

State of Rhode Island
And
Providence Plantations

Commissioner of
Education

Student J.A. Doe

v.

Lincoln School Committee

**INTERIM ORDER
DECISION**

Held: Student Doe's parent's request for issuance of an interim protective order under R.I.G.L. 16-39-3.2 is hereby granted to maintain his status quo placement at Lincoln High School. Pending any ruling by a due process hearing officer (in a regular or expedited due process context) that would change Student Doe's current educational placement, he is to continue to attend Lincoln High School and participate in his current schedule of classes unless his removal from class is warranted by implementation of a behavioral intervention plan or a determination is made by school personnel that Student Doe presents an immediate threat to himself or to others.

Date: March 13, 2009

Travel of the Case

Student J.A. Doe is a disabled student. On February 23, 2009 Student Doe's mother requested that Commissioner Peter McWalters hear her request for an interim protective order¹. According to Mrs. Doe's petition, an interim order was necessary so that, pending a due process hearing, her son would remain in his current educational placement at Lincoln High School. The parties agreed that this matter would be heard on March 6, 2009. On that date, both Mrs. Doe, accompanied by an advocate, and the Lincoln School Committee, represented by its legal counsel, presented testimony and documentation in support of their positions. The hearing concluded on that same date, with the statute requiring the issuance of a written decision within five working days. Because of this fact, this decision is based on the hearing officer's notes of the testimony and the exhibits received into evidence at the hearing.

Jurisdiction to hear this dispute arises under R.I.G.L. 16-39-3.2 and 16-39-1.

Issue

Is Mrs. Doe entitled to the issuance of an interim protective order so that her son's attendance at Lincoln High School will continue and his current class schedule will be maintained?

Is Mrs. Doe entitled to "interview" a therapeutic aide recently hired to work with her son on a one on one basis prior to when he undertakes this role?

Is a member of the professional staff at Gateway Healthcare, Inc. with whom Mrs. Doe is currently consulting on placement and consistency issues, entitled to observe Student Doe in school on more than one occasion for a period of thirty minutes?

Findings of Relevant Facts:

- Student J.A. Doe is a sixteen-year old who resides in Lincoln, Rhode Island with his parents. Until recently, he attended Lincoln High School. Joint Ex. 1.
- Student Doe has disabilities that affect his auditory, touch and movement processing, verbal and written communication skills, and his behavioral control. He exhibits verbal and/or physical aggression on average of twice per week. Both his behavior and his communication difficulties impede his learning. Joint Ex. 1. Individualized Education Program dated November 25, 2008.
- Although the record in this case does not indicate the exact frequency or duration², both parties agreed that Student Doe has been removed from class in the past when he was "having a bad day". On those occasions, either he took himself out of class, or he was sent out of class to work with the school social worker on calming down. (hearing officer notes)

¹ The undersigned was designated by the Commissioner to hear and decide this appeal.

² There may have been some misunderstanding by Mrs. Doe that her son was recently "removed" from his classes for an entire week. This was the week of mid-term exams, when the regular class schedule for all students was suspended and an exam schedule was followed. Student Doe took his one exam in Auto 1 and spent the remainder of that week supervised in school by his special education teacher.

- After meetings on January 30, 2009 and February 5, 2009 Student Doe's IEP team recommended that his placement be changed from Lincoln High School to an out-of-district placement at the West Bay Collaborative. Petitioner's Ex. A.
- Student Doe's mother does not agree that this proposed placement is appropriate for him and on or about February 11, 2009 she filed a request with the Rhode Island Department of Education for a due process hearing. Petition for an Interim Order dated February 23, 2009; Joint Ex. 3. Mrs. Doe's request for a due process hearing is currently pending. (hearing officer notes)
- On February 13, 2009 the Director of Student Services for the Lincoln School Department wrote to Mrs. Doe to acknowledge that she was aware of her due process hearing request and that she had received Mrs. Doe's letter requesting that her son remain in his "stay put" placement pending a decision. The letter notes that Student Doe "has not been removed from his current placement" and that each day the school bus will "continue to come to your home to transport your son to Lincoln High School until the due process matter is concluded".³ Joint Ex. 3.
- In the February 13, 2009 letter to Mrs. Doe, the Director confirmed that Student Doe would continue to receive related services as indicated on page 14 of his IEP, as well as the instruction described in the "Special Education" section of the IEP, which consists of .5 hours per day in school and 1.0 hours per day of home tutoring. The letter went on to note:

However, please understand that the Lincoln Public Schools will determine what classes he will attend while at Lincoln High School. This class schedule is not governed by his IEP. (Joint Ex.3)

- Student Doe's current IEP⁴ at page 7 in the section of the document entitled "Program of Study" includes the following information:

(Student Doe) will continue Wheels of Learning, Auto I, Auto II classes and career exploration activities. He will also participate in Speech and Language services, Occupational therapy services and social skills development. Adaptive physical education will begin at the onset of third quarter, January 27, 2009. Academic requirements will be met through a combination of tutoring and in school academics. (Joint Ex.1.)

- Student Doe's current class schedule reflects the classes, instruction, and related services⁵ specifically described in his IEP, including the specific classes listed at page 7 of his IEP. Joint Ex. 2.
- Mrs. Doe was notified that a new therapeutic aide⁶ would be working with her son on February 13, 2009. This information was contained in the letter notifying her that he would not be removed from his current placement at Lincoln High School. Joint Ex. 2.

³ We do not infer from this statement that the district is refusing to send the bus to transport Student Doe to Lincoln High School even if the result of the due process hearing is that he should continue to attend school there rather than an out of district placement.

⁴ Evidently, the parties are in agreement that the November 25, 2008 IEP is currently in effect even though it states that it is effective "From: 11-25-08 to 1-30-09".

⁵ With the exception of adaptive physical education scheduled to begin in the third quarter. Implementation of this service has not been possible because Student Doe's mother refuses to send him to school until the issue of his "stay put placement" is resolved.

- On the first day after school vacation, February 23, 2009 when the bus pulled up to Student Doe’s stop, there were three additional people at the stop, including the Director of the West Bay Collaborative and the new teacher assistant who had been hired by Lincoln through the West Bay Collaborative.⁷ (hearing officer notes).
- According to his mother’s testimony, Student Doe became very upset when he saw two new people with whom he was not familiar at the bus stop waiting for him. Mrs. Doe testified that when she saw staff from the West Bay Collaborative at the bus stop that morning, she assumed that the bus was going to take her son to the West Bay Collaborative, rather than Lincoln High School despite the letter from the district indicating the bus would continue to go to Lincoln High School each day. Mrs. Doe, who had been waiting with her son at the bus stop in her car, quickly pulled away.⁸ (hearing officer notes).
- Staff from the West Bay Collaborative were at Student Doe’s bus stop on February 23, 2009 not to transport him there, but to facilitate his introduction to and work with the new teacher assistant who had been hired through the Collaborative to work with him at Lincoln High School. (hearing officer notes).
- Mrs. Doe had requested of district staff that she have an opportunity to “interview” any new teacher assistant prior to any decision to hire him/her. At the hearing, she clarified that she wanted only to “meet” that person and ask him questions that would enable her to determine if he would work well with her child. (hearing officer notes).
- Mrs. Doe has asked that a professional from Gateway Healthcare, Inc. be allowed to observe her son for purposes of “placement” and for purposes of “coordinating treatment with consistency between home and school”. The clinician who has been working with her notified Mrs. Doe on February 25, 2009 that the Director of Student Services will permit her to observe Student Doe one time for a period of thirty minutes. Petitioner’s Ex. B and C.

Positions of the Parties

Mrs. Doe

Mrs. Doe argues that she truly does need an interim protective order from the Commissioner so that, pending resolution of her objection to the Lincoln School Department’s proposal for an out of district placement, her son will continue to be educated at Lincoln High School. Mrs. Doe submits that without any prior explanation to her for the presence of the Director of the West Bay Collaborative and other staff members at her son’s bus stop, she legitimately concluded that her son was going to be transported there on February 23, 2009. Despite the written assurance she received on February 13, 2009 that he would not be removed from his current placement, she contends that a transition to a placement at the West Bay Collaborative is nonetheless underway. She does not want to send him to school until there is an order in place to prevent such a transition because she does not agree that such

⁶ The testimony in this case was that several aides had not worked out (quit or been fired) during the school year and that the district had experienced great difficulty in securing the services of a “CPI-trained, certified teaching assistant” to work one on one with Student Doe as is called for in his IEP. While it sought a new, certified teacher assistant for Student Doe, the district had assigned a non-certified person to work with him. According to the testimony, that person had been working well with Student Doe.

⁷ The third additional person at the stop that morning was the school social worker at Lincoln High School, who had volunteered to go to the stop that morning to ease Student Doe’s transition to a new teacher assistant. Student Doe also has a good relationship with the school social worker.

⁸ Mrs. Doe’s request for an interim order hearing was filed later that day.

a placement is appropriate for him and any changes that might take place are difficult for him to handle from an emotional and behavioral perspective.

Secondly, once an order is in place to assure his continued attendance at Lincoln High School, she seeks expanded protection to prevent alterations in his current class schedule. Although she is not aware of any immediate plan to change his schedule of classes, she has received written notice that the School Department will determine what classes he will attend and that his class schedule is not governed by his IEP. She contends that his current schedule is, in fact, governed by his IEP, specifically at page 7, in the section entitled "Program of Study". She argues that this schedule must remain unchanged. She further objects to her son's removal from those classes when his behavior is at issue. Implicitly, her argument at the hearing was that removals from class in the past have been unwarranted and/or excessive.

Mrs. Doe requests that an interim order from the Commissioner enable her to meet the new aide hired by the Lincoln School Department before he actually works with her son. Mrs. Doe submits that her prior request to interview the new teacher assistant was based on the excessive turnover in those assigned to work with him, unsuccessfully, so far this year. Although she recognizes the prerogative that school officials have to make the hiring decision, she argues that she is uniquely qualified to assess whether the person is likely to work out. Again, implicitly, her argument is that if school officials had let her play a more active role in this process previously, some of the turnovers could have been avoided.

Mrs. Doe also requests that the district be ordered to permit her consultant to observe Student Doe while he is at school for a period in excess of the thirty minutes it has agreed will be permitted.

Lincoln School Committee

Although the district has proposed an out of district placement as appropriate to meet Student Doe's educational and behavioral needs, counsel for the district clearly affirmed that, pending resolution of the dispute on this issue by a due process hearing officer, Student Doe will not be removed from his current placement at Lincoln High School. Mrs. Doe's concern that a transition to the West Bay Collaborative is underway results from the unfortunate and mistaken conclusion she drew from the presence of staff from the West Bay Collaborative at the bus stop on February 23, 2009. There was no plan then, nor is there now, to place him at the West Bay Collaborative until a ruling is made in the due process proceeding.

With respect to the issue of changes to his schedule, counsel argues that the district retains the unilateral right to change the classes in which he is currently enrolled. While it may be that specific classes are listed in his current IEP in the section entitled "Program of Study", this listing is simply an affirmation of the coursework to be undertaken by a student during the school year. It is not binding upon the district to maintain Student Doe in these specific courses just because the IEP team found it appropriate to write a specific list of classes contemplated at that time in his IEP. It is a fact, counsel notes, that the specific classes in which Student Doe would be placed at Lincoln High School were considered by the IEP team. An abbreviated class schedule and school day⁹ were very carefully planned for him. To a great extent, the choice of classes listed in the IEP was with the hope that an

⁹ Which is supplemented by an hour of home tutoring each day.

abbreviated schedule, together with the other instruction and services provided for in the IEP, would enable Student Doe to have some success in the general education environment. This plan has not proved to be successful. Although there is no immediate plan to make changes to Student Doe's class schedule, the district clearly wishes to reserve the right to do so. Not only is it the district's position that the IEP does not "govern" his class schedule, but also that changes to that class schedule¹⁰ do not constitute a change in his placement that is prohibited by the IDEA.

District officials have had great difficulty in finding a qualified teacher assistant, who is CPI-trained, who works well with Student Doe and who is acceptable to Mrs. Doe. At this point, after so many unsuccessful attempts, the district is not willing to make its hiring¹¹ of a teacher assistant conditional upon a successful interview with Mrs. Doe. The district has finally found a CPI-trained person after extensive efforts, and is willing to have him meet with Mrs. Doe prior to actually working one on one with her son. The Commissioner should not order that staffing decisions are subject to parental approval.

Decision

Mrs. Doe's request for issuance of an interim order pending resolution of the issue of her son's proposed placement at the West Bay Collaborative is granted in part and denied in part. The evidence in this case shows that even though the district has assured Mrs. Doe that her son will continue to be educated at Lincoln High School, changes in his "class schedule" are contemplated and these changes could effectuate a change in his current placement. In order to maintain this student in the educational environment indicated in his current IEP, both in terms of the level of his participation in regular classes¹² and his placement in a "category on the continuum of special education placement and services"¹³ we find it necessary to issue an interim protective order under R.I.G.L. 16-39-3.2. to prohibit the district from making changes in his current class schedule.

The written notice to Mrs. Doe from the Director of Student Services on February 13, 2009, coupled with the district's position that it reserves the right to make changes in his class schedule at any time indicates that when this Student returns to school, the district could, unilaterally, make changes to "the classes he will attend while at Lincoln High School". The specific courses he is currently taking are incorporated into that section of his IEP entitled "Program of Study". Student Doe's IEP supports the notion that his IEP team gave careful consideration to his educational needs, his expressed post-school goals and required transition planning in selecting the courses he would take. This record does not support the district's contention that his class schedule "is not governed by his IEP". On the contrary, the IEP addresses and governs this precise subject. Thus, from a procedural perspective, in order to change Student Doe's class schedule, the IEP team would have to meet and agree that such changes

¹⁰ The hearing officer's notes do not confirm whether the changes under consideration relate to the choice of specific classes or a change to reduce/eliminate the amount of time that Student Doe participates in general education classes.

¹¹ Or, by inference, its retention

¹² According to page 11 of his IEP he is in an educational environment in which he participates in regular classes "79%-40% of the time".

¹³ According to page 11 of his IEP his "Placement" on the continuum is in the "General education class with special education consultation, supplementary aides (sic) and services or part time services in a special class

should be made. The question then becomes¹⁴, assuming the IEP team meets and agrees that changes in his schedule should be made, whether or not this constitutes a change in his placement. Not all changes made to a student's class schedule by an IEP team would constitute a change in placement¹⁵, but some changes could be substantial enough to alter the student's educational environment and/or his placement on the continuum of special education placements.

Notes of the testimony received at the hearing are not specific on the answer to the question posed by the hearing officer as to what the district meant when it wrote to Mrs. Doe on February 13th "...please understand that the Lincoln Public Schools will determine what classes (Student Doe) will attend while at Lincoln High School". The inference on this record is not that the district contemplates taking this student out of Auto I and Auto II and placing him in other elective, general education courses at the high school. Stated another way, the issue is not whether Student Doe should be using a saw or chemicals rather than welding tools, but whether he should continue to participate in general education classes at the level currently called for by his IEP. As we understand it, the right that the district wishes to exercise is the right to change his schedule to reduce or eliminate his participation in general education classes. This would alter both his educational environment and his placement on the continuum of special education placements, both of which are now indicated on page 11 of his IEP. Although we understand the point that the district makes that Individualized Education Program drawn up for Student Doe on November 25, 2009 has not been successful,¹⁶ we find that the nature of the changes that the district would like to make pending a decision in the due process hearing would constitute a change in his current placement. An interim protective order is issued to prohibit the Lincoln School Department from making such changes.

We should make clear that the district is not precluded from requesting an expedited due process hearing to change his current placement if it believes that maintaining such placement is substantially likely to result in injury to this child or others. See Section 300.532 of the Board of Regents Regulations Governing the Education of Children With Disabilities.¹⁷ There was no evidence submitted at this hearing that maintaining his placement is substantially likely to result in such injury, but an inference was created on this record that school staff have had to deal with ongoing behavioral difficulties that have resulted in some instances with Student Doe's removal from class. Our interpretation of the aforementioned Regulations is that authority exists for school personnel to remove Student Doe from class only pursuant to a behavioral intervention plan or upon a determination by school personnel that he presents an immediate threat to himself or to others. See Section 300.530 of the aforementioned Regulations. In granting Mrs. Doe's request for an Interim Protective Order to maintain her son's current placement, we want to clarify that we do not address or rule on these other issues.

¹⁴ And it would be a disservice to the parties if we did not anticipate such action in this decision.

¹⁵ It should not be a disincentive to an IEP team to give careful consideration to the classes a student with a disability should take and actually write it in the IEP for fear that the district will be foreclosed from changing these decisions at a later point.

¹⁶ To the extent that the district is now convinced that an out of district placement is needed to meet his educational and behavioral needs.

¹⁷ There is no evidence that the district is authorized to place Student Doe in a more restrictive educational environment at Lincoln High School - an "interim alternative educational setting" - because he has inflicted serious bodily injury upon another person.

We deny Mrs. Doe's request that the district be ordered to allow her to "interview" the new teacher assistant. At the time of the hearing, Mrs. Doe's advocate argued that she really didn't want to conduct an interview, but just wanted an opportunity to meet the person who has been hired and ask him questions. While the meeting request is reasonable, and the district has indicated that it would permit that, Mrs. Doe's questioning of the person hired to be her son's teacher assistant is at the discretion of school officials. The evidence indicates that school officials have been sensitive to Mrs. Doe's concerns in the past, and it would be helpful to all parties if the degree of cooperation on this point continued.

Mrs. Doe's request that her educational consultant be permitted to observe her son in his school environment at Lincoln High School is in the nature of an "independent educational evaluation" and is a right she has under Section 300.502 of the Regulations. To the extent that there is a dispute between the parties as to whether the educational program at Lincoln High School is appropriate rather than an out of district placement, such observation could affect Mrs. Doe's ability to present relevant information and testimony to the due process hearing officer. The district did not address the issue of why such observation should be limited to a single opportunity for thirty minutes. On its face, such a limitation would appear unreasonable, and the parties are directed to confer to determine if such observation could be more extensive without disrupting classes. Should a dispute on this issue remain, it should be presented to the due process hearing officer for resolution.

For the foregoing reasons, Mrs. Doe's request for an interim protective order is granted in part, as described in this decision.

Kathleen S. Murray

APPROVED:

Peter McWalters, Commissioner

March 13, 2009

Date