

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION



**In The Matter of Student Z.M. Doe**



**INTERIM ORDER**  
**DECISION**

Held: Pending a due process hearing, the parents of Student Z.M. have requested that his current placement be made comparable to that which was specified in his 2005-2006 IEP. When a dispute develops between a school district and parents concerning the appropriate placement of a student receiving special education, the student is entitled to remain in his or her last uncontested special education placement until the dispute is resolved. We therefore direct the school district to locate a placement for this student that is comparable in instructional focus to his 2005-2006 IEP placement, with such changes as may be necessary to reflect student's present age. This placement is to be implemented and it is to remain in effect until the due process hearing officer determines a new placement for this student.

DATE: December 5, 2007

## **Jurisdiction and Travel of the Case**

The petitioning parents are requesting an interim protective order. Jurisdiction is present under R.I.G.L.16-39-3.2, R.I.G.L.16-39-1 and R.I.G.L.16-39-2. The parents have requested a due process hearing which is now pending before an independent hearing officer. The parents are contending in a pending due process hearing that the placement the school district has assigned their child does not provide him with a free appropriate public education. To govern the situation while the applicable due process procedures are being completed, the parents are requesting the Commissioner of Education to issue an interim protective order placing this student in a placement comparable to his placement in the 2005-2006. The parents contended that such a placement is the student's "stay-put" placement under federal law.

## **Issue**

What is this student's stay-put placement?

## **Positions of the Parties**

### **The Parents**

The parents contend that this student's stay-put placement is a placement comparable to the placement he had under his 2005-2006 IEP.

### **The School District**

The school district contends that this student's stay-put placement is his present 2007-2008 classroom placement, despite the fact that this placement was made before an Individualized Education Plan (IEP) was developed for this placement. The district contends that the petitioning parents have acquiesced to this placement and that this placement is now the student's stay-put placement.

## **Findings of Fact**

1. The student in this case is a thirteen-year-old child who was found to be eligible for special education services from when he was three years old. He has a number of very significant disabilities, including severe mental retardation, cerebral palsy, spastic quadriplegia, a seizure disorder, ADHD, and numerous orthopedic disabilities that have required major surgeries over the years. He requires a wheelchair and a walker with full support in order to be mobile. He cannot sit up independently for more than one minute. Although he makes speech approximations, some of which can be understood by those who are very familiar with him, he communicates primarily by means of gesture, facial expression, eye gaze, some limited vocalizations and assistive communications devices. He is also highly distractible, and needs a relatively quiet environment with a low level of sensory distractions in order to remain sufficiently focused to make educational progress.

2. The last agreed-to IEP in this case is dated November 16, 2005. This IEP was to be effective from November 16, 2005 until June of 2006. Under this IEP this student was placed in a program offered by the Northern Rhode Island Collaborative (NRIC). He had attended programs offered by NRIC from age 3 until he turned twelve years old in August of 2006.<sup>1</sup> For his last four years with NRIC he was in the same classroom with the same teacher. This classroom seems clearly to have been focused on providing education to students who had very significant levels of disability. The teacher for the class had the requisite certification to teach students who have severe to profound mental retardation. This student's fourth and final year in this teacher's classroom required the issue of a variance to the age range regulations of the Board of Regents.
3. The 2005-2006 IEP for this student's final year at the NRIC program specified that this student should spend 100% of his school day in special education, or in special education supported instruction. The IEP noted that his disabilities made it necessary for him to participate in an alternate assessment program, rather than in the regular statewide assessment program.<sup>2</sup> (For a student to qualify for alternate assessment there must be a demonstration, *inter alia*, that: "The student has a disability that significantly impacts cognitive function and adaptive behavior" and that: "The student is unable to apply academic in home, school and community without intensive, frequent, individualized instruction in multiple settings.")<sup>3</sup>
4. This student is dependent on others for self care.<sup>4</sup> "His current cognitive test results with the K-Bit [Kaufman Brief Intelligence Test] ...placed his overall abilities within the *lower extreme range*. However, because of [his] communication, movement and attention difficulties these findings should be viewed with caution."<sup>5</sup> (Emphasis added)
5. At the hearing in this matter the student's mother testified that through knowledge she gained as an active parent in her small town's special education community and as a school employee who had contact with her son's special education class, she had reached the conclusion that most students in her son's 2005-2006 special education class had a level of disabilities that tended to be in the severe or profound range. Her petition, as supported by her testimony, and as outlined in her brief, describes this 2005-2006 placement as being a self-contained class room for students with severe and profound disabilities. Without reaching the issue of whether the students in this classroom could properly be categorized as having severe or profound disabilities, we concur, based upon our own evaluation of the documents and testimony in this case, with the parent to the extent that we find that the student's 2005-2006 class placement focused on the needs of students with more severe disabilities than are present in the

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<sup>1</sup> Transcript, page 12.

<sup>2</sup> Exhibit 2, IEP, November 16, 2005.

<sup>3</sup> Rhode Island Department of Education Standards for Alternative Assessment.

<sup>4</sup> Exhibit 1, Psychological Evaluation, March 30, 2005

<sup>5</sup> 1, Psychological Evaluation, March 30, 2005

student's current 2007-2008 placement. In stating this we are not finding that student's current placement could not, given a valid IEP or the decision of a due process hearing officer, provide the student with FAPE. This is one of many issues for the due process hearing officer to determine — but it is not an issue that is before us. We are simply finding that the student's 2005-2006 placement differs significantly from his current classroom placement in the 2007-2008 school year. As we will develop later, this means that we cannot find that the student's current 2007-2008 classroom placement to be the student's "stay put" placement. On this point it must be understood that a "stay-put" placement is not a guarantee of FAPE — it is only a status quo placement that remains in effect while issues relating to FAPE are being determined.

6. The parties were aware that the 2005-2006 school year was the last year this student would be able to attend programs at the NRIC.<sup>6</sup>
7. On November 23, 2005 the school district — in preparation for the student's 2006-2007 school year — sent out requests, with parental consent, to neighboring school districts to see if they might have a placement suitable for this student.<sup>7</sup> These letters were sent because the student would no longer be age appropriate for the NRIC program in the 2006-2007 school year. Two school districts indicated that they had suitable programs. The mother visited these programs and agreed that one of them would be suitable for her child. It appeared to the parties that the student would be placed in this program. Approve.<sup>8</sup> No IEP was drafted to establish this placement.
8. However, as matters turned out, the student's school district decided to create a self-contained special education "functional life skills program" within its own school system. It was suggested to the student's parents that this new placement would be suitable for their child, and that the teacher in this class would have a great deal of teaching experience. Still, no IEP was ever developed for this placement.
9. The teacher the district expected to hire decided not to take the position. Instead a relatively new teacher with certification in "mild to moderate" disabilities was hired. The parents were dubious about the appropriateness of this program. Once again, no IEP was developed to govern this placement.
10. The parents' concerns with this placement related to the fact that their child would be the youngest of the ten students in the class and that the other students were functioning at a comparatively higher cognitive level than their child was. The program was a work preparation program which they believed was not really suitable for their child. The age range in this class extended from 12 years (the student) to age 21. A class age span of more than four years is not allowed by the applicable regulations unless a variance is granted in accordance with an IEP. No variance was

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<sup>6</sup> Transcript, page 31.

<sup>7</sup> Transcript, page 32.

<sup>8</sup> Transcript, page 42.

agreed to or ever sought, and no IEP was developed before the placement took place. The parents received none of the information or notices required before a change in placement can take place.<sup>9</sup> In fact, it was not until January 23, 2007 that a preliminary draft IEP was presented to the parent and it was not until February of 2007 that a proposed final IEP for this placement was presented to the parents.<sup>10</sup>

11. In any event, the student began attending the new class in his home school district at the start of the 2006-2007 school year. The parents continued to express reservations about this “placement.” The student’s mother was convinced that this student needed placement in a smaller class for students with severe to profound disabilities.<sup>11</sup> The student began to experience behavior problems in this class.
12. On January 10<sup>th</sup>, 2007 a mediation session was held with a state-appointed mediator.<sup>12</sup> This mediation ended with a directive that an IEP be developed for the student.
13. In January of 2007, after a draft of a new IEP was tendered to the parent, she filed a complaint with the Rhode Island Department of Education. A letter of findings (dated April 9, 2007) stemming from this complaint concluded that the district had failed to have an IEP in place for the student in the 2006-2007 school year.<sup>13</sup>
14. When an IEP was developed calling for placement in the class the student was now attending, the parent marked this IEP where it stated: “I do not accept the educational program outlined.” The district Special Education Director, on March 13, 2007 directed a letter to the parent asking her what her objections to the proposed placement were. On April 6, 2007 the parent replied to this letter and set forth her objections to the proposed placement. Her main concern was that she did not accept the student’s placement, “in a mild/moderate classroom...”<sup>14</sup> The parent then filed for a due process hearing and requested an interim protective order from the Commissioner.

### Discussion

We concur with petitioners that the student’s present placement is not the student’s stay-put placement. It is true that a placement *based on an IEP* can become a student’s stay-put placement, even if the placement is rejected by the student’s parents, provided that the parents allow the placement to become operative *without their filing a request for a due process hearing*. Under such circumstances the IEP process and the notice procedures of the IDEA ensure that the parents’ decision not to file for due process hearing may be taken as a knowing and intelligent waiver of the right to file for such hearing, and thus as a valid acquiescence to the placement.

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<sup>9</sup> Rhode Island Special Education Regulations, 300.503

<sup>10</sup> Transcript, page 54.

<sup>11</sup> Transcript, page 52.

<sup>12</sup> Exhibit 11

<sup>13</sup> Exhibit 15

<sup>14</sup> Transcripts, page 89. See: Exhibit 18.

In the case at hand, however, where the district has failed to tender an IEP *before* the placement took effect, a knowing waiver of the opportunity to contest the placement cannot be found. Furthermore, it would be contrary to the premises of the IDEA to encourage school districts to make placements without first developing an IEP for the placement. To continue such a practice would subvert the fundamental premise of the IDEA that placements should be made only through the prior development of an Individualized Education Plan for a student. In the end, parents can't be said to have acquiesced to the implementation of a non-existent IEP. Indeed, without a pre-existing IEP there is no valid placement for the parents to acquiesce to. Therefore, in the case now before us, the student's present physical classroom placement for the 2007-2008 school year is not his "stay-put" placement.

This leaves us with the problem of determining what the student's stay-put placement is. The petitioning parents suggest that we should look back at the student's actual classroom program in the 2005-2006 school year as constituting the student's stay-put placement. The parents, of course, concede that as a physical matter the student's prior 2005-2006 placement no longer exists for him because he is now well beyond the appropriate age range for that placement.

### **Conclusions of Law**

If a dispute develops between a school district and parents concerning the appropriate placement of a student receiving special education, the student is entitled to remain in his or her last uncontested special education placement until the dispute is resolved. 34 C.F.R. 300.513 The difficulty we face in this case is that the student's last uncontested IEP placement, which was established in the 2005-2006 school year through an IEP, is no longer available because the student has exceeded the age range for this placement. We must also deal with the issue raised by the school district concerning whether or not the parents in this case have "acquiesced" to the student's present 2007-2008 classroom placement.

We think that the best authority on how to determine a stay-put placement when the student's last prior uncontested placement is no longer available can be found in *John M. v. Board of Education of Evanston*, Nos. 06-3271 & 06 – 3735, September 17, 2007.<sup>15</sup> In this case the court ruled that in defining a stay-put placement for a student whose prior uncontested placement is no longer available, a "new" stay-put placement should be determined by making primary reference to the student's prior IEP, with attention paid to the actual workings of the prior placement only to the extent necessary to clarify the meaning of the prior IEP. In its decision, which remanded a case to a district court, the 7<sup>th</sup> Circuit Court of Appeals court wrote:

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<sup>15</sup> In *John M v. Board of Education of Evanston* numerous parties, including the United States Department of Education, filed friend of the court briefs on the subject of how a stay-put placement is to be determined.

In examining the May 2004 IEP [The IEP the 7<sup>th</sup> Circuit Court of Appeals found to be controlling in the case.], the district court must note with particular care the precise requirements of the IEP. Even if a school has provided a particular service in the past, it need not be provided in a stay-put situation if it was not within the governing IEP. See *Cordrey v. Euckert*, 917 F.2d 1460, 1468 (6<sup>th</sup> Cir.1990); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1313-14 (9<sup>th</sup> Cir.1987). If the parties dispute what the IEP requires, as they do here with respect to co-teaching, the court must evaluate the IEP as a whole and determine whether such a methodology is required under the terms of the IEP. Under usual circumstances, the court should find it *unnecessary to go beyond the four corners of the document in order to make that determination. However, vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan. Doe v. Defendant I*, 898 F.2d 1186, 1190 (6<sup>th</sup> Cir.1990) (noting that it would “exalt form over substance” to ignore information known to parents and administrators simply because it was not contained in the four corners of the IEP). A methodology not mentioned in the plan may well indicate that those who formulated the plan did not consider that particular methodology a necessary component to the plan – although they well may have intended that some comparable methodology be implemented. See *Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1121-22 (10<sup>th</sup> Cir.1999) (holding that, when IEP simply required occupational therapy, the substitution of one type of occupational therapy for another was permissible). Here, the term “co-teaching” is not mentioned in the May 2004 IEP itself. Therefore, the district court ought to determine, after evaluating the entire May 2004 IEP as a totality, whether the parties regarded this methodology as an essential part of the plan or as simply one of several ways by which the plan could be implemented. As we noted earlier, in answering this question, the court will need to explore precisely how the plan was implemented ....

We agree with the 7<sup>th</sup> Circuit Court of Appeals that the controlling document in making a determination of a stay-put placement must be the student’s last uncontested IEP. In Rhode Island, where Individualized Education Plans are purposely drafted to avoid labeling students or assigning them to programs defined in procrustean terms, it will often be necessary to examine how a student’s prior IEP was actually implemented to glean a better understanding of the intended meaning of the IEP. Of course, none of this allows us to take our focus off the student’s IEP in deciding what a student’s prior placement was in determining the stay-put placement for the student.

In the case before us we conclude, based the student’s 2005-2006 IEP — as clarified by its actual implementation — that this student’s 2005-2006 IEP called for this student to be placed in a self contained class that had a focus on instructing students with very significant disabilities. We find that the student’s current 2006-2007 classroom situation places him in a class where most students are performing at, and are being instructed at, a level that is significantly higher than was the case in the student’s 2005-2006 IEP placement. Once again we are not finding that the student’s current 2007- 2008 “placement” amounts to a denial of FAPE — this is for the due process hearing officer to decide — we are simply holding that this 2007-2008 placement differs significantly from the student’s prior placement and that therefore it cannot be found to be the student’s stay-put placement. Given this conclusion, we must direct the school district to locate a stay-put

placement for this student that is comparable in instructional focus to the student's 2005-2006 class, with such changes as may be necessary to reflect student's present age.

**Conclusion**

We direct the school district to locate a placement for this student that is comparable to his 2005-2006 IEP placement. This placement is to be implemented and it is to remain in effect until the due process hearing officer determines a new placement for this student.

APPROVED:

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Forrest L. Avila, Hearing Officer

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Peter McWalters, Commissioner

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December 5, 2007  
Date