IN THE MATTER OF PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS,
Respondent.

Docket No. 97-29-CR
Civil Rights Proceeding

INITIAL DECISION

Appearances: Andrew W. Nussbaum, Esq., Greenbelt, Md., for the Respondents

Seksan Cucukow, Esq. and Lee A Nell, Esq., Philadelphia, Pa., for the Office for Civil Rights, U.S. Department of Education

Before: Judge Allan C. Lewis

This is an action to terminate the continued eligibility of Prince George's County Public Schools (District) to receive or apply for Federal financial assistance from the U.S. Department of Education. It was instituted as a result of a determination by the Assistant Secretary of Education for Civil Rights that District violated Section 504 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 701 et. seq.) when it denied a request by RT, a student with an educationally related disability, to participate in an after school day care program at her neighborhood elementary school. Based upon the facts and conclusions of law, infra, the determination of the Assistant Secretary of Education for Civil Rights is upheld in part.

I. FACTS

Since 1987, District has operated a program which provides day care for elementary students in their schools before and after regular school hours.See footnote 1[1] The program was available at any elementary school which had at least 20 to 30 children whose parents or guardians were willing to participate and pay a reasonable fee to cover the out-of-pocket costs and expenses of the program such as the salaries of the staff and supplies.See footnote 2[2] The fee was identical for each participant and did not vary from school to school. During the school years 1995-96 and 1996- 97, District had 121 elementary schools and 8 special education centers for elementary age students with educationally related disabilities. Of these schools, the day care program was available in 37 schools for 1995-96 and 39 schools for 1996-97, none of which were the special education centers. The day care programs were conducted on the premises of the elementary schools, except for three schools which were close in proximity and shared a program that utilized the nearby Challenger Instructional Center.See footnote 3[3]

Morning day care was available between 7:00 a.m. and the beginning of the school day which ranged between 8:00 a.m. and 9:35 a.m. depending on the particular elementary school.See footnote 4[4] After school day care was available following dismissal from school, which varied between 2:15 p.m. and 3:45 p.m., and 6:00 p.m. Parents were responsible for transporting their children to the care program in the morning and to their residence after the close of the day care program.

In general, a day care program was open to students who resided in the attendance area of the school and were enrolled at the school. Transfer students were not eligible. In addition, District maintained various elementary schools designated as magnet schools as the result of a desegregation order. The magnet schools had programs designed to attract students from outside their attendance area. Pursuant to the general rule of eligibility, students who resided within the attendance area of a magnet school could attend the day care program at their school if there was one. The students, who lived outside the attendance area of the magnet school, were not eligible to participate in the day care program at their magnet school or their local elementary school.

The general rule of eligibility was modified, however, for students who were involuntarily bussed to another elementary school in order to comply with the desegregation order. In this circumstance, the bussed students were considered as enrolled and residing in the attendance area of the school to which they were bussed. Hence, these students were only eligible to participate in the day care program at the school which they attended, if there was one, and were ineligible to participate in the day care program at their local neighborhood school.

District had 8 special education centers in which students with educationally related problems were instructed. The geographic attendance area for a special education center was substantially larger than the attendance area for a regular elementary school. The enrollments in the special education centers were uniformly smaller that the regular elementary schools. Like a regular elementary school, a day care program was available at these centers if provided there was a sufficient parental interest. Since the inception of the program, however, none of the special education centers has had a day care program.

In some instances, even the special education centers cannot provide the appropriate education services for a student. In this circumstance, the student was assigned to and educated at a private school at public expense. Under the rules of the day care program, a program may not be offered at a private school. Hence, these students were precluded from participating in the day care program at their private schools and at their local elementary schools.

During the 1994-95 school year, RT, a student with an educationally related disability, attended one of the special education centers operated by District. She was placed in the Chapel Forge Special Center by District because Kingsford, the neighborhood elementary school within her attendance area, could not provide an appropriate educational program. Shortly before the school year began, RT's parents sought her admission into the afternoon aspect of the before and after school day care program at Kingsford. The Deputy Superintendent of District denied her admission on the ground that she was enrolled in the special education center, not Kingsford, and, therefore, was not eligible to participate in the Kingsford program. RT's parents appealed this decision and District denied the appeal.

In the 1995-96 school year, RT was assigned and enrolled by District in a private day school which offered special educational and related aids and services necessary to afford her an appropriate education. The school began at 9:15 a.m. and ended at 3:00 p.m. RT's bus ride to and from school was approximately 60 minutes, while a direct trip was approximately 25 minutes. Once again, RT sought admission into the afternoon aspect of the day care program at Kingsford and was denied. She was not eligible to participate in the program at Kingsford due to the enrollment rule. In addition, the rules of the program prohibited a day care program at a private school.

Prior to October 30, 1996, the Office for Civil Rights of the U.S. Department of Education (OCR) notified District that its enrollment policy resulted in the exclusion of students with disabilities from participation in the program and, as such, it constituted a violation of Section 504 of the Rehabilitation Act of 1973, as amended. OCR sought voluntary compliance by District which was unsuccessful. A formal letter of findings was issued on November 8, 1996, and a notice of opportunity for a hearing was filed with the Office of Administrative Law Judges on March 18, 1997.

II. Opinion

Section 504 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 794 (a) (1990)) prohibits programs receiving federal financial assistance from discriminating against an individual with a disability solely because of that disability--

> No otherwise qualified individual with a disability in the United States, as defined by section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied of the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

As stated by the Secretary, “a recipient of Federal financial assistance, in providing any aid, benefit, or service may not, directly or through . . . other arrangements, on the basis of handicap: (i) [d]eny a qualified handicapped person the opportunity to participate or benefit from the aid, benefit, or service; [or] (ii) [a]fford . . . an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.” 34 C.F.R. § 104.4 (b)(1);See

footnote 5 New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

The parties agree that there is no dispute that District is the recipient of Federal assistance and that RT was a "handicapped" or "disabled" person due to an educationally related disability and, therefore, was appropriately assigned to a special education center and later to a private school. The present controversy focuses on whether RT was an otherwise qualified individual and whether RT was excluded from participating in the day care program solely because of her disability.See footnote 6[6]

The Court defined an otherwise qualified individual as "one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). This proposition was not applied literally, rather, it was interpreted to mean that an individual with a disability need only meet a program's necessary or essential requirements. 34 C.F.R. § 104.3(k)(4); Simon v. St. Louis County, 656 F.2d 316, 321 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982). Even though an individual with a disability cannot meet the essential requirements of a program, he or she is otherwise qualified if reasonable accommodations would enable him or her to satisfy the requirements. Reasonable accommodations do not require an institution "to lower or to effect substantial modifications of standards to accommodate" a disabled person. Davis, 442 U.S. at 413. Moreover, accommodations are not reasonable if they impose "undue financial and administrative burdens" or if they require a "fundamental alteration in the nature of [the] program." Pottgen v. Missouri State High School Activities Association, 40 F.3d 926, 930 (8th Cir. 1994) (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987)).

OCR argues that RT was qualified to attend her local elementary school, Kingsford, which had a day care program because she lived within the attendance area of this school. To be "qualified" to receive public schooling, according to OCR, one need be only a person "of any age during which it is mandatory under state law to provide such services." 34 C.F.R. § 104.3(k)(2)(ii). (M.Br. at 10-11.) Since RT was placed by District for educational purposes in a special education center and, subsequently, in a private school due to the insufficient educational resources at Kingsford, she was thereby denied her right to participate in the day care program at Kingsford. In OCR's view, this constituted categorical discrimination due to her disabilities.

In addition, OCR maintains that a modification to the rules of the day care program which would permit educationally related disabled students to attend the program at their local elementary school would not result in a fundamental alteration of the service. OCR notes that the nature of the program would not be affected in terms of location, staff, hours of operation, or content. The only modification caused by the admittance of RT into the program would be the location at which RT boards her school bus in the morning to commute to her special education center or private school and disembarks from her bus in the afternoon. Currently, RT embarks and disembarks at her residence and, if she were participating in the day care program, this would occur, instead, at the nearby Kingsford Elementary School.See footnote 7[7]

District counters that its enrollment eligibility rule was a neutral rule, which was neutrally applied. As such, there was no categorical denial of an equal opportunity to participate in the day care program because the students with disabilities were not excluded from the program "solely due to their disabilities," but rather, solely due to where they attended school. M.Br. at 1. Moreover, District maintains that the eligibility rule was devised in order to avoid transportation and timing issues and that its waiver would create significant administrative burdens and difficulties.

District argues that three courts of appeals have addressed a somewhat analogous issue, namely whether age or semester eligibility standards in high school sports may be waived for disabled students who are still attending high school due to an educationally related disabling condition which, in turn, slowed their progress through school.

In Sandison v. Michigan High School Athletic Association, 64 F.3d 1026 (6th Cir.1995), the court found that an age limitation of 19 was a neutral rule which was neutrally applied. Students were disqualified because they turned 19, not solely by reason of their educationally related disability. Sandison, along with Pottgen and McPherson v. Michigan School Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997), addressed the age or semester limitation in the context of the accommodation issue. Sandison held that Section 504 does not require "affirmative action," substantial changes such as a "fundamental alteration in the nature of the program," or changes "imposing undue financial and administrative burdens." 64 F.3d, at 1031 (quoting Davis, 442 U.S., at 410, 411 n.10, 412.). Rather, Section 504 demands "even-

handed treatment of otherwise qualified handicapped persons." Id.

In Pottgen, the Eighth Circuit determined that the nature of the age limitation did not lend itself to any accommodation other than a waiver of the rule. In this regard, the Eight Circuit held that a waiver was not a reasonable accommodation as "waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program." 40 F.3d at 930.

McPherson dealt with the eight semester rule which limited a student's participation in high school sports to eight semesters. Like the age limitation rule, the purpose of the semester rule was to create a fair sense of competition by limiting the level of athletic experience and skill of the players in order to create a more even playing field for the competitors. Id., at 456. In this case, waivers of the rule had been granted in the past where the waiver was applied for prior to the expiration of the eight semesters and in cases in which the students had been physically unable to attend school for a medical reason or had been limited to taking a small number of courses, which resulted in attending high school more than eight semesters. Id,

The Sixth Circuit held that a waiver would not constitute a reasonable accommodation since it would inject older and more physically mature students into the competition and, therefore, would work a fundamental alteration of the high school sports program. Id. at 462. While McPherson argued that there would be no fundamental alteration of the program due to his average height, weight, and skill level, the court rejected this argument by focusing on the broader picture. In its view, a mandate which required the association to develop, analyze, and review the physical attributes and skills of all learning disabled students who remain in school more than eight semesters would impose an immense financial and administrative burden on the association as well as likely lead to widespread abuse of the rule by schools through the red- shirting of student athletes. Id, at 463. In its view, "[h]aving one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocable altering the nature of high-school sports." Id. at 462-63.

RT sought admission into the Kingsford day care program -- once while enrolled in a special education center and once while enrolled in a private school. The alleged discrimination under Section 504 will be addressed, first, in the context of the private school enrollment.

District's enrollment rule -- that a student enrolled in the elementary school in his or her attendance area may only participate in a day care program at that school provided there is sufficient parental interest -- is not a neutral rule as applied. The educationally disabled students assigned to private schools are members of the only class of students which was denied an opportunity to be eligible to participate in the day care program. It was denied this opportunity while the other four categories of students, including the educationally related disabled students who attended the eight special education centers, possessed either the opportunity to be eligible to participate in the program or had voluntarily waived this opportunity.See footnote 8[8] Hence, discrimination against this class is readily apparent and, unlike the age limitation cases of Sandison and Pottgen, the basis of such discrimination is due solely to the disabilities of the members of this class. Such discrimination violates Section 504. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir. 1982) ("federally-funded education system may be found in violation of Section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped.").

District maintains that the eligibility enrollment rule was devised in order to avoid transportation and timing issues and that its waiver would not constitute a reasonable accommodation because it would create significant administrative burdens and difficulties.See footnote 9[9] The rationale for the eligibility rule was explained by the Deputy Superintendent of District as follows--

> it would be excessively burdensome for the school system to provide transportation between the school in which the student participates in the . . . Program, and the school in which the student is enrolled. The Board established these programs as self-sustaining ones, and providing transportation between the "program school" and the "enrollment school" was not and is not part of the cost of the program. The timing issue has to do with the fact that schools in Prince George's County do not have a uniform or standard opening and closing time. Thus, if a student were to attend a . . . Program which begins its regular educational day at 8:00 a.m., but attends a school program which does not begin until 9:25, it would be virtually impossible to provide services to the child during

that “gap” in time. The same situation could occur in the afternoons.

Stip. Attachment 8.

A waiver of the enrollment rule is not unusual. District waived this rule in order to permit a significant number of its students, who are bussed under the desegregation order, an opportunity to be eligible to participate in the day care program. The waiver was effected through a rule modification which treated these students as residing within the attendance area of the school to which they were bussed rather than their local school attendance area. District also waived its same school requirement and thereby incurred transportation costs contrary to its expressed policy, when it permitted three elementary schools to participate in a combined day care program that was housed in a separate facility, the Challenger Instructional Center. While this facility was located immediately adjacent to two of the schools, the participants from the Langley Park/McCormick Elementary school were bussed between the facility and the school.See footnote 10[10] These circumstances illustrate District's flexible approach toward the enrollment rule when dealing with the needs of its students.

There is no merit to District's contention that providing transportation between the enrollment school and the program school would be excessively burdensome or costly. Inasmuch as District is obligated to provide daily bus service for an educationally related disabled student between his or her residence and the private school, there would be little, if any, additional expense in altering a student's pick-up and drop-off point from the student's residence to his or her local elementary school. Thus, the provision of transportation in this instance is cost neutral and, hence, not a factor.

Similarly, there is little merit to District's argument that substantial confusion and disruption may arise at a school's drop off and pick up point for the busses due to busses discharging students in the morning at the same time that busses are picking up educationally related disabled day care students to transport them to their private schools. This argument lacks evidentiary support and, in any event, it is clearly not a significant, major problem given the potential number of educationally related disabled students who may participate in the day care program.See footnote 11[11]

District has a point that its program may incur additional personnel costs if the educationally related disabled students in private school are permitted the opportunity to be eligible to participate in the day care program. Additional personnel may be necessary in order to escort these students to or from their busses or to supervise these students if a gap period exists in their schedules, i.e. a period of time during which day care may be provided for an educationally related disabled student while the other students in the program are attending school. Again, these costs, if they are incurred, will be minimal because very few additional students will participate in the program as a result of this decision.

Based upon the above, it is determined that RT was an otherwise qualified individual and that she, as a student attending a private school, was excluded from participating in the day care program solely by reason of her disability. In this circumstance, a modification of the enrollment rule which permits educationally related disabled students attending private schools to have the opportunity to be eligible to participate in their local elementary school's day care problem is appropriate and warranted.See footnote 12[12]

Lastly, OCR argues that educationally related disabled students who attend the eight special education centers should be permitted to participate in the day care program at their local elementary schools. Each special education center has an attendance area and a day care program may be initiated if there is sufficient parental interest. Sufficient parental interest is defined, for purposes of both the special education centers and the regular elementary schools, as the prospective participation of at least 20-30 students at the school. Thus, unlike the private school students, the educationally related disabled students who attend the special education centers have the opportunity to be eligible to participate in a day care program.

While OCR acknowledges that the special education center students have this opportunity, it argues that the opportunity is essentially a mythical one and, therefore, these students should be entitled to the same opportunity for participation in the day care program as that given the educationally related disabled students who attend the private schools. In support of this position, OCR notes that none of the special education centers has had a program since the inception of the day care program in 1987. This contrasts with a participation rate of thirty to thirty-two percent of the regular elementary

schools in 1995 and 1996. The eight special education centers serve larger geographical areas than the 121 regular elementary schools and, therefore, the time and distance to and from school are, on average, longer in duration and distance than the duration and distance for a regular student. Lastly, the enrollment in the special education centers is uniformly smaller than the enrollment in the elementary schools.

Based on these facts, OCR argues that the smaller pool of students and the longer commuting distances for parents between their residences or work places and the special education schools, coupled with the absence of any day care program in the past, proves that the opportunity to participate in a day care program is virtually nonexistent. Therefore, OCR maintains that these students should be allowed the opportunity to be eligible to participate in the day care program in their local school, if there is such a program.

District responds, in effect, that over 80 regular elementary schools do not have a program. Hence, there is nothing unusual if a school does not have a program. It adds that the parties' stipulation of facts offers no indication to suggest why no special education center has had a sufficient number of parental requests to establish such a program. District urges that, based on this record, OCR has not proved its case.

As to this class of students, the tribunal agrees with District. The few stipulated facts and any reasonable inferences therefrom fall substantially short of establishing a prima facie case that the students assigned to the special education centers do not have an equal opportunity to be eligible to participate in a day care program as the students who attend the regular elementary schools. Accordingly, the tribunal rejects OCR's position regarding the educationally related disabled students who attend the special education centers.

III, ORDER

Based upon the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that the continued eligibility of Prince George's County Public Schools, directly or indirectly, to receive or apply for Federal financial assistance administered by the United States Department of Education shall be terminated.

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Allan C. Lewis
Chief Administrative Law Judge

Issued: March 17, 1998

Washington, D.C.

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SERVICE

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On March 17, 1998, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

Andrew W. Nussbaum, Esq.
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Seksan Cucukow, Esq.

U.S. Department of Education
Office for Civil Rights
3535 Market Street
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A courtesy copy was also sent by regular mail to--

JoAnn Goedert, Esq.
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Office of the Attorney General
200 Saint Paul Place
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Footnote: 1[1] The facts are taken from a stipulation executed by the parties.

Footnote: 2[2] For its part, District provided in-kind support for a school's program such as free use of a room in the school building, heat, and janitorial service.

Footnote: 3[3] The three elementary schools were Cool Springs, Adelphi, and Langley Park/McCormick.

Footnote: 4[4] The staggered times were due to the extensive busing of students within the county as the result of a desegregation order.

Footnote: 5[5] The regulations have not been updated to conform to the statutory amendment by the Rehabilitation Act of 1992, 106 Stat. 4346 (1992), which substituted the term disability for the term handicap.

Footnote: 6[6] In this matter, OCR employs RT as a representative of two similar, but distinct, classes of students. While both classes consist of educationally related disabled students, one class encompasses the students educated in the eight special education centers and the other class includes the students who attend private schools at public expense.

Footnote: 7[7] The tribunal recognizes that RT sought admission into the day care program for the afternoon session only. Since OCR seeks relief for two classes of educationally related disabled students, the tribunal must evaluate the arguments at the class level and not based upon RT's desire.

Footnote: 8[8] The four classes of students are based upon the circumstances of a student's enrollment and the student's residence: The classes are -- (1) students who attended their local elementary school; (2) students who attended a magnet school or other school and resided outside this school's attendance area because they could have attended their local school and, thus, had the opportunity; (3) students who attended the special education centers because the centers had the opportunity to offer day care programs; and (4) students who, due to the desegregation order, involuntarily attended another elementary school outside their school's attendance area because, under the rules, they were treated as enrolled and residing within the attendance area of the school to which they were bussed.

In addition, District's view that the educationally disabled students voluntarily chose to attend the private schools is misplaced. District elected not to provide these necessary services in its regular elementary schools or in its special education centers. Hence, in this context, attendance at private schools by these students was not voluntary.

Footnote: 9[9] While it advances these arguments, District concedes that the inclusion of the educationally related disabled students who attend private school in the day care program would not cause a fundamental alteration of the program.

Footnote: 10[10] *Although District distinguishes this combined program as an unintended offshoot of an experimental, academic design in which one elementary program was spread over three schools due to their close proximity, it, nevertheless, demonstrates its willingness to allow modifications to its enrollment rule.*

Footnote: 11[11] *While the record does not disclose the actual number of students affected by this decision, it will not be significant. First, the number of students in the private schools is small because, due to the cost of private education, District makes every effort to educate students with educationally related disabilities in its 121 regular schools and its eight special education centers. Second, within this small pool of students attending private schools, a significant number will not participate in the day care program for one or more reasons. Some students will not have the opportunity to participate because they reside in an attendance area of a school which does not have a program. In fact, only 30 percent of the regular elementary schools have a program. Other students will not participate because their parents elect not to participate.*

Footnote: 12[12] *The parties agree that District may review on a case-by-case basis the needs of any educationally related disabled student to determine whether reasonable accommodates can be made for the student without fundamentally altering the nature of the actual program.*