

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

IN THE MATTER OF JOHN B.B. DOE

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:
:

INTERIM ORDER

Held: Student's request for interim order during pendency of due process hearing is denied without prejudice; School Committee's request for interim order is denied with prejudice.

July 29, 1994

Introduction

This matter concerns separate requests by the Lincoln School Committee and student Doe that the Commissioner exercise his interim-order authority under R.I.G.L. 16-39-3.2 to determine an appropriate educational placement for student Doe while a special-education due process hearing regarding the child's individual educational program (IEP) for the 1994-1995 school year is pending. ¹

Background

Student Doe is 12 years old. He is deaf. It is disputed as to whether student Doe has additional health impairments which constitute learning disabilities.

Student Doe has been enrolled in the Lincoln school district since October 1991. IEPs were developed for him in January 1992 and January 1993. His special education placement in both IEPs was Rhode Island School for the Deaf.

In October 1993 student Doe was hospitalized for medical treatment at Bradley Hospital. In February 1994 a hospital IEP was developed and implemented. The IEP lists School for the Deaf as student Doe's current placement, and it provides for 4 hours of tutoring services at Bradley Hospital per week.

None of the above-mentioned IEPs provides for extended school year services.

A proposed IEP for the 1994-1995 school year was developed for student Doe in June 1994. This proposed IEP and other issues concerning student Doe's educational needs and services are the subject

¹ The interim-order requests were referred to the undersigned hearing officer and a hearing was conducted on July 13, 1994. Additional evidence and memoranda were submitted on July 22, 1994.

of an ongoing special education due process hearing. Student Doe continues to be hospitalized at Bradley.

Contentions of the Parties

The parties are in agreement that the educational services currently being provided to student Doe are inadequate, and that he is in need of extended school year services. The parties disagree, however, as to what constitutes an appropriate educational placement for student Doe pending the outcome of the due process hearing.

The School Committee contends that a summer day program at the Rhode Island School for the Deaf, with particular modifications for student Doe, is an appropriate educational program. The Committee asserts that student Doe's current educational placement is the School for the Deaf, and that the summer day program merely represents a change in the location of the educational services already being provided, not a change in placement which is prohibited by federal and state "stay-put" provisions absent agreement by the school district and the parent. The School Committee further argues that

there is a strong presumption against the usurpation of a due process hearing officer's authority to rule on the ultimate issue of placement. [Student Doe's] request for an interim order asks the commissioner to force a change in [his] educational placement from the day program at the Rhode Island School for the Deaf to a more restrictive residential environment. The LEA (Local Education Agency) seeks only to be able to provide an appropriate level of educational services without disturbing [student Doe's] current placement. That request is the only issue properly before this hearing officer. (School Committee Memorandum, p. 9).

Counsel for student Doe contends that the interim protective order set forth in R.I.G.L. 16-39-3.2 is a speedy mechanism to ensure that a child's right to a free appropriate education (FAPE) is upheld

during the pendency of the due process hearing procedure, which can be lengthy. Counsel notes that

Usually it is relatively easy to determine what is necessary to protect that right for a child who has previously been enrolled in a program of special education and related services. Typically where there is a currently valid IEP, that IEP provides guidance as to what is FAPE for a child during the pendency of a hearing. In this matter however, the parties agree that there is no provision at all for extended school year services in [student Doe's] last valid non-hospital based IEP . . . and therefore there is no "status quo" program of extended year services prescribed in the prior valid IEP. (Petitioner's Memorandum, p. 2).

Counsel argues that

If the purpose of an Interim Protective Order is to ensure that a child's right to a free appropriate public education is upheld during the pendency of a hearing, then the Commissioner must determine in the context of this Interim Protective Order hearing what constitutes a free appropriate public education for [student Doe] given all of the circumstances presented. (Emphasis in original; Petitioner's Memorandum, p. 3).

Counsel also contends that the School Committee's proposed program is inappropriate because it is based on significant regulatory violations and it does not address student Doe's multi-faceted disability profile. Counsel asserts that the only appropriate program for student Doe is an interim 24-hour program of special education and related support services specifically designed to address his unique combination of deafness and communication, cognitive, motor and emotional disabilities, and delivered in his primary language, i.e., American Sign Language.

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Discussion

R.I.G.L. 16-39-3.2 authorizes the Commissioner of Education to

2 Our discussion of the difficult issue raised in this case is abbreviated by the time constraints applicable in interim-order hearings.

issue interim protective orders "pending a hearing as may be needed to ensure that a child receives education in accordance with applicable state and federal laws and regulations during the pendency of the matter."

Student Doe is a child with a learning disability. He is therefore entitled under state and federal laws and regulations to a free appropriate public education from his local school district. That education must consist of specially designed instruction, at no cost to his parents, which meets his unique needs. The elements of that education are not to be unilaterally decided by the school district. Instead, they are to be developed jointly by the child's parents and qualified school district personnel in accordance with comprehensive procedural and substantive requirements contained in state and federal laws and regulations.

Those laws also contain provisions for the determination of a free appropriate public education if the parents and school district personnel are unable to agree on the appropriate educational programs and services. A parent or school district may initiate a due process hearing before a hearing officer who has expertise in special education matters. A parent also may make a private educational placement and seek reimbursement of the cost through the due process hearing route.

When the parties are unable to agree on an appropriate educational program for a child with a learning disability and a due process complaint is filed, the "stay put" or "status quo" provision of state and federal laws and regulations governing special education assumes great importance. This provision states that if a due

process complaint is filed, the student involved must remain in his or her current educational placement during the pendency of any administrative or judicial proceeding regarding the complaint unless the state or local education agency and the parents agree otherwise.³ While there is no authority for a state department of education to change a "status quo" placement at the request of a local education agency, the state has discretion to change such a placement at the request of the parents. Burlington School Committee v. Department of Education, 471 U.S. 559 (1985).

As previously mentioned, while the parties agree that student Doe's current educational program is inadequate, they do not agree on what constitutes appropriate extended school year services. Furthermore, there is no current educational placement with regard to an extended school year program because student Doe's current IEP does not provide such services. As noted by counsel for student Doe, we are not being asked to maintain the status quo. Rather, the Commissioner is being asked, prior to the issuance of a decision by the due process hearing officer, to rule on the appropriateness of extended school year services for a student who was not receiving such services at the time the dispute over his education arose.

In John A.U. Doe v. Coventry School Committee (Commissioner's decision, March 4, 1994), we stated that

as a general rule we think the better procedure is to allow completion of at least the local level special education hearing before we act in a matter. In this way we have the benefit of a complete record and the hearing officer's decision before we decide whether or not a student is receiving education in accordance

³ 20 U.S.C. Sec. 1415(e)(3).

with applicable state and federal law and regulations. G.L. 16-39-3.2. We do not believe that we should "short circuit," even in a small measure, the due process procedures established by congress unless there is a clear need to do so to protect the rights of a student. (Decision, p. 2).

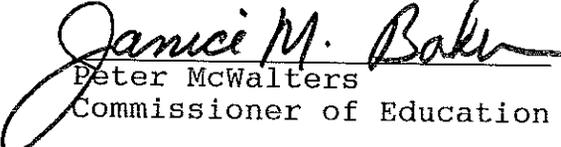
In light of the ongoing nature of the due process hearing regarding student Doe, the lack of a complete record in this proceeding,⁴ and the rapidly approaching onset of a new school year, we find that it is best to observe the general rule expressed in the John A.U. Doe case. Accordingly, we refrain from exercising our interim-order authority with regard to student Doe's request at this time. We further find that, in the absence of the provision of extended school year services to student Doe in his current IEP, we cannot grant the School Committee's request. It is therefore denied.

Conclusion

The interim-order request of student Doe is denied without prejudice. The interim-order request of the Lincoln School Committee is denied with prejudice.


Paul E. Pontarelli
Hearing Officer

Approved:


Peter McWalters
Commissioner of Education

July 29, 1994

⁴ Given the expedited nature of this interim order hearing, the parties were not able to present and/or cross-examine all of their witnesses.