003-12

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATION

COMMISSIONER OF EDUCATION

STUDENTS X DOE AND Y DOE

v.

BRISTOL-WARREN SCHOOL DEPARTMENT

Interim Orders

Held: Stay-put orders are issued during pendency of expedited due process hearings under §300.532(a) of the Board of Regents' Regulations Governing the Education of Children with Disabilities. Due process hearing officer, not the School Department, has the authority to remove a child from educational placement based on a finding that maintenance of the current placement is substantially likely to result in injury to the child or others.

Date: February 3rd. 2012

Introduction

This is a request for "stay-put" interim protective orders pursuant to Rhode Island General Law 16-39-3.2 and §300.518 of the Board of Regents' Regulations Governing the Education of Children with Disabilities.[1] Petitioner also claims an entitlement to independent functional behavioral assessments under §300.502 of the Regulations.

Background

Students X and Y Doe each have an individualized education program (IEP) which provides for a placement at the Colt Andrews School. Shortly into the current school year, X and Y began to engage in behaviors that resulted in physical restraints and disciplinary consequences. According to the School Department, the frequency of these behaviors increased in the second quarter and school staff were injured. The School Department initiated discussions about moving X and Y from Colt Andrews. Petitioner filed due process complaints, alleging that X and Y's IEPs were not being followed and that the School Department wrongfully denied requests for independent functional behavioral assessments. The School Department filed a request for expedited due process hearings for X and Y, alleging that maintaining their placements at Colt Andrews is substantially likely to result in injury to them or others. The School Department proposed to change X and Y's placements to a more restrictive setting. The instant request under §16-39-3.2 followed.

Positions of the Parties

Petitioner contends that under §300.518 of the Regents' Regulations, a "stay-put" order must automatically issue when a disagreement about placement arises and the parent files a due process complaint. It also argues that it is entitled to independent functional behavioral assessments of X and Y at public expense under §300.502 of the Regulations.

[1] The Commissioner of Education designated the undersigned hearing officer to hear and decide the request. A hearing was held on January 24, 2012 and the record was supplemented on January 26 and 30, 2012.

The School Department contends that §300.518 provides for an exception to the "stay-put" requirement which, in conjunction with §§300.532 and 300.533, allows a school district to change a placement in cases of substantial likelihood of injury pending the result of an expedited due process hearing. It further contends that the Commissioner does not have jurisdiction to consider the request for independent behavioral assessments because that issue is before a due process hearing officer.

Discussion

Section 300.518 of the Regents' Regulations Governing the Education of Children with Disabilities is commonly referred to as the "stay-put" provision. Section (a) of the regulation provides that

> Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

Section 300.507 grants the right to file a due-process complaint on matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate education. Section 300.533 states that

> When an appeal under §300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in §300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.[2]

Section 300.532, entitled "Appeal," provides for expedited due process hearings. Subsection (a) states, in part, that

> The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing.

[2] "SEA" means state educational agency; "LEA" means local educational agency.

Under subsection (b) of §300.532, the due process hearing officer, in ruling on the appeal, may

> (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or
>
> (ii) Order a change of placement of the child with a disability to an Appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Under §300.530(f) of the Regulations, if the LEA, the parent, and relevant members of the IEP Team determine that the conduct under review was a manifestation of the child's disability, the IEP team must develop or revise a behavioral intervention plan and

> (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

Subsection (g) reads as follows:

> *Special circumstances*. The LEA may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child —
> (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
> (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
> (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

We begin our analysis of these regulatory provisions with some historical perspective. In 1985, the United States Supreme Court addressed unilateral placements by school districts and the operation of the "stay-put" provision. The Court said, in part,

> We think at least one purpose of [the "stay-put" provision] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings. As we observed in Hendrick Hudson District Bd. of Education v. Rowley, 458 U.S. at 192 (1982), impetus for the [Individuals with Disabilities Education Act] came from two federal-court decisions [citations omitted], which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools. Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes.[3]

In its 1988 Honig v. Doe decision, the Supreme Court revisited the "stay-put" provision and stated

> We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts. (emphasis in original)[4]

Clearly, Congress meant to limit the ability of LEAs to remove children with disabilities from the classroom without the parents' permission. With limited exception, parents may seek a "stay-put" order to maintain the last educational placement to which they agreed pending resolution of the due process complaint concerning a proposed change of placement.

Section 300.530(g) of the current Regulations sets forth three instances when an LEA may remove a student to an alternative setting without the parents' consent. Those

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[3] School Committee of the Town of Burlington v. Department of Education of Commonwealth of Massachusetts, 471 U.S. at 373 (1985).
[4] 484 U.S. at 323-324.

situations concern conduct involving weapons, drugs and serious bodily injury. The situation at issue in this case, i.e., where the LEA believes that maintaining the current placement is substantially likely to result in injury to the student or others, is not included in §300.530(g). It easily could have been included had it had been deemed to warrant unilateral action by the LEA.

Section 300.530(g) authorizes the removal of a student "without regard to whether the behavior is determined to be a manifestation of the child's disability . . ." Otherwise, under §300.530(f), if it is determined that the conduct was a manifestation of the child's disability, the child must be returned to the placement from which he or she was removed, unless the parent and the LEA agree to a different placement. We believe that §300.530(f) explains the LEA "appeal" language in §300.532(a), and thus accounts for the "[e]xcept as provided in §300.533" wording in the "stay-put" provision, i.e., §300.518.

Under our interpretation of §300.532(a), if the student's behavior is determined to be a manifestation of his or her disability, and the LEA believes that maintaining the student's current placement is substantially likely to result in injury to the child or others, the LEA may "appeal" that determination by filing a due process complaint and requesting an expedited due process hearing. While technically not an appeal of the results of the manifestation determination, it is the existing Regulations' mechanism for dealing with potentially dangerous students. In 1988, as noted in our quote from the Rowley decision, LEAs could resort to the courts to remove a student when parents did not agree to a change in placement. Now, under the revised Regulations, LEAs may request expedited due process hearings. Under §300.532(b)(2)(ii), the hearing officer may change the student's placement to an appropriate interim alternative educational setting if the hearing officer finds that maintaining the current placement is substantially likely to result in injury to the child or to others. We find that the Regulations authorize the hearing officer, not the LEA, to change the student's placement, and only after a finding of substantial likelihood of injury based on the evidence presented at the expedited due process hearing.

Our interpretation of these provisions is supported by the comments to the final regulations governing the Assistance to States for Education of Children with Disabilities

Program issued by the U.S. Department of Education on August 14, 2006.[5] In response to a recommendation that 34 CFR §300.530(g)(3), as proposed, be clarified, the Department's comment states that the provision

> indicates that school personnel have the discretion to remove a child with a disability who inflicts 'serious bodily injury upon another person' from his or her current placement to an interim alternative educational setting for up to 45 school days . . . Section 300.530(g)(3) applies to school personnel's unilateral removal of a child from the current educational placement. *School officials must seek permission from the hearing officer under §300.532 to order a change of placement of the child to an appropriate interim alternative setting. Hearing officers have the authority under §300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others.* (emphasis added)[6]

Based on the above, we hold that the School Department may not remove students X and Y Doe from their placements under §§300.532 and 300.533 during the pendency of the expedited due process hearings. We shall issue stay-put orders to that effect. We do not have jurisdiction to consider Petitioner's request that we order independent functional behavioral assessments under §300.502 of the Regulations. In conducting proceedings under R.I.G.L. 16-39-3.2 involving special-education matters for which due process complaints have been filed, we have limited our authority to injunctive-type relief. The impartial due process hearing system provided for in the Regents' Regulations is the appropriate forum to reach a final resolution of the dispute arising under §300.502 of the Regulations.[7]

Conclusion

The School Department may not change the educational placements of students X and Y Doe pursuant to §300.532(a) of the Board of Regents Regulations Governing the Education of Children with Disabilities during the pendency of the expedited due process hearings it requested. It is hereby ordered that X and Y shall stay put in their current

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[5] 71 Federal Register 46540.
[6] Ibid. at 46722.
[7] See L. Doe v. Burrillville School Committee, October 3, 2005.

placements pending resolution of the expedited due process complaints. We do not have jurisdiction under R.I.G.L. 16-39-3.2 to consider Petitioner's requests for independent functional behavioral assessments under §300.502 of the Regulations.

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Paul E. Pontarelli
Hearing Officer

Approved:

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Deborah A. Gist
Commissioner of Education

Date: February 3rd., 2012