TIMOTHY W. v. ROCHESTER N.IL SCHOOL DLIS'MICT

United States Court of Appeals, 1989.
875 F.2d 954 (1st Cir.)

BOWNES, Circuit Judge.

Plaintiff-appellant Timothy W. appeals an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. **We reverse.**

I. BACKGROUND

Timothy W. was born two months prematurely on December 8, 1975 with severe respiratory problems, and shortly thereafter experienced an intracranial hemorrhage, subdural effusions, seizures, hydrocephalus, and meningitis. As a result, Timothy is multiply handicapped and profoundly mentally retarded. He suffers from complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness. His mother attempted to obtain appropriate services for him, and while he did receive some services from the Rochester Child Development Center, he did not receive any educational program from the Rochester School District when he became of school age.

* * *

On July 5, 1988, the district court rendered its opinion entitled "Order on Motion for Judgment on the Pleadings or in the Alternative, Summary Judgment." The record shows that the court had before it all the materials and reports submitted in the course of the administrative hearings, and the testimony from the two-day hearing. The court made rulings of law and findings of fact. It first ruled that "under EAHCA [the Education for All Handicapped Children Act], an initial determination as to the child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." After noting that the New Hampshire statute * * * was intended to implement the EAHCA, the court held: "Under New Hampshire law, an initial decision must be made concerning the ability of a handicapped child to benefit from special education before an entitlement to the education can exist." The court then reviewed the materials, reports and testimony and found that "Timothy W. is not capable of benefitting from special education .... As a result, the defendant [school district] is not obligated to provide special education under either EAHCA [the federal statute] or RSA 186-C [the New Hampshire statute]." Timothy W. has appealed this order. Neither party objected to the procedure followed by the court.

The primary issue is whether the district court erred in its rulings of law. Since we find that it did, we do not review its findings of fact.

* * *

The language of the Act could not be more unequivocal. The statute is permeated with the words "*all* handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, as indicated *supra*, the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will "benefit" from the educational program. Rather, the Act speaks of the *state's* responsibility to design a special education and related services program that will meet the unique "needs" of all handicapped children. The language of the Act in its entirety makes clear that a "zero-reject" policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all. In summary, the Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain.

* * *

In mandating a public education for all handicapped children, Congress explicitly faced the issue of the possibility of the non-educability of the most severely handicapped. The Senate Report stated, "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." * * * The report continued: "The Committee has deleted the language of the bill as introduced which required objective criteria and evaluation procedures by which to assure that the short term instructional goals were met." * * *

Thus, the district court's major holding, that proof of an educational benefit is a prerequisite before a handicapped child is entitled to a public education, is specifically belied, not only by the statutory language, but by the legislative history as well. We have not found in the Act's voluminous legislative history, nor has the school district directed our attention to, a single affirmative averment to support a benefit/eligibility requirement. But there is explicit evidence of a contrary congressional intent, that no guarantee of any particular educational outcome is required for a child to be eligible for public education.

* * *

The district court relied heavily on Board of *Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 * * * (1982), in concluding that as a matter of law a child is not entitled to a public education unless he or she can benefit from it. The district court, however, has misconstrued *Rowley*. In that case, the Supreme Court held that a deaf child, who was an above average student and was advancing from grade to grade in a regular public school classroom, and who was already receiving substantial specialized instruction and related services, was not entitled, in addition, to a full time sign-language interpreter, because she was already benefitting from the special education and services she was receiving. The Court held that the school district was not required to maximize her educational achievement. It stated, "if personalized instruction is being provided with sufficient supportive services to permit the child to -benefit from the instruction. . . . the child is receiving a 'free appropriate public education' as defined by the Act," * * * and that

"certainly the language of the statute contains no requirement . . . that States maximize the potential of handicapped children." * * *

Rowley focused on the level of services and the quality of programs that a state must provide, not the criteria for *access* to those programs. * * * The Court's use of "benefit" in *Rowley* was a substantive limitation placed on the state's choice of an educational program; it was not a license for the state to exclude certain handicapped children. In ruling that a state was not required to provide the maximum benefit possible, the Court was not saying that there must be proof that a child will benefit before the state is obligated to provide any education at all. Indeed, the Court in *Rowley* explicitly acknowledged Congress' intent to ensure public education to all handicapped children without regard to the level of achievement that they might attain.

> Congress expressly 'recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*.' * * * Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

* * * (emphasis added).

Rowley simply does not lend support to the district court's finding of a benefit/eligibility standard in the Act. As the Court explained, while the Act does not require a school to maximize a child's potential for learning, it does provide a "basic floor of opportunity" for the handicapped, consisting of "*access* to specialized instruction and related services." * * * (emphasis added). Nowhere does the Court imply that such a "floor" contains a trap door for the severely handicapped. Indeed, *Rowley* explicitly states: "[t]he Act requires special educational services for children 'regardless of the severity of their handicap,'" * * * and "[t]he Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied." * * * See also *Abrahamson*, 701 F.2d at 227 ("A school committee is required by the Act merely to ensure that the child be placed in a program that provides *opportunity* for some educational progress.") (emphasis added). This is a far cry from a requirement of proof that educational benefit *will definitely result*, before a child is entitled to receive that education.

* * *

CONCLUSION

The statutory language of the Act, its legislative history, and the case- law construing it, mandate that all handicapped children, regardless of the severity of their handicap, are entitled to a public education. The district court erred in requiring a benefit/eligibility test as a prerequisite to implicating the Act. School districts cannot avoid the provisions of the Act by returning to the practices that were widespread prior to the Act's passage, and which indeed were the impetus for the Act's passage, of unilaterally excluding certain handicapped children from a public education on the ground that they are uneducable.

The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs. The only question for the school district to determine, in conjunction with the child's parents, is what constitutes an appropriate individualized education program (IEP) for the handicapped child. We emphasize that the phrase "appropriate individualized education program" cannot be interpreted, as the school district has done, to mean "no educational program."

We agree with the district court that the Special Education Act of New Hampshire * * * implements the federal statute. Its policy and purpose is as unequivocal as that of the federal Act:

> It is hereby declared to be the policy of the state that *all children* in New Hampshire be provided with equal educational opportunities. It is the purpose of this chapter to insure that the state board of education and the school districts of the state provide a free and appropriate public education for *all educationally handicapped children*.

* * * (emphasis added). For the reasons already stated, we hold that the New Hampshire statute is not subject to a benefit/eligibility test.

The judgment of the district court is reversed, judgment shall issue for Timothy W. The case is remanded to the district court which shall retain jurisdiction until a suitable individualized education program (IEP) for Timothy W. is effectuated by the school district. Timothy W. is entitled to an interim special educational placement until a final IEP is developed and agreed upon by the parties. The district court shall also determine the question of damages.

Costs are assessed against the school district.