

Cite as 1986-87 EHLR DEC. 558:461

ELIZABETH S., et al.,  
Plaintiffs

v.

THOMAS K. GILHOOL, et al.,  
Defendants

Civil Action No. 86-0218

United States District Court, Middle District of Pennsylvania

August 3, 1987

Pennsylvania school district refused to train teacher and other school personnel to monitor and remediate condition of six-year-old student with juvenile diabetes. Class action lawsuit in federal district court alleged violation of Sec. 504 of Rehabilitation Act in school district's refusal to serve "health impaired" students. Under terms of settlement, *infra*, students will be classified as physically handicapped "exceptional children" within the meaning of state law and, in the event there is no agreement on services needed by a child, the parents will be entitled to a due process hearing. In addition to circulating policy statement reflecting settlement, SEA will conduct in-service training, monitor compliance by local school districts, and investigate any noncompliance.

Counsel for Defendants: Andrew S. Gordon, Chief Deputy Attorney General, Chief, Litigation Section, Office of Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120

Counsel for Department of Education: Ernest Helling, Esq.

Counsel for Plaintiffs: Theresa Glennon, Esq., Education Law Center, Inc. 225 South 15th Street, Suite 2100, Philadelphia, PA 19102

EDWIN M. KOSIK, J.

## STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, plaintiffs and defendants, by their undersigned counsel, being desirous to resolve outstanding matters, hereby agree and stipulate to dismissal of the above-captioned action on the following terms and conditions:

1. Defendants Gilhool, Logan and Makuch (hereinafter "defendants") will issue the attached policy statement to all School District Superintendents, all School District Directors of Special Education, all Intermediate Unit Executive Directors, all Intermediate Unit Directors of Special Education, all Special Education Hearing Officers, and all special education program staff of the Division of Regional Review and of the Office of Planning and Auditing within 30 days of the date this stipulation is approved by the Court;

2. Defendants will conduct in-service training concerning the contents of the attached policy statement for all Special Education Hearing Officers, Regional Reviewers, and special education personnel of the Office of Planning and Auditing;

3. Defendants will utilize existing data collection systems or implement data collection systems necessary to ensure that all local school districts and intermediate units fulfill their obligations to identify as exceptional all children who are described as "physically handicapped" in accordance with the attached policy statement;

4. Defendants will investigate any local school district which has not, within two years from the date this stipulation is approved by the Court, identified any additional children as "physically handicapped" under 22 Pa. Code Sec. 341.1;

5. In recognition of the above, the plaintiffs agree that the approval of this stipulation shall dismiss the claims of both named and class plaintiffs without prejudice.

6. The plaintiffs' Stipulation of Dismissal is expressly conditioned upon defendants issuing as final the policy statement attached to this stipulation. Defendants reserve the right to amend, alter or rescind the policy statement in the future and otherwise change the policies described in paragraphs 1-4 of this stipulation. For three years after this stipulation is approved by the Court, defendants will notify



plaintiffs' counsel at least sixty (60) days before the effective date of any change in policy.

7. Plaintiffs do not relinquish the right of all present and future members of the plaintiff class to file claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, in court without first exhausting available administrative procedures.

8. This stipulation is not nor is it to be construed either as a consent decree or a settlement agreement; it does not operate as an adjudication on the merits and nothing stated herein shall be construed as an admission of liability by any party.

9. The issue of attorney's fees is reserved.

### Appendix

#### BASIC EDUCATION CIRCULAR

SUBJECT: Physically Handicapped and Other Health Impaired Students

TO: School District Superintendents  
Special Education Supervisors  
Intermediate Unit Executive Directors  
Intermediate Unit Special Education Supervisors  
Staff, PDE

FROM: William R. Logan  
Acting Commissioner for Basic Education

#### SUBJECT TO TECHNICAL AMENDMENTS

In February, 1986, a class action lawsuit was filed against the Department and one of Pennsylvania's local school districts. The case involved the rights of the named plaintiffs, one of whom has juvenile diabetes and the other of whom uses braces and crutches as a consequence of spina bifida, to receive the accommodations and supportive services which they need to attend school safely and productively. This Basic Education Circular (BEC) is intended to set forth the rights of school-aged students like those plaintiffs who have physical disabilities or health impairments, as well as the correlative responsibility of teachers, principals and other school personnel to extend a decent and thoughtful consideration to children who have physical disabilities or health impairments so that their education may proceed safely and successfully.

In 1986, in response to the lawsuit, Acting Secretary D. Kay Wright organized a task force composed of representatives of school boards, administrators, principals, teachers, parents, pupil personnel, special educators, and advocates. From some members of that Task Force came a suggestion of a new and further "due process" scheme, separate and apart

from the existing system required by P.L. 94-142. This suggestion was under active consideration when Thomas K. Gilhool was appointed and confirmed as Secretary of Education.

His review led to the conclusion that a new and additional separate system of "due process" was unnecessary and would impose undue complications in the education of disabled students. To the contrary, his review concluded that many students who have permanent or temporary disabilities or health conditions and who have not formerly been considered as "exceptional" or "handicapped" students in this state must, in accordance with state and federal law and regulations, be so considered. Thus, all students who have physical disabilities or health conditions which affect, or without special assistance are likely to affect, their ability to participate in their school programs are exceptional or handicapped students who are entitled to all the rights and privileges accorded other exceptional or handicapped students under state and federal laws and regulations.

This conclusion is based upon 22 Pa. Code Section 341.1, which defines "physical handicap" as:

Orthopedic or other health impairments of sufficient magnitude to limit the classroom accommodation and educational performance of a person,

and upon the federal law definitions of "other health impaired" or "orthopedically impaired." 34 C.F.R. Sec. 300.5(b)(6) & (7), which provide respectively:

- (6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).
- (7) "Other health impaired" means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.



These definitions include children with orthopedic impairments and conditions such as muscular dystrophy, diabetes, arthritis, heart conditions, spina bifida, cerebral palsy, cancer, hemophilia, epilepsy, sickle cell anemia, cystic fibrosis, and asthma, which, without thoughtful accommodations or special services, would limit their ability to participate successfully in school. Such children are entitled to be identified as "exceptional" or "handicapped" students, to be evaluated to determine whether they require accommodations and/or services to participate successfully in their public school programs, and to be provided with the services and accommodations which they need to participate in those programs. The accommodations and services needed by these students may include, but are not limited to, support and assistance to teachers and other support personnel in recognizing, anticipating and addressing any episodes which may arise from the condition or impairment as well as related services such as adaptive transportation, assistance with toileting, adaptive physical education, occupational therapy, or school health services. Students identified as being "physically handicapped" or "health impaired" because of orthopedic or health conditions are to be considered to be "exceptional" or "handicapped" students whether or not they receive all of their education in "regular" education classes.

Thus, children who are "physically handicapped," even if educated in "regular" education classes, are entitled to all substantive and procedural rights set out in 22 Pa. Code Chapters 13 and 341 and to any other rights set out in Section 504 of the Rehabilitation Act, 29 U.S.C. Sec. 794 and the Education of the Handicapped Act, as amended, 20 U.S.C. Secs. 1401 *et seq.* These rights include, but are not limited to, the following: (a) an Individualized Education Program to be developed at a conference of parents, teachers, other school personnel and, if necessary, physicians, which sets forth the related services and accommodations needed to meet the student's special needs during the school day; (b) education with children who are not handicapped to the maximum extent appropriate including education in regular classes whenever with supplemental aids and services it may be satisfactorily achieved; (c) full and non-discriminatory evaluation services; (d) all procedural rights, including notice to parents, conferences and access to the due process hearing and appeal system; and (e) access to mediation and to the complaint system of the Division of Regional Review.

Although the rights of such children are susceptible of the legal statement given them in the preceding paragraph, it is not that technical, legal statement which is of primary importance here. Rather, these matters, as most "due process" matters, are properly addressed when they receive the kind of decent and thoughtful consideration and resolve which concerned adults—parents, teachers, principals, and other concerned personnel alike—can be expected to give

them. The point of "due process" is to assist human beings to overcome and to avoid "the arbitrary quality of thoughtlessness." *Hobson v. Hansen*, 269 F. Supp. 401, 497 (DC DC 1967). Thus, what the policy set forth here requires is simply that parents and teachers, principals and others, whose advice and participation are valued because of their knowledge of the child, or the school, or of the disability or health condition, should sit down together, together inform themselves and think out loud together about the child's circumstances (the evaluation, the IEP conference) and about the arrangements and undertakings which will support and assist the child to participate effectively in school (the IEP itself). If there remains a difference about how to provide them, the familiar appeal and complaint processes apply. In a phrase, a "thoughtful consideration" of the child and his or her circumstance, and action upon it, as with a child remaining in school with a broken leg or arm, a considerate and attentive watchfulness, perhaps a schedule adjustment, adaptive physical education and a thoughtful contingency plan for any acute circumstance which may arise is all that is required. Sometimes a chronic condition may require arrangements for snacks or medication or for toileting, but at least since the unanimous Supreme Court decision in *Tatro v. Texas*, 104 S.Ct. 3371 [1983-84 EHLR DEC. 555:511] (1984), their provision has been required to support a child in school.

The two children who are named as plaintiffs in the lawsuit provide useful examples of children who, under the definition of "physically handicapped," or "health impaired," should be evaluated to determine what services or accommodations are necessary to assist and support them in participating successfully in school and to illustrate the services or accommodations which should be provided.

Elizabeth S. is a six-year-old with insulin dependent diabetes. She attends a regular education program in her local school and requires no instruction from a special education teacher. Nonetheless, in order to attend school safely and productively, the youngster's blood sugar level must be monitored and provision made for insulin injections, snacks during the course of the school day, the management of any medical emergencies which may arise, and perhaps for modification in scheduling and activities. Under the law and regulation, Elizabeth should have been evaluated by her district and provided with the health consideration, accommodations and school health services she needs.

Jose C. is a six-year-old child with spina bifida who walks with the assistance of braces and crutches. Evaluation shows that he needs, and, as an "exceptional" or "handicapped" child he is entitled to, adapted transportation and support and assistance with his toileting needs. Some other examples of related services and accommodations that such physically handicapped children may need are adapted physical education or occupational therapy, use of an elevator or other accommodations to make school facilities, programs



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and activities accessible, staff training in the needs of the child, supervision of medications, and flexible homebound instruction programs, should frequent absences occur due to a chronic health problem.

Local school districts and intermediate units should provide for the systematic and routine identification of children who have physical disabilities or health impairments defined above. To aid in this identification, school districts must include in any appropriate document, such as a school calendar or brochure, which is given to all parents on an annual basis, a description of the group of children who are included in the definition of "physically handicapped" or "health impaired" together with a simple explanation of the rights of these students. The following language is being provided as a sample and may be used for this notice:

Children who are physically handicapped or who have a chronic health impairment, such as diabe-

tes or spina bifida, cannot be excluded from school because of their disability. These youngsters may be eligible for special services or program changes even if they are in regular education programs. If you believe your child may need some services, accommodations, or program changes in order to participate successfully in school, please contact \_\_\_\_\_ at \_\_\_\_\_ for information. All inquiries and information shall be treated confidentially in accordance with state and federal law.

School officials with questions concerning their responsibilities toward the students described in this BEC should contact \_\_\_\_\_ at the Department of Education.

A.A., on Behalf of His Son, A.A., Jr.,  
Plaintiff-Appellant

v.

SAUL COOPERMAN, Commissioner of Education, NEW JERSEY DEPARTMENT OF EDUCATION,  
and FREEHOLD REGIONAL HIGH SCHOOL DISTRICT,  
Defendants-Respondents

Superior Court of New Jersey, Appellate Division

May 29, 1987

Orthopedically handicapped student was placed voluntarily by father in private secondary school. Student's handicap requires individual motor vehicle with curbside drop-off and pick-up to transport him to and from school. School district agreed to provide for transportation only the amount fixed by statute for transportation of any student to private school, *i.e.*, \$406 per year, which is considerably less than actual expense. Father filed application with state department of education seeking payment of full cost. Commissioner dismissed application and denied request for hearing, ruling that father was not entitled to due process hearing. State board of education affirmed decision and father appealed to state superior court.

*HELD*, administrative decision affirmed.

Orthopedically handicapped student who does not require special education is not eligible for related service of transportation to private secondary school.

Because due process hearing is required under state law only where issue concerns child's eligibility, evaluation, or appropriateness of placement, father seeking related service of transportation is not entitled to hearing where parties agree that child is handicapped and there is no dispute concerning his program or placement.