

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

PARENT OF JOHN A.G. DOE

vs.

A RHODE ISLAND SCHOOL
DISTRICT and the
GRODEN CENTER, INC.

INTERIM ORDER

June 30, 1988

This matter is before the Commissioner of Education on the basis of a petition by a parent of a student for an Interim Order seeking to maintain the student in his current placement at the Groden Center. The student had been placed at the Groden Center, a private facility, in pursuance of the school district's obligation (G.L.16-24-1) to provide this student with special education. The Groden Center has informed the school district, and the students' parent, that it will not renew its contract with the School District to continue this child's placement at the Center because in the Center's judgment the Groden Center is not an appropriate placement for the student.

Under Federal and State law a handicapped student's placement may not be changed until applicable due process procedures have been exhausted. We must decide whether we have jurisdiction in this dispute and if we do have jurisdiction whether the "stay put provision" of Federal and State law is applicable to private special education facilities in Rhode Island.

The Commissioner has Jurisdiction Over This Case

We have pointed out on numerous occasions that simply because a dispute involves parties who have some association with education it does not mean that the Commissioner has jurisdiction over the dispute. For example, the Commissioner has no jurisdiction to decide whether a collective bargaining agreement has been breached by the transfer of a school custodian, Madden vs. Warwick School Committee, Commissioner of Education, April 23, 1984. Or again, the Commissioner has no jurisdiction to decide whether a teacher union has breached its fiduciary duty to provide fair representation

to an individual teacher. Hoag vs. Providence School Board, Commissioner of Education, June 27, 1988. While the disputes just mentioned involved school "affiliated" individuals or entities, they did not "arise under any law relating to schools or education". (G.L.16-39-1). Jurisdiction was, therefore, not present. The case at hand, however, arises squarely under laws and regulations which govern the provision of special education in Rhode Island. We are, therefore, confident that jurisdiction is present in this case. Indeed, since the phrase "may appeal" has been interpreted to mean "shall appeal" in a cognate statute it appears to us that jurisdiction is mandatory in this case. Warren Ed. Ass'n v. Lapan, 235 A.2d 866, 103 R.I. 163.

The "Stay-Put" Provision is Applicable to the Groden Center

The student in this case was placed in the Groden Center by the school district for educational reasons. The Groden Center is a private facility which has been approved by the Rhode Island Board of Regents to provide special education and related services. It is clear that the procedural protections of the Federal Education For All Handicapped Children Act (20 U.S.C.1400-1885) should be applicable to the Groden Center. The Regulations to the Act state:

300.2 Applicability to State, local and private agencies.

* * * * *

(c) Private schools and facilities. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency. (Emphasis added).

The question in this case is whether the "rights and protections of this part" which include the "stay-put" provision (Regs. 300.513) are, in fact, applicable to the Groden Center. See also: Doe v. Honig, 56 LW 4091, ___ U.S. ___. We must rule that they are. The Regulations of the Rhode Island Board of Regents in pertinent part read as follows:

4.0 State Operated and Non-Public Day and Residential Programs for Handicapped Children.

4.1 All special education programs in any state operated and non-public day or residential school shall meet the same criteria as those established for public school programs including the employment of appropriately certified personnel.

* * * * *

4.5 Each non-public and residential school shall use and have available for inspection written administrative and program procedures that encompass the following:

4.5.1 Provision for emergency and early termination of students including prior consultation with the administrator of special education in the community of the child's residence in order to provide for an orderly transfer of responsibility back to such supervisor.

4.5.2 Provision of procedural safeguards which cover the same areas mandated for public schools. (Emphasis added).

We think it clear that Rhode Island has met its duty under 300.2 to insure that handicapped students placed by school districts in private schools have the same procedural protection as students in the public schools by simply mandating that private schools "shall meet the same criteria as those established for public school programs" and that private schools shall provide for "procedural safeguards which cover the same areas mandated for public schools." (Regs. 4.1 and 4.5.2) Since the "stay-put"

provision is at the foundation of the procedural safeguards mandated by Federal and State law (Doe v. Honig, supra), we simply cannot see how Groden Center can be seen to be exempt from the "stay-put" provision. (Reg. 300.513).

Furthermore, we think that Groden Center would be in violation of Reg. 4.5. if it terminated services to this student before exhaustion of the applicable due process procedure. We can hardly see how a transfer back to the school district can be "orderly" if such a transfer back involves a violation of the Regulations of the Board of Regents. We further note that the Groden Center, as part of the approval process, has filed with the Department of Education assurance that it is in compliance with all applicable State Regulations. We are also aware that existing law is an implied term of every contract. Citizens for Presentation of Waterman Lake v. Davis, ___ R.I. ___ 420 A.2d 53 (1980). We, therefore, do not see how Groden's contract with the School District can exempt the Center from compliance with the Regulations of the Board of Regents.

The petitioner in this case contends that the Groden Center is the appropriate placement for this student and further contends that the well-known difficulty which autistic children experience in dealing with any change in routine make it imperative that this student stay in the Groden Center. The Groden Center contends that it is not an appropriate placement for this student. The School District suggests that with cooperation it could arrange a comparable placement for this student at the Trudeau Center. Of course, the petitioner does not accept this. We think that we must leave this as-

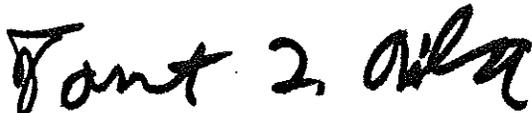
pect of the dispute where Congress mandated that it be left - - with an independent Hearing Officer and the applicable due process procedures. (Regs. 300.13). We limit ourselves to ruling that this student's placement at the Groden Center cannot be changed until the dispute is resolved.

The petitioner has filed a notice that she has "revoked" the permission she granted which allowed this student to be evaluated by the Groden Center or the School District. Of course, it would be impossible to provide a program of behavior modification if this student cannot be continuously evaluated. We, therefore, must make this Interim Order conditional on petitioner filing an immediate withdrawal of her objection to having this student evaluated. In any event, it appears to us that her effort to revoke permission to evaluate this student is of little effect.

Carroll v. Capalbo, 563 F.Supp. 1053.

Conclusion

The Groden Center is ordered to maintain this student in placement pending completion of due process proceedings.



Forrest L. Avila, Esq.
Hearing Officer

Approved:



J. Troy Earhart
Commissioner of Education

June 30, 1988

Reg. 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

- (1) A final decision is reached in the review; and
- (2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

Reg. 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

Comment. Reg. 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

Reg. 300.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

- (1) No parent (as defined in Reg. 300.10) can be identified;
- (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or
- (3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a

surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

- (i) Has no interest that conflicts with the interest of the child he or she represents; and
- (ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

- (1) The identification, evaluation, and educational placement of the child, and
- (2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

PROTECTION IN EVALUATION PROCEDURES

Reg. 300.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

Reg. 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 300.532.

(20 U.S.C. 1412(5)(C))

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DECISION ON MOTION TO VACATE

JUNE 28, 1989

This matter is before the Commissioner of Education on a motion of the Groden Center to vacate the Interim Order we entered in which we required the Groden Center to keep this student enrolled at the Center.

The Groden Center is in a difficult position in this case. It has contracted to provide services for this student and under its contract, and under the applicable Rhode Island regulations (Regs. IX -11) it is, in our view, required to maintain this student in his current placement even though the Center no longer believes that the placement is appropriate. The problem is that the parent and the School District are of the opinion that the placement is suitable. The parent, therefore, opposes any change in placement and the School District does not appear to be using exceptional diligence in locating a new placement.

The Groden Center is in a difficult position because it appears to lack standing to initiate a due process hearing to validate a new placement for the student. Under these circumstances the Groden Center will have to keep the student enrolled although the Center thinks the student should be educated elsewhere. Our examination of the law, however, indicates that this is the prevailing rule. As the Court in Woods Schools v. Commonwealth Dep't of Education, 514 A.2d 686 (PA. 1986) stated:

The Standards delineate procedural safeguards balancing the interests of the child, the parents, and the school district. Of foremost concern, of course, is the education of the exceptional child. We are of the opinion that once a school gains

¹]A "placement" under the Special Education Regulations is not a certain named place but rather a program which meets the IEP requirements of the student. There is, therefore, nothing improper about the School District locating a new placement for this student so long as it is equivalent to the placement at the Groden Center. The parent, of course, would have the right to challenge the equivalency at a due process hearing before the move took place.

the status of an approved private school and accepts an exceptional child to a program of instruction and maintenance appropriate to that child's needs, the approved private school must continue to serve the child unless and until either the parent or the school district determines that that particular program is less than appropriate. See 22 Pa. Code Secs. 13.31, 13.32. Obviously, any suggested change in the program must be in accord with the best interests of the child. As long as the approved private school's program is appropriate for the child, it is in the best interest of the child to remain in the program. Whether or not it is in the best interest of the school is, therefore, irrelevant.

We find the above-quoted language to be in accordance with Rhode Island law.

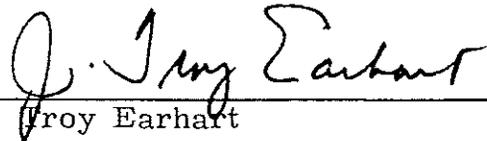
Conclusion

The Motion to Vacate the Interim Order is denied.



Forrest L. Avila, Esq.
Hearing Officer

Approved:



J. Troy Earhart
Commissioner of Education

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DECISION ON DURATION OF INTERIM ORDER

December 13, 1990

The Groden Center has moved that we clarify the duration of the Interim Order which we have entered in this matter. The order we entered was intended to implement the "stay put" provision which is found in Section 1415 of the Education for all Handicapped Childrens' Act.

In Honig v.Doe, 108 S.Ct.592 (1988) the Supreme Court stated:

The stay-put provision in no way purports to limit or pre-empt the authority of courts by section 1415(e)(2), see Doe v.Brookline School Committee, 722 F.2d 910,917 (CA1 1983); indeed, it says nothing whatever about judicial power.

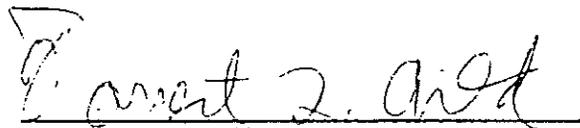
In Andersen v.District of Columbia, 877 F.2d 1018 (D.C.Cir.1989) the Court of Appeals stated:

Once a district court has resolved the issue of appropriate placement, the child is entitled to an injunction only outside the stay-put provision, i.e., by establishing the usual grounds for such relief.

These authorities lead us to conclude that the "stay put" provision of Section 1415, which amounts to an "automatic injunction", and which our order implemented, has effect only until a trial court of competent jurisdiction decide the case. (See also: "The Many Faces of the EHA's "Stay Put Provision", 62 Ed.Law Reporter 833 (November 22, 1990))

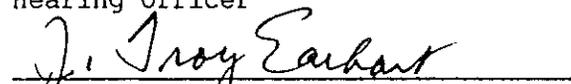
Conclusion

The Interim Order we have entered in this matter shall remain in effect until the Federal District Court rules in this matter or until the Federal District Court makes some other disposition.



Forrest L. Avila, Esq.
Hearing Officer

Approved:


J. Troy Earhart
Commissioner of Education