

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

FRANCES C.

V.

DEPARTMENT OF EDUCATION

Decision

Held: Commissioner does not have authority to act on cross-district transportation variance request in light of statute's invalidation on constitutional grounds.

Date: August 30, 2004

Introduction

This is a parent's appeal of an opinion letter by the Commissioner of Education concerning a bus transportation variance request.¹

For the reasons stated below, we must deny the appeal.

Background

Appellant's family resides in North Smithfield. Appellant's daughter wishes to attend an all-girls school, St. Mary Academy – Bay View, in East Providence. North Smithfield and East Providence are in different bus regions under the cross-district student transportation statute.² As a result, Appellant invoked the variance procedure in R.I.G.L. 16-21.1-3(a), which states:

Variations to require a city or town to provide bus transportation to a pupil who attends a school, except a special education facility, outside the region in which the pupil resides shall be granted by the commissioner of elementary and secondary education if he or she finds that:

- (1) There is no similar school within the region;
- (2) The transportation is necessary to provide an educational opportunity which the pupil has a right to pursue; and
- (3) The school building which the pupil attends is within fifteen (15) miles of the city or town of which the pupil is a resident.

In a June 14, 2004 opinion letter, the Commissioner of Education denied the transportation variance request. The Commissioner did so on the basis of the United States First Circuit Court of Appeals' decision in Members of Jamestown School Committee v. Schmidt,³ which held the variance provision of § 16-21.1-3(a) to be unconstitutional. As noted in the Commissioner's opinion letter, the Court found that the statutory variance procedure constituted an excessive entanglement with religion and therefore violated the First Amendment. The Court invalidated §16-21.1-3(a) in its entirety and thereby left the subject to the Rhode Island legislature. The opinion letter

¹ The Commissioner of Education designated the undersigned-hearing officer to hear and decide the appeal. A hearing was held on August 25, 2004.

² Specifically, R.I.G.L. 16-21.1-2.

³ 699 F.2d 1 (1983), cert. denied, 464 U.S. 851 (1983).

concluded by stating that “Since (1) the Court has declared R.I.G.L. 16-21.1-3(a) to be unconstitutional and (2) the General Assembly has never acted since 1983 to re-enact this variance in a more narrowly secular form, the Commissioner is powerless to act under it . . .” [Department of Education Exhibit 1].

Positions of the Parties

Appellant contends that its request presents a secular, not religious, issue in that the family feels that it is in the child’s best interest to be educated in a same-sex school. Appellant argues that its request does not require the Commissioner to engage in a comparison of the content and curricula of religious programs that was found to be constitutionally objectionable by the First Circuit. Because this case meets the three variance criteria and does not raise any church-state issue, Appellant asserts that the Commissioner should grant the family’s request.

The Department of Education reiterates that the Court struck down §16-21.1-3(a) in its entirety. The Court did not attempt to save any part of the variance provision by severance or by finding that the provision could stand insofar as it was applied to purely secular matters. Furthermore, the General Assembly has not acted to redraft the provision in light of the Court’s decision.

The North Smithfield School Committee, a party in interest in this matter, contends that the Commissioner’s opinion letter correctly addressed Appellants’ request.

Discussion

We have reviewed the First Circuit’s decision in the Jamestown case in light of Appellant’s assertions at the hearing. While Appellant’s arguments make the case that §16-21.1-3(a) could be applied in a more limited, secular-based way, the fact remains that the Rhode Island legislature has not redrafted the variance provision in such a manner. We can only speculate as to why, but there is no doubt about the effect of the Jamestown decision. The Court clearly invalidated the entire variance provision and rendered it inoperative. As the last word in this matter, the Court’s decision stripped the

Commissioner of any authority to act on Appellant's request. Accordingly, we must deny the appeal.⁴

Paul E. Pontarelli
Hearing Officer

Approved:

Peter McWalters
Commissioner of Education

Date: August 30, 2004

⁴ In deciding this case, we have assumed for the sake of argument that a school's same-sex status is a relevant consideration under the statute's "no similar school" requirement, and that St. Mary Academy - Bay View is actually within 15 miles of the town of North Smithfield.