

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....
Mary S. :
 :
 v. :
 :
The Prout School :
 :

Decision on Interim Order

Held: It has not been demonstrated on the record that this student was discriminated against because of his disability in violation of Section 504 of the Rehabilitation Act of 1973. He was provided with reasonable accommodations while in attendance at The Prout School, and his exclusion this year is due to his failing grades in English and Math which were received despite the availability of these accommodations.

DATE: October 13, 2000

Travel of the Case

On September 7, 1999 Mary S. filed an appeal with Commissioner Peter McWalters, requesting an interim protective order to permit her son to continue in attendance at The Prout School (hereinafter “Prout”) in Wakefield, Rhode Island. Alleged in the appeal was that Prout had changed its contract to restrict the nature of the accommodations available to students with disabilities who were enrolled there. Further alleged was that Mrs. S’s son, a junior, would be discriminated against because he was eligible for additional “minor accommodations” not available under the terms of the new Prout contract. Since she had refused to sign the revised Enrollment Contract for the 1999-2000 school year, her son, Ryan, had not been permitted to resume his attendance at the beginning of the year. Hearing on the September 7, 1999 appeal was deferred at Mrs. S.’s request to permit her time to retain an attorney, since she had indicated her reluctance to proceed unrepresented. Thereafter, the matter was not scheduled for hearing despite several written requests by the hearing officer that Mrs. S. indicate a convenient date for hearing, or indicate whether the matter had been resolved. The last such communication was sent to Mrs. S. on June 27, 2000. There was no response at that time.

On September 25, 2000 Mrs. S. filed a new appeal, based on a decision of Prout to exclude Ryan from attendance during school year 2000-2001. In contesting Prout’s decision Mrs. S. noted that his exclusion was without due process and related to the issues raised in her initial appeal, i.e. the provision of accommodations described in an individualized education program that had been created by the North Kingstown School Department for Ryan in 1998.

Hearing on both appeals was consolidated and scheduled for October 4, 2000. At that time Mrs. S. appeared pro se, and Prout was represented by its attorney. Counsel for the North Kingstown school department also was notified of the hearing and participated, although to a very limited extent because of the nature of the claims presented in the appeals before the Commissioner. The record in this matter closed on October 5, 2000 when a copy of Prout’s handbook for the 1999-2000 school year was provided to the

hearing officer, as neither of the parties had available at the hearing a copy of the handbook in effect for the year in which this dispute arose. Given the length of the hearing, the entire transcript was not available for purposes of this decision. The decision is based on the hearing officer's notes, an extensive number of exhibits submitted into evidence, and a transcript requested for a small portion of the testimony for which notes proved inadequate.

Positions of the Parties

Mrs. S.

Mrs. S. takes the position that her son's exclusion from Prout is in violation of his rights as a student with a documented disability who requires a number of modifications to the regular academic program, all of which have been documented and are contained in his IEP. She argues that Prout has a duty not to discriminate against her son and to provide him with those modifications, which are designed to "level the playing field" so that he might have the same opportunity for academic success as students at the school who do not have disabilities. Although Ryan received these accommodations to the school program at Prout during his freshman and sophomore years, Mrs. S. contends that he did not receive these accommodations during his junior year. She notes that the school changed both its enrollment contract and its actual practice to restrict the accommodations available to only those two described in the contract and in Prout's handbook at page 16. The failure to provide the additional accommodations to which Ryan is entitled constitutes illegal discrimination under Section 504 of the Rehabilitation Act of 1973, she argues.

With respect to Ryan's current exclusion from Prout, Mrs. S. has received no documentation which would explain or document the reasons for his exclusion. Although she has been told verbally that his exclusion is based on his failure of two courses, math and English, she has not received any documentation of the grades he received in these summer school courses. If in fact he did fail math and English in summer school, such academic failures should not make him ineligible to remain in attendance at Prout because, she contends, he initially failed these two courses during the

regular school year because the teachers at Prout failed to implement the accommodations called for in his IEP. In any event, Prout's handbook does not require that a student be dismissed from the school if he or she has failed two courses at year's end, but merely permits the school to take such action. Implicit in the record is Mrs. S.'s argument that if ever there were a case in which discretion should be exercised to retain a student, it is a situation such as this.

The Prout School

Counsel agreed with Mrs. S. that The Prout School is subject to Section 504 of the Rehabilitation Act of 1973, and therefore legally obligated to refrain from discriminating against otherwise qualified individuals with disabilities. Counsel submits that there has been no discrimination on the basis of Ryan's disability and that he has been provided with reasonable accommodations to the academic program at Prout. Implicit in counsel's argument was that the accommodations provided to Ryan in his junior year generally followed those listed in the IEP in effect for that year, and were not restricted to the two accommodations described in the enrollment agreement and Prout's handbook.

Prout actually went beyond what was required by law when, despite the availability of these modifications, Ryan failed three subjects at the end of his junior year. Instead of exercising its option to exclude Ryan from Prout at that time, school officials gave him the opportunity to take the three courses (English, math and religion) in the summer. Passing grades in these courses would have been permitted to replace the final grades he received at the close of his junior year. Counsel notes that Prout went so far as to extend the deadline for completion of this summer coursework until September 5, 2000, after the school year had already begun, because of Ryan's late start of this work. Although Ryan successfully completed his religion course, he again failed both English and math, courses provided to him through the North Kingstown school department's extended school year program. After considering for a brief period of time the possibility of make up credits through CCRI, the principal, in conjunction with an appeals board, decided to exclude Ryan from further attendance at Prout. Since the handbook clearly states that the school has the discretion to take such action when a student fails two or

more courses, Prout argues that its dismissal of Ryan was within its rights. Excluding Ryan from further attendance was not prohibited by Section 504 because Prout had provided reasonable accommodations; in fact measures in addition to such accommodations were taken, but proved unsuccessful in helping Ryan maintain the grades required for continued enrollment at Prout. Attainment of certain academic standards, especially in math and English, are integral to Prout's school program, it is argued.

Legal Context

Under Chapter 87 of Title 42 of the General Laws of Rhode Island, entitled "Civil Rights of People With Disabilities" the Department of Education is directed to hear all complaints relating to violations of the chapter in the area of elementary and secondary education. See R.I.G.L. 42-87-5 (c). Chapter 42-87 defines discrimination to include those acts prohibited on the basis of disability by 42 USC 12101 et seq. (the Americans With Disabilities Act) and by 29 USC 794 (Section 504 of the Rehabilitation Act of 1973). The parties have stipulated that the provisions of Section 504 of the Rehabilitation Act of 1973 apply to The Prout School, a Catholic school operated by the Diocese of Providence. The school offers a college preparatory program for students in grades seven through twelve. See Prout Ex. C. The record does not reflect the factual predicate for Section 504's applicability, but we must assume, given the stipulation of the parties, that The Prout School is the recipient of federal financial assistance. In any event the ADA¹, which clearly would apply to the Prout School, and the Rehabilitation Act impose parallel requirements.

In a Section 504 context Prout is required not to discriminate against disabled individuals. Section 504 states in relevant part:

No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his

¹ Specifically Title III of the Americans with Disabilities Act of 1990, 42 USC 12181 which prohibits discrimination on the basis of disability by public accommodations. By regulation, 28 CFR 36.104 defines a place of public accommodation to mean a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories...(10) a nursery, elementary, secondary, undergraduate or postgraduate private school or other place of education.

disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

Substantially the same language appears in the regulations promulgated pursuant to Section 504, found at 34 CFR 104.4 (a):

...No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

Section 104.39 of the Regulations provides further that recipients that operate a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with “minor adjustments,” be provided an appropriate education within the recipient’s program.

Cases applying Section 504 and the ADA have recognized that applicability of these statutes does not transform private, non-special needs schools into special needs schools, nor do they require that private schools devise individualized education programs for students with disabilities who are in attendance. See *Bercovitch v. Baldwin School, Inc.* 133 F2d 141 (1st Cir. 1998). Private schools are not required to make substantial modifications in their programs to allow disabled persons to participate, especially when such modifications or accommodations would lower academic standards or impose undue hardship. See *Wynne v. Tufts Univ. Sch. of Med.*, 976 F2d 791 (1st Cir. 1992). Such schools are required, however, to make “reasonable accommodations” to the school program. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed. 2d 980 (1979).

Factual Context

It has been established by the evidence in this case that Ryan has been excluded from Prout for failing three courses at the end of his junior year, and for his failure to recoup his necessary credits in retaking English and math with his summer tutor. His

report card indicates a final grade of 56 in English and 46 in Integrated Math II at the end of his junior year. The testimony of the school's guidance counselor established that a portfolio review of Ryan's summer work that she conducted with the tutor indicated that he had again failed Math and English. Absent from this record is clear and direct written communication from the Prout School to either Ryan or his mother as to what his summer school grades were and the basis for the decision to dismiss him from the school. However, the absence of such (appropriate) documentation does not outweigh the testimony that his exclusion is based on his course failures and a determination that he failed to meet the academic standards in effect at the school. There is no evidence whatsoever that Ryan's exclusion is solely based on his disability.

Our inquiry therefore becomes focused on Mrs. S.'s arguments that if appropriate accommodations had been in place, he would not have received the failing grades which resulted in his dismissal from Prout. She has implicitly argued that the modifications contained in Ryan's IEP (Appellant's Ex. 4) constitute the "reasonable accommodations" to which he was² legally entitled. Counsel for the Prout School did not argue that any of the accommodations listed in the IEP were unreasonable and therefore not required under Section 504.³ The dispute in this matter was not that any of the modifications called for were unreasonable, but rather that they had, in fact, been provided or substantially provided. We are therefore constrained to discuss in detail our factual findings with respect to whether or not Ryan received those modifications called for in his IEP, Appellant's Ex. 4.

Specific factual findings as to the extent accommodations were made to the academic program at Prout for Ryan S.:

Ryan testified that he received some, but not all, of the program modifications contained in a five page list of required modifications included in the IEP in effect for his junior year (Appellant's Ex. 4). The guidance counselor from Prout testified that all of the

² It should be noted that the "new" IEP drawn up at the end of Ryan's junior year, to be in effect for his then-anticipated senior at Prout, and signed by his mother, narrows one of his prior modifications to remove any penalty only for "spontaneous spelling / grammar errors".

³ This is nonetheless due to the fact that representatives of Prout participated in the development of this IEP in 1998 and at that time consensus was reached on these modifications.

program modifications contained in this document were “made available” to Ryan, but that he rarely exercised his eligibility to have extended time on tests or assignments. The procedure for obtaining extra time on tests involved the guidance counselor in that if Ryan needed extra time it was to be provided in the guidance office. The system for securing extra time on assignments and papers also involved the guidance counselor in that Ryan was to notify her of an assignment that would require extended time, and the counselor would then work with him on breaking down the assignment into manageable units and notify the teacher involved of the need to extend the due date.

We find that the system used by Prout in implementing the accommodation of extended time, for both tests and assignments, was consistent with the IEP. We note that extended time for tests was to be provided in the guidance room and increases in the amount of time allowed to complete assignments/tests was to result from a contract with the student concerning time allotment. We understand the reasoning behind this system of implementation to be twofold: the inability of the guidance counselor to “chase down” students to determine which assignments would require her assistance and/or an extension of time and, secondly, the IEP team’s identification of a goal for Ryan to increase his own responsibility for getting his assignments completed on time. The record demonstrates that Ryan failed to take advantage of the accommodations Prout had agreed to with respect to extended time for testing and assignments.

The evidence concerning Ryan’s use of a calculator for math in his junior year is in conflict. The IEP describes the use of a calculator as both “helpful” and “required”. There is some testimony that one of Ryan’s math teachers did not permit him to use a calculator until Mrs. S. raised this issue, but the documentary evidence submitted would indicate that any confusion regarding Ryan’s eligibility to use a calculator in math was resolved in January of his sophomore year. See Appellant’s Ex. 14. The preponderance of evidence submitted on this issue leads to the conclusion that Ryan was able to use a calculator in math throughout his junior year, and thus did receive this accommodation.

There are several exhibits in the record which would indicate that Ryan received grade reductions for spelling errors in English papers even though his IEP required that teachers not grade his spelling in different content areas. The guidance counselor

testified that although Ryan did not receive grade reductions for in-class work in which he would make spontaneous spelling errors, on written papers for English which were completed at home and for which he could use spell check, some reduction in his grade would occur. On the papers submitted into evidence as examples of deductions for spelling, we find that any deductions made for spelling were negligible and not determinative as to whether Ryan received a failing grade. With each of the items submitted in evidence, the failure was attributable to the teacher's assessment of other inadequacies, such as content and organization. Therefore, even if spelling deductions for at-home papers was a practice inconsistent with the modifications set forth in Ryan's IEP, the impact any violation had on his grade in English was negligible, according to the evidence in the record.

It is undisputed that Prout exempted Ryan from its foreign language requirement, and permitted him to substitute elective credits for a foreign language. This was in accordance with a provision to this effect contained in his IEP, but not included in the list of required modifications.

To summarize, we find that despite a conflict in the testimony,⁴ Prout provided or made available to Ryan S. all of the modifications to his school program contained in his IEP with the exception of the requirement that he not be graded for spelling. Since we find that this had no substantial impact on his English grade, according to the evidence contained in this record, we need not determine if this constituted denial of a reasonable accommodation under Section 504.

As a final issue, Mrs. S. argues that the discretion which the school handbook calls for when students fail and are subject to dismissal should be exercised to permit Ryan to remain in attendance. In essence, this is a request for a further accommodation for Ryan. Prout has argued that attainment of academic standards, especially in English and Math is an integral part of Prout's program. We must agree with the notion that attainment of certain academic standards, especially in English and Math, is the core of an academic program. Under our statutory scheme, Prout is free to condition eligibility

⁴ and inconsistent statements in the enrollment contract and handbook restricting to two the accommodations available to Prout students.

for continued attendance on attainment of certain standards, as long as it does not discriminate against students with disabilities. We find no evidence of discrimination in this case. The request for an interim order is denied.

Counsel for Prout has requested that we provide any “recommendations” we might have in this matter. If the parties agree that they wish to meet to attempt to mediate their dispute, the Legal Office will facilitate such meeting upon further request and agreement.

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

October 13, 2000

Date