The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220-2015-CV-146

DEPARTMENT OF EDUCATION

V.

CROYDON SCHOOL BOARD, *et al.*

DECISION AND ORDER

Under a self-described "school choice" program, the Croydon School Board allows parents to decide whether their child will attend a public school or one of two non-sectarian private schools – the Newport Montessori School or, for high school students, Kimball Union Academy. If a parent opts for a private school, the school board pays the student's tuition with state money and local tax dollars. The state Department of Education contends the practice is illegal and has sued to enjoin the school board and its individual members from continuing the practice.

The factual background is that the town of Croydon has one public school – the Croydon Village School – which admits students in kindergarten through the third grade. In years past, Croydon belonged to an Authorized Regional Enrollment Area (AREA) agreement through which students too old for the Village School attended school in the neighboring town of Newport. Croydon residents voted to withdraw from that

arrangement in favor of a "school choice" program. Under this system as outlined in Croydon's AREA withdrawal plan, Newport serves as the "anchor" or default school system for Croydon students in grades 4 through 12. *See* Exhibit 2, p. 2; RSA 193:1 (2015 supp.) (requiring parent to "cause such child to attend the public school to which the child is assigned in the child's resident district."). But the Croydon school board assumes that parents know their child better than anyone else and so allows them to select the school that they think best suits the child. To exercise this right, parents simply select a school other than the one to which the child would be assigned in Newport, and disclose their choice to the school board and the school administrative unit to which Croydon belongs.

At least as to public schools, this procedure is contemplated under a state law that permits parents to "apply to enroll [their] child in a public school or public academy outside the school district in which the person and child reside." RSA 193:3, IV (a) (2015 supp.). If the child is accepted by the other school district, then tuition may be charged to the parent or to the "school district in which the child resides." *Id. See* RSA 194:27 (2008) (school district that does not maintain a high school must pay tuition of student residing in district who attends "an approved public high school or public school of corresponding grade in another district or an approved public academy.") *See also* RSA 186:13, IX (authorizing use of funds "appropriated by the legislature for general educational purposes" for payment of tuition expenses allowed by law.) In addition to Newport, school districts for Sunapee and Lebanon now accept Croydon students in their public schools. The department does not contest this practice.

The controversy arises from the school board's policy of also allowing parents to designate a private, non-sectarian school for their child, with the school board paying the student's tuition up to the amount that would be necessary to send the child to an equivalent public school in Newport. In the most recent 2015-2016 school year, Croydon sent four students to the Newport Montessori School. In the 2014-2015 school year, it paid tuition for a student's senior year at a private high school, Kimball Union Academy. The Montessori School is an approved private school for purposes of attendance, so a child attending the school fulfills the compulsory school attendance requirement placed on parents by RSA 193:1 (2015 supp.). *See* N.H. ADMIN.R. ED 401.02 (b). The Montessori School's headmaster acknowledged that as a private school, it is not required to meet the standards for providing an adequate public education. *See* RSA 193-E.

The Croydon school board pays the private school tuition with public funds. The Croydon select board presents the school board with a check drawn from state money and local tax revenue. The treasurer of the school board distributes a certain amount to the SAU for Croydon and Newport, and keeps funds needed for private school tuition in a municipal account for disbursement as required. The department contends that state law does not allow the school board to spend public funds on private schools. The Croydon side says the statutory framework leaves room for a school board to assign students (along with the necessary funding) to non-public schools. The issue underlying both arguments is whether the Croydon School Board is following state law when it allows a student to attend a private school based on a parent's preference.

The issue is one of statutory interpretation, so the text is the starting point in determining what the statutes mean. Their words are given their "plain and ordinary meaning," and without considering "what the legislature might have said or add[ing] language that the legislature did not see fit to include." *Appeal of Michele*, 168 N.H. 98, 102 (2015) (quotations omitted). A statute's words and phrases are read in "the context of the statute as a whole," with the goal of interpreting the law "in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.* (quotations omitted).

New Hampshire citizens have a state constitutional right an adequate public school education. *Claremont School Dist. v. Governor*, 147 N.H. 499, 513 (2002). The right is implemented through a comprehensive statutory framework, whose underlying purpose "is to provide all children within the borders of a state with a free public school education." *Luoma v. Union School Dist. of Keene*, 106 N.H. 488, 490 (1965). The statutory policy is administered by the school board, which is responsible for providing "elementary and secondary education to all pupils who reside in the district." RSA 189:1-a (2015 supp.). But the board's authority is limited to what "is expressly or impliedly granted by statute." *Ashley v. Rye School Dist.*, 111 N.H. 54, 55 (1971).

The Croydon defendants do not point to any specific law that authorizes the school board to assign students to private school, but they say the authority is implied by statutes addressing changes in school assignments. Remember that by default Croydon students are

assigned to attend school in Newport, but RSA 193:3 (2015 supp.) describes several circumstances in which a child may attend a different school.

First a parent "may apply to the school board for relief if the person thinks the attendance of the child at the school to which such child has been assigned will result in a manifest educational hardship to the child." RSA 193:3, I. Croydon defends its actions on this basis, *see* Exhibit 1, p. 2, contending a parent's determination that a school outside the Newport system is better for the child is sufficient to establish the manifest educational hardship necessary to transfer.

This section can't apply under Croydon's school choice policy. The hearing testimony was clear that parents need not show manifest educational hardship in order to avoid Newport's schools. In fact, according to the chair of the school board it is not necessary for a parent to go to the school board at all. The parent simply notifies the SAU of the school chosen and the school board pays the tuition.

If this section of the statute did apply, it would not authorize sending children to a private school in any event. The statute does not say what the school board's choices are if it finds manifest educational hardship, but it does say what happens if the parent is dissatisfied with the school board's response. Then the parent may appeal to the state board of education, whose options are set forth in the same paragraph. Depending on the results of its investigation into the parent's application, the state board "may order such child to attend another school in the same district, if such a school is available, or to attend school in

another district." RSA 193:3, I. To attend a school in a "district" necessarily means attendance at a public school. *See Nashua School Dist. v. State*, 140 N.H. 457, 460 (1995) (as a private entity, a residential school was not part of a school district). There is no reason to believe that Croydon's choices would be any greater than those afforded the state board.

The school board argues that RSA 193:3, II provides a basis for assigning students to non-public schools. Again, the statute cannot apply because of the procedure the Croydon board uses to place its students in private schools. The section begins with a requirement that the state board of education adopt rules on manifest educational hardship. To that end, the administrative rule on that subject (which is entitled to "some deference" in determining how the statute ought to be interpreted, *In re Juvenile 2004-789-A*, 153 N.H. 332, 338 (2006) (quotation omitted)), provides for a student's reassignment to "a reasonably available *public* school, in the district or in another district." N.H. ADMIN.R. ED 320.01 (c) (emphasis added).

The statute goes on to require that the local school board "establish a policy, consistent with the state board's rules, which shall allow a school board, with the recommendation of the superintendent, to take appropriate action including, but not limited to, assignment to a public school in another district when manifest educational hardship is shown." *Id.* Testimony from members of the school board established it has not enacted a policy that is either consistent with the administrative rule or that contemplates a recommendation on reassignment from the superintendent. In fact, the Croydon School

Board has no policy on manifest educational hardship at all. And why would it when its school choice program does not require hardship in order to send its students to a school outside of Newport?

This background undermines Croydon's argument. If it had a policy on manifest educational hardship, paragraph II of the statute says what it must include. So, the policy would allow for "appropriate action" by the school board "with the recommendation of the superintendent," which may "includ[e], but not [be] limited to, assignment to a public school in another district when manifest educational hardship is shown." Croydon says the "included, but not limited to" language implies that assignment to a public school is not the only option. But beyond the fact that this position is inconsistent with the administrative rule and that, in practice, Croydon does not require a showing of hardship, this section describes what must be included in a policy that Croydon does not have. It does not create a substantive right for the school board to take whatever action it thinks is appropriate with respect to the assignment of students.

Paragraph III of RSA 193:3 provides a means to change a school assignment "based on the best interest of the pupil." The pupil's "best interest" is an aspect of the Croydon policy, but its program incorporates none of this section's requirements. These include a school board vote on whether to reassign the student and a finding by the superintendent that the change is in the pupil's best interest. RSA 193:3, III (a); *id.*, ¶ III (a) (2), (3). Under this section, the final decision is left to the superintendent. RSA 193:3, III (g).

The evidence showed that the Croydon school board does not vote on reassignments. The superintendent of the SAU to which Croydon belongs testified that she has no specific familiarity with the Newport Montessori School and has not assessed its suitability for Croydon students. But a more basic problem with relying on this section as authority for assigning students to private schools when it is in their "best interest" is that the statute does not allow for it. Where a reassignment is based on the pupil's best interest, the only transfer authorized is "from the public school to which he or she is currently assigned to another public school." It was noted earlier that under RSA 193:3, IV (a) a parent may ask that the child's enrollment be switched to a school outside the district, but again, the statute says the school sought must be public.

Nowhere in RSA 193:3 is there a reference to private schools. To infer that Croydon may reassign a student from a Newport public school to a private school would read into the statute "words the legislature did not see fit to include." *In re Town of Seabrook*, 163 N.H. 635, 653 (2012). It seems the legislature acted advisedly in omitting private schools as landing spots for students shifted from the public school to which they were assigned, since it authorized school boards to pay tuition to private schools in other instances, such as when a private organization enrolls a child from the district in an approved program for children with disabilities. *See* RSA 186-C:10.

Beyond the question of statutory interpretation, Croydon contends the department is estopped from obtaining an injunction because its AREA withdrawal plan included

references to enrollments at private schools and the education department's response to the plan did not include an objection to that feature. A state official – described as a policy attorney at the department of education – reviewed the plan and commented that private schools had to be approved private schools. *See* Exhibit 2, p. 3, Comment [s8]. According to testimony, she indicated also that the schools could not be religious schools. She did not say the practice was unacceptable.

The Croydon estoppel claim requires that it prove four elements:

> first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury. With respect to the last element, the reliance of the party claiming estoppel must have been reasonable

Sunapee Difference, LLC v. State, 164 N.H. 778, 792–93 (2013) (citations and quotation omitted). "Reliance is unreasonable when the party asserting estoppel, at the time of his or her reliance or at the time of the representation or concealment, knew or should have known that the conduct or representation was either improper, materially incorrect or misleading." *City of Concord v. Tompkins*, 124 N.H. 463, 468 (1984).

Assuming without deciding that Croydon meets the first three elements of proving estoppel, in September 2015 the school board learned that the department regarded Croydon's practice of paying private school tuition with public funds as illegal. *See* Exhibit F (attached to complaint). This specific representation from the State and the Commissioner

of Education negates whatever prior representations were made by a department lawyer that led the Croydon board to understand the use of private schools was permitted beginning with the 2014-2015 school year.

At the hearing, the State represented that it did not seek an order barring Croydon students from attending the Montessori school for the balance of the 2015-2016 school year, but rather one that would prohibit the practice prospectively beginning with the 2016-2017 school year. Since it would now be unreasonable for Croydon to use the earlier, disavowed statements as a basis for continuing its policy of paying private schools in the 2016-2017 school year, it has not proved the department is estopped from obtaining an injunction.

Parents, of course, have the right to enroll their child in a private school and pay the tuition. But for the reasons given, the Croydon School Board and its members do not have the authority to grant parents the unilateral right to reassign their child from the Newport public schools to a private school, and provide public financial support for them to do so. The department's request for a permanent injunction barring the practice is, therefore, GRANTED, effective with school assignment decisions for the 2016-2017 school year. Funds held in the municipal account for payment of private school tuition shall be forwarded to SAU 43 within 30 days of the date on the clerk of court's notice of this decision.

The department's request for attorneys' fees is DENIED, as no basis for such an

award was shown.

SO ORDERED.

DATE: JULY 29, 2016

BRIAN T. TUCKER
PRESIDING JUSTICE