

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

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**In Re: Student C. Doe**

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**INTERIM ORDER**  
**DECISION**

Held: Pending a due process hearing, Student Doe is not entitled to tutoring services provided in his home and at district expense. Student Doe's parents may send him back to the middle school he had been attending up to March 13, 2008 to resume his educational program there or work as part of an IEP team to adjust his program of regular and special education to better address his needs pending resolution of any issues they plan to present to a due process hearing officer.

DATE: May 23, 2008

## **Travel of the Case**

This matter was assigned to the undersigned for hearing on an interim order request on March 20, 2008. After some initial impediments to scheduling this matter were overcome, hearing was held on May 8, 2008, and the record closed on May 19, 2008 with the submission of memoranda by counsel.

The Commissioner of Education has authority to issue interim protective orders pursuant to R.I.G.L. 16-39-3.2.

## **Positions of the Parties**

### **Parents of Student Doe:**

Counsel for Student Doe's parents argues in his memorandum that an interim order is necessary to require the district to provide him with home tutoring for ten (10) hours per week for ten (10) weeks so that he can complete his seventh-grade curriculum and pass to the eighth grade. The need for tutoring arises because Student Doe's parents have not sent him to school since March 13, 2008 because the school environment is unsafe. Over the course of school year 2007-2008, counsel submits, Student Doe was the victim of bullying, harassment, and discrimination by both students and teachers. Although he has an IEP in effect for this school year with a specific goal that recognizes his need for "positive behavioral supports", those supports have been denied him<sup>1</sup> and replaced by increasingly negative and punitive responses to Student Doe's behavior. He is routinely sent out of class without good reason by teachers who fail to respond appropriately to Student Doe's comments and behavior. Despite numerous communications and requests by Student Doe's parents to protect him from assaults by other students and provide him with positive behavioral supports in class, school officials, and in particular the principal, have not responded. The effect on Student Doe of this pattern of abuse, harassment, discrimination, as well as the failure to provide behavioral supports, has been to exacerbate his existing mental health conditions and to produce "reactive anxiety". According to his mother, his condition is now such that not only is Student Doe unable to attend school, but he has become afraid to go out to public places and be around people he does not know.

The pattern of harassment and abuse culminated in an incident which occurred on March 13, 2008, the last day Student Doe attended school. When the principal received an alleged report that Student Doe was trying to hug another student and was making inappropriate comments of a sexual nature in class, he immediately questioned Student Doe and asked him repeatedly if he had engaged in certain behaviors, using graphic sexual language<sup>2</sup>. The principal questioned Student Doe, as well as other students, using terminology which was sexually traumatic. Although he could have interviewed teachers who allegedly were present to confirm what actually happened, he did not. Student Doe was unjustly and immediately suspended for

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<sup>1</sup> Especially since a December 7, 2007 meeting in which Student Doe's psychologist met with school staff to assist them in responding appropriately to Student Doe's behavior.

<sup>2</sup> According to Student Doe's mother's testimony the expression used by the principal was "an extremely graphic homosexual expression that should never be used with a child". Tr. p.23.

one day for violating the school's sexual harassment policy. Counsel cites this as yet another example in which Student Doe became the victim of harassment and discrimination. In this particular incident, his parents also concluded that the questioning by the principal constituted a "sexual assault" and filed a complaint against him with the state police. They do not feel he is safe at school and have not sent him since.

### School Committee

Counsel for the School Committee takes the position that the Petitioners are not entitled to the issuance of an interim order requiring the district to pay for home tutoring because (1) there is no proof that Student Doe has a disability or other medical condition that prevents him from attending school and (2) there is no evidence to support the claim that Student Doe has been subjected to harassment and bullying at school. The argument is that although there may be circumstances which warrant the education of a child at home, the evidence in this case does not indicate that this is necessary. In fact, in educating a child with a disability (such as Student Doe) the Individuals with Disabilities Act requires the least restrictive environment, with as much "mainstreaming" with general education students as possible. The claim made by the Petitioners that their son is afraid to return to school, or that his mental health condition prevents him from attending school at this time, has not been substantiated by any medical evidence. Counsel for the School Committee points out that although Student Doe has a treating psychologist, he has not testified in this matter, nor has any health care professional who has treated Student Doe provided an expert opinion as to his current inability to attend school.

As to the allegations that there has been a pattern of harassment, bullying, and discrimination, the district submits that the evidence does not support these allegations. If anything, the evidence shows that the Petitioners have misinterpreted the actions of district, especially the school principal in their attempts to deal with Student Doe's sometimes-problematic behavior. To the extent that there have been incidents in which Student Doe has been hit by other students, it is because he has invaded their personal space or made inappropriate comments to them. Many times, counsel for the district asserts, Student Doe has focused repeated and unwanted attention on his female classmates who have reported feeling uncomfortable. In each case, the principal looked into what had happened, and took appropriate measures.

With respect to removal of Student Doe from class, the district submits that this has happened only occasionally, and when it has, it is because Student Doe's behavior becomes "obsessive" to the point that it disrupts the class and teachers have no other choice. Despite the contention that Student Doe has been unduly subjected to discipline, counsel submits that the record indicates that Student Doe served only one detention out of the six he received, and one-half day suspension. When school staff met with Student Doe's psychologist early in December of the school year, he did not criticize the methods used in dealing with Student Doe's behavior in school, nor did he offer any specific suggestions. Late in February he did send a letter to clarify comments he had made at the meeting and to suggest that alternative consequences to detention be formulated for behaviors of concern.

In summary, the district takes the position that Student Doe's parents have unilaterally determined that their son need not attend school any longer and with no legal support, have requested that the district pay to have a tutor of their choice sent to their home. Counsel for the district submits that his withdrawal from school isolates him from his peers and prevents him from having necessary social interaction. The parents have taken a "discretionary" approach to school attendance in the past, in that during his last two years of school enrollment, he had a history of excessive absences and tardiness.

On the basis of this record, and the lack of legal support for the requested relief, the district requests that interim relief be denied.

### **Findings of Relevant Facts:**

- ♦ Student Doe is thirteen (13) years old, resides in the town of East Greenwich and most recently attended the seventh grade at the middle school. Tr.p.9.
- ♦ Student Doe is a child with a disability who has been found eligible for special education and related services by the East Greenwich School Department. E.G.Ex.B
- ♦ An IEP was developed for Student Doe on September 21, 2007; it calls for special education services which include resource support ("academic skills" class), use of a computer for writing and math, modifications to assignments, preferential seating, and a contact person to be available to Student Doe as a support<sup>3</sup>. E.G. Ex. B; Tr. pp.87-89.
- ♦ Although the IEP was not been formally amended at the time, in early November of 2007 when Student Doe's mother sent a letter requesting that he be removed from the academic skills class in which some of the services called for in his IEP were provided, the principal complied with this request. Tr. pp. 87-88.<sup>4</sup>
- ♦ Student Doe's behavior and/or comments in school are sometimes not appropriate, have been the subject of complaints from several students, and have frequently caused him to be excluded from the classroom by teachers who found his behavior disruptive to the class. On

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<sup>3</sup> The nature of Student Doe's disabilities is such that he is psychologically and emotionally quite vulnerable. See Appellants' Ex.2.

<sup>4</sup> There is no evidence of written amendments to the IEP and insufficient evidence of the allegation that school officials unilaterally altered the program described in the September 21, 2007 document. Student Doe's mother testified that the district altered his written IEP, that it was not being implemented as written, and that she received a quarterly report indicating that changes to the IEP were made "per parents request" when they had made no such request. Tr. pp. 10-11, 18. In the Petitioners' memo the specific assertion is made that the district unilaterally "removed the positive behavior portion of the IEP..." (memo p.7). Despite opportunity to present testimony and documentation which may have supported these contentions, no such evidence was presented. Other than the principal's testimony with respect to eliminating the academic skills class at Mrs. Doe's request, there is no evidence of changes to Student Doe's program. Although a two-page document was faxed to the hearing officer on May 20<sup>th</sup> and is referred to at page 4 of the Petitioners' memo as "the exhibit that could not be located at the hearing", this document is not in evidence. Counsel for the Petitioners indicated at the close of the hearing that he was not requesting that the record be left open for submission of an additional exhibit. See Tr. pp. 189-190. Therefore, no provision was made by the hearing officer for opportunity for the district to examine or respond to this exhibit if it wished to do so.

one occasion, his use of inappropriate language caused him to receive an after-school detention.<sup>5</sup> Tr. pp. 91-125, 172.

- ♦ On March 13, 2008 Student Doe's inappropriate behavior and comments caused the principal to remove him from class at mid-day and suspend him from school on the following day. Tr. pp. 124-127; App. Ex.3.
- ♦ There have been incidents in which Student Doe has been hit and kicked at school<sup>6</sup>. There is no evidence that the principal has failed to investigate or respond to each incident reported to him or of which he has become aware. Tr. pp. 165-171. There is one student with whom Student Doe is "supposedly friends", but who has nonetheless "bullied" Student Doe, evidently on several occasions.<sup>7</sup> The principal has intervened and spoken to teachers about this situation. The success of his interventions is unclear. Tr. pp. 168-170.
- ♦ There was an incident in which Student Doe's art teacher, in front of the class, crumbled up a project that Student Doe had been working on and threw it out because she felt that he had not followed her directions. Tr. pp. 121-123. Student Doe's mother described this incident in giving examples of how he has been bullied by staff at the school.<sup>8</sup> Tr. pp. 15-16.
- ♦ Since March 13, 2008 Student Doe has not attended school and has not received any tutoring or education at his home. His parents requested that a tutor be provided by the district and the Rhode Island Department of Education, but their requests have been denied. Tr. p. 42.

## 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 IEP. Although "the state" does have the discretion to alter a status quo placement at the request of the parents<sup>9</sup> 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. Absent extraordinary circumstances, the Commissioner has declined requests to create or change placements. Traditionally, the extraordinary circumstances sufficient to warrant a change from the "status quo placement" are found to exist when the health or safety of the student is jeopardized by

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<sup>5</sup> Student Doe received a total of approximately six (6) detentions this year, only one of which he served, because his parents objected. Tr. pp. 95, 103.

<sup>6</sup> Although any instance of a physical altercation is harmful, and probably especially so for a child described as emotionally vulnerable, there is no evidence of any physical injury to Student Doe on any of these occasions.

<sup>7</sup> The testimony is that this other student has also been bullied by Student Doe.

<sup>8</sup> Mrs. Doe also testified that teachers would question her son's use of the computer in class even though his IEP allowed it and that they would comment on the fact that he had an IEP in front of his classmates. Tr. p. 15.

<sup>9</sup> See Burlington School Committee v. Department of Education, 471 U.S. 559 (1985)

continuing the status quo, or in situations in which the status quo placement is clearly inappropriate. See In Re: John C.L. Doe, Interim Order Decision dated October 21, 1997; see also John Doe v. A Rhode Island School District, Interim Order dated December 24, 1996.

In this matter, Student Doe's parents have requested a due process hearing because they take the position that the East Greenwich School Department has not provided their son with a free appropriate public education which addresses their son's disabilities. Counsel for the Petitioners indicates that despite requesting a due process hearing in early January of 2008, the hearing has not yet started and "could possibly take the rest of the school year to complete". Appellants' Ex.1. The position taken by the Petitioners is that their son's health and safety are jeopardized by his attendance at the middle school, that his program there was clearly inappropriate, and, additionally that his current mental health status makes it impossible for him to attend school. Thus, implicitly, the Petitioners argue that his status quo placement at the middle school with the program that has clearly failed to address his educational needs should be changed to home tutoring, with a tutor chosen by his parents and paid for by the East Greenwich school district. In this way, when the due process hearing "resolves future educational needs and placements for (Student Doe) he will be able to matriculate into the eighth grade. See Petitioners' memo at pages 11-12.

The specific factual allegations supporting the request for an interim order are contained in the April 16, 2008 letter submitted by counsel on behalf of the Petitioners. These allegations are that the East Greenwich School Department has improperly treated Student Doe as a behavior problem, made false accusations against him and that the principal of his school has intimidated him to the point at which he is afraid to return to school. (Appellants' Ex. 1.) These factual assertions were expanded upon in the memorandum submitted on the Petitioners behalf at the conclusion of the hearing. Additional factual assertions contained in that memorandum are that the environment at the middle school has become unsafe for Student Doe and that it is now impossible for Student Doe to attend his school because of "reactive anxiety" from which he suffers.

We find that the factual assertions advanced in support of the request for an interim order have not been proven by a preponderance of the evidence in this record. Clearly there have been many problems encountered by Student Doe this year in school. The principal did not deny that incidents had occurred in which other students had hit, and even in one instance kicked, Student Doe. His testimony was that in each instance he investigated what had happened and took measures to prevent future incidents. The characterization of such incidents as continuous and persistent is not supported in this record. There is insufficient evidence that Student Doe's safety is imperiled or that he is at imminent risk of harm if and when he returns to the middle school.<sup>10</sup>

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<sup>10</sup> The specific contention in the Petitioners' memo that Student Doe's mother had written on twenty (20) occasions (memo of the Petitioners at page 6) to complain about bullying and harassment of her son was not supported by the record. The principal's testimony was that he received five or six letters from Student Doe's mother. Tr. pp. 166-167. Mrs. Doe's testimony was that such incidents occurred on an almost daily basis and that she had documented them in numerous letters sent to the principal. Not one letter was produced in evidence to support this contention, from either the Petitioners records or requested by subpoena from the district's records.

There is similarly no evidence that school staff have improperly treated Student Doe as a behavior problem. There is much evidence in the record of behavior and comments from Student Doe which could generally be characterized as inappropriate in school. As indicated in our findings of fact, this behavior and comments have been problematic for some of the other students and on many occasions was found by teachers and staff at the middle school to be inappropriate and disruptive. It is undisputed that on many occasions his behavior prompted teachers to send him out of class to the office or to the school social worker, but no evidence that any of these decisions were made in an arbitrary manner or without good reason. Student Doe's mother testified that when her son was "evicted" from class, this was done in a totally arbitrary manner. Her testimony, which was based primarily on accounts she received from her son, was contradicted by the testimony of the principal, whose testimony was quite credible. Of concern is that Student Doe's inappropriate behavior may be related to his disability, and could be better responded to under the provisions of a behavior management plan developed for him after a functional analysis. However, until teachers are provided by the IEP team with a behavioral management plan which calls for alternative responses to removal from class,<sup>11</sup> his removal from class for inappropriate behavior does not constitute improper treatment as a "behavior problem".

The principal has not been shown to have intimidated Student Doe or to have made false accusations against him. Specifically with respect to his investigation of the March 13, 2008 incident, the process he described as the process he followed was a reasonable one. In his questioning of Student Doe and his classmates who were witnesses, he used the identical language that had been reported to him as being used by Student Doe. This language had both implicit and explicit sexual connotations. His finding that Student Doe had engaged in the conduct reported and that he had made the statements attributed to him was based on the facts he found after a reasonable investigation<sup>12</sup>. The finding that Student Doe had violated the school's sexual harassment policy has not been shown to be a false accusation against him or that the penalty was unduly harsh.<sup>13</sup>

As indicated above, our findings of fact do not confirm the existence of the causes cited by the Petitioners as creating "reactive anxiety" or as exacerbating his mental health conditions. If, however, Student Doe had been proven to be medically unable to attend school based on his current mental health status, *regardless of the reason*, the district would be obliged to provide him with tutoring at his home or some other suitable location. The principal testified that he has received no documentation from Student Doe's treating psychologist that he has been unable to attend school at any time after March 13, 2008. Tr. p.129. At this hearing, there was no competent evidence that Student Doe is currently unable to attend school based on his mental health condition or otherwise. Evidence of such a condition would have been provided by a treating health care professional or by an expert retained to provide his or her opinion. Testimony of Student Doe's mother, to the extent that she implied that her son was medically

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<sup>11</sup> And which would reduce the amount of instructional time Student Doe is losing when he is removed from class.

<sup>12</sup> A more complete investigation would have included input from any teachers who may have been present in the room at the time.

<sup>13</sup> Again, a behavioral management plan could identify behaviors that are related to Student Doe's disability and provide alternative responses short of disciplinary measures as appropriate responses. One would first have to identify which behaviors are inappropriate and therefore to be targeted for response and intervention. There appeared to be a basic difference of opinion between Student Doe's mother and the principal on appropriate school behavior.

unable to attend school<sup>14</sup> was not competent evidence on this point, even though she herself is a psychiatrist.

As a final matter, there is no indication that a placement for Student Doe which consists exclusively of home tutoring would provide him with the free appropriate public education to which he is entitled. There is no evidence that such a placement would be more appropriate than that provided to him at the middle school. Although the program at the middle school could be improved upon by parents and school staff working together in an IEP context, the program he received there has not been shown to be inappropriate, except to the extent that (as of the second quarter) it did not provide Student Doe with the academic supports he had previously received in an academic skills class. Although we do not draw any conclusion as to how academic support should be provided or conclude that a resource class is the only way in which to do so, his IEP clearly describes Student Doe's need for academic support. The record contains no evidence with respect to Student Doe's academic progress in school year 2007-2008.

For the foregoing reasons, the request for issuance of an interim order pending the outcome of the due process hearing is denied and dismissed.

For the Commissioner,

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

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May 23, 2008  
Date

<sup>14</sup> Her testimony as to the reasoning for his need for home tutoring was somewhat unclear. When pressed as to the existence of medical documentation from her son's treating psychologist to establish his mental health status, Mrs. Doe denied that it was his medical condition that precluded his school attendance, citing instead the unsafe environment at his school. Tr. pp. 42-46.