

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF
EDUCATION

.....
:
In the Matter of Kerry H. :
:
.....

DECISION
AND
INTERIM ORDER

HELD: The issue in this case is whether or not the school district must continue to provide the petitioner with a Free Appropriate Public Education [FAPE] under the Individuals with Disabilities Education Act (IDEA) even though the school district has awarded the petitioner a regular high school diploma. We conclude that the school district must continue to provide the petitioner with FAPE during the pendency of due process procedures in this case. The school district is required to maintain and pay for the current educational services it has been providing to the petitioner until due process procedures have been completed.

DATE: November 16, 2001

Travel of the Case

This is an interim protective order hearing before the commissioner of education. Jurisdiction is present under R.I.G.L.16-39-3.2. The student in this case has claimed a special education due process hearing to contest her school district's decision that she is no longer entitled to receive a Free Appropriate Public Education (FAPE) from the district because she has graduated from high school with a regular education diploma.¹ This diploma was mailed to the petitioner on October 3, 2001.

The petitioner argues that she has not assented to such a change in her placement. She is therefore seeking an interim protective order from the commissioner to maintain what she regards as her *status quo* "stay-put" placement as a special education student, eligible to receive a Free Appropriate Public Education (FAPE) until the completion of all applicable due process procedures.

Issue

The issue in this case is whether or not the school district must continue to provide the petitioner with FAPE under the Individuals with Disabilities Education Act (IDEA) even though the school district has awarded the petitioner a regular high school diploma.

Positions of the Parties

Position of the Student

The petitioner, who is over 18, contends that graduation from high school with a regular education diploma, is, under state and federal regulations, a change in placement which cannot take place, absent her consent (and certainly not over her voiced objections) until all applicable due process procedures have been completed. She points out that she and her parents noted-- in writing-- on the last IEP tendered to them that they did not agree with this IEP which called for the termination of educational services on August 31, 2001. The petitioner argues, in essence, that her written objection to the last IEP that was tendered to her by her school district established a *status quo* placement. She contends that under the "stay-put" provision of the IDEA this *status quo* placement cannot be changed except by agreement or through completion of due process procedures - ---procedures which have not yet taken place.

¹ CFR 300.122

Position of the School District

The school district, on the other hand, contends that the petitioner was properly notified, in accordance with the regulations, of the district's intent to end the provision of educational services to her. The district proceeds to argue that if the petitioner disagreed with this change in placement, it was up to the petitioner to claim a due process hearing *before* the change in placement took place.

As we understand this matter, the school district further submits that if a claim for a hearing had been filed by the petitioner the *status quo* position of the parties would have become frozen at the point of filing of the claim, and that this "status quo" would not have "thawed out" until the completion of all due process procedures. The school district contends, however, that since no claim for a hearing was filed before the award of regular education diploma the district was free to make this change of placement, and to "exit" the student from the public schools.

The school district argues, as we understand it, that it only must obtain **written consent** from parents (or, as the case is here, the student, if the student has reached the age of majority) when the district is seeking permission to:

- (1) Initially evaluate a student or
- (2) Initially provides special education and related services to a student.²

Except in these two circumstances the school district argues that it has fulfilled all its responsibilities when it *notifies* parents (and student, if the student has reached the age of majority) of an impending change in placement. The district argues that only parental notice, and not written parental consent, is required before a change in placement is made. If the parents or the student object to the proposed change, the district argues that it is the parents' or the student's responsibility to note any objection by claiming a due process hearing before the change in placement takes place.

The school district argues that if the parents (or the student) don't file a complaint for a due process hearing the school district is free to implement the new placement, which then becomes the new *status quo* placement. In the present case the district argues that the *status quo* placement is now "no placement at all" since the student has been awarded a regular high school diploma, and thus has lost eligibility for FAPE.

² CFR 300.505

Applicable Regulations and Statutes

We believe that the following regulations and statutes, in pertinent part, are of particular importance to the resolution of this matter:

300.122 Exception to FAPE for certain ages.

(a) *General.* The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(3) (i) Students with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but who have not been awarded a regular high school diploma.

(iii) Graduation from high school with a regular diploma constitutes a change in placement, requiring prior notice in accordance with **300.503**.

300.503 Prior notice by the public agency; content of notice.

(a) *Notice.* (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability in a reasonable time before the public agency---

(i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child....

300.507 Impartial due process hearing: parent notice.

(a) *General.* (1) A parent or a public agency may initiate a hearing on any off the matters described in 300.503 (a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability or the provision of FAPE to the child).

(b) *Parent notice to the public agency.*

(1) *General.* The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice...to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(3) *Model form to assist parents.* Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

- (4) *Right to due process hearing.* A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c) (1) and (2) of this section.

20 U.S.C. 1415 (j) Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of such child....

Findings of Fact

1. On May 7, 2001 an IEP meeting concerning the petitioner took place to review services. The participants agreed to educational services continuing through August 31, 2001. Still the parents and the student indicated on the IEP that they "did not accept the education program outlined. The parties agreed to reconvene the IEP meeting on June 11, 2001.
2. On May 10, 2001, a school district administrator sent to the petitioner a notice of proposed change of placement proposing to graduate the petitioner on August 31, 2001.
3. On June 11, 2001 the IEP team, as scheduled, reconvened. However, an impasse was reached. The petitioner, her family, and her service providers wished to continue educational services under the auspices of the school district.
4. Through the summer and through September of 2001 the school district continued to provide services to the petitioner in accordance with her IEP.
5. The school district did not file a claim for a due process hearing and it did not schedule an IEP meeting during the summer, or during the month of September.
6. On October 3, 2001 the school district mailed a regular education diploma to the petitioner.
7. The school district has notified those who provide services to the petitioner that the school district will no longer pay for these services.
8. On October 18, 2001 the petitioner claimed a due process hearing.

Conclusions of Law

We agree with those courts that have adopted a "fact driven approach", rather than a mechanical approach, to determine what a student's *current educational placement* is for purposes of the "*stay-put provision*." ³ In such a fact driven approach the rule appears to be that:

Although parental consent technically is not required for a change in placement, if parents object to a new educational program, the stay-put provision prevents the change. Thus, parental acquiescence (but not consent) is required.⁴

In the present case the parents and the petitioning student have repeatedly signaled in writing, and at IEP meetings, their disagreement with the districts proposed termination of services. In our view it is this clear expression of disagreement with a proposed change in placement which will have the effect, in most cases, of indicating most clearly what "the last actual, peaceable, uncontested status that preceded [the] pending controversy..."⁵ was.

The last uncontested (i.e. acquiesced to) placement in this case was one in which the student was receiving services from the school district. This is the placement to which the stay-put provision attaches. In our view the date when the school district dropped the petitioner's diploma in the mail, or the date on which the petitioner requested due process, have, in this case, little relevance to determining the student's "then current educational placement" for purposes of applying the "stay put provision." Instead the petitioners "current educational placement " is the last placement prevailing before this placement controversy developed. This was a placement in which the petitioner was receiving FAPE from the school district.

³ *Board of Education of Oak Park & River Forest High School District Number 200 v. Illinois State Board of Education*, 10 F.Supp.2d 971, 128 Ed. Law Rep. 1052. (N.D.Ill.1998)

⁴ Gail Paulus Sorenson, *The Many Faces of the EHA's "Stay-Put" Provision*, 62 Ed.Law Reporter [833] (Nov. 22, 1990)

⁵ *Lidsey v. Board of Education of the City of Chicago*, 468 N.E. 2d 1019, 20 Ed. Law Rep. 650 (1984) While the cited case deals with the issuance of a preliminary injunction and not with special education we believe it correctly states the sort of equitable considerations which the "stay-put" provision is a least partially based.

Conclusion

We conclude that the school district must continue to provide the petitioner with a Free Appropriate Public Education [FAPE] during the pendency of due process procedures in this case. The school district is required to maintain and pay for the current educational services it has been providing to the petitioner until due process procedures have been completed.

Forrest L. Avila
Hearing Officer

APPROVED:

Peter McWalters, Commissioner

November 16, 2001
DATE