

0038-10

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

R. DOE

v.

FOSTER SCHOOL COMMITTEE

INTERIM ORDER
DECISION

Held: Parent of Student Doe has established her entitlement to an interim protective order under R.I.G.L. 16-39-3.2 to maintain the status quo special education placement wherein her child is provided with speech/language services by his district of residence (Foster) on-site at the private school he attends in Richmond, Rhode Island.

DATE: November 16, 2010

Travel of the Case

On October 15, 2010 Student Doe's parent filed a written request with Commissioner Deborah A. Gist for an interim protective order. The interim order was requested by the parent so that her child could remain in his current educational placement pending a due process hearing regarding the district's proposal that he be provided speech/language services at the Captain Isaac Paine School in Foster rather than at his private school, the Meadowbrook School in Richmond, Rhode Island. Hearing was deferred until she actually requested a due process hearing challenging the new IEP which, if fully implemented, would provide her son with both reading instruction and speech/language services at the Captain Isaac Paine School in Foster. A copy of the request for a due process hearing was received on October 28, 2010 and a hearing was convened by the undersigned on November 3, 2010.

The parties presented testimony and documentary evidence. Closing arguments were made at the time of the hearing. A transcript of the hearing was received on November 8, 2010.

Issue: Is Student Doe entitled to an interim protective order maintaining the district's provision of twice-weekly speech/language services at the private school he attends pursuant to his current IEP?

Findings of Relevant Facts:

- Student Doe resides with his family in the town of Foster, Rhode Island and is enrolled at the Meadowbrook Waldorf School in Richmond, Rhode Island where he is in the third grade. Pet.Ex.2; Tr. p.3.
- Student Doe is a student with a disability who receives twice-weekly speech/language services at Meadowbrook pursuant to an IEP developed by his district of residence, Foster. He also receives specialized reading instruction at Meadowbrook five times per week from the Chariho Regional School District pursuant to a services plan. Pet. Ex.4; Tr. p.21 and pp. 63-64.
- Re-evaluations in the spring and early fall of 2010 indicated that Student Doe's academic progress has been limited and that he continues to experience significant language-based learning difficulties. It was

recommended that in addition to ongoing speech and language services, Student Doe receive more intensive, multi-sensory language-based reading instruction, such as that provided through the Orton Gillingham method, including extended school year services. S.C. Ex. A and B.

- After review of these re-evaluations, the IEP team convened by the Foster School Department developed an IEP dated October 4, 2010 (Petitioner's Ex. 2). This IEP called for explicit reading instruction¹ five days a week and twice-weekly speech and language services to be provided at the Captain Isaac Paine School in Foster. The district has opened up a discussion with Student Doe's parents as to scheduling times for these IEP services and is willing to provide just the speech/language therapy without the reading instruction (i.e. forego full implementation of the proposed IEP). The district did not discuss transportation services at the IEP meeting and at the hearing indicated that it is not willing to provide Student Doe with transportation from the Meadowbrook School to Foster (or from Foster to Meadowbrook) in order for him to access the services proposed in the IEP. Tr. pp. 9, 23, 37, 61-62, 70.
- Ms. Doe testified that she is not in agreement with the IEP the district has proposed because she believes it is not in her son's best interests to transfer to the Captain Isaac Paine School from the Meadowbrook School, as was recommended to her at the IEP meeting. She testified that district officials have not yet presented her with specifics as to when and how services would be made accessible to her son in Foster. Potential times for services which were discussed overlapped with her son's school day at Meadowbrook and his after school activities. It is her understanding that it would be up to her to transport her son to and from the Captain Isaac Paine School. Tr. pp. 9, 14-15, 18-19, 23.
- Ms. Doe has requested both mediation and a due process hearing to resolve the dispute with respect to the obligation of Foster to continue to provide speech/language services on-site at the Meadowbrook School, the scheduling of IEP services off-site, and any obligation to provide transportation if her son must access his IEP services in Foster. Tr. p. 13, 21-22 and 43.

Positions of the Parties

Ms. Doe

¹ The Special Education Director testified that the district planned to use either the Orton-Gillingham or the Wilson reading program. Tr. p. 66.

Student Doe's mother takes the position that pending the due process hearing she has requested,² her son is entitled to continue to receive the speech/language services that the district has provided under his last agreed-upon IEP, in effect September 10, 2009-September 9, 2010. That IEP (Petitioner's Ex. 1) provided him with twice-weekly speech/language services on-site at the Meadowbrook School. If the Commissioner does not enter an interim protective order, Ms. Doe will be required to pay each week for the services of a speech/language therapist to work with him at his private school. The due process hearing officer will determine the issue of whether Student Doe is entitled to continue to be provided with services on-site and, if not, whether Foster is required to provide him with transportation in order for him to access the services that will be made available to him at the Captain Isaac Paine School. Both alternatives have financial implications for Foster and it is these financial concerns, she insists, that are motivating Foster to propose changes in her son's current IEP.

Foster indicated at the hearing that Ms. Doe could accept only speech/language services and continue to have specialized reading instruction provided to her son on-site under a services plan from the Chariho School District. Ms. Doe testified that her ability to reject part of the proposed IEP was not made clear to her prior to the hearing. Implicit in her argument is that her required acceptance of the entire proposed IEP may be another issue for the due process hearing officer to resolve, and until this occurs, the status quo should be maintained.

Foster School Department

Counsel for the district initially notes that Student Doe's rights to a free appropriate public education (and an individual IEP) arise only under state law, R.I.G.L. 16-24-1. It should not be assumed that federal procedures for resolution of disputes regarding FAPE are applicable. He submits that a child with a disability placed by his/her parents in private school has limited rights to educational services under the Individual With Disabilities Education Act (IDEA) and is not entitled to any due process rights, including the right to "stay put" pending resolution of disputes. The entitlement to remain in the "current educational placement" goes hand in hand with the right to a due process hearing, an entitlement which parentally-placed private school students do not have under federal law.

² Or an agreed-upon resolution through the mediation process that she has also initiated.

When the General Assembly amended R.I.G.L. 16-24-1 to give the right to a free appropriate public education to students enrolled in private schools, there was no provision included in the law for a “stay put” when parents disagreed with their school district or issues arose with respect to the provision of special education services. Thus, in Rhode Island, “stay put” is an entitlement that arises only under federal law and applies only to students in public educational placements. Student Doe is not in a public placement and is therefore, ineligible to apply to the Commissioner for an order requiring that he “stay put” pending the due process hearing his parent has requested.³

Secondly, Student Doe is not entitled to a “stay put” order because the change Foster has proposed in his IEP is not a change in his “placement.” District officials do not seek to eliminate the speech/language services that have been provided to Student Doe, but propose only to change the location at which he receives services. Based on the lack of progress measured by recent evaluations and concerns as to how effectively the speech/language services have been provided to Student Doe in the past, Foster has determined that it needs to “take control” of the delivery of his IEP services. Counsel points out that state law places the responsibility on Foster to ensure that Student Doe receives a free appropriate public education and that he makes sufficient progress on. It can no longer manage his IEP from afar and delegate this responsibility to private contractors. This is the reason that it proposes to have its own personnel work directly with Student Doe at the elementary school in town. The district is willing, however, to have Chariho continue to provide reading instruction to Student Doe, if his parents do not wish to access the instruction in reading that would be available to him in Foster under the proposed IEP.

Finally, the district submits that state law, and newly-promulgated regulations of the Board of Regents Governing the Education of Children With Disabilities, should not be interpreted to require districts to provide transportation to students with disabilities who are enrolled by their parents in private schools located at great distances from their district of residence. Districts should have total discretion in selecting sites for providing FAPE to private school students. If a requirement to transport students from their private school to the site selected by the district is imposed or if districts are compelled to pay for services to be delivered at the site of the parents’ choosing, costs will be beyond control. Already limited

³ Counsel for the district indicated that the issue of entitlement to a due process hearing would be raised with the due process hearing officer. Tr. p. 72.

resources will be diverted and a disproportionate amount spent on meeting the needs of private school students with disabilities.

Counsel submits that Student Doe has no entitlement to receive speech/language services at the Meadowbrook School or to be provided with transportation services so that he can access these services in Foster. For this reason, and based on the other arguments made on Foster’s behalf, he requests that Ms. Doe’s request for an interim protective order be denied.

DECISION

This case involves a student who has been placed by his parents in private school and his entitlement to a “stay put” order as an interim measure pending resolution of a special education dispute. Foster argues initially that a “stay put” order is not available to private school students because their entitlement to a free appropriate education arises exclusively under state law. The entitlement to file a due process complaint and invoke other procedural safeguards have their origin in federal law, specifically 20 USC 1415. Counsel for the district submits that the right of a child to remain in his then-current educational placement as specifically described in 20 USC 1415 (j) is a right that arises under federal law and therefore accrues only to students with disabilities in public educational placements.⁴

Our review of state law and the recently-promulgated Board of Regents Regulations Governing the Education of Children With Disabilities (effective July 1, 2010) leads to the conclusion that procedural safeguards, including the right to a due process hearing and maintenance of a child’s current educational placement pending a due process hearing, are rights available to students receiving a free appropriate education pursuant to state law. R.I.G.L. 16-24-1 states that school committees in Rhode Island have a duty to provide parentally-placed private school students with disabilities with “...the same free and appropriate education as it provides to children in public schools.” This law goes on to state that “These children shall have the same rights and remedies in the regulations of the board of regents for elementary and secondary education governing the education of children with disabilities as children in public school relative to initially determining eligibility, implementation and/or any other rights and remedies relative to any

⁴ For parentally-placed private school children with disabilities, revisions to IDEA in 2004 provided for their equitable participation in the special education programs operated by the LEA in which the private school was located. Educational services are provided to the private school student pursuant to a “services plan” and create no individual right to special education and related services. Due process procedures are inapplicable, except for due process complaints related to child find requirements.

special education services the child may be eligible (sic) or receive from the public school district.” This statutory language provides an indication that the General Assembly intended the procedural rights and safeguards provided to students with disabilities in public schools to accrue to private school students with disabilities. The discussion of private school students’ entitlement to FAPE in the Regents Regulations is consistent with this interpretation. In Section 300.129, entitled “FAPE for Children with Disabilities Enrolled By Their Parents in Private Schools” clearly echoes state law with regard to the entitlement to FAPE that private school children have and the obligation of their district of residence to provide it. Section 300.129 (c) (2) of the regulations further indicates:

(2) LEA Responsibility. Each LEA of residence shall ensure that, an IEP is developed and implemented for each eligible child with a disability enrolled by their parents in a private school and that the child is afforded all of the rights of a child with a disability served by the LEA.

In the sections of the regulations following the discussion of the provision of FAPE to private school students are the provisions for the equitable participation of private school students in the special education programs operated by the LEA in which the private school is located. Consistent with federal regulations, state regulations clearly indicate that the district in which the private school is located has no obligation to provide FAPE and access to special education is limited to meaningful or equitable participation in the district’s Part B program. Consistent with federal law, private school students in Rhode Island have no entitlement to receive (from the LEA in which their school is located) any of the special education and related services that they would receive if enrolled in a public school.

Section 300.140 of our state regulations confirms that due process is not applicable with respect to issues concerning a private school student’s services plan. However, the language the Regents use in this section in order to maintain Rhode Island’s consistency with IDEA in this regard does clearly indicate that due process is applicable to complaints that the LEA of residence has failed to provide FAPE pursuant to section 300.129 of the Regents’ Regulations.

Section 300.140 (a) states:

(a) Due process not applicable, except for child find. (1)
Except as provided in paragraph (b) of this section,⁵ the

⁵Subsection (b) relates to child find complaints.

procedures in §§ 300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on the child's services plan.

Therefore, the procedures in §§ 300.504 through 300.519 remain applicable to complaints that the LEA in which a student resides has failed to meet the requirement to provide FAPE pursuant to § 300.129. These procedures include the right to an impartial due process hearing (§300.511) and the entitlement of a child to remain in his or her current educational placement pending such proceeding (§300.518). The inescapable conclusion is that Student Doe is entitled to remain in his current educational placement while his due process complaint is pending.

The district argues that there is no change in placement proposed because the same speech/language services Student Doe received through his last agreed-upon IEP will be provided to him through the proposed IEP. These services will be made available to him at the Captain Isaac Paine School in Foster, rather than at the private school he attends in Richmond. We find that there is more than just a change in location that results from this proposal. First, the services will no longer be easily integrated into Student Doe's school day at Meadowbrook as they currently are. Although the district is obviously entitled to exercise discretion⁶ in determining whether or not to provide services for its resident children on the premises of a private school, the exercise of such discretion in this case effectively makes Student Doe's attendance at his private school and his receipt of FAPE from the town of Foster mutually exclusive.

Whether or not the district is alternatively required to provide transportation to Student Doe so that he can access services at Captain Isaac Paine School twice weekly is a matter also in dispute between the parties. Pending resolution of this dispute, both with respect to the proposed site for delivery of services and the district's transportation obligations, the status quo must be maintained to ensure Student Doe's continued access to FAPE. Based on the district's position that it has no transportation obligations to Student Doe, his receipt of speech/language services is placed in jeopardy by implementation of the new IEP. An interim protective order is needed to ensure that he receives FAPE pending resolution of these issues by the due process hearing officer. An interim order is hereby issued under R.I.G.L. 16-39-3.2 to require the Foster School Department to continue in

⁶ And the district makes at least a tenable argument that its responsibility for Student Doe's academic progress supports its decision to "control" the delivery of services to him.

effect Student Doe’s last agreed-upon IEP (Petitioner’s Ex.1) and to continue to provide twice-weekly speech/language services to him at the Meadowbrook School at the district’s expense.

For the Commissioner,

Kathleen S. Murray

APPROVED:

Deborah A. Gist, Commissioner

Date