

Introduction

This is a request for an interim order directing the School Department "to honor the status quo provision of the Individuals with Disabilities Education Act and arrange for the continuance of [student Doe's] summer program at Camp Aldersgate . . ."¹

For the reasons set forth below, we grant Petitioners' request.

Background

Student Doe is a 9 year old child with mild cerebral palsy and developmental delays. On September 21, 1994, Petitioners and the Northwest Special Education Region agreed on an individualized education program (IEP) for student Doe covering the period September 1994 to September 1995. The IEP provides for regular classroom² as well as special education services³ for student Doe at the West Gloucester Elementary School. The IEP also provides for "extended-school-year services as per Reg. VI, 1.3 (integrated location)" for the summer of 1995.⁴

The September 21, 1994 IEP notes that student Doe has "weaknesses in expressive language and motor skills most affected by her physical disabilities." The IEP further states that her "Personal/social/-

1 Petitioners' request was received on July 11, 1995. The matter was referred to the undersigned hearing officer and heard on July 20, 24, and 26, 1995.

2 The IEP states that the regular services are "minus as-needed 'respite' with appropriate staffing," i.e., the presence of a one-on-one aide at the discretion of the classroom teacher. [Petitioners Exhibit 3].

3 The special education services included 3 hours of self-contained classroom per day. [Petitioners Exhibit 3].

4 Section VI, 1.3 of the Regulations of the Board of Regents Governing the Special Education of Students with Disabilities concerns the availability of extended school year services.

behavior skills also require on-going addressing, particularly during activity transitions."

Problems with student Doe's behavior continued during the 1994-1995 school year. In February 1995 Petitioners and the School Department agreed to refer student Doe to the Meeting Street Center for diagnosis and reevaluation. The April 6, 1995 Summary of Diagnostic Evaluation by the Meeting Street Center Diagnostic Team includes the following:

[Student Doe] was referred to Meeting Street Center's (MSC) school program by the Gloucester School Department because of concerns related to aggressive behavior. Some of the presenting problems included tantrums, head-butting, spitting, and disrobing. The situation had deteriorated to the point where [student Doe] could no longer be safely managed at school . . . The Gloucester School Department requested a complete diagnostic workup with recommendations for instructional strategies and a behavior management protocol.

[Student Doe] has a significant school history of attentional difficulties and aggression that dates back to 1991 . . . The same pattern of attention and aggression problems are noted in school reports dated January, 1995. Behavioral techniques, while temporarily helpful, have not successfully managed [student Doe's] behavior or taught her more permanent self-control. Her attention and aggression problems have only intensified over the years. [School Committee Exhibit 5].

The Evaluation Summary concluded by stating that

Proactive suggestions for assisting [student Doe] to maintain her attention to task and reduce the occurrence of aggressive outbursts have been made throughout all of the evaluations and summarized in the Behavior Management Suggestions protocol. However, it is strongly felt that instructional recommendations as well as the behavior management suggestions will only be effective in the long run when coupled with psychiatric intervention.

On April 12 the Northwest Special Education Region sent Petitioners a "Notice of IEP/Post-Evaluation Conference" scheduled for

April 26. The purpose of the letter was to "confirm that an IEP and post-evaluation meeting has been scheduled for the purpose of reviewing your child's educational progress and placement" [School Committee Exhibit 6].

The parties met on April 26 and signed a document entitled "Student Review Record." [School Committee Exhibit 7]. The words "IEP Addendum" are handwritten at the top of the document. The document describes the "Issue(s)" as "Post-Meeting-Street-Center-Evaluation/IEP Update to provide a positive return for [student Doe] back to WG from MSC." The document includes the Meeting Street Center behavior management suggestions. It also states that student Doe's self-contained classroom teacher will "continue to include" her in the activities of the regular education students "as much as possible," and that her "success in integrated activities" will be monitored. The "parental response" portion of the document acknowledges the receipt of the procedural safeguards and states that student Doe's mother accepts "this interim IEP."

The April 26 document also states that student Doe's progress will be reviewed on May 24, and that "ESY services" will be a "focus" of that meeting.

Student Doe returned to West Glocester Elementary School. Further behavioral difficulties resulted in her being kept home from May 11 to May 24. The parties met during this time to revise student Doe's behavior management plan. On May 17 student Doe's mother was asked to authorize the release of information to Bradley Hospital for a possible summer program placement at the Hospital's Developmental Disability Unit (DDU) in East Providence. The parties agreed on a

modified behavior program at the May 24 IEP meeting, and they discussed ESY services at this time as well.

On May 30 student Doe's mother authorized the release of information to Bradley Hospital with the attached note:

As of this date, we feel that another major transition for [student Doe], (RE: Bradley Hospital (DDU) placement for Summer 1995) is not in her best interest. We will, however, view the facility, as well as further explore other possible resources related to her extended year (Summer) program. [School Committee Exhibit 10].

The School Department proposed that student Doe receive ESY services in a summer program at the Bradley Hospital DDU. Petitioners disagreed with this proposal, and on July 8 they filed a request for a due process hearing "to challenge the summer placement for [student Doe]." [Petitioners Exhibit 2].

The record shows that student Doe attended Camp Aldersgate in North Scituate in the summers of 1992, 1993, and 1994. None of her IEPs for those years list Camp Aldersgate by name. The IEP for 1992 states that the summer program or services are to be determined per Regulation VI, 1.3 [School Committee Exhibit 15], and the IEPs for 1993 and 1994 state that summer services are to be finalized by May of the respective years per the same regulation. [School Committee Exhibits 17 and 18].

The majority of children who attend Camp Aldersgate do not have learning disabilities. Student Doe participated in typical camp activities, such as swimming, crafts, and field trips, with these children. She also received physical therapy, occupational therapy, and speech and language therapy in the course of her day at Camp Aldersgate. The Bradley DDU is located on the Hospital grounds,

is a highly structured program, and primarily focuses on behavioral programming for the children. Each child at the Bradley DDU has a behavior management program.

Contentions of the Parties

Relying on student Doe's September 21, 1994 IEP and her history of attending a summer program at Camp Aldersgate, Petitioners contend that Camp Aldersgate is the last agreed-upon summer placement for student Doe and therefore must be found to be the status quo placement during the pendency of the dispute concerning her ESY services. Petitioners argue that the "integrated location" requirement of the September 21, 1994 IEP was not changed by any subsequent IEP addenda. They assert that the proposed Bradley DDU program represents a substantial and fundamental change in student Doe's ESY services, and thus is a change in placement for which the School Department has not provided proper notice. Petitioners point to student Doe's integration opportunities at her school in West Gloucester, the integrated nature of Camp Aldersgate, and the absence of any integration at the Bradley DDU. While Petitioners reserved the right to present detailed evidence concerning student Doe's behavior during the school year, they contend that the record fails to establish that she would be a danger to herself or others at Camp Aldersgate. In any event, Petitioners further argue that the United States Supreme Court has held that there is no "dangerousness" exception to the status quo provision.⁵

The School Committee contends that the April 26, 1995 agreement is the controlling IEP document, and that Camp Aldersgate is not the

⁵ Honig v. Doe, 484 U.S. 686 (1988).

current educational summer placement under that document. Citing student Doe's recent behavior problems, the School Committee argues that only the Bradley DDU can deliver a summer program while implementing the behavior management program contained in the April 26, 1995 IEP. According to the Committee, the Camp Aldersgate setting does not accommodate the particular techniques and facilities that are essential elements of the behavior management program. The Committee emphasizes student Doe's total lack of classroom integration since April, and it asserts that the Bradley DDU constitutes a change merely in the location of her program, not a change in the placement itself. As a result, the requirement to notify parents of a proposed change in placement is not applicable.

Discussion

The status quo provision invoked by Petitioners in this matter reads as follows:

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.
34 C.F.R. 300.513(a).

Student Doe's "present educational placement" for the summer of 1995 is to be determined by examining her IEP. Student Doe's September 21, 1994 IEP states that she will receive extended school year services in an "integrated location" during the summer of 1995. Although the April 26, 1995 "IEP Addendum" or "interim IEP" incorporates a behavior management plan into student Doe's educational program, it did not eliminate the integration objective from her programming, nor did it provide an alternative description for her ESY services.

We therefore find, in light of the IEP documents and the location of her past ESY services, that student Doe's present educational placement for the summer of 1995 is Camp Aldersgate.

We further find that the School Department's proposal to provide summer programming at the Bradley Hospital DDU involves changes to the present placement which will "affect in some significant way the child's learning experience." DeLeon v. Susquehanna Community School District, 747 F.2d 149, 153 (3rd Cir. 1984). We base this finding on the differences in the nature of the two facilities, their populations, and the program contexts in which the special education services are provided. We therefore find that the School Department's proposal represents a change in student Doe's actual placement, not just the service location.

In Honig v. Doe, the United States Supreme Court observed that an emergency exception for dangerous students is "[c]onspicuously absent" from the status quo provision. The Court concluded that the omission was intentional, and that it was "not at liberty to engraft onto the statute an exception Congress chose not to create." However, the Court took note of the Comment to Section 300.513 which states that while a child's placement may not be changed absent agreement during a complaint proceeding, "this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." According to the Court, this may include the seeking of injunctive relief. As we have previously stated, "we do not preclude the school district from applying for an injunction from the Federal District Court if it can prove that [the student] is a danger to himself or others." John B.C. Doe vs.

Smithfield School Committee, September 13, 1994, p. 4.

We find further support for Petitioners' request in the case of Educational Assignment of Shaun P, 1986-87 EHLR 508:242 (Pa. 1986). Shaun received special education services in his regular school year program. He also was enrolled in ESY programs during summer breaks. Shaun attended a 6-week ESY program in the summer of 1985. In March 1986, the school district proposed a 5-week ESY program for the summer of 1986. Shaun's parents disagreed with the proposed shorter program and they requested a due process hearing. We quote the decision on review:

In regard to Shaun's ESY program, the hearing officer held that ESY eligibility determinations from year to year are wholly independent of each other and that pendency [of an administrative proceeding] would not require continuation of the past year's ESY program during hearings and appeals regarding the proposed program for the subsequent year. We can, however, find no legal support for the distinction drawn by the hearing officer in this case. Regular school year IEPs must also be reviewed, and if necessary revised, on an annual basis. [Citations omitted]. In the instance of a regular school year IEP, even though an annual review is required, the current agreed upon IEP is continued to be implemented during administrative and judicial proceedings to resolve disagreement over a proposed IEP which incorporates significant changes in program or service. Similarly, we conclude that the last agreed-upon ESY program constitutes the status quo in a subsequent summer or other break period during which the parties are engaged in proceedings regarding disagreement over proposed changes to the ESY program . . .
508:244

There is no indication in Shaun P that his IEP specifically designated a 6-week ESY program. Rather, his program from the prior summer was found to be the present placement when the parties were unable to agree on a program for the upcoming summer.

Conclusion

Student Doe's present ESY educational placement is Camp Aldersgate. We therefore grant Petitioners' request and hereby enter an interim order directing the Gloucester School Committee and the Northwest Special Education Region to enroll student Doe in an appropriate ESY program at Camp Aldersgate during the pendency of the due process proceeding. Our entry of this status quo order does not preclude the School Department from taking appropriate action if it believes student Doe presents a danger to herself or to others at Camp Aldersgate.

Paul E. Pontarelli

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Hearing Officer

Approved:

Peter McWalters

Peter McWalters
Commissioner of Education

Date: August 2, 1995