

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....

Student Doe

v.

**Davies Career & Technical
High School**

.....

DECISION

Held: Student Doe's parents are entitled to reimbursement for a portion of the litigation expenses they incurred in their appeal to the Commissioner on the issue of the validity of their daughter's grade in Cosmetology and her eligibility to enter her senior year at Davies.

DATE: October 26, 2007

Travel of the Case

Student Doe's mother filed an appeal with Commissioner Peter McWalters on July 6, 2006. The matter was heard and a decision issued on August 25, 2006. The Commissioner ruled that Student Doe's failing grade in Cosmetology was due to the school's failure to provide her with extended time on tests as required by her Individualized Education Plan (IEP). The decision directed that her grade in Cosmetology be raised from a 67 to a passing grade of 70 and that she be allowed to begin her senior year at Davies. Counsel for Student Doe's parent filed a written Motion for Attorney's fees, to which the school objected, at the conclusion of her case at the hearing on August 15, 2006. Because of the fact that the school year was about to begin, further hearing and argument on the issue of attorney's fees was postponed until after a decision on the merits was issued. In his August 25, 2006 decision the Commissioner directed the parties to attempt to resolve the issue of attorney's fees by agreement, which they were not able to do. Further hearing was held on April 11, 2007. Written arguments were submitted on May 16, 2007 at which time the record closed.

ISSUES

Did the initial position of the Davies Career & Technical High School have a reasonable basis in law and fact?

Did the position of the Davies Career & Technical High School in the proceedings before the Commissioner have a reasonable basis in law and fact?

Findings of Relevant Facts¹

- ♦ The letter of appeal submitted by Student Doe's mother on July 6, 2006 does not allege that Student Doe was denied the accommodation of extended time on tests in her Cosmetology class. The letter of appeal (Davies Ex.B) makes no allegations with respect to the failure to follow this student's IEP, but asserts the existence of other facts which constitute a "pattern of arbitrary and capricious decisions" by her Cosmetology instructor. Davies Ex.B.
- ♦ On the first day of hearing, several issues were raised by Student Doe's counsel, including sufficiency of the notice provided to Student Doe's parents of her failing grade, availability of summer school for students failing shop class, school policy on absences and make up, validity of the policy on repeating the entire year when a student fails shop class, and the existence of a personality conflict between this student and her teacher. Tr. Vol.I pp. 23-119.

¹ The findings of fact in the Commissioner's decision of August 25, 2006 are hereby incorporated in this decision

- ◆ During the testimony of Ms. Vicki Phelps, the supervisor of special populations at Davies, the issue of Student Doe's IEP and compliance with the required accommodations was raised for the first time. Tr. Vol.I.pp.119-137.
- ◆ Ms. Phelps testified that there had never been any notice to her that Student Doe was not receiving the accommodations called for in her IEP. Tr.pp. 124-136.
- ◆ The last witness called on the first day of hearing (August 2, 2006) was Student Doe's Cosmetology instructor. She testified that at no time did she provide Student Doe with extended time when testing her on the practical components of the course. In reviewing Student Doe's grade reports, she attributed many of the zero's Student Doe had received to the fact that she did not have time to complete the activity being assessed. This was especially true when there was a sequence of three or four activities that were skills tested on the state licensure test in Cosmetology. Tr.Vol.I. pp.154-183.
- ◆ The cosmetology instructor's testimony was that Student Doe ran out of time when doing a sequence of tasks on which she was graded, and received zeros on those tasks she did not get to or lacked sufficient time to complete. This was reflected in an exhibit submitted as a Joint Exhibit on August 2, 2006, e.g. grade reports in Cosmetology for the four quarters of the school year. Joint Ex.1.
- ◆ Student Doe was not provided with extended time for tests in the practicum component of her Cosmetology class even though her instructor was aware that her IEP called for extended time when Student Doe needed it. This was due to her instructor's mistaken belief that Student Doe could not receive extended time when the same tasks were performed as part of the state licensing exam, and her opinion that the time limits for licensing purposes should be applicable in the cosmetology program at Davies, so that students would be well-prepared for the licensing exam in June of their senior year.
- ◆ After the August 2, 2006 hearing, the position of the Davies School did not change with respect to the validity of Student Doe's grade in Cosmetology, and it continued to take the position that, because of her Cosmetology grade, she was not eligible to proceed to her senior year. The School continued to take this position when the hearing was reconvened on August 15, 2006 and additional evidence and arguments were received. Tr. Vol.II.
- ◆ At the outset of this case, given the allegations of fact contained in the letter of appeal dated July 6, 2006, the position of the Davies School, that Student Doe's grade in Cosmetology was valid and that she was not eligible to advance to her senior year had a reasonable basis in law and fact.
- ◆ After the August 2, 2006 hearing, the position of the Davies School that Student Doe's grade in Cosmetology was valid, or alternatively if it was invalid, that she should nonetheless repeat her entire junior year at Davies² did not have a reasonable basis in law and fact.

² Davies did advance a "fall back" position at the August 15, 2006 hearing. This position assumed that Student Doe's IEP was violated because she did not get extended time on the "timed" tests covering skills

- ♦ The total net worth of Student Doe and her parents at the time of the hearings before the Commissioner's designee was less than five hundred thousand (\$500,000.00) dollars. Doe Ex.8 and 9.

Positions of the Parties

Student Doe

On behalf of Student Doe and her parents, counsel argues that this is a situation in which the application of the Equal Access to Justice for Small Businesses and Individuals law, R.I.G.L. 42-92-1 et seq. calls for an award of reasonable attorney's fees. The actions of the Davies School, primarily those of this Student's cosmetology instructor, constitute a knowing and willful violation of the provision of her IEP which entitled her to extended time in testing. During the entire 2005-2006 school year the Cosmetology instructor chose to disregard the extended time provision when testing the practical application of cosmetology skills. Her rationale, that these tests simulated the conditions which students would encounter when they took the licensing exam, had no basis in fact. Clearly, the materials emanating from the Rhode Island Board of Hairdressing and Barbering envisioned extended time for qualified disabled individuals. Even if strict time limitations were applicable to all candidates for licensure, in the secondary school setting it is the provisions of the IEP which are controlling.

It was the unreasonable, unjustified action of the instructor, supported by school administrators both prior to and during this proceeding, which caused Student Doe to receive a failing grade in Cosmetology. The consequence of this failing grade would have been, under the school's policy, the requirement that she repeat her entire junior year, even other course work in which she had been very successful. Davies clearly did not act with substantial justification in giving Student Doe failing grades for the 2005-2006 school year. Mr. and Mrs. Doe have established that their net worth qualifies them for an award of reasonable litigation expenses pursuant to the Equal Access to Justice Act. They should be awarded reasonable attorney's fees in accordance with this law.

which would be tested at the time of the licensing exam. The argument was that it was not in Student Doe's best interests to pass the course and proceed to her senior year because she had not yet been able to demonstrate proficiency in the various skills she would need. Davies presented information on certain remedial work that would assist Student Doe in succeeding during her senior year. Tr.Vol.II pp.26-32.; Davies Ex.C. Her instructor testified that another year as a junior would help her to succeed in her senior year. Davies' counsel argued that even if the provisions of her IEP were not complied with, a better remedy would be to re-administer the timed tests, with a reasonable amount of extended time, and have a neutral observer grade her work. The decision of the instructor that she was not ready to enter her senior year was entitled to deference because she was attempting, in good faith, to ensure that Student Doe met the standards of proficiency to be a senior, and ultimately, to be a good cosmetologist. Vol.II, pp.67-68.

Davies

Counsel for the school submits that the Equal Access to Justice Act is not applicable to these adjudicatory proceedings. A plain reading of the language of the statute indicates that the “agency” referenced in R.I.G.L. 42-92-3 is the same agency throughout. The “agency” that conducts the adjudicatory proceeding is the “agency” which must be found to have acted with substantial justification to avoid triggering a fee award. In this case, the agency conducting the adjudicatory proceedings is the Department of Education, yet it would be illogical to then assess whether the Department of Education acted with substantial justification, or assign to this agency the costs of reimbursing Student Doe’s parents for their litigation expenses. Similarly, if Davies is the “agency” as that word appears in Section 42-92-3, Davies did not conduct the adjudicatory proceedings here and it has no authority to do so under state law. Thus, when one seeks to fit the facts here in to the framework of the Equal Access to Justice Act, it simply does not fit. A strict construction of the language of the statute would require clear applicability to the situation at hand and no reasonable construction of the language of 42-92-3 can be made which would enable the “agency” to be both the Department of Education and the Davies School.

A second argument is that even if the Equal Access to Justice Act is applicable, Davies was substantially justified both in its actions leading to this proceeding and in the proceeding itself. Even if it is conceded that Davies’ position regarding extended time was “not necessarily correct”, the cosmetology instructor had a reasonable and good faith belief that the state would not permit extensions of time on the practical skills portion of the cosmetology licensing test. Based on this belief, and her reliance on documentation she had received from the state licensing board (Davies Ex.E “Examiner’s Manual”) she endeavored to have her students prepare for the licensing exam in the tests of practical skills they took with her as part of their cosmetology class. Her approach had found success with past students, including those with disabilities, who had passed the licensing test³ without extended time.

Further, to whatever extent Student Doe was done a disservice, some of the fault lies with the State of Rhode Island Board of Barbering and Hairdressing. It was this board which certified Davies as an approved school for purposes of providing students with the requisite hours of instruction in hairdressing and cosmetology and certified its curriculum. A career and technical high school, such as Davies, has a focus on preparing students to take and pass the relevant state licensing exam, in this case the exam in hairdressing and cosmetology. Thus strong reliance was placed by the instructor on the Examiner’s Manual provided by the board through the Department of Health. The Manual could not be more explicit in its direction that no time adjustments be made, and the instructor followed these directions in administering tests which simulated the licensing exam, within the time constraints indicated in the Examiner’s Manual (Davies Ex.E) It was not until October 17, 2006 that a letter of clarification was issued by the Board, indicating that it had approved up to double time to special needs students taking written and practical examinations. Prior to this clarification and during the entire time of these proceedings, Davies clearly

³ And, we infer, passed her class at Davies

acted reasonably in relying on the Examiner's Manual, which clearly prohibited extended time.

Furthermore, Davies submits, an award of attorney's fees in this case would be unjust. In the decision on the merits, the hearing officer found that the staff at the Davies School had demonstrated its "concern, responsiveness, and expertise" for Student Doe and that school staff were committed to helping her realize her goal of graduating and becoming a licensed cosmetologist. An award of reasonable litigation expenses under the Equal Access to Justice Act is premised on a finding of arbitrary and capricious action by the public agency. How could the conclusion that school officials have acted in Student Doe's best interests be reconciled with a finding, at this stage of the case, that Davies' action was arbitrary, capricious, and unjust?

In addition, if one were to try to determine responsibility for the mistake of the Cosmetology instructor, and her adherence to the strict time limits she thought applied to both the licensing test and testing in her program at Davies, it would be the Department of Health. It is this state agency which wrote and distributed the Examiner's Manual on which the Davies instructor mistakenly relied. Finally, Davies agreed from the outset to expedite the Commissioner's hearing in this matter so that a determination of Student Doe's entitlement to proceed to her senior year could be made. The school's Board of Trustees had not even had a chance to review the matter. This, again, is an indication that the school's primary objective was Student Doe's best interests. Such circumstances would make an award of attorney's fees in this matter unjust.

DECISION

As determined when this matter was heard on the merits, Student Doe's Cosmetology instructor mistakenly thought that the provision in her IEP for extended time on tests was not applicable to tests in the practical component of her program. Elements of confusion and mistake persisted right up to the point at which evidence was taken in this matter on August 2, 2006. At that point, it became clear that because of this misunderstanding, Student Doe had failed to receive the accommodation that was provided for in her IEP, that this situation had persisted over the course of the entire school year, and that her failure in the course was clearly due to the unavailability of extended time. Up to August 2, 2006, the actions and position of the Davies School were entirely reasonable. Evidently, special education and guidance staff had no notice that the required accommodation was not being provided, according to the testimony received at the August 2, 2006 hearing. The record does not indicate whether Student Doe's parents were aware of the situation, but their letter of appeal filed on July 6, 2006⁴ raised no issue with respect to noncompliance with her IEP. Based on the facts known prior to the hearing, Davies officials had every reason to take the position that Student Doe's failing grade was a valid and accurate assessment of her performance and to insist that she repeat her junior year, in accordance with school policy.

⁴ Student Doe's parents did not enlist the aid of an attorney until just days before the hearing.

After the completion of the August 2, 2006 hearing, the only fact still not evident on the record was the availability of an extended time accommodation for candidates sitting for the state's licensing examination in cosmetology⁵. This fact was relevant in the licensing context, and as pointed out in the decision on the merits would be important information for a technical high school intent on preparing disabled students to take the cosmetology licensing exam. Licensing rules are not binding in a public education context and cannot negate the provisions of an IEP. As noted in the decision on the merits, Davies had a clear responsibility to honor the IEP's provisions to provide Student Doe with extended time on all tests, including assessments of her cosmetology skills. This was required for Davies to provide Student Doe with a free, appropriate public education. At the end of the August 2, 2006 hearing, the school's failure to comply with the IEP had been conclusively established by Davies' own witness (the instructor), and grade records⁶ indicated the disastrous impact this had on Student Doe's grade. It was at this point the Davies School's position that Student Doe was required to repeat her entire junior year because of a grade of 67 in Cosmetology became untenable.

There was no substantial justification for Davies' position after the August 2, 2006 hearing. We find, under the applicable language of the Equal Access to Justice Act, that the "initial position" of the Davies School had a reasonable basis in law and fact but that its "position in the proceedings" after August 2, 2006 lacked a reasonable basis in both law and fact. The school continued to point to the licensing "Examiner's Manual" (Davies Ex. E) as a binding document and/or as a basis to excuse non-compliance with the extended time provision in Student Doe's IEP. Neither of these propositions is reasonable in an education law context. Davies' "position in the proceedings" would, under a strict application of 42-92-3, trigger an award for all of the reasonable litigation expenses incurred by Student Doe's family. Special circumstances would make such an award unjust.

Section 42-92-3 of the Act indicates that the adjudicative officer may, at his or her discretion, deny fees or expenses if "special circumstances" make an award unjust. The instructor's noncompliance with the IEP, while regrettable, was due to her mistake and misunderstanding. According to the record in this case, her failure to provide extended time on tests was not raised with school officials by Student Doe's parents at any time prior to August 2, 2006 when it was raised by their attorney. The letter of appeal made no mention of noncompliance with the IEP and attributed Student Doe's failing grade to other specified conduct of her instructor that constituted "a pattern of arbitrary and capricious decisions". The fact which transformed the position of the school to one without substantial justification was advanced for the first time on August 2, 2006⁷. These circumstances warrant the reimbursement of reasonable attorneys fees incurred by Student

⁵ There was documentation in the record which indicated that extended time was available to licensing candidates with disabilities requiring such an accommodation and a second document utilized by the instructor indicating that time limits specified for each task were to be strictly adhered to. After the hearing, both documents were authenticated, and a clarification issued from the Board that extended time on the licensing exam was available, up to double the amount of time allotted for the written and practical examinations. Davies Ex.F.

⁶ Coupled with testimony of the cosmetology instructor

⁷ There is no discovery process in administrative hearings before the Commissioner.

Doe's parents only from August 2, 2006 forward, up through the submission of memoranda on May 16, 2007. Had Davies received actual notice of the IEP claim and the facts supporting it prior to the hearing, and still taken the position it did, an award of litigation expenses from the outset would be made. However, the circumstances of this case (the lack of notice) make an award of the family's total fees unjust.

The Commissioner has indicated in the past that there is some uncertainty as to the applicability of the Equal Access to Justice Act in hearings at the Department of Education. See Ugurhan K. Akturk Kosereis v. DCYF⁸ In a more recent case, however, the Commissioner entertained a request for reimbursement under this statute. See Charland v. Pawtucket School Committee, decision of the Commissioner dated November 26, 2001⁹. Davies' argument that the Equal Access to Justice Act applies only when the "agency" conducting the adjudication is the same "agency" whose actions must be reviewed for substantial justification is well taken. From a grammatical standpoint, it is a strained construction for two different agencies to be involved. However, we would note that in the case of Taft v. Pare¹⁰ our Supreme Court took a more flexible approach in applying this language, and confirmed an award of reasonable litigation expenses pursuant to this same statute against the Registry of Motor Vehicles. The "adjudicatory proceedings" in Taft v. Pare actually took place in the District Court (not even an "agency" as defined in the statute) and the "agency" found to have acted without substantial justification was the Registry of Motor Vehicles. Given the statute's remedial purpose and the liberal construction it has been given by the Court, application of this law to hearings before the Commissioner seems appropriate despite grammatical impediments.

For the foregoing reasons Student Doe and her parents are entitled as prevailing parties to reasonable attorney's fees for those fees incurred subsequent to the August 6, 2006 hearing to date. Further hearing will be scheduled to determine the amount of those fees unless notice is received from the parties that they have resolved this issue.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

October 26, 2007
Date

⁸ Decision of the Commissioner dated November 16, 1998

⁹ The Commissioner denied the fee request by Mr. Charland because he had not established that his net worth was less than five hundred thousand dollars (\$500,000) at the time of the adjudication.

¹⁰ 536 A.2d 888 (R.I. 1988)