

IOWA DEPARTMENT OF EDUCATION
(Cite as 13 D.o.E. App. Dec. 26)

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In re: Robert T.)	
)	
John T. and Leigh T., Appellants)	DECISION
)	
v.)	
)	
Marion Independent School District and Grant Wood AEA 10, Appellees)	Admin. Doc. SE-160

The above entitled matter was heard by Administrative Law Judge, Daniel J. Reschly, pursuant to Iowa Code Section 256B.6 (1993), the rules of the Iowa Department of Education I.A.C. 281-41-112 to 281-41-125, and the U.S. Code and regulations of the U.S. Department of Education implementing the Individuals with Disabilities Education Act 20 U.S.C. Sections 1400-1485; 34 C.F.R. 300 (1994). The parties to this matter agreed to a stipulated record hearing as provided in I.A.C. 281-41-116.

The hearing was conducted in response to an affidavit of appeal filed by the appellants on September 14, 1995 with the Iowa Department of Education. The appellants were represented by attorneys Elizabeth D. Jacobi of the Cedar Rapids law firm of Lynch et al. and Curt Sytsma of Iowa Protection and Advocacy Services, Inc. Appellees were represented by Matt Novak of the Cedar Rapids law firm of Pickens et al. Extensions of the 45 day time period for resolution of due process hearings were granted at the request and mutual consent of the parties on October 16, 1995, October 25, 1995 and December 11, 1995.

The parties stipulated to a set of facts concerning Robert T., a kindergarten student. Briefs arguing the application of the law to this case were filed by attorneys representing the appellants and appellees. There were no disagreements on the material facts regarding Robert T.'s disability and his need for special education and related services.

Appellants seek legal redress due to the refusal of the Marion Independent School District (MISD) and the Grant Wood AEA 10 (GW-AEA) to provide a full-time instructional assistant at the St. Joseph's school where Robert T. was placed by his parents. Robert T. is in a private school setting due to the choice of his parents. Appellants agree that a free, appropriate education (FAPE) was offered by MISD and GW-AEA through the formulation of an individualized educational program (IEP) that provided, among other services, the assistance of a full-time instructional assistant to assist Robert T. with mobility and communication.

The legal issue here is whether public education agencies such as MISD and GW-AEA have approximately the same obligations to children with disabilities regardless of whether the children attend a public school that has offered FAPE or a private school chosen by their parents. Appellants argue that the obligations are similar, if not the same. Appellees reject these arguments and claim broad discretion to determine which parentally-placed children in private schools will receive special education and related services as well as the extent and nature of those services.

I. Findings of Fact

The Administration Law Judge finds that he and the Iowa Department of Education have jurisdiction over the parties and the subject matter of this hearing.

Information contained in documents submitted on October 13, 1995 by attorneys representing the parties constitute the record in this case. These documents included 29 stipulated facts regarding Robert T. and his educational needs (see Exhibits A through G).

Robert T. is a six-year old enrolled in kindergarten at the St. Joseph's Catholic School, a private sectarian institution. He has the condition known as cerebral palsy which severely affects his physical mobility and communication skills. Robert T. appears to have normal cognitive abilities and there is no mention of emotional or behavioral difficulties.

Robert T. was parentally-placed at St. Joseph's and, "... neither appellee took part in the decision to place him at St. Joseph's." Robert T.'s parents pay the tuition at St. Joseph's (covering the costs of the general education program) and the costs for the full-time instructional assistant. It is the costs for the full-time instructional assistant that the parents seek to obtain from the appellees, i.e., "Robert's parents do not seek the cost of Robert's tuition at St. Joseph's."

The parties agree that Robert T. is a child with a disability " ... within the meaning of 1401(a)(1) of the Individuals with Disabilities Education Act 20 U.S.C.A. 1400 et seq. (hereafter, IDEA). He is a child requiring special education as specified in Iowa Code 256B.2. The MISD and GW-AEA in consultation with Robert T.'s parents have developed and an IEP that provides FAPE.

Exhibits A, B, and C, were summaries of the proceedings of three conferences of an MISD and GW-AEA multidisciplinary team and Robert T.'s parents concerning Robert T.'s needs for special education and related services. The summary marked as Exhibit C contained this conclusion,

"Robert needs the assistance of a student specific associate to allow Robert to meet the demands of his school routine as he pursues his outcomes identified in the IEP. The associate is necessary on a full time basis and reviewed at least annually."

Correspondence between Robert T.'s parents and William C. Jacobson, MISD Superintendent of Schools, appears as Exhibits D and E. The parents requested of MISD a full-time instructional assistant to work with Robert T. at St. Joseph's Catholic School. Dr. Jacobson's reply informed the parents of the willingness of MISD to provide extensive special education and related services in the public school setting, but denied the parents' request for an instructional assistant at St. Joseph's School. According to Dr. Jacobson,

"The state law allows a district to employ a teacher aide in a private school if

it wishes to do so and if the student has physical and communication disabilities."

Dr. Jacobson also noted that the provision of a full-time instructional assistant, "... could lead to 'over-attending' Robert ..." as he acquired additional skills which, in turn, would be a poor allocation of scarce resources. Dr. Jacobson's letter concluded with, "We are ready and able to provide the free and appropriate public education, including all the support necessary, to assist Robert to maximize his many abilities." This offer was, however, predicated on the parents enrolling Robert in MISD.

The agenda for the MISD Board of Education August 14, 1995 meeting appears in the record as Exhibit F. The agenda described the parents' request for a full-time instructional assistant at the St. Joseph's School paid by MISD. This discussion expressed concerns about the financial implications of this request as well as concerns about setting a precedent regarding provision of full-time personnel at private schools.

"If Robert were enrolled at St. Joseph's Catholic School the Marion schools would not be able to count him for purposes of receiving state aide (sic). He would generate approximately \$8000 in state aide (sic) if he were enrolled in the Marion Schools."

"Public schools are the mainstay of a democratic form of government. The funds generated by tax dollars to support them are being stretched as far as they will go. To provide an aide for Robert T _____ will take money from the public schools of Iowa and directly from the Marion Independent School District." (last name deleted).

"For these reasons, it is still the recommendation of the administration to deny the T _____ request."

Minutes reflecting the Board's action appear as Exhibit G. The Board voted 3 to 2 to deny the request for a full-time instructional assistant at the St. Joseph's School for Robert T. The final stipulated fact was, "To date, MISD has not provided public school services, including special education programs and related services, on non-public school property."

The 1995 IEP update (Exhibit C) specified the related services of occupational therapy, physical therapy, and speech language therapy that were to be provided by personnel employed by the GW-AEA, presumably at St. Joseph's School or at a mutually agreed upon neutral site. Although the record is not entirely clear, it appears that two hours per month of consultative services were provided for each of physical and occupational therapy (Exhibit B). The nature and extent of services from a speech/language clinician were unclear; however, these services are mentioned in the briefs submitted by the parties. It appears that the related services associated with Robert T.'s IEP were provided in about the same form and amount as they would have been provided had he been a student at MISD. The only discrepancy between the IEP and the services provided was the full-time instructional assistant.

Appellants seek in this hearing the following rulings: a) MISD and GW-AEA have violated the Federal IDEA by failing to provide a full-time instructional assistant to Robert T. at the St. Joseph's School; b) The parents have prevailed in this proceeding; c) MISD and GW-AEA must provide for Robert T. a full-time instructional assistant at St. Joseph's; and d) Reimbursement of the parents' cost for the full-time instructional assistant provided by them thus far in the 1995-1996 school year. Appellees seek dismissal of this action and denial of parents' claims.

The appellants' brief arguing the responsibilities of public education agencies to parentally-placed private school students with disabilities was exceptionally well prepared. The appellees' brief was short, but to the point and effective. Both sides recognize that high stakes are involved in this issue and that this decision is not likely to be the last legal decision in this case, nor the only legal decision this year dealing with facts similar to those in this case. There is a need for clarification of the responsibilities of public education agencies to parentally-placed private school students who have available FAPE in the public schools.

Some commentaries on this matter lament the unfair burden and expanded responsibilities that this and similar cases would place on the special education resources of the public schools if appellants prevail (e. g., MISD Board Agenda and Minutes in Exhibits F and G). As is made clear in the next section, Robert T. and similar litigants seek only the special education services that they would receive if they attended the public schools. The litigants do not seek reimbursement for the private school tuition. One might argue that the litigants are lessening the burden on public education because they, in addition to paying taxes to support the public schools, are paying the tuition or general education costs for their children. The efforts of these litigants and others like them cannot be seen accurately as causing an unfair strain on the public purse.

II. Findings of Law

This case can be characterized as a veritable battleground over the meaning of portions of the federal IDEA statute and regulations (20 U.S.C. 33; 34 C.F.R. 300) and the proper application to this dispute of court cases interpreting these statutes and regulations. The statutes and regulations are far from clear in their intent and application. Others have referred to them as "... containing ambiguities and inconsistencies" (Bratton, 1995) and as having "... left school districts in a fog" regarding their responsibilities to children with disabilities placed by their parents in private schools (Pitasky, 1995).

IDEA Statute

The IDEA Federal statutes in question read as follows:

Section 1412. Eligibility Requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

Section 1413. State Plans

(a) Requisite features

Any state meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan Each state plan shall

(4) set forth policies and procedures to assure

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; (emphasis added).

A significant issue in this litigation is the referent to "... the program assisted or carried out under this subchapter ..." Is the referent restricted to the IDEA and the federal funds associated with the IDEA, or does "program" include state and local special education and related services programs and funding?

IDEA Regulations

The regulations implementing these statutes appear in subpart D--Private Schools at 34 C.F.R.300.400. through 300.452.

Publicly-Placed Students

The regulations at 300.400, 300.401, and 300.402 deal with the responsibilities of the state education agency (SEA) and local education agency (LEA) if children with disabilities are referred to or placed in a private school by a public agency as a means to provide such students with FAPE. Under these circumstances, the SEA and LEA are responsible for paying for all the educational services, that is, both the general and special education costs. The apparent rationale is that the public agencies are responsible for providing FAPE. If the public agencies are unable or unwilling to provide FAPE, then they should bear all of the costs of the child's education at the private school that they have selected to provide FAPE. As clearly noted in the Appellants' and Appellees' briefs, these regulations do not apply to this case because the MISD and GW-AEA have offered FAPE to Robert T.

Parentally-Placed Students

The regulations at 300.403, 300.450-300.452 deal with parentally-placed children with disabilities attending private schools who were offered FAPE by an SEA or LEA; however, their parents chose to place them in private schools. These regulations are directly related to the case at hand.

The regulations specify, first, that the SEA and LEA are not responsible for the tuition at the private school [see 300.403(a)]. Second, the due process procedures specified in 300.500 to 300.515 can be used to resolve disputes regarding the availability of an appropriate program and financial responsibilities [see 300.403(b)].

Consistent with these regulations, Appellants do not seek reimbursement for the Robert T.'s tuition costs at the St. Joseph's School, but they have made use of the due process procedures to challenge the MISD and GW-AEA's refusal to provide a full-time instructional assistant at the St. Joseph's School.

Regulation 300.451 requires the SEA to ensure that,

"To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and The requirements of 34 C.F.R. 76.651 to 76.662 are met."

Regulation 300.452 refers to the LEA responsibility to,

"provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency."

The dispute in this hearing revolves around interpretation of key phrases in 300.451 and 300.452, particularly, what constitutes "participation" and what precisely is meant by "program assisted or carried out under this part ..."

EDGAR Regulations

The IDEA regulations incorporate by reference portions of the Education Department General Administrative Regulations (EDGAR). The EDGAR regulations apply to a number of federal education programs established by Congress and administered by the USDE. EDGAR regulations incorporated specifically into IDEA appear at 34 C.F.R. 76.651 to 76.662. Critical provisions are:

"A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation ... consistent with the number of eligible private school students and their needs."

"The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools."

"An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

- (1) Which children will receive benefits under the project;*
- (2) How the children's needs will be identified;*
- (3) What benefits will be provided;*
- (4) How the benefits will be provided;*
- (5) How the project will be evaluated."*

"The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section;"

"A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for the participation of public school students:

- (a) The needs of students enrolled in private schools.*
- (b) The number of those students who will participate in a project.*
- (c) The benefits that the subgrantee will provide under the program to those students."*

"Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools."

"subgrantee shall spend the same average amount of program funds on:

- (1) A student enrolled in a private school who receives benefits under the program;*
and
- (2) A student enrolled in a public school who receives benefits under the program."*

Interpretations of IDEA Statute and Regulations

Administrative responsibility for the IDEA rests with the USDE Office of Special Education Programs (OSEP). OSEP interpretations of the IDEA responsibilities to parentally-placed students with disabilities in private schools have been consistent for approximately two decades. According to the U.S. Supreme Court, courts may defer to USDE interpretations of ambiguous regulations in the Education of the Handicapped Act (the forerunner of IDEA).

"Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute." [(Honig v. Doe, 484 U.S. 305, 325, n.8 (1988)].

OSEP Interpretations

A recent amicus brief provides a clear statement of the federal OSEP position [(see U.S. Department of Justice (October, 1995). Brief for the United States as Amicus Curiae in

Support of Appellant, United States Court of Appeals for the Seventh District, K.R. by M.R. (Plaintiff and Appellee) v. Anderson Community School Corporation (Defendant and Appellant)] (hereafter, USDJ Brief, 1995).

The reasoning of OSEP begins, first, with the obligations owed to all children regardless of whether they attend public or private schools. These obligations include the child find activities in which efforts are made to identify, locate, and evaluate children with disabilities. Next, public educational agencies have the obligation to develop an IEP that offers FAPE to all children with disabilities (34 C.F.R. 300.220). Parents may accept the offer of FAPE or they may choose to enroll their child with a disability in a non-public school (Letter to Barry, 211 EHLR 82, December 18, 1978; Letter to Knapp 211 EHLR 263, February 20, 1981; Letter to Peters, 19 IDELR 974, January 11, 1993).

If parents choose the latter course of declining the FAPE offered by the public education agency, the obligations of public education agencies to students with disabilities then differ according to the OSEP interpretations. OSEP reasons that the differences in obligation are apparent in federal statute by the very existence of language that distinguishes between obligations to all children in 20 U.S.C. 1412(1) and the language in 20 U.S.C. 1413(a)(4)(A) regarding children in private schools, "... provision is made for the participation of such children in the program assisted or carried out under this subchapter ..." If Congress had meant to extend the same FAPE entitlement to all children, the provision for the participation of private school students would be redundant and unnecessary (USDJ Brief, 1995).

OSEP claims further that the participation referred to in 20 U.S.C. 1413(a)(4)(A) is limited to a proportionate share of the federal IDEA funds which, according to the USDJ Brief (1995), involves only seven to eight percent of the additional costs of providing FAPE to students with disabilities. Construed in this manner, the parentally-placed private school children with disabilities are entitled only to the limited special education and related services that can be funded by federal IDEA monies (USDJ Brief, 1995).

From this interpretation of the statutory language flows further distinctions according to OSEP. First, public education agencies are not required to offer the same range of special education and related services to parentally-placed private school children with disabilities. Second, the public education agency can decide which services will be provided and who among eligible private school children will receive the services subject to the consultation requirement in 34 C.F.R. 76.652 (see Letter to Knapp, 211 EHLR 263, February 20, 1981; Letter to Bieker, 211 EHLR 388; Letter to Farris, 213 EHLR 142, June 24, 1988; Letter to Department of Special Education, 213 EHLR 186, November 1, 1988; Letter from Schrag, 213 EHLR 268, September 18, 1989; Letter to Mentink, 18 IDELR 276, May 21, 1991; Letter to Schmidt, 20 IDELR 1224, August 31, 1993; Letter to Livingston, 17 EHLR 523, February 15, 1991; Letter to Hartman, 211 EHLR 294, December 13, 1983; Letter to Wing, 211 EHLR 414, June 6, 1986; Letter to Williams, 18 IDELR 742, January 22, 1992; Letter to Peters, 19 IDELR 974, January 11, 1993).

Appellants note, however, that the final responsibility for interpretation of laws rests with the

courts, quoting on page 41 of the Appellants' Brief the following provision of administrative law:

"if a reviewing court's interpretation of a statute is more in keeping with the intent of Congress than the administrative construction, the administrative construction is not entitled to substantial deference." [(2 Am. Jur. 2d Administrative Law 85 (1994))]

Appellants assert that the OSEP "election doctrine" is markedly inconsistent with the "plain language of the governing statute" and the "plain language of the federal regulations." These assertions are advanced by citing case law and excerpts from the Congressional debate over IDEA.

Case Law

Appellants quote liberally from a landmark U.S. Supreme Court case regarding the responsibilities to parentally-placed private school students of publicly supported state and local educational agencies. The Appellants' touchstone case, Wheeler v. Barrera, 417 U.S. 402, 405-406, 94 S. Ct. 2274, 2278, 41 L. Ed. 2d 159 (1974) (hereafter, Wheeler), examined the intent of Congress in enacting Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a et seq., 1965), a program that provided, "federal funding of special programs for educationally deprived children in both public and private schools." The Wheeler court noted that, "Title I is the first federal-aid-to-education program authorizing assistance for private school children as well as public school children."

The facts in Wheeler were that the expenditures of Title I funds in public and private schools in Missouri were markedly disproportionate, "The services provided to the class of children represented by respondents were plainly inferior, both qualitatively and quantitative" The Wheeler Court saw the case as, "The questions that arise in this case concern the scope of the State's duty to insure that a program submitted by a local agency under Title I provides "comparable" services for eligible private school children." Furthermore, comparable was not construed to mean identical, and the ultimate control and responsibility for Title I funds were clearly recognized as within the purview of public education agencies. Although the regulations require a consultation process between public and private schools, private schools did not have veto power over the program selected by the public education agency for implementation in the private school.

Significantly, the language of the Eighth Circuit Court of Appeals in defining "comparability" was endorsed by the Supreme Court:

"... that the Act and regulations require a program for educationally deprived non-public school children that is comparable in **quality, scope, and opportunity**, which may or may not necessarily be equal in dollar expenditures ..." (Wheeler, 1974, p. 2280) (emphasis added).

Beyond these general criteria, the Wheeler court preserved the broad discretion of local

education officials in determining what services would be supported with Title I monies and how those services would be delivered to "educationally deprived children." It is the scope and nature of this discretion that is at the heart of the appellants rejection of the OSEP interpretations of IDEA requirements.

Another landmark decision of the U.S. Supreme Court influenced, at least indirectly, the initiation of a number of cases in the Federal Courts similar to this action. In Zobrest v. Catalina Foothills District, 113 S.Ct. 2462 (1993) (hereafter, Zobrest), the Court decided that the provision of a full-time sign language interpreter, paid for by a public school, placed full-time in a private, sectarian school with a parentally-placed student did not violate the Establishment Clause of the First Amendment to the U.S. Constitution. Although Zobrest was decided on constitutional grounds, several remarks about the IDEA appeared in the decision. IDEA was characterized as a "... general government program that distributes benefits neutrally to any child qualifying as handicapped without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends." Moreover, public agency expenditures on a sign language interpreter were seen as not benefitting the sectarian school; rather, the benefits were focused on a child with little or no benefit to the private school.

The Zobrest conclusion focused solely on constitutional grounds, "... we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there to facilitate his education." The Zobrest court did **not** rule, as the Appellants claim on p. 42 of their Brief, "... that under IDEA, special education services must be provided to a child with disabilities without regard to the public or nonpublic nature of the school the child attends." In fact, Zobrest explicitly avoided ruling on statutory grounds, noting that the trial court and court of appeals focused only on the constitutional questions (see Zobrest, pp. 2465-2467). In Zobrest the Supreme Court ruled that full-time personnel could be provided under certain circumstances without offending the U.S. Constitution; however, that decision made no ruling on whether or not state and local public education agencies were compelled by IDEA to provide such services to parentally-placed private school students.

Cases in the Federal District Courts since Zobrest have issued varying rulings regarding the extent of responsibilities of the public schools to provide special education and related services to parentally-placed private school children with disabilities. As noted earlier, neither OSEP nor the public education agencies that appear here as appellees have denied all responsibility under IDEA for special education and related services to parentally-placed private school children. The issue is the extent of that responsibility and the degree to which the public schools have to provide the same special education and related services to parentally-placed students with disabilities in private schools.

The case law that is directly relevant to this matter falls into two camps with dramatically different interpretations of the IDEA requirements regarding parentally-placed private school students. One camp is formed by interpretations in three separate Federal District Court decisions that required public education agencies to provide essentially the same special

education and related services in private schools as were specified in the IEP providing FAPE in the public school setting. The other camp is formed by one case that has advanced to the Federal Circuit Court of Appeals that preserves the OSEP interpretation of the IDEA.

The United States Court of Appeals for the Fourth Circuit affirmed its earlier ruling that the IDEA did not require a public education agency to provide a cued speech transliterator for a parentally-placed private school child with a profound hearing loss (Goodall v. Stafford County School Board, 22 IDELR 972, 1995). Although this service could have been provided by the public school without violating the First Amendment Establishment Clause according to Zobrest, the Fourth Circuit affirmed its earlier ruling that the public school was not compelled to provide the service by the IDEA (Goodall v. Stafford County School Board, 17 EHLR 745, 1991). The Goodall decisions depended heavily on the OSEP interpretations of IDEA and 34 C.F.R. 76.654.

The lead case representing an expanded interpretation of the public education agency responsibilities to parentally-placed students with disabilities in private schools has facts that are similar to this case [K.R. by M.R. v. Anderson Community School Corporation, 887 F.Supp. 1217 (S.D.Ind. 1995)] (hereafter, Anderson). In both cases a student with physical disabilities that affected speech and motor skills was placed in a private sectarian school. In both the public education agency agreed to provide various related services such as speech-communication, occupational therapy, and physical therapy. In both the crucial service at issue was the provision of a full-time instructional assistant to assist a child with mobility and communication. In both the instructional assistant would have been provided as specified in the IEP offering FAPE if the child attended the public school.

In Anderson the trial court reversed a hearing decision, reasoning that the comparability standard in 34 C.F.R. 76.654 required that the service of an instructional assistant be provided and, that in order to be meaningful, this service had to be provided in the private school setting, "Here, there simply is no "comparable" alternative to in-class services provided by an instructional assistant ..." (Anderson, pp. 1225). The Wheeler interpretation of 34 C.F.R. 76.654 was cited extensively in the Anderson decision. The Anderson court also noted that its decision was contrary to the Fourth Circuit Court of Appeals Goodall decision, "Overall then, this court disagrees with the Fourth Circuit's interpretation and application of 76.654(a)." (Anderson, p. 1225).

Two other cases decided in 1995 also ruled that the special education and related services specified in a public education agency IEP that provided FAPE had to be provided to parentally-placed children in private schools. A New York Federal District Court ruled that the public school must pay for the services of a consultant teacher and a teacher aide at the private, sectarian school attended by a child with the disability of mental retardation [Russman by Russman v. Board of Education of the Enlarged City School District of Watervliet, 22 IDELR 1 (N.D.N.Y. 1995), 22 IDELR 1028 (N.D.N.Y. 1995)] (hereafter, Russman). The Federal District Court in Russman reversed findings at the administrative hearing and magistrate judge levels that the Establishment Clause would be violated by the provision of the consultant teacher and teacher aide at the private, sectarian school. The

ruling in Russman, however, was devoted almost exclusively to constitutional issues with virtually no consideration of the IDEA requirements. Although Anderson was cited in Russman, the citation referred to the Anderson holding regarding the application of Zobrest. IDEA and the crucial interpretation of 34 C.F.R. 76.654 was largely ignored by the Russman court.

Finally, a Federal Court in Louisiana ruled that the services specified in a public school IEP that provided FAPE had to be provided at the private, sectarian school chosen by the parents [Cefalu by Cefalu v. East Baton Rouge Parish School Board, 22 IDELR 1045 (M.D.La. 1995)] (hereafter, Cefalu). The service at issue was a sign language interpreter for a student with a hearing impairment. The Cefalu court followed closely the reasoning in Anderson.

The law clearly remains unsettled regarding the extent and nature of the responsibilities of public education agencies to parentally-placed private school students with disabilities. Existing court precedents do not provide unequivocal guidance. There is no controlling precedent in the Federal District Courts of Iowa or in the Eighth Circuit Court of Appeals.

Conclusions Regarding Legal Principles

In view of the inconsistent case law and ambiguous interpretations of statute and regulations, it is necessary to focus first on the language of the statute and regulations. The critical determination in this and like cases is the referent to program in the IDEA regulations:

"... under some programs ..." [34 C.F.R. 76.650(a)]

"... a particular program..." [34 C.F.R. 76.650(b)]

"... the authorizing statute and implementing regulations for a program ..." [34 C.F.R. 76.651(a)(1)]

"... program benefits that a subgrantee provides..." [34 C.F.R. 76.654(a)]

"... shall spend the same average amount of program funds ..." [34 C.F.R. 76.655(a)]

"... the differences if any between the program benefits the applicant will provide to public and private school students ..." [34 C.F.R. 76.656(g)]

"... may not use program funds ..." [34 C.F.R. 76.658(a)]

"... shall use program funds ..." [34 C.F.R. 76.658(b)]

"... may use program funds ..." (34 C.F.R. 76.659)

"... equitable program benefits ..." [34 C.F.R. 76.659(A)]

"... may use program funds ..." (34 C.F.R. 76.660)

The U.S. Supreme Court in Wheeler clearly interpreted "program" to refer to a particular federally-funded program; specifically, Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a et seq., 1965) (hereafter, Title I). Appellants urged application of the Wheeler order to these facts. Wheeler required that steps be taken to ensure relatively equal Title I funding and benefits to educationally deprived children attending Missouri public and private schools. The Anderson court also cited Wheeler as part of the basis for its decision that the same special education benefits offered in a public school had to be provided by the public school to a parentally-placed student in a private school.

The referent to "program" in Wheeler was the Title I program for educationally deprived children. The referent to "program" in this case must be the IDEA, a federally-funded program for students with disabilities. The Wheeler court did not, however, extend its ruling to other state and local educational programs with similar purposes, e. g., state-funded compensatory education programs for economically disadvantaged children or other state-funded programs designed to benefit a class of students defined in federal law as educationally deprived. In fact, the Wheeler court spoke to the federally-funded program and only to that program. The federally-funded IDEA provides a small portion of the monies required to provide FAPE to children with disabilities. A recent amicus brief estimated that the federal share of these expenses through IDEA was only seven to eight percent of the additional costs associated with special education and related services. In contrast, all of the Title I monies at issue in Wheeler were from the federal government.

Appellants interpret Congressional intent as mandating that, "... parentally placed private school children share equitably, in fair proportion to their needs and numbers, in all education programs funded, in whole or in part, with federal funds." (Appellants' Brief, pp. 37) (emphasis added). The appellants construction of IDEA and Wheeler results in a state and local burden based on a massive extension of the IDEA language to cover any state- or local-funded "program" that receives any federal funds. It is inconceivable to this observer that Congress either intended, or the courts ultimately will permit, such a broad construction of federal statute and regulations. The referent for program and program funds language must be restricted to the federal program (IDEA) and to federal program funds (IDEA monies). The OSEP interpretations of IDEA appear reasonable in light of the limited role of the federal government in funding the special education and related services costs borne by state and local education agencies.

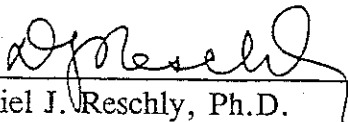
Appellants' construction if applied to other programs would mean that a state-funded compensatory education program for economically disadvantaged students, since it has similar goals to Title I, would also have to provide comparable benefits to parentally-placed private school students who also were economically disadvantaged if any federal funds were used as part of this program. State-funded programs designed to benefit economically disadvantaged students exist in several states. Does a state acquire further obligations from federal law because of its establishment of a program with similar purposes and goals? That conclusion

seems particularly unreasonable, yet, appellants construction of the IDEA and EDGAR regulations would lead to that result.

The record in this case does not permit analysis of the degree to which the MISD and GW-AEA met all of the requirements of IDEA regarding services to parentally-placed students in private schools. The related services provided now likely meet the requirement of comparable benefits from the federally-funded IDEA monies as that responsibility is understood here. It is not clear, however, whether or not the MISD and GW-AEA have met the "consultation" requirements of 34 C.F.R. 76.652 and no ruling is made on that issue.

III. Decision

Appellants' claims are denied regarding the responsibility of the MISD and GW-AEA to pay for the full-time instructional assistant at St. Joseph's School. Appellees have prevailed on all substantive issues in this proceeding.



Daniel J. Reschly, Ph.D.
Administrative Law Judge

1-29-96

Date

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IOWA DEPARTMENT OF EDUCATION

(Cite as 13 D.o.E. App. Dec. 40)

In re: Robert T.)

John T. and Leigh T., Appellants)

v.)

Marion Independent School District)
and Grant Wood AEA 10, Appellees)

ENLARGEMENT OF FINDINGS
AND CONCLUSIONS

Admin. Doc. SE-160

Attorneys for the appellants requested an enlargement of the findings in the administrative law decision in the case of In re: Robert T. (Iowa Admin. Doc. SE-160, 13 D.o.E. App. Dec. 26) reported by this administrative law judge to the parties on January 29, 1996. The request contended that the January 29, 1996 decision In re: Robert T. did not address significant aspects of the law appellants cite as authority for their claim that the Marion Independent School District (MISD) and the Grant Wood Area Education Agency (GW-AEA) are responsible for providing an instructional assistant to Robert T., a student with a disability placed by his parents at a private, sectarian school who was offered a free appropriate education at public expense by the MISD and the GW-AEA.

All facts in the previously reported decision (see In re: Robert T., Admin. Doc. SE-160, 13 D.o.E. App. Dec. 26) remain the same regarding the legal representation of the parties, the relief sought by the appellants, the kind of hearing, stipulated facts about the educational record, the legal arguments by the appellants and appellees, and the analysis of the legal responsibilities of the parties under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400-1485; 34 C.F.R. 300 (1994). In this enlargement of findings and conclusions the appellants' legal arguments based on the U.S. Constitution and Iowa statutes and rules are addressed.

II. Findings of Law

Iowa Statute and Administrative Rules

Appellants cite state statute in support of their claim that the MISD and GW-AEA are required to pay for a full-time instructional assistant at the St. Joseph's School where they have placed Robert T. The statute at issue reads as follows:

"2. This section does not deprive the respective boards of public school districts of any of their legal powers, statutory or otherwise, School districts and area education agency boards shall make public school services, which shall include special education programs and services and may include health services, services for remedial education programs, guidance services, and school testing services, available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students. However, services that are made available shall be provided on neutral sites, or in mobile units

located off the nonpublic school premises as determined by the boards of the school districts and area education agencies providing the services, and not on nonpublic school property, except for health services, diagnostic services for speech, hearing, and psychological purposes, and assistance with physical and communication needs of students with physical disabilities, and services of an educational interpreter, which may be provided on nonpublic school premises, with the permission of the lawful custodian." [Iowa Code Section 256.12(2)].

Appellants argue that the plain language of the statute requires the provision of certain special education services at the nonpublic schools attended by children with disabilities. They focus on each sentence as well as the entire text. The second sentence is interpreted to mean that the Iowa Legislature intended to require school districts and area education agencies to make available special education and related services to children with disabilities attending nonpublic schools. This responsibility is, however, modified in important ways by the third sentence, a long statement with complex phrases that are open to varying interpretations. The first part to the third sentence appears to limit substantially the location at which special education and related services could be provided to nonpublic school students. These services are to be provided at "neutral sites" which, in this context, appears to mean at a site chosen by the boards of school districts or area education agencies that is away from the grounds of the nonpublic school.

The third sentence specifies certain exceptions to the neutral site requirement. These exceptions are, "... health services, diagnostic services for speech, hearing, and psychological purposes, and assistance with physical and communication needs of students with physical disabilities, and services of an educational interpreter ..." According to the Iowa Code, the services mentioned as exceptions to the neutral site requirement, "...may be provided on nonpublic school premises."

Appellants argue that the MISD and GW-AEA must provide the instructional assistant needed by Robert T. to help him with communication and mobility according to Iowa statute 256.12(2). First, they point to the exception clause, interpreting an instructional assistant as consistent with what the legislature was permitting to be provided on the premises of nonpublic schools with the words, "assistance with physical and communication needs of students with physical disabilities." Second, they argue that the full meaning of the text of Section 256.12(2) is that the public school not only is permitted to provide the services at the nonpublic school, but it is required to do so.

This conclusion is reached by the following logic: 1) The second sentence mandates that special education and related services must be available; 2) The first part of the third sentence requires that these services must be provided at neutral sites; 3) The last part of the third sentence modifies the neutral site requirement for certain special education and related services, one of which is, "... assistance with the physical and communication needs of

students with physical disabilities."; and 4) The services listed as exceptions to the neutral site rule must be provided by the public school at the nonpublic school. Under this construction of the meaning of Iowa Code Section 256.12(2) the MISD and GW-AEA are required to provide the services of an instructional assistant to Robert T. on the premises of the nonpublic school that he attends.

Appellees' construction of Iowa Code is dramatically different from that of appellants. They argue, first, that the Iowa Legislature did not intend to deprive the local boards of their discretionary powers through the provisions of Section 256.12(2). The first sentence in the quoted portion of Section 256.12(2) is cited in support of this position. Some discretion in the provision of services to students in nonpublic schools was intended by the Legislature according to appellees. Moreover, appellees contend that the word "may" in the phrase, "... which may be provided on nonpublic school premises..." is consistent with the discretion the legislature intended to confer on the local boards. Appellees' construction of "may" is that it means that the local board can, at its discretion, provide the services listed as exceptions to the neutral site clause at the nonpublic school.

Appellants' reply brief argued further that the word "may" under certain legal circumstances has a meaning equivalent to "shall." They argue that appellees' interpretation of "may" as granting discretion to local boards results in negating the second sentence of Section 256.12(2) which requires the availability of special education and related services to nonpublic school students, but at neutral sites. Although appellants' interpretation of "may" appears to be rather unorthodox, they did cite case law to substantiate that, in some legal contexts, may was interpreted by several courts to mean shall.

Proper application of the Iowa Statutes and Administrative Rules to this controversy is far from clear. No directly relevant case law was cited by either party and none could be located by this administrative law judge. The application depends on the meaning of "may" in the statute as well as the meaning of "assistance with physical and communication needs," an issue that was largely ignored by appellants and appellees.

It is significant that the services listed by the Iowa Legislature as exceptions to the neutral site principle are all related services, not special education instructional services. Prominent among the exceptions are diagnostic services which are to be provided as part of the diagnosis of a disability and the determination of special education needs (Iowa Administrative Code 281.41.47). These services typically are provided by personnel that are itinerant, that is, they typically are not assigned to full-time teaching roles at a specific school site. Moreover, these services are crucial to implementation of the public schools' obligations to all children with disabilities regardless of whether they attend public or nonpublic schools. These obligations include child find activities in which efforts are made to identify, locate, and evaluate children with disabilities and, following the diagnosis of a disability and the determination of special education needs, the development of an

individualized educational program (IEP) that provides a free and appropriate education at public expense (FAPE) (34 C.F.R. 300.220). Stipulated facts in this case indicate that appellants agree that these diagnostic and IEP development services have been provided by appellees.

In this context, then, the proper interpretation of "assistance with physical and communication needs" is in relation to related services. The related services that typically are provided to children with physical disabilities, the type of disability mentioned specifically in this section of the Iowa Code, are speech/language therapy, occupational therapy, and physical therapy. Moreover, these services typically are provided on a consultative basis to teachers or through relatively brief therapy sessions that may be scheduled for as little as 30 minutes per week. This interpretation is consistent with the Iowa Legislature's apparent concern with the location of services and the desire to avoid the provision of full-time personnel paid by public monies on the premises of nonpublic schools.

The case record indicates that the public agencies (MISD and GW-AEA) currently provide to Robert T. speech/language services, occupational therapy, and physical therapy. Although the record is unclear as to where these services are provided now, the provision of these services on the premises of the nonpublic school that Robert T. attends would appear to be in line with the intent of the Iowa Legislature and the complete meaning of the full text of Section 256.12(2).

No ruling is necessary in this decision on appellants' arguments that "may" in this context means "shall." Even if appellants are correct, the key issue is the intent of the Iowa Legislature in the exceptions listed to the neutral site principle in Section 256.12(2). Those exceptions refer to part-time related services, not full-time instructional services that would involve placing public school employees full-time on the premises of nonpublic schools. Related services of the kind contemplated in Section 256.12(2) are now provided to Robert T., thus meeting the obligations of the MISD and GR-AEA imposed by Iowa Code Section 256.12(2) to parentally-placed nonpublic school students with disabilities.

Free Exercise Clause

Appellants also argue that the Free Exercise Clause of the First Amendment to the U.S. Constitution requires that the MISD and the GW-AEA pay for the instructional assistant at St. Joseph's School. The Free Exercise Clause states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Appellants argue that the failure to provide the instructional assistant that Robert T. needs places an undue financial burden on the practice of their religion if they choose, as they have done, to place Robert T. in a sectarian school. Appellants argue that having to pay for the instructional assistant constitutes a government-imposed burden that seriously impairs their

opportunity to practice their chosen religion.

Case law regarding the Free Exercise clause does not support appellants' application to this set of facts. In general, (see Goodall v. Stafford County School Board, 22 IDELR 972, 1995) (hereafter, Goodall) case law indicates that "...the government may not pass laws that stifle religious belief or practice, ... a law that is religion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally affects religious practice." (Goodall, 1995, p. 973). Moreover, a law or policy does not create a substantial burden on the free exercise of religious beliefs even if it operates to make the practice of those beliefs more expensive [Braunfeld v. Brown, 366 U.S. 599, 605 (1961), cited in Goodall, 1995].

The available case law requires rejection of appellants' claims based on the Free Exercise Clause. The law at issue here focuses generally on nonpublic schools, not just sectarian, nonpublic schools. Secondly, the burden of having to pay for the instructional assistant was not imposed by the government on the parents; rather, that burden comes about through a religion-neutral public policy that, in this case, has the incidental effect of increasing the cost of the parents' practice of their religion. Case law precedents defeat appellants' efforts to prevail on the basis of the Free Exercise Clause.

Equal Protection

Appellants final claim is based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution which forbids states to, "...deny to any person within its jurisdiction the equal protection of the laws..." Although appellants' arguments regarding the application of the equal protection right to the facts in this case are not entirely clear, it appears that they are making the claim that the MISD and GW-AEA denial of payment for the instructional assistant is based either on Robert T.'s status as a child with a disability or on the parents' religion. Either of these bases for denial of the instructional assistant might come under the purview of equal protection; however, appellants' analysis is incorrect. The clear basis for the denial is Robert T.'s status as a student in a nonpublic school (see Appendix F in the stipulated facts), a status that in and of itself has no relationship either to religion or to disability.

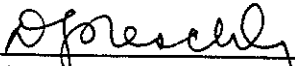
There appears to be one factual error in appellants' brief regarding the MISD expenses for providing the instructional assistant at St. Joseph's School, "The school district would not incur any greater financial costs to provide Robert with an assistant at St. Joseph's than they would if Robert attended their public schools." (Appellants' Brief RE: Iowa Statutes & Regulations & Federal Constitutional Law, p. 19). As noted in Appendix F in the stipulated facts, however, the MISD cannot obtain monies from the State of Iowa for providing the instructional assistant for Robert T. at St. Joseph's School. The district would receive those monies if Robert T. was a student in the MISD. Robert T.'s status as a nonpublic school student does influence directly the monies available to MISD to pay for any services

provided to him due to his disability.

The record clearly indicates that the basis for the differential treatment of Robert T. is his status as a student in a nonpublic school. This status is not protected by the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution, that is, states are not prohibited from treating public and nonpublic school students differently.

III. Decision

Appellants' claims based on Iowa statutes and regulations and the U.S. Constitution are denied regarding the responsibility of the MISD and GW-AEA to pay for the full-time instructional assistant at St. Joseph's School. In the initial decision in this matter (see In re: Robert T., Admin. Doc. SE-160, 13 D.o.E. App. Dec. 26) appellants' claims based on the Individuals with Disabilities Education Act were denied. Appellees have prevailed on all substantive issues in this proceeding.



Daniel J. Reschly, Ph.D.
Administrative Law Judge

2-21-96

Date