

RS v. West Orange Board of Education
Office of Administrative Law
8175-94
December 19, 1994

Richard McGill., Administrative Law Judge

Counsel for Parents: Theodore A. Sussan, Esq., and Staci J. Greenwald, Esq., Sussan & Greenwald.

Counsel for Board: Stephen J. Christiano, Esq.

This matter concerns a petition on behalf of R.S., a fifteen-year-old student classified as neurologically impaired, who was scheduled to enter a high school of the West Orange Board of Education ("district" or "respondent") in September 1994. R.S.'s parents, J.S. and P.S., (collectively "petitioners") seek placement of R.S. at the Early Childhood Learning Center (ECLC) in Chatham, New Jersey. In support of the requested relief, petitioners maintain that the individualized education program (IEP) developed by respondent for R.S. fails to comply with pertinent legal standards set forth in N.J.A.C. 6:28-3.6 and that respondent's proposed placement at West Orange High School will not provide R.S. with an appropriate education.

Respondent contends that the IEP and the placement at West Orange High School comply with pertinent legal standards. Moreover, the placement at West Orange High School with some mainstreaming is the least restrictive environment.

Procedural History

The petition on behalf of R.S. was filed with the Division of Special Education on August 15, 1994. The matter was transmitted to the Office of Administrative Law on August 25, 1994 for a hearing in accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. § 300.506.

The hearing commenced on September 21, 1994 at the Office of Administrative Law in Newark, New Jersey. A total of eight days of hearing concluded on November 22, 1994, and the record closed on the last hearing date.

Issues

The main issues in this proceeding are whether the IEP developed by respondent complies with the requirements set forth in N.J.A.C. 6:28-3.6 and whether the proposed placement at West Orange High School would provide an appropriate education for R.S. The final issue is whether R.S. should be placed at ECLC.

Facts

The underlying facts in this matter are largely undisputed, and I FIND as follows. R.S. is a fifteen-year-old student who was born on September 7, 1979. R.S.'s difficulties became apparent at an early age with the result that he was placed in a pre-school special education program. In 1984, R.S. was classified as neurologically impaired, and throughout elementary school, R.S. was placed in a class for neurologically impaired students.

R.S. attended sixth, seventh and eighth grades at the district's Roosevelt Middle School, which has a departmentalized program. For the 1991-92 school year, his sixth grade, R.S. was in a class for neurologically impaired students but he was mainstreamed for the advisory period and for related arts. R.S. continued in the neurologically impaired class at Roosevelt Middle School for the 1992-93 and 1993-94 school years. Related services included speech and language, occupational therapy and adaptive physical education.

Elisa Rescigno, the school psychologist, conducted a psychological evaluation of R.S. on April 28, 1993. Ms. Rescigno determined that R.S. has a full scale IQ of 60. Her report states:

Most notable of [R.S.'s] behaviors was his high level of distractibility. [R.S.] needed constant refocusing, as he was distracted by visual stimuli on the walls and by his internal thoughts which he felt compelled to share despite lack of relevancy. He tended to respond impulsively to both verbal and visual hands-on tasks and needed ongoing reminders to slow down and think before answering.

[R.S.] was also observed in class working independently on a math assignment. While he appeared to make attempts at focusing, he was easily distracted by the other students' goings-on.

The report further states:

[R.S.'s test] results continue to reflect borderline Verbal abilities and deficient functioning in overall Performance and Full Scale measures. Verbal abilities continue to be significantly better developed than non-verbal, visual-perceptual abilities. Verbally, inter-subtest scatter

continues to exist with [R.S.] achieving very poor scores in some areas (vocabulary, fund of information, numerical reasoning) and low average to average scores in others (verbal abstract reasoning, common sense reasoning and short-term auditory recall). Nonverbally, [R.S.] continues to be seriously deficient in his ability to perceive, organize and integrate visually meaningful and abstract stimuli.

[R.S.] has shown ongoing progress socially, emotionally and in terms of fulfilling the behavioral and academic expectations of his school environment. A cooperative, hard working youngster, [R.S.] comes prepared more consistently with homework and demonstrates more independence in terms of assignment completion. While he now attempts to make conscientious efforts to focus, distractibility, impulsivity and poor concentration continue to impact on [R.S.'s] availability for learning, and work quality and efficiency. He works hard to follow classroom rules and is accepting and appreciative of teacher guidance and correction.

Socially, [R.S.] is a sensitive, caring and polite youngster who is respectful toward adults and well liked by peers. He has formed many friendships within and out of the school setting although such relationships are maintained on a superficial level. Peer acceptance is important to [R.S.] and thus he may be inclined to join in peer misbehavior. [R.S.] responds favorably to firm discipline in such cases.

Madelyn Miller, a learning consultant employed by respondent, evaluated R.S. on May 6 and 7, 1993, while he was in the seventh grade. Ms. Miller administered the Wechsler Individual Achievement Test (WIAT), the Woodcock-Johnson Tests of Achievement---Revised (WJ-R) and the New Sucher-Allred Reading Placement Inventory. The results for WIAT indicate the following grade equivalencies: 2.5 for reading, 2.0 for writing, 1.0 for language, 3.4 for mathematics and 2.2 as the total composite. For WJ-R, the results indicated grade equivalencies of 4.5 for science, 4.8 for social studies, 1.3 for humanities and 3.5 for broad knowledge. The New Sucher-Allred Reading Placement Inventory indicated that R.S.'s oral reading instructional level was 2.1.

Ms. Miller's report also refers to R.S.'s distractibility, stating:

[R.S.] was observed in several of his classes for purposes of this evaluation. With modifications, individual attention and close supervision, he is able to complete assignments. He continues to be easily distracted as noted on previous evaluations, although considerably more motivated.

...

During testing, [R.S.] needed to be refocused frequently and was easily distracted by noises in the hallway as well as materials used for testing.

The Child Study Team along with the parents developed an IEP dated June 9, 1993, which reflects the evaluations of Ms. Rescigno and Ms. Miller. describing R.S. as easily distracted. Under a section entitled "Current Educational Status," the IEP reflects R.S.'s educational needs and states: "[R.S.] has several academic deficits which adversely affect educational performance." However, the academic deficits are not specifically quantified in the IEP. For annual goals and objectives, the IEP states as follows: "The goals and objectives are a direct outgrowth of the educational evaluation. The objectives listed in each objective category will be taught to mastery level--80% or better." The IEP then lists goals and objectives under various categories such as reading and English. For example, the IEP states under English: "[R.S.] will develop grammar mechanics. He will be able to distinguish between complete and incomplete sentences. . . ."

An annual review was performed in June 1994. At the beginning of the IEP is a section entitled "Current Levels of Functioning." This section states that R.S. is functioning at the mid-fourth grade level in mathematics and at the beginning of fourth grade level for reading. R.S.'s written language skills are "quite limited," but no reference is made to grade level. R.S. receives adaptive physical education, speech/language therapy and occupational therapy to improve fine motor and grapho-motor skills. There is no mention of R.S.'s distractibility.

R.S. started ninth grade at West Orange High School, which has approximately 1,300 students. The facility is located on Pleasant Valley Way, which is a major roadway. R.S. was assigned to a departmentalized self-contained program at the high school. His main academic subjects were taught in self-contained classes for neurologically impaired students with mainstreaming for lunch and a course known as Foods for Fitness. R.S. was in the lower of two tracts based upon academic level.

The self-contained program is located in one wing of the high school. While classrooms are standard in size, they are partitioned with bookcases, filing cabinets and chalkboards such that two classes are taught at the same time in one room. Sound is readily transmitted from one side of the room to another. During warm weather, the windows are opened, with the result that noise from Pleasant Valley Way enters the room. Small school busses are parked outside the special education

classes toward the end of the school day. Larger busses are parked at a more distant location.

Expert Opinion Testimony

Respondent's witnesses included Dr. Jane Kachmar, who is the supervisor of special education at West Orange High School, and Madelyn Miller, who is a learning consultant at Roosevelt Middle School and was R.S.'s case manager.

R.S.'s witnesses included Dr. David Gallina, an expert in psychiatry and neurology; Dr. James J. Krivacska, a licensed clinical psychologist and certified school psychologist; and Dr. Dulcie Freeman, who is the director at ECLC.

a. Madelyn Miller

Ms. Miller is a learning consultant at the Roosevelt Middle School, where R.S. attended sixth, seventh and eighth grades. As R.S.'s case manager during that period of time, Ms. Miller was responsible for the evaluation, the annual review, his program, in-class observations, and monitoring R.S.'s progress. R.S. was placed in a departmentalized, self-contained program for neurologically impaired students. No classrooms were divided into instructional spaces for two classes. R.S. was not a behavior or discipline problem, and he participated in school trips and school dances. R.S. received A's and B's as grades, and his progress reports indicate on-going progress. Ms. Miller concluded that R.S. received significant educational benefit from the special education program at Roosevelt Middle School. Ms. Miller went so far as to say that R.S. flourished at Roosevelt Middle School.

b. Dr. Jane Kachmar

Dr. Kachmar is the supervisor of special education at West Orange High School, which has 177 classified students and fourteen special education teachers. Self-contained programs are provided for students classified as emotionally disturbed, neurologically impaired and perceptually impaired. There are twenty-six students classified as neurologically impaired at West Orange High School. The neurologically impaired class is limited to eight students within a departmentalized program. All teachers are certified teachers of the handicapped. West Orange High School is comprised of two connected buildings with the special education program located on one side of a wing with three levels. Four classrooms are shared by two teachers with the instructional space separated by bookcases. Noise in the classroom is not a problem. R.S. is mainstreamed for Personal Typing,

Foods for Fitness and lunch, while his other classes are self-contained. Despite an IQ of 60, R.S. is expected to fulfill the same requirements as other students in the Foods for Fitness class.

During class observations, R.S. was engaged, on task and following directions. R.S. generally completes his work and is not a behavior problem. R.S. moves from class to class in an appropriate manner. He has made some friends and is taking pride in his work. R.S. is making an excellent transition to high school.

For pupils with severe disabilities, placement in the regular school is the least restrictive environment and avoids social isolation. Special education students have the opportunity to participate in activities such as sports, marching band and clubs.

In regard to the IEP, Dr. Kachmar states that the document cannot be considered in isolation. Rather, the IEP must be considered in relation to curriculum guides such that a reference, for example, to fourth grade level would imply the contents of the fourth grade curriculum. These types of documents are used by professionals in the special education area and provide specific and measurable goals and objectives. A transition plan was not developed for R.S. because the request for due process imposes a "stay put" requirement.

c. Dr. David Gallina

Dr. David Gallina, whose areas of expertise are psychiatry and neurology, evaluated R.S. on June 8, 1994 and completed a report dated June 9, 1994. During the interview, R.S., was restless and looked about the room in a distracted fashion. R.S. was talkative, introduced irrelevant questions or comments during the course of their conversation and had difficulty expressing himself. Dr. Gallina referred to school reports which indicate that R.S. needs constant refocusing. R.S. had a somewhat uncoordinated gait and his gross motor coordination lacked agility and grace. His fine motor control was also lacking, as he demonstrated poor dexterity. His grapho-motor skills were also poor with very immature paper organization, irregular margin maintenance and poor drawings. Dr. Gallina noted levels of energy to the point of mild hyperactivity. R.S. also demonstrated performance anxiety and some fear of failure.

Dr. Gallina found that R.S.'s peer relationships were generally poor in quality and degree. R.S. is beginning to feel rejected by his peer group which he had not felt when he was younger. R.S.'s level of performance in school and adaptation to the classroom environment are diminished

particularly in the area of academic achievement, social adaptation and emotional development.

Dr. Gallina diagnosed R.S. as an individual with attention deficit disorder, an identity disorder of adolescence, a mixed specific developmental disorder, and a motor control disturbance along with cognitive and central processing difficulties. Dr. Gallina concurred with the classification of neurologically impaired and stated that R.S. would benefit from a small, highly structured class situation where he would receive one-to-one attention in the classroom and also be exposed to teachers skilled in the use of behavior modification techniques. Dr. Gallina noted that the concerns of J.S. and P.S. about the adjustment difficulties and negative impact of a large high school on R.S. seemed realistic and that a more self-contained school environment would be appropriate for him. Dr. Gallina stated that R.S. needed an environment that was as free from distraction as possible. Dr. Gallina expressed the opinion that if R.S. were placed in a dual-use classroom, he would not be able to attend and that his ability to learn and benefit from his instruction would be minimal at best.

d. Dr. James J. Krivacska

Dr. Krivacska is a licensed clinical psychologist and certified school psychologist, who evaluated R.S. on July 16, 1994 and submitted a report dated September 2, 1994. Dr. Krivacska reviewed R.S.'s records, interviewed him and administered various tests, dealing with the areas of attention, sensory processing, memory, higher order cognitive skills, language production, motor functioning, academic achievement and social and emotional inhibitors and facilitators.

R.S. is particularly susceptible to distraction by auditory stimulation. Additionally, he is not aware of when he is becoming distracted. R.S.'s attention deficit is evident across all settings as he is easily drawn off task at the family restaurant as well as at school or at home. R.S. has difficulty screening out irrelevant information from the environment. Deficits in attention interact with deficits in memory, motor planning and language and require significant mental effort on his part to overcome. As a result, R.S. has difficulty planning ahead, organizing and anticipating what will occur next. R.S. obtained a score of seventy-three on the auditory processing scale of the WJ-R Test of cognitive abilities, which is indicative of performance in the fourth percentile or roughly equivalent to the level expected of a six year, seven month old individual. R.S. does not have a stronger modality such as visual to rely upon for learning. R.S. has difficulty remaining on topic during a conversation.

R.S.'s performance on the WISC-R, WISC-III, and WJ-R-TOC all reflect borderline cognitive ability as compared to peers placing him between the second and fifth percentile. R.S. does best in terms of cognitive operations when a verbal response is required to a verbally presented stimuli. R.S.'s cognitive functioning is compromised by slow processing speed, deficient long-term memory retrieval and a dearth of knowledge about the world. R.S. has significant deficits in both fine and gross motor coordination. As a result, he will require an alternate mode of communication for written expression independent of handwriting.

R.S. has made limited progress academically. Since 1990, R.S. has made no growth in reading, a little over a year's worth of growth in math and no growth in writing. Based upon this information, Dr. Krivacska questions the conclusions of Ms. Miller that R.S. has benefited from special education.

Over the most recent seven-year period. R.S. has made two year's progress in reading, two and a half year's progress in math and two year's progress in written language. In Dr. Krivacska's opinion, R.S. should demonstrate a greater rate of growth.

Dr. Krivacska reviewed R.S.'s IEP and found it to be deficient. One portion of the IEP is the current educational status (CES). The CES is deficient in that it does not include a description of R.S.'s current cognitive functioning or his personal and social development. Given his level of cognitive functioning, the CES should address prevocational, vocations, self-help skills and recreation needs. The CES failed to identify all areas of R.S.'s educational disability, in particular his attention deficit and its impact on his school functioning, despite reference thereto throughout his school history. Additionally, the CES fails to consider R.S.'s immaturity, his post-secondary outcome and his adaptive life skills. Overall, the CES fails to provide the breadth and depth of information necessary to develop appropriate goals and objectives.

The annual goals describe the educational performance expected to be achieved under the pupil's IEP and should be related to the special education and/or regular education curriculum. The objectives are specific measurable steps between the current educational status and the annual goals.

The goals and objectives are deficient in that the basic form of the goals remained the same for several years consisting of a generally stated goal which does not describe the amount of progress expected in a one-year period. Additionally, some of the objectives are not

specific and measurable to permit a determination whether the objectives have been attained. Two subject areas, social studies and science, do not have goals and objectives. Further, the IEP lacks a transition plan. Finally, Dr. Krivacska identifies six technical deficiencies in the IEP.

In regard to R.S.'s program at West Orange High School, Dr. Krivacska observed a math class where the classroom was divided by bookcases into two instructional spaces. Another class was in progress on the other side of the bookcases. The voices of the teacher and students in the other half of the classroom were readily apparent and clearly distinguishable. At times, it was difficult to hear the teacher and even more so the students in the math class. From an instructional point of view, the auditory distractions in a classroom shared by two classes pose an insurmountable obstacle for R.S.

e. Dr. Dulcie Freeman

Dr. Freeman testified that she is the executive director of ECLC, which is a private nonprofit school approved by the State of New Jersey for neurologically impaired and communications handicapped students from five to twenty-one years of age. ECLC has 214 youngsters in twenty classes at its Chatham campus with eighty-five staff members. Dr. Freeman described the school building which is located in a quiet neighborhood, and the curriculum. Students from fifteen to twenty-one years of age are at the senior level. In addition to academic subjects, students at the senior level take a life class which relates to practical matters such as banking, consumerism, and care of clothing and the home. A skill program has four phases including prevocational which concerns attitudes, values and general preparation, a second phase which involves work at jobs in the school, a third phase in which the students work in the community, and a last phase which relates to independent living skills. Extracurricular activities include an after-school recreation program and other opportunities to develop social skills. There are no dual use classrooms at ECLC.

J.S. and P.S. applied to have R.S. admitted to ECLC. R.S. was considered to be a good match with the program at ECLC and was admitted in October 1994. R.S. would be in the middle range of students.

Law and Analysis

As a recipient of Federal funds under the Individuals with Disabilities Act ("IDEA") or "Act"), 20 U.S.C.A. 1400 *et seq.*, the State of New Jersey must have a policy that assures all children with disabilities the right to

a free appropriate public education. 20 U.S.C.A. 1412. A free appropriate public education includes special education and related services. 20 U.S.C.A. 1401(a)(18). The requirement of a free appropriate public education is implemented in New Jersey through regulations codified at N.J.A.C. 6:28-1.1 *et seq.* The responsibility to provide a free appropriate public education is specifically placed on the district board of education. N.J.A.C. 6:28-1.1(d).

A State satisfies the requirement that it provide a child with disabilities with a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). IDEA requires more than a trivial or *de minimus* educational benefit but rather mandates meaningful benefit which generally implies progress. *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171, 180-185 (3rd Cir. 1988). However, the State is not required by IDEA to maximize the child's potential. *Ibid.* In addition to compliance with this substantive standard, the district must also comply with the procedural requirements of the Act. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034 (3rd Cir. 1993). The school district has the burden of proof. *Lascari v. Board of Educ.*, 116 N.J. 30, 44 (1989).

The first issue is whether the IEP complies with the requirements of N.J.A.C. 6:28-3.6(d). In accordance with this regulation, the IEP must contain a statement of the students eligibility for special education and/or related services, a statement of current educational status, a statement of annual goals, a statement of objectives which must be specific and measurable and a description of the pupil's educational program. Based upon the evidence presented at the hearing. I FIND:

1. The IEP dated June 1, 1994 is deficient in that the CES fails to describe R.S.'s disability and generally lacks the breadth and depth of information necessary to develop appropriate goals and objectives.
2. The annual goals generally identify areas for improvement but do not provide a measure of the amount of improvement.
3. The IEP does not contain a meaningful transition plan.

Based upon the above, I CONCLUDE that the IEP dated June 1, 1994 fails to comply with the requirements of N.J.A.C. 6:28-3.6(d).

The next issue relates to program and placement. The program must be individually designed to provide educational benefit to the student with a disability. *Rowley, supra*, 458 U.S. at 201, 73 L.Ed. at 708. Here, R.S.

has made limited progress as reflected in standardized tests over the last three years at the Roosevelt Middle School where he was educated in classrooms in which one class was conducted at a time. As a student with attention deficit disorder who is especially susceptible to auditory distractions, R.S. needs a quiet, structured setting in which to learn. Nonetheless, directly contrary to R.S.'s educational needs, the district has placed R.S. in classrooms in which two classes are taking place at the same time with the instructional areas separated only by bookshelves. I accept the testimony of Dr. Krivacska to the effect that it was difficult to hear the teacher and students in the math class and that the auditory distractions in the divided classrooms pose an insurmountable obstacle to educational progress for R.S.

Based upon the evidence presented at the hearing, I FIND:

4. R.S. has made limited academic progress as reflected on standardized tests during his three years at Roosevelt Middle School, where no more than one class is held in a classroom at a particular point in time.

5. R.S. has attention deficit disorder and is easily distracted from a task. R.S. is especially susceptible to auditory distractions. R.S. needs a quiet, structured environment in which to learn.

6. For his academic courses, the district assigned R.S. to classrooms in which two classes are conducted at the same time with the instructional areas divided by bookcases.

7. The sound of voices from one instructional area readily travels to the other side of the classroom.

8. The auditory distractions in the divided classrooms pose an insurmountable obstacle to educational progress for R.S.

Based upon the above, I CONCLUDE that respondent has failed to provide R.S. with a free appropriate public education as required by N.J.A.C. 6:28-1.1.

The next issue is whether ECLC is an appropriate placement for R.S. Based upon the description of ECLC, it is evident and I so FIND that:

9. ECLC can provide R.S. with an appropriate education.

Respondent argues, however, that in addition to receiving an appropriate education, learning disabled students must be placed in the least restrictive environment. Respondent cites N.J.A.C. 6:28-2.10

and 20 U.S.C.A. § 1412(5)(b) for the proposition that students with educational disabilities must be educated with children who are not learning disabled to the maximum extent appropriate. Where placement outside the regular class is necessary for the student to benefit educationally, the district must nonetheless mainstream the child to the maximum extent appropriate. *Oberti v. Board of Educ.*, 995 F.2d 1204 (3rd Cir. 1993).

The difficulty with respondent's argument is that the determination has been made herein that the educational program offered by the district at West Orange High School does not provide R.S. with a free appropriate public education. The guarantee of an education in the least restrictive environment cannot be applied to cure an otherwise inappropriate placement. *Town of Burlington v. Dept. of Educ. Com. of Mass*, 736 F.2d 773, 789 n. 19 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The inquiry must focus on the program actually offered by the district and not some program that the district could have offered. *Lascari v. Board of Educ.*, 116 N.J. at 46.

Here, respondent has failed to carry the burden of proof that the program which it offered is appropriate. The only alternative placement supported by the record is ECLC. It is not appropriate to place the parents in the dilemma of accepting an inappropriate education or providing their child with an appropriate education at their own expense. *Id.* at 50. Moreover, parents may be reimbursed for the cost of private school where the district fails to provide an appropriate education. *Id.* at 49-50. Under the circumstances, I CONCLUDE that R.S. should be placed at ECLC and that the parents should be reimbursed for any costs for placement of R.S. at ECLC for the 1994-95 school year.

Accordingly, it is ORDERED that:

1. Respondent revise R.S.'s IEP to achieve full compliance with N.J.A.C. 6:28-3.6.
2. R.S.'s placement is ECLC.
3. Respondent reimburse J.S. and P.S. for the costs incurred for placement of R.S. at ECLC for the 1994-95 school year.

This decision is final pursuant to 20 U.S.C.A. § 1415(e) and 34 C.F.R. § 300.509 and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. 20 U.S.C.A. § 1415(e)2, 34 C.F.R. § 300.511. If either party feels that this decision is not being fully implemented, this

concern should be communicated in writing to the Director of Special Education.