

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

L. DOE

v.

BURRILLVILLE SCHOOL COMMITTEE

Interim Order and Decision

Held: Special-education student's current educational placement is unavailable; request for "stay put" order is therefore referred for expedited hearing before due process hearing officer to determine appropriate interim alternative educational setting.

October 3, 2005

Introduction

This matter concerns a request for an interim-order hearing to determine a “stay put” placement for student Doe.¹

Background

Student Doe is a 10th-grade special-education student. He has been diagnosed with nonverbal learning disorder, attention deficit hyperactivity disorder, and depression.²

An individualized education program (IEP) was developed for Doe in January 2005.

During his two years of attendance at Burrillville High School, Doe has displayed insubordinate and aggressive behavior toward staff and students. On one occasion in 2003 he walked out of the school building and stood in traffic on the street. During the 2004-05 school year, Doe’s aggressive behavior escalated to physical contact with other students. Doe received numerous suspensions from school for these behaviors.

Following an incident with a student in February 2005, Doe was taken out of school. Home tutoring was arranged as well as a neuropsychological evaluation. In April 2005, Doe’s IEP was amended to provide that he “will continue with tutoring until evals are completed or the school year ends, whichever occurs first.” [Joint Exhibit 4]. Correspondence between counsel for Doe’s family and the school district reflects a disagreement as to whether home tutoring would constitute a “stay put” placement.

The neuropsychological evaluation was completed in June 2005.³ Doe subsequently attended a summer program at a school in Connecticut, to which he was admitted as a probationary day student. An IEP meeting was held on September 2, 2005, at which the parties agreed to a day placement for Doe at the Connecticut school.

On September 6, 2005, Doe was asked to leave the school in Connecticut. The formal notice of this action cited shortcomings in Doe’s “interpersonal and social skills,”

¹ The Commissioner of Education designated the undersigned hearing officer to hear and decide the request. A hearing was held on September 26, 2005.

² The record also contains a reference to a child psychiatrist’s diagnosis of intermittent explosive disorder.

³ The evaluation’s recommendations included several supports, strategies and accommodations to address Doe’s “nonverbal learning disorder, his significant social deficits and secondary inflexible and problematic behavior . . .” [Joint Exhibit 5].

adding that “where he is in a small group setting and is supervised by a teacher, he seems to do well. But [he] appears to lack the skills to negotiate his way through situations with larger groups and less supervision.” [Joint Exhibit 8].

An IEP meeting was held on September 19, 2005. Doe’s family requested that home tutoring be authorized until such time as an appropriate placement could be found. The school district recommended a 45-day out-of-district placement for Doe. Following the disagreement, Doe’s family filed this request seeking a “stay put” placement pending the resolution of the dispute by a special-education due process hearing officer.

Positions of the Parties

Petitioner contends that, in the absence of an available facility which deals with nonverbal learning disorders, Doe’s “stay put” placement is home tutoring, as set forth in the April 2005 amendment to his IEP. Petitioner argues that it is not appropriate for Doe to attend Burrillville High School given his history of poor interaction with peers there. Doe needs an opportunity to interact positively with his peers, and until that setting is found, he should receive academic instruction at home. Petitioner maintains that Doe is receiving appropriate treatment and supervision during the day, and that home tutoring should be his “stay put” placement while a due process hearing officer determines an appropriate placement.

The School Committee contends that Doe’s amended IEP clearly makes home tutoring a temporary service, not to last beyond June 2005. It asserts that Doe needs an educational environment with intensive supports, and his well-being may be jeopardized if he were to remain at home. The Committee maintains that a home tutoring placement should be used for medical reasons only. Finally, it argues that a review of the IEPs in this case shows that Burrillville High School was the last agreed-upon placement for Doe. The High School therefore constitutes the “stay put” placement.

Discussion

Provision for a “stay put” placement once again appears in the procedural safeguards section of the recently-reauthorized Individuals with Disabilities Education Act (IDEA). The Act states that

Except as provided in subsection (k)(4), 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 the child . . . until such proceedings have been completed.⁴

The “stay put” provision focuses on the operative placement in which the child is actually receiving educational services at the time the dispute arises. The application of the “stay put” provision in this case involves circumstances similar to that of Wagner v. Board of Education of Montgomery County, Maryland,⁵ where the 4th Circuit Court of Appeals observed that

In the typical section 1415(j) case, the school board is attempting to remove the child, whether through expulsion or by other means, from his or her current placement and the parents are seeking to stop that action. This case is atypical in that the School Board is not trying to change [the child’s] placement; the placement has simply become unavailable through no fault of the School Board.⁶

In Wagner, the 4th Circuit reviewed a district court’s holding that when the student’s then-current placement became unavailable, the student’s parents were entitled to an automatic injunction under the “stay put” provision requiring the school district to provide an alternative comparable placement. The court initially noted that the “stay put” provision is designed to prohibit a school district from removing a child from his or her current placement during a due process hearing. It then stated that

By its terms, section 1415(j) does not impose any affirmative obligations of a school board; rather, it is totally prohibitory in nature. Moreover, section 1415(j) makes no exception for cases in which the ‘then-current educational placement’ is not functionally available. In other words, the question of availability is entirely irrelevant to the task of identifying the child’s then current-educational placement, and it is only the current placement,

⁴ Section 615(j) of the reauthorization or 20 U.S.C. 1415(j).

⁵ 335 F.3d 297 (2003).

⁶ Id. at 300.

available or unavailable, that provides a proper object for a ‘stay put’ injunction. Ordering the child to enter an alternative placement, as the district court did here, causes the child not to remain in his or her then-current educational placement, a result that contravenes the statutory mandate and turns the statute on its head by transforming a tool for preserving the status quo into an implement for change.⁷

The court in Wagner further explained that if the parties are unable to agree on a new placement, §1415(i)(2)(B)(iii) of the IDEA empowers a district court to order a change in placement. Injunctive relief under §1415(i)(2)(B)(iii) is not automatic, however, and the party seeking the change in placement must demonstrate that such action is warranted under the standards generally governing requests for preliminary injunctive relief. Finally, the court stated that district courts should proceed with caution in this area “given the statute’s strong presumption, expressed in section 1415(j), in favor of the status quo and its provision for administrative hearing before adjudication in federal court.”⁸

Rhode Island General Law 16-39-3.2 authorizes the Commissioner of Education to issue interim protective orders to ensure that children receive an education in accordance with state and federal laws and regulations. In dealing with IDEA, we have exercised our interim order authority to entertain requests for “stay put” orders while due process hearing procedures were pending. Our activity in this area has been limited to the automatic injunctive relief discussed in Wagner, however.⁹ Our restraint is based on the same considerations noted in Wagner -- IDEA’s presumption in favor of the status quo and its provision of an impartial due process administrative hearing system to resolve disputes.

It is uncontroverted that the agreed-upon placement at the time the dispute in this case arose was the day placement at the Connecticut school. As in Wagner, the dispute concerns the course to be taken after the current educational placement became unavailable. The Connecticut school is the “stay put” placement, however. Because

⁷ Id. at 301-302.

⁸ Id. at 303.

⁹ See John A.U. Doe v. Coventry School Committee, March 4, 1994; In the Matter of John B.B. Doe, July 29, 1994; Jane A.C. Doe v. North Kingstown School Committee, March 28, 1995; Student R.C. v. Cranston School Committee, March 11, 2004.

Doe’s “stay put” placement is no longer operative, we are being asked to change Doe’s placement, not preserve the status quo. We decline to do so in an interim-order setting.

Instead, we turn to the subsection (k)(4) exception to the “stay put” provision. Subsection (k) authorizes a school district to place a child with a disability who violates a code of student conduct in an interim alternative educational setting. Subsections (k)(3) and (4) provide for expedited due process hearings for appeals by parents under this subsection and for requests by local educational agencies which believe “that maintaining the current placement of the child is substantially likely to result in injury to the child or to others . . .” The expedited hearing must occur within 20 school days of the date the hearing is requested and a decision must be rendered within 10 school days after the hearing. By referring this dispute for an expedited due process hearing, we honor the intended purpose of the “stay put” provision and utilize the administrative mechanism designed by Congress to resolve disputes such as this.¹⁰

Conclusion

Due to the unavailability of student Doe’s current educational placement, we order that the request for a “stay put” placement be referred to a special-education due process hearing officer for an expedited hearing to determine an appropriate interim alternative educational setting pending the resolution of the parties’ due process proceeding.

Paul E. Pontarelli
Hearing Officer

Approved:

Peter McWalters
Commissioner of Education

¹⁰ To expedite matters even further, we stand ready to transfer the record of the September 26th hearing to the due process hearing officer in order to avoid duplication of effort in this case.

October 3, 2005