

0032-97

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

IN RE: JOHN C.L. DOE

INTERIM ORDER
DECISION

Held: Pending a due process hearing, Student Doe should remain in his current educational placement pursuant to the “stay put” provision, 20 USC 1415 (j). the Commissioner will not exercise his interim order authority to change a placement, where there has been no demonstration on the record of irreparable harm, or even inappropriateness of the current placement.

DATE: October 21, 1997

Travel of the Case

Student Doe's parents and the West Warwick School Department are currently involved in due process proceedings to resolve their dispute on an appropriate educational placement and program for Student Doe. On October 2, 1997 Student Doe's father requested an interim order hearing pursuant to R.I.G.L. 16-39-3.2. He requested the Commissioner to order an "interim placement" for his son, who is almost four years old and who has been diagnosed with pervasive developmental disorder (NOS)¹. The interim order request stated that Student Doe had no safe and appropriate current educational program. A hearing was convened on October 8, 1997 at which time Student Doe's father appeared pro se and the West Warwick School Department, the district of the parents' residence, proceeded through counsel. Both parties submitted evidence and summarized their respective positions. The record of the hearing closed on October 9, 1997 upon receipt of an additional exhibit provided by Student Doe's father by agreement of the parties. Since under our statute interim order decisions are due within five (5) working days of the completion of the hearing, the decision in this matter is based on the hearing officer's notes and the exhibits submitted at the time of the hearing.

- Issues: (1) What is Student Doe's current educational placement under the "stay put" provision, 20 USC 1415 (J)²?
- (2) Should Student Doe be placed in an interim placement, different from his current educational placement, because of health and safety factors, or a clear demonstration of inappropriateness of such program?

¹ Not otherwise specified.

Position of the Parties

Student Doe

Student Doe's father maintains his son has no current appropriate and safe special educational placement or program, despite his eligibility. He requests that the Commissioner fashion an interim placement, pending completion of due process proceedings. He denies that the prior placement at Sargent was with his consent, even though his son attended the Sargent School from January 6, 1997 until September 22, 1997, at which time he was withdrawn by his parents. He argues that consent to this placement was "qualified" to such extent that it should not operate as the last agreed-upon placement.

Even if the Sargent School is the last agreed-upon placement, Student Doe's father advances several reasons why the "status quo" should not be maintained pending due process proceedings. They are:

- (1) his son's safety is at risk at the Sargent Center
- (2) his health is jeopardized by continuing at the Sargent Center
- (3) both the facility itself and his son's educational program at Sargent are clearly inappropriate

He argues for an interim order providing for his son's immediate return to the Quinn Elementary School in West Warwick, either under the provision of a prior IEP (Exhibit 8) or a modified program at the Quinn School (Exhibit 10).

The School Committee

Counsel for the school committee notes that the dispute here centers on whether Student Doe is receiving a free appropriate public education at the Sargent School. A due

² Previously Section 1415 (e)(3)(A).

process hearing is scheduled on this issue in the very near future and it is this procedure which is designed to resolve such disputes. Under both federal and state law, pending resolution of this dispute, Student Doe should remain at the Sargent School. It is this placement which was consented to by the parents who unilaterally withdrew him on September 22, 1997. Although the district does not dispute the underlying facts raised by Student Doe's father³ with regard to health and safety, it does not view these facts as giving rise to health and safety concerns of such magnitude to justify removing Student Doe from the Sargent School.

As to the appropriateness of the facility and program, counsel notes that this is a due process hearing issue in all but "extraordinary" circumstances. The school department notes that the evidence shows that the Sargent program is not only appropriate, but also that Student Doe has been making substantial progress in the program since his enrollment in early January, 1997. The district acknowledges that the setting is restricted and there are no current mainstreaming opportunities for Student Doe, since the school population consists entirely of children (and adults) with disabilities. The district argues, however, that the intensive therapies and structured, small classes at Sargent will, hopefully, enable Student Doe to make rapid progress and return to his community school in one to two years. The district acknowledges the importance of mainstreaming and presenting Student Doe with appropriate behavioral and language models which would be available if he attended a school with non-disabled peers. However, Student Doe's needs are so intensive right now that the District views the more restrictive setting of the Sargent School as essential at the present time.

³ Frequent changes in the classroom teacher, an incident in which Student Doe's fingers got caught in a door, two rocks found in his pocket upon his return home from school one day, sand found in his diaper

Decision

The Commissioner's authority to issue interim orders under R.I.G.L. 16-39-3.2 is for the purpose of ensuring that a child receives education in accordance with applicable state and federal laws and regulations. For a child with disabilities who is eligible for special education and related services, interim order authority can be utilized to maintain a "status quo" placement pending resolution of a dispute between parents and a school district as to what constitutes an appropriate placement. It can also be utilized to alter the status quo or create a placement for a child who has no prior Individualized Education Program. Although "the state" does have the discretion to alter a status quo placement at the request of the parents⁴ we have consistently ruled that the exercise of such discretion should not short-circuit the due process procedures established by congress unless there is a clear need to do so to protect the rights of a student. See John A.U. Doe v. Coventry School Committee, Commissioner's decision, March 4, 1994. The Commissioner of Education has consistently declined the invitation to create or change placements, absent extraordinary circumstances. See John A.U.Doe, supra; In the Matter of John B.B. Doe, decision of the Commissioner, July 29, 1994; Parents of Jane A.G. Doe v. Warwick School Committee, June 23, 1995 decision of the Commissioner.

The threshold issue in this case is whether this student has a "current educational placement" or status quo which can be maintained. We find that the March 24, 1997 individualized education program, which placed him at the Sargent School, is his last agreed-upon placement. Although the parents expressed ongoing reservations regarding the appropriateness of both the facility and the child's program, Student Doe's father

following play in a sand box etc.

⁴ See Burlington School Committee v. Department of Education, 471 U.S. 559 (1985).

indicated his agreement to this placement. There were “qualifications” noted on the IEP, but basic agreement was reached. More importantly, it was this placement which was implemented on January 6, 1997 and continued up to September 22, 1997 when the child was withdrawn by his parents.

We would also note that in April of 1997 the parents requested a due process hearing on one element of their child’s program at Sargent, the extent of individual therapy. Both the local level hearing officer and the review officer found that the IEP was “accepted by the parents”, except for the therapy issue, and that there was no issue with regard to the basic program at Sargent. See Exhibit A pp. 3,6 and Ex. B pp. 3,5. The argument that they did not consent to the placement at Sargent is not supported in the record.

As to health and safety issues raised by Student Doe’s father, the record contains uncontroverted fact regarding frequent changes in the identity of the classroom teacher, the fact that this child’s hands were caught in the door one day, that he once returned home from school with rocks in his pocket, and on one occasion, he was wet and sandy when his parents picked him up⁵. None of these incidents individually, or taken as a whole, prove that Student Doe’s health or safety are in jeopardy at the Sargent School. The turnover in teaching personnel was attributable to factors beyond the control of school officials. Consistency prevailed in the identity of the rest of the team of professionals with whom he had daily contact.

The amount of time devoted at the hearing to proof on the issue of the appropriateness of Student Doe’s current placement was limited, and no expert witness

appeared on the parent's behalf. Nonetheless even on the limited record created as to this issue⁶, we are unable to find that Student Doe's placement at the Sargent School is unnecessarily restrictive and, therefore, inappropriate. A more complete record will undoubtedly be made at the due process hearing. Our ruling on this issue is in no sense binding on that tribunal. We find on this record that the child's present placement at Sargent provides him with a free appropriate public education.

The request for an interim order is denied.

Kathleen S. Murray
Hearing Officer

Approved:

Peter McWalters, Commissioner

DATE: October 21, 1997

⁵ While no one would argue with the distress caused by a diagnosis of "impetigo" there is nothing in the record which would show the infection was contracted at school; or if it was, that it was due to neglect or unsanitary conditions at the school.

⁶ In the context of an interim order, such constraints are necessary.