

State of Rhode Island
And
Providence Plantations

Commissioner of Education

C. Doe

v.

Cumberland School Committee

Interim Order
and
Final Decision

Held: The school district violated Section 504 of the Rehabilitation Act of 1973 when it failed to implement the 504 plan developed on March 7, 2011 that called for tutoring services to be provided to this student. The district also failed to follow the evaluation and placement procedures set forth in § 104.35 of the 504 Regulations in making placement decisions about this student.

DATE: April 19, 2011

Travel of the Case

On April 1, 2011 Student Doe's mother submitted a request for an interim protective order to Commissioner Deborah A. Gist. She alleged in her written request that her daughter's Section 504 plan was not being implemented and that, as a result, tutors were not providing her daughter with services according to the 504 plan that had been developed and agreed to on March 7, 2011. The undersigned was designated to hear this matter, and a hearing was convened on April 7, 2011. At that time the parties presented testimony and documentary evidence on the issues. A copy of the transcript was received on April 12, 2011 at which time the record was closed.

Jurisdiction to hear this matter arises under R.I.G.L. 42-87-5 (c) which authorizes the Rhode Island Department of Education to hear complaints of violations of the civil rights of persons with disabilities when they arise in the elementary and secondary education setting. Also conferring jurisdiction upon the Commissioner is R.I.G.L. 16-39-3.2 which empowers the Commissioner to issue interim protective orders as may be needed to ensure that a child receives education in accordance with applicable state and federal laws and regulations during the pendency of a matter.

The parties indicated at the time of hearing that they had presented all of the evidence on the issues they sought to raise. The hearing officer has inferred that this interim order decision will therefore also be a final decision in this matter.

ISSUES

1. Has the Cumberland School Department complied with Section 504 of the Rehabilitation Act of 1973 in its implementation of a March 7, 2011 "504 Educational Student Service Plan" for this student?
2. Was the March 7, 2011 "504 Educational Student Service Plan" developed in accordance with 34 CFR § 104.35?

Findings of Relevant Facts

- Student Doe is currently enrolled at Cumberland High School. She is a handicapped student, suffering from severe depression and anxiety since sixth grade. She has had a Section 504 plan in place since at least her freshman year. Tr.pp. 6-7, 86.
- Student Doe has had ongoing problems coming to the high school and staying in school once she is there. During her freshman and sophomore years, there was a procedure in

place for addressing these situations.¹ The strategies that were developed, but not formally incorporated into her 504 plan, were particularly successful during her sophomore year, but were less effective during the junior year. By early March, she had been absent from school for thirty-two days. Tr.pp. 16, 32, 126-130.

- When Student Doe voiced objections to going to school, her mother tried to find out what the problem was. One day, Student Doe told her mother that “it’s torture at the school” and reported that she was being bullied. Student Doe also reported being bullied to her doctor and counselor. Tr. pp. 16-17, 20; App. Ex. 3, 5 and 7.
- Mrs. Doe obtained the details on her daughter’s complaints of bullying² and other issues she described as complaints with respect to conditions at the school.³ She brought these complaints to the attention of the principal in a meeting on February 11, 2011. At the meeting, Mrs. Doe indicated that she was thinking of enrolling her daughter in a different school but that she “needed” a 504 meeting to be scheduled. Tr. pp. 20-29. The principal indicated to Mrs. Doe that she would investigate the complaints and testified that she did conduct an investigation of all of the issues brought to her attention at the February 11, 2011 meeting. Tr. pp. 122-124.
- Mrs. Doe did not hear back from the principal as to the complaints she had made at their February 11, 2011 meeting, but a 504 meeting was scheduled. Tr. p. 30.
- In attendance at the meeting of March 7, 2011 were the Principal (who is also the 504 coordinator for Cumberland High School), the district’s Section 504 coordinator, Attorney Joseph Rotella, and Mrs. Doe, who was accompanied by a friend. A guidance counselor and two teachers had to leave shortly after the meeting began. Tr. pp. 31-32.
- There was no medical documentation submitted at or considered by the participants at the March 7, 2011 meeting, but a plan was developed and agreed to at that time to provide her with home tutoring and computerized instruction for the balance of the school year. Tr. pp.114-115. App. Ex.2; S.C. Ex. A. The plan signed by the meeting participants indicates that “mother will provide documentation.” Mrs. Doe faxed a form from her daughter’s doctor on March 8, 2011. App. Ex. 2 and 3.

¹ Student Doe was allowed to go to the guidance office and call her mother, but not to leave school. She could remain in the guidance for the entire day, if necessary. Tr. pp. 126-127.

² Student Doe reported that students were calling her derogatory names in the school corridors and that someone was taking her pencils and pens and stapling her notebook shut when she left her seat in the (physics) classroom. Evidently a complaint of harassment by a male student had been reported by Student Doe to the Assistant Principal early in the year and successfully addressed. Tr. pp. 20-24.

³ Student Doe reported to her mother that her history class was left unattended, that a student was consuming alcohol in the back of the history classroom on a day that the class had a substitute teacher, that she had insufficient access to bathrooms between classes because the doors were locked, and that she was concerned that the exterior doors of the school were unlocked and the school was unsecured. Tr. pp. 25-29.

- Because Mrs. Doe had not provided an original doctor’s note and because the doctor did not indicate an “end date,” steps to secure tutors for Student Doe were not taken until March 23, 2011. Tr. pp.59, 103-105, 136; App. Ex. 8. Although she had supplied an original doctor’s note on March 21, 2011, the doctor had filled in “indefinite” in the space where an “approximate end date” was called for.⁴ App. Ex.5.
- On March 24, 2011 a note from Student Doe’s doctor indicating that the “request is for 3-7-11 to 6-30-11” was submitted to the district and was received by the district’s Section 504 coordinator. App. Ex. 7; Tr. p. 56.
- Student Doe was hospitalized from March 8 to March 22, 2011. Tr. pp. 49-50.
- There are five (5) tutors needed⁵ to provide Student Doe with the tutoring called for in her March 7, 2011 504 plan. As of April 7, 2011, only one tutor had contacted Mrs. Doe and conducted a tutoring session with her daughter. Two other tutors have been secured by the district, but have not yet set up tutoring sessions. Student Doe has accessed her physical education/health course online. Tr. pp. 8, 149, 168.

Positions of the Parties

The Petitioner

Mrs. Doe argues that her daughter has been seriously affected by conditions at Cumberland High School this year that, in her opinion, make the situation at the school “out of control.” For a student with the mental health issues her daughter suffers from, these conditions, coupled with the harassment and bullying that she has experienced, have had a disastrous effect. Her daughter is now afraid to go to school and must be tutored for the balance of the school year. She submits that school officials have not responded to or addressed her concerns with respect to unacceptable conditions at the school, specific complaints that her daughter is being harassed, and reports by Mrs. Doe of ongoing unprofessional conduct of one of her daughter’s teachers.

Her contention is that despite her repeated requests for a 504 meeting to address the effects that the school environment was having on her daughter, school staff delayed in scheduling the meeting. It was only after she contacted a member of the Cumberland School Committee that she was contacted to set up a meeting for March 7, 2011. To her dismay, there were no teachers or guidance counselors in attendance at the meeting - only the principal and the Section 504 coordinator for the district. Mrs. Doe asserts that a hastily-developed plan

⁴ It is not clear from the record if the “approximate end date” refers to the end of the student’s illness, the end of his/her absence, or the anticipated end of the requested home instruction services.

⁵ At the 504 meeting, it was thought that Student Doe would be able to take Western Civilization on line, but the Principal determined on March 31, 2011 that a tutor would be needed in that course as well.

called for her daughter to finish the balance of this school year with a combination of on-line instruction and home tutoring, and that upon her return to school next fall, she would have essentially the same 504 plan as during her first three years at Cumberland High School.

The focus of Mrs. Doe's appeal is on the fact that at the time of hearing (April 7, 2011), the plan to provide her daughter with home tutoring remains essentially unimplemented. Only one tutor has contacted her to set up one tutoring session since her daughter's discharge from the hospital on March 22, 2011. She argues that when she left the 504 meeting on March 7, 2011, her understanding was that all that remained to be done for the plan's implementation was for her to submit medical documentation justifying the need for home instruction. She faxed a form entitled "Physician's Statement for Temporary Home or Hospital Education" from her daughter's doctor on the following day, March 8, 2011. This form provided medical information on Student Doe's diagnosis and present condition, and further indicated that Student Doe would require educational services at home for a period of more than fourteen (14) days. Mrs. Doe points out that no steps were taken to secure tutors for her daughter until March 23, 2011, and she questions how school officials can rely on her alleged failure to provide "appropriate documentation" as the reason for their delay in implementing the 504 plan. This delay violates her daughter's rights to be provided with a free appropriate education under Section 504 of the Rehabilitation Act.

Mrs. Doe submits that what has happened here is that school officials have not taken her or her daughter's complaints seriously. Although she met with the Principal on February 11, 2011 to discuss the various incidents and reports of harassment, the Principal did not follow up or report back on her findings. Even though a plan that requires her daughter be instructed at home has been in place since March 7, 2011, this instruction is not being provided. Mrs. Doe's position is that if her daughter had a physical, rather than a mental, disability, the district would have responded in a different fashion.

Cumberland School Committee

Counsel for the School Committee argues that school officials have indeed sought to ensure that Student Doe's needs have been met throughout this school year. Student Doe has been provided with all of the services and modifications called for in the 504 plan that was in place at the beginning of this school year. In addition, her guidance counselor has continued to supplement the written 504 plan with an informal arrangement that allows Student Doe to come to the Guidance Office and remain in the office for as long as necessary, even if she were upset and wanted to leave school. This arrangement had proven successful during Student Doe's sophomore year in resolving issues of her being able to remain at school.

In response to Mrs. Doe's assertion that the complaints she has made have not been taken seriously, counsel notes that the evidence demonstrates that all of the complaints that Mrs. Doe has brought to the Principal's attention have been thoroughly investigated. Counsel notes, however, that all of the issues cannot be resolved exactly in the way that Mrs. Doe would like

them to be. For example, since Cumberland High School is not a single building, but consists of several buildings in a campus setting, it is not possible for all of the doors to be locked. However, the campus has security staff and cameras in place that should provide students, including Student Doe, with any needed reassurance that they are safe at school.

When the Principal investigates complaints regarding professional misconduct of a teacher (which she in fact did when she received information from Mrs. Doe about a teacher leaving his class unattended), it is not possible for the Principal to disclose confidential information about the employee to the complaining party. Thus, it was not possible for the Principal to make a follow-up report to Mrs. Doe of her findings after she investigated the allegation of professional misconduct by one of Student Doe's teachers. With respect to reports of bullying and harassment, immediate steps have been taken to address each and every one of Student Doe's complaints. Mrs. Doe admitted that early in the school year when her daughter and another student complained to an assistant principal that they were being harassed by a male student, she "took care of it". The Principal testified she immediately looked into the report that Student Doe's pencils and pens were being taken from her desk and that her notebook was being stapled, but she could not verify that this had actually happened. She received no other complaints during the school year.

With respect to the issue of lack of implementation of the 504 plan, counsel submits that there are legitimate reasons for the delay. First, student caseloads, particularly for staff in the Guidance Office, are extremely high. Second, there is the necessary paperwork that must be submitted by parents if their request for home tutoring is to be processed in the right way. In this case, Mrs. Doe received both a telephone call and written information the day after the 504 meeting (March 8, 2011) that specifically informed her of the additional documentation that would need to be provided by Student Doe's doctor. In addition, she was also informed that the process would be delayed if this documentation were not provided. The necessary documentation was not actually received until March 24, 2011 and thus the delay in lining up tutors occurred.

Student Doe has already been connected with one tutor, and two other tutors are in place and should be contacting her to set up tutoring sessions at mutually-agreed upon times. The district is still trying to find tutors for French IV and Western Civilization and is making its best efforts to do so. The computerized instruction for her physical education/health course is in place and she has accessed it. Counsel for the district states unequivocally that Student Doe will be provided with additional "compensatory" tutoring sessions to make up for this delay in actual implementation of her 504 plan. She will, in fact, be provided with make-up sessions going back to the date of March 8, 2011, the first day the plan was in place. For these reasons, counsel for the Cumberland School Department argues that Mrs. Doe's request for an interim order should be denied.

DECISION

Although neither Section 504 of the Rehabilitation Act nor the implementing regulations set forth a specific timeline for implementation of 504 plans,⁶ the law clearly requires that students in the protected class be provided with a free appropriate public education. According to § 104.35 of the Regulations, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35 and 104.36. Even though a 504 plan was developed for Student Doe on March 7, 2011, she has not been provided with a free appropriate public education since the time she returned to her home after being hospitalized from March 8, 2011 to March 21, 2011. She is entitled under the law to be provided with the educational services described in the 504 plan, as described in more detail in the record of this proceeding.

As indicated above, although the 504 Regulations do not contain a specific timeline on implementation of services to the 504-eligible student, 34 CFR Subpart D, entitled “Preschool, Elementary and Secondary Education,” does indicate in several instances that compliance with the procedural and programmatic requirements of the Education of the Handicapped Act⁷ (20 USC 1400 et seq.) constitutes compliance with Section 504. With respect to the timeline for implementation of Individualized Education Programs (IEP’s),⁸ federal regulations require that services be provided “as soon as possible following development of the IEP” (§300.323 (c)(2)). Board of Regents Regulations Governing the Education of Children With Disabilities have made the federal timeline even more stringent. Section 300.323 (c)(2) states that special education and related services are to be made available “as soon as possible following development of the IEP, but not later than ten (10) school days.” Therefore, if the IDEA timelines are to serve as a guide to provide districts with some flexibility and time to take any steps necessary to implement a 504 plan, Student Doe’s tutoring services should have been available to her ten (10) school days after the March 7, 2011 Plan was developed. She obviously could not access those services until her release from the hospital on March 21, 2011.

According to the evidence in this case, we find that district staff acted in good faith and truly believed that they could not even take initial steps to line up the tutors that Student Doe needed in her various academic subjects. Both the Principal and guidance counselor testified credibly that they understood that they were constrained by a requirement to have additional documentation from Mrs. Doe before “setting the process in motion.” This misconception impeded their ability to have tutoring services in place for Student Doe as soon as possible after her 504 Plan was developed. It was simply not reasonable, under the facts of this case, to delay

⁶ There is not even a specific requirement that a written “plan” be developed.

⁷ Or the “Individuals With Disabilities Education Act”

⁸ We find that Student Doe’s situation is more like that of a disabled student awaiting an “initial placement” in the special education context because of the low level of services she had received at home as of the date of the hearing..

even the initial steps to secure tutors until after Mrs. Doe had provided an original note from her daughter's doctor and that doctor had provided "missing" information on an "approximate end date" for the tutoring services.

The process for obtaining qualified tutors available to deliver the tutoring described in Student Doe's 504 plan could have been set in motion on March 8, 2011, and any necessary additional documentation could have been obtained prior to actually providing tutoring services. It is our finding that original documentation from Student Doe's doctor should have been as important for consideration at her 504 meeting on March 7, 2011 (when important decisions about her educational needs were made) as it was later on in the process when the task at hand was to document the necessity for and expected duration of services. Stated another way, it is difficult for the district to justify the delay resulting from the necessity for it to have additional documentation when that same documentation was not necessary for the educational decisions that were made at the March 7, 2011 504 meeting. Thus, we find that the reasons advanced by the Cumberland School Department for delay in providing tutoring services for Student Doe have not demonstrated compliance with Section 504.

For these reasons, Mrs. Doe's request for an interim protective order is hereby granted, and the Cumberland School Department is ordered to provide Student Doe with tutoring services in Pre-Calculus, French IV, Western Civilization, English and Physics, and to make-up any sessions she may need to enable her to finish the courses in which she is enrolled this year.

Because we find, in addition, that the procedural requirements of §104.35 were not met in developing Student Doe's 504 Plan, we direct that, prior to the end of school year 2010-2011, a group of persons, including persons knowledgeable about Student Doe, the meaning of evaluation data, and placement options, meet to consider all information available on Student Doe to plan for her return to Cumberland High School. Rather than just renewing her old 504 plan (that evidently did not provide her with success during this past school year) as is currently anticipated, a new plan should be developed that may better address her needs. We are confident that school staff, and perhaps also the school psychologist, can work together cooperatively with Mrs. Doe to develop a plan that may better meet Student Doe's needs and address issues raised by actual situations or her perception of situations in the school environment.

For the Commissioner:

Kathleen S. Murray

Deborah A. Gist, Commissioner

April 19, 2011
Date