurate or affected by bias. Counsel notes that Student D's mother did not follow up on the suggested procedure to challenge the grade that he had received for the second and third quarters of the year. Citing this fact, the school department argues it reasonably relied on his math grade to exclude him from the program. There was no justification to admit him to the program despite his failure to meet the selection criteria.

DECISION

Based on the record in this matter we are prepared to issue an interim order. Counsel for both parties have indicated that they have no additional proof to present at a later hearing. Therefore, our interim order will be entered as a final decision as well.

The weight of the evidence at this hearing showed that the process in place to select students for the Advanced Placement Program is a fair and reasonable one. Professional educators may disagree³ on whether one or more criteria are needed to accurately identify eighth graders who would benefit from acceleration in math and English. Testimony in this case substantiated the decision to screen students for the program by looking only at their cumulative averages in these two subject areas. The use of aptitude testing and recommendations to verify the identification of this initial pool of candidates was shown to be well thought out, especially since the program substantially alters the traditional eighth grade program and the participants' course work in high school.

It would appear that at one point the superintendent was willing to give Student D the benefit of any doubt which may have existed about the legitimacy of his cumulative math grade, and he in fact permitted him to be tested for the program. However, the position taken by the school department at the hearing was that Student D continued to be ineligible for the program based on this grade. There was evidence submitted at the hearing of reasons for possible bias on the part of his math teacher, but no case of actual bias was proven; nor was there any proof submitted that the grade was inaccurate. Therefore the school department's decision not to make an exception for student D was not shown to be arbitrary or capricious. The district fairly applied its selection criteria and fairly and reasonably responded to a request for exception from those criteria. By agreeing to test Student D, the superintendent did not waive the right to require that all criteria for selection be met in making his ultimate decision on Student D's request to be admitted to the program.

The appellant has raised a legal argument which would nonetheless call into question the validity of the process utilized for selecting students for the Advanced Placement Program in North Providence. It is alleged that the process is inconsistent with the process for identification of "gifted and talented" students required by Board of Regents regulations. In responding to and ruling on this argument, we must acknowledge that the existing statute on "Education of Gifted Children" (16-42-1 et seq.) is less than clear. It is also possible that our interpretation of this statute in an adjudicative context differs from that made in any current regulatory context. Since we conclude that North Providence's program is a "program for gifted and talented students," we are necessarily drawn into the existing ambiguities of this area of education law.

The program described in the record as the North Providence School Department's Grade 8 English/Language Arts and Mathematics Advanced Placement

³ and in fact did disagree on the record at this hearing.

Program is “the type of educational program that will satisfy the needs of the gifted or talented child in grades pre-kindergarten through twelve (12)” as set forth in R.I.G.L. 16-42-1. The program is designed to satisfy the needs of eighth grade students who have demonstrated superior performance and aptitude in the areas of English and mathematics. Their regular or “traditional” eighth grade program is altered to provide instruction at an accelerated or advanced grade level in these two subject areas (together with a course in comparative cultures). This program facilitates the students’ ability to proceed to the higher-level course offerings at the high school. Counsel for the school department seeks to distinguish the Advanced Placement Program from a program for gifted and talented students on the basis that it advances grade levels of students in math and English, rather than simply enriching grade-level experience. He argues that programs for the gifted and talented more typically maintain students’ at their grade level. We view the evidence to be that the group of high ability students is provided high school-level coursework while remaining in the eighth grade at the Birchwood School. The program is delivered at a specific location to a single class of students drawn from throughout the North Providence school district. The selection process has several steps, including aptitude testing in the subject areas and compilation of modified Renzulli scales on each of the eligible students. Parental consent is required for participation. Selection is competitive, even among those identified as eligible, because of the limited number of seats in the program. Given these characteristics, we find that the Advanced Placement Program is a program covered by R.I.G.L. 16-42-1 et seq., “Education of Gifted Children”.

This statute was amended by the General Assembly in 1995 by Public Laws Chapter 95-307. Without going into an extended discussion of the specific changes made to the law in 1995, of significance was the removal of the statutory reference to a district’s “request for support from the state” in providing gifted and talented programs as a prerequisite to the application of regulations promulgated by the Board of Regents. The amendments added the provision that the Commissioner must approve programs for gifted and talented children in grades pre-kindergarten through twelve. The 1995 amendments also reduced the scope of the subjects to be covered by regulation to be consistent with the fact that there was no longer state reimbursement for such programs. Applicability of the regulations was not dependent on state funding, but was relevant in determining eligibility for approval by the commissioner. Unaltered was the existing reference to “Criteria for the identification of gifted and talented students in the categories in Section 16-42-1” as a required subject for regulations.

We take administrative notice of the fact that the Board of Regents Regulations entitled “Education for Gifted and Talented Children” (Reprint March, 1992) have not been amended since the 1995 legislative amendments to 16-42-1 et seq. Thus, the introductory provision confining applicability of the regulations to programs which receive state funds (page 3) remains unchanged. It is inconsistent with the law as amended and therefore invalid. The regulations apply to all districts operating programs for gifted and talented students. Section One 1. G. of the regulations remains unchanged as well, requiring local districts to use a minimum of three identification devices in selecting students for the proposed. program (page 5). The effect of the regulations is to constrain the North Providence school district to utilize three methods of identification in

selecting students for its Advanced Placement Program, rather than conducting an initial screening on the basis of cumulative grades alone. The selection process must also be accomplished by a team, in accordance with Section H of the regulations, rather than a single administrator.

Thus, while we find that the present selection process, and its implementation in this case was not arbitrary and capricious in any way, the process was inconsistent with regulatory requirements. Given that he was ranked number 30 on the eligibility list according to his (valid) math grade, and tests administered to him, Student D should be placed on such list until such time as a place in the program should open up. The issue as to whether the Advanced Placement Program satisfies the needs of sufficient numbers of students in the North Providence district is not fully developed in this record. This is an issue which should first be considered by the members of the North Providence School Committee, which has the statutory authority to put in place programs to meet the educational needs of the community and determine budgetary priorities. It may be that in considering this issue, the school committee will determine that there is a need for additional spaces in this program and will see fit to expand the numbers of qualified students accommodated by the program.

Kathleen S. Murray
Hearing Officer

APPROVED:

Peter McWalters, Commissioner

October 5, 2001
Date