

Travel of the Case

This matter was appealed to former Commissioner J. Troy Earhart on December 14, 1990 and the undersigned was designated as Hearing Officer shortly thereafter. It was heard on May 22, 1991, June 19, 1991 and July 17, 1991, said dates selected and agreed to by the parties. At the initial hearing on May 22nd, it was proposed by counsel for the Department of Education that the Department intervene as a respondent in the appeal and, upon agreement of the appellant and the North Kingstown School Committee, the Department was added as a party. The record in this matter closed on October 16, 1991 with the filing of the final memorandum in this case by the appellant. On February 4, 1992 the appellant filed a motion to sustain his appeal because of the failure of the Commissioner to issue a decision within the time constraints set forth in the rules governing appeals to the Commissioner. This motion is outstanding, unheard and not acted upon as of the date of this decision.¹

Jurisdiction to hear this appeal lies under R.I.G.L. 16-39-1 and 16-39-2.

Findings of Relevant Facts

- Appellant James T. Murphy is a resident of the Town of North Kingstown and the parent of children enrolled in the public schools of the town.
- On December 3, 1990 the North Kingstown School Committee appointed a 17-member Community Advisory Committee. The members of the Advisory Committee were directed to :

review, discuss, and recommend revisions to
the proposed Sex and Family Life Curriculum

which had been developed by the administration and staff of the North Kingstown School Department (S.C.Ex. A2, Appendix B; Vol.III Tr. pp.4-7)

1) The appellant has rightfully pointed out the 45 working-day requirement of the rules, and the fact of noncompliance, however, while we regret that the decision is overdue, we know of no precedent for the remedy he seeks. It would seem that entry of an order sustaining appeals in cases where a decision may be overdue is inappropriate and unfair to the respondents in such cases.

- Included, inter alia, in the School Committee's formal "charge" to the Advisory Committee was the requirement that in its review process it "adhere" to the mandated Instructional Outcomes for Sex and Family Life Education (Rhode Island Department of Education) S.C. Ex.A2, Appendix B).
- Over the course of the next few months the Advisory Committee disseminated the proposed curriculum, solicited input from community organizations, conducted a community survey, and reviewed and revised the proposed curriculum for grades 6-12. (S.C. Ex.A5-All, Vol. III, Tr.pp.11-20).
- For each grade level the Advisory Committee (1) developed content information to address state mandated outcomes, (2) outlined student activities (reading and writing assignments, lectures, student projects etc.) and (3) developed text and audio-visual materials to be utilized by students and teachers. (S.C. Ex.A-3 and A-12).
- On March 8, 1991 the revised Sex and Family Life Curriculum for grades 6-12 was presented to School Committee members for review (a partial curriculum had been presented and discussed at a special meeting of the School Committee on February 11, 1991). (S.C. Ex.A9 and A-10).
- On March 19, 1991 at another special meeting of the North Kingstown School Committee the proposed Sex and Family Life Curriculum, grades 6-12, incorporating the revisions recommended by the Advisory Committee, was adopted by the School Committee. Also adopted at that time was a plan for implementation proposed by the members of the Advisory Committee. (S.C. Ex.A-12 and A-13).
- The curriculum ultimately adopted by the North Kingstown School Committee is based on the Instructional Outcomes for Sex and Family Life Education (Testimony of Carolyn Hazard, Assistant Superintendent for Curriculum, , Vol. III Tr. pp.24-25.)
- The Introduction to the Town of North Kingstown's Sex and Family Life Curriculum states:

The curriculum is based on the Rhode Island Department of Education's Instructional Outcomes for Sex and Family Life Education. (1988). (S.C.Ex.A-12).

- From 1985 until its 1991 adoption of the Sex and Family Life Curriculum, the North Kingstown School Committee required instruction in sex and family life as a component of its health curriculum. (Tr. Vol.III,pp.31-32).

Issues

- Is the document entitled Instructional Outcomes for Sex and Family Life Education advisory and designed only to provide technical assistance to local school committees in developing a curriculum, or is it a binding set of regulations?
- If a binding regulatory document, is it supported by legal authority and issued upon proper procedures?

D E C I S I O N

At the outset of the hearing, the appellant raised ² the issue of the ability of the Commissioner, through the hearing process of Section 16-39 of the General Laws, to adjudicate impartially the legal validity of a document issued by the Commissioner and developed by the Department of Education. The hearing officer is designated by the Commissioner for purposes of hearing and decision in such controversies, a process permitted under our present statutes.³ This process permits a fair hearing and independent resolution of many issues intimately connected to the Commissioner and the Department of which he is chief administrative officer. This is a parallel to the separation of functions within modern administrative agencies which has formed the basis of the Court's

2) Tr. Vol. I pp.3-5

3) Prior to a 1973 amendment to the law, the Commissioner was charged with the sole responsibility of deciding education controversies. This observation was made by the Rhode Island Supreme Court in ruling to uphold the designation of such hearing officers in Jacob v. Board of Regents, 117 R.I. 164, 365 A.2d 430 (1976). The Commissioner may now supervise several specific functions one of which is to decide controversies appealed to him. See R.I.G.L.16-60-6(9)(h).

holdings that investigatory and prosecutorial functions of an agency can coexist with the hearing/decision-making function, consistent with due process requirements.⁴ It was with a rudimentary description of this adjudicative process that the appellant determined he would proceed with his appeal to the Commissioner, rather than proceeding before some other forum.

The appellant's first argument is that the "Instructional Outcomes" are advisory only, since in issuing them the Commissioner doesn't say that they are required.⁵

We agree with the appellant that the text of the document entitled "Instructional Outcomes for Sex and Family Life Education" (hereinafter "Outcomes") does not state that the instructional outcomes contained in it are mandated. The document is prefaced by a letter from former Commissioner J. Troy Earhart⁶ which indicates that the purpose of the Outcomes is to "assist school districts" in carrying out the Board of Regents policy requiring them to implement family life and sexuality education. One would not glean from this communication that the Outcomes were intended not only to require sex and family life education but to require a specific set of learning expectations in sex and family life at the grade clusters indicated. Yet, the Department of Education (hereinafter "Department") argues that the Outcomes mandate school districts in Rhode Island to have in place an educational program in sex and family life which contains the specific content information indicated by the Outcomes. Indeed, both of the representatives of the Department who testified⁷ were consistent in their perception of the Outcomes as required by the state. They also uniformly perceive the method of delivery of the required information to be a matter of choice of the individual school districts. This per-

4) See La Petite Auberge, Inc. v. R.I. Commissioner for Human Rights, 419 A.2d 274 (R.I. 1980) and most recently, Larue v. Registrar of Motor Vehicles, 568 A.2d 755 (R.I. 1990).

5) i.e., if it doesn't sound like a state mandate it can't be a state mandate.
6) dated October, 1988.

7) Kenneth L. Glew, a Department Specialist in Comprehensive Health and Physical Education, and Edward T. Costa, Director of the Division of School Support Services for the Department.

ception is borne out in North Kingstown's situation by the actions of the School Committee in developing its own curriculum (here used to mean instructional tools, books, audio-visuals, etc.) while at the same time adhering to the Outcomes in developing the instructional content at each grade level for grades 6 through 12.

We are of the opinion that the interpretation of the Outcomes as requiring specific instructional content in sex and family life is a correct interpretation. This interpretation of the Outcomes is made despite former Commissioner Earhart's less-than-clear reference to the authority for the document and his failure to indicate its binding effect. We attribute Dr. Earhart's failure to characterize the listing of instructional outcomes for grades K-12 as "required" to the sensitivity of the subject and his incorrect reference to the authority for the document to the confusing intersection of action on the subject by many entities - - the Governor, Legislature, Board of Regents and Department of Health.- - all within a relatively short time frame.

The Outcomes are mandated because in issuing them, the Commissioner was responding, in part, to the responsibility given to him by the Public Laws of 1986, Chapter 412, commonly referred to as the "Ferry Act".⁸ That law gave the Commissioner the responsibility in Section 16-1-5(n):

to establish health education, alcohol and substance abuse programs for students in grade kindergarten (K) through twelve (12) . . . said program will consist of the following: a mandated state health education, alcohol and substance abuse curriculum for grades kindergarten (K) through twelve (12). . . . (emphasis added).

8) a fact recognized by Augustine Capotosto, Chairman of the Board of Regents at the time it voted to amend its policy to require instruction in sex and family life. See Appellant's Exhibit 6 a March 5, 1987 memorandum from Dr. Capotosto to the Regents on this subject. Mr. Costa of the Department of Education also testified that the Commissioner's directive to prepare a "mandated curriculum" for, among other health-education subjects sex and family life, stemmed from the Ferry Act. (Tr. Vol. II, p.7).

The appellant would reject the Ferry Act as the source of the Commissioner's authority to issue mandated outcomes in sex and family life, since he argues that sex and family life is a topic separate and distinct from "health". The Legislature did not define "health education" as that term is used in R.I.G.L. 16-1-5(n), previously cited. The Legislature has consistently not elaborated on what it means by health education. It did not define health education when it required instruction in "health and physical education for an average of twenty (20) minutes in each school day" (R.I.G.L. 16-22-4) or when it required that all schools have a school health program, including health education (R.I.G.L. 16-21-7). We would note, however, that the Legislature uses the word "health" in the title of 16-22-18 to refer to sex education in requiring that abstinence be taught as the preferred method of pregnancy prevention and prevention of sexually transmitted diseases.

We must give the term "health education" its ordinary and plain meaning⁹ and we construe it to include instruction in both sex and family life. It has not been shown to be unreasonable to include topics such as reproduction, contraception, pregnancy, sexually transmitted diseases (all topics which are included in the state-mandated Outcomes) within the scope of health instruction. Obviously, in giving the Commissioner the responsibility of developing a state-mandated curriculum,¹⁰ the Legislature left the prerogative of judgment as to topics to be included to the Commissioner. We would point out that his decision to include instruction in sex and family life within "health education" is not inconsistent historically with the North Kingstown School Committee's own interpretation of these words when it required instruction in sex and family life as part of its required health education program commencing in 1985.

9) The proposition that absent a contrary intent, words in a statute must be given their plain and ordinary meaning was very recently affirmed in D'Ambra v. North Providence School Committee issued by the Rhode Island Supreme Court on January 10, 1992.

10) and by curriculum, we think the Legislature intended instructional content, rather than materials for delivery of information.

In sum, the Legislature left the difficult decisions of exactly what to teach and when to teach it to the Commissioner of Education, and he has not been shown to have acted unreasonably or arbitrarily in making decisions in this regard.

Buttressing the Commissioner's statutory authority to issue the Outcomes in sex and family life education is the Board of Regents inclusion within its Basic Education Program (BEP) the requirement that:

Instruction shall be provided to all students in sex and family life education, including AIDS instruction. This coursework shall be developed with community based input Sex and Family Life Curriculum shall be implemented by the fall of 1988 and must be in accordance with State-Mandated Outcomes. . . Sex and Family Life education, which includes AIDS instruction, must be introduced to all students at the grade clusters indicated in the State-Mandated Health Education Outcomes.

(Appellant's Ex.H).

The Board of Regents voted to include the above-cited language as an amendment to the health education standard on April 23, 1987.¹¹ The effect of adding this language in Standard 11 was to incorporate the Outcomes into the Basic Education Program. Viewed another way, the Regents, who under R.I.G.L. 16-7-24 have the regulatory authority to establish a basic education program for all public schools in the state, adopted the Commissioner's sex and family life "curriculum" as part

11) This language was incorporated at Section 11(g) of the Basic Education Program. In the text of the BEP has been added in parentheses "(R 16-21-SCHO, Part II, Section 5.3.8)". This reference was not contained in the Standard approved by the Board and it is our opinion that it is an incorrect reference. The only document which contains both State-Mandated Outcomes and grade clusters for introduction of specific information on the subject of sex and family life is the Outcomes..

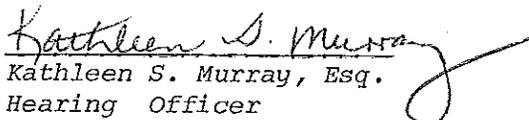
of the required school program.¹² This adoption or endorsement by the Regents of the Outcomes does not diminish the independent legal authority for the document found in R.I.G.L. 16-1-5(n).

A final argument made by the appellant is that even if the Commissioner had the legal authority to issue a mandated curriculum in sex and family life that he did not follow proper procedures in doing so. Specifically, the appellant argues he should have issued such regulations in conformance with the notice and hearing requirements of the Administrative Procedures Act, Section 42-35-1 et seq. of the General Laws. In Henry v. Earhart, 553 A.2d 124 (R.I. 1989) the Rhode Island Supreme Court held that the Administrative Procedures Act was not applicable to regulations promulgated by the Department of Education. The Court's rationale was that both Section 42-35-18(a) (28) and 16-60-10 of the General Laws exempt Chapter 60 of title 16 from the provisions of the Administrative Procedures Act. The duties of the Commissioner set forth in Section 16-60-6 include those specifically enumerated in that Section, as well as "the duties as defined in Section 16-1-5, elsewhere in this title or in law whenever outlined. . .". Thus, when the Commissioner acts to fulfill his duties under R.I.G.L. 16-1-5 he acts pursuant to 16-60-6 as well and his rule-making activities are thereby exempted from the APA. In Henry, supra, the Commissioner had issued regulations pursuant to Chapter 48.1 of Title 16 and because this was a duty defined "elsewhere in this title or in law wherever

12) It is true, as the appellant points out, that the Outcomes had not, at the time of the Board of Regents vote, been published. This evidently occurred in October of 1988. However, the document was in existence at the time of the BEP amendment, a fact we believe is reflected in the Capotosto memorandum to the Board of Regents dated March 5, 1987. Testimony quoted by the appellant in his brief at pages 13-14 to show that the Outcomes were not in existence at the time of the BEP amendment is not testimony in the record of this case. The appellant quotes from pages 29, 49 and 51 of Exhibit 3. Department Exhibit 3 consists of four (4) pages of the minutes of the Board's March 12, 1987 meeting. If the document was not in existence at the time of the BEP amendment in 1987, then, of course, it could not have been incorporated by reference. In that event, the Commissioner's authority for the mandated outcomes would rest exclusively on R.I.G.L. 16-1-5(n).

outlined" the Court found the rule-making procedure adequate. The same principle applies to the Commissioner's issuance of regulations under 16-1-5, which is specifically referenced in 16-60-6(7), and, therefore, the Administrative Procedures Act does not apply. The procedures utilized by the Commissioner in developing the Outcomes, as testified to by Mr. Costa of the Department, were reasonable. Mr. Costa described the convening of a task force of specialists by Commissioner Earhart. This group worked over a period of one year to develop the Outcomes, as well as the other parts of the document. It was reviewed by professional health educators from several of our school districts prior to its implementation by Commissioner Earhart. The process was a thorough one.

For the foregoing reasons, the appeal is denied and dismissed.


Kathleen S. Murray, Esq.
Hearing Officer

Approved:

March 6, 1992


Peter McWalters
Commissioner of Education