

State of Rhode Island and
Providence Plantations

Commissioner of Education

Student A.A. Doe

v.

Lincoln School Committee

INTERIM ORDER DECISION

Held: The School Committee's request to dismiss this matter for lack of jurisdiction is denied. The Commissioner does have Jurisdiction under R.I.G.L. 16-39-3.2 to issue An interim protective order pending proceedings in federal court in which Student Doe's parent seeks review of a due process hearing officer's decision. However, the parent's request for an interim order to require the district to provide home tutoring and necessary related services until the federal court acts in this matter is denied as such an order would not provide him with a free appropriate public education and would undermine his return to a school setting.

Date: August 31, 2009

Travel of the Case

On August 3, 2009 counsel for Student Doe's parent filed a request with Commissioner Deborah A. Gist for an "interim placement order" for the school year about to begin. The request noted the existence of past and pending litigation on Student Doe's behalf, advised the Commissioner of his status as a special education student and alleged that there was no current placement or education plan in place for Student Doe for the upcoming school year. The undersigned was designated to hear and decide this matter and scheduled a hearing for August 7, 2009. On August 5, 2009 counsel for the Lincoln School Committee filed a Motion to Dismiss the request for an "interim placement" and alleged that the Commissioner lacked jurisdiction to hear the matter because an appeal of an April 15, 2009 decision of a due process hearing officer had been taken and was pending. On the same day, counsel for the Student filed a "Motion for Summary Finding" requesting that Student Doe be furnished with home tutoring during 2009-2010 until such time as the court ordered otherwise.

The parties, both represented by counsel, appeared for hearing on August 7, 2009 at which time testimony was taken and documentary evidence was received. By agreement, the parties submitted memoranda summarizing their respective positions on August 18, 2009. A transcript of the hearing was received on August 21, 2009 at which time the record in this matter closed. Under R.I.G.L. 16-39-3.2 our decision in this dispute is due within five (5) working days "of the completion of the hearing." Given the complexities of this matter and the request of counsel that their written arguments be submitted on August 18th we will interpret the timeframe for this decision to be extended by agreement.

Issues

- Does the Commissioner have jurisdiction to hear requests for interim protective orders with respect to the placement of special education students during the pendency of proceedings in which the parent challenges the decision of a due process hearing officer?
- Is Student Doe entitled to the issuance of an interim protective order requiring that the Lincoln School Committee provides him with home tutoring and related services in an off-campus setting?
- Is the Bradley Day School Program Student Doe's current educational placement?

Positions of the Parties

Student Doe

Counsel for Student Doe submits that there is well-established precedent for the Commissioner to exercise the authority to issue interim protective orders under R.I.G.L. 16-39-3.2 in special education matters to ensure that, pending due process hearings or other proceedings, a child remains in his or her current educational placement. He points out that the Commissioner has observed that interim orders may be necessary to alter the status quo when there is a clear need to do so to protect the rights of a student. John A.U. Doe v. Coventry School Committee, decision of the Commissioner dated March 4, 1994. Although there has been traditional deference to the special education due process procedures as established under IDEA, the petitioner argues that when necessary the Commissioner has exercised her authority under state law to intervene not just to maintain the status quo, but to create a placement for a child or to permit a student to access special education and related services from home.

The Petitioner points out that because of the unusual circumstances present in this case, Student A.A. Doe has not had an actual educational placement since the 2007-2008 school year. In fact, he has received no instructional services from the district at all since the fall of 2008 when a plan to transition him into the 6th grade of middle school proved unsuccessful. Unless the Commissioner intervenes in this dispute to exercise her interim order authority, counsel submits that Student Doe will be deprived of educational services until the conclusion of pending federal court proceedings. In the civil action she has filed in federal court Student Doe's mother appeals the decision of a due process hearing officer issued on April 15, 2009 and also asserts other causes of action arising under federal and state law. It is conceivable that judicial proceedings could extend six months or more¹ and, counsel argues, pending resolution of this complicated litigation, Student Doe must be educated and the district must deliver necessary services as required under applicable federal and state law. The Commissioner is requested to enter an interim protective order requiring the district to provide home tutoring (6th grade curriculum) and necessary related services in an "off campus setting."

¹ Counsel for the district projected as long as a eighteen months for a final decision at the federal district court level. Tr. p. 133.

Lincoln School Committee

At the outset, counsel for the district moves to dismiss the Petition on the basis of the Commissioner's lack of jurisdiction. This matter essentially involves an appeal of a due process hearing officer's decision issued on April 15, 2009. The hearing officer's decision established that the current appropriate educational placement for Student Doe is the Bradley Day School (hereinafter "Bradley"). That decision is final, subject to appeal under the provisions of Sec 300.516, entitled "Civil action." Student Doe's mother has filed a civil action in United States District Court for the District of Rhode Island² which, inter alia, seeks to establish that Bradley is not an appropriate placement and that until a placement can be found, Student Doe should receive tutoring and related services in his own home. Because these issues are before the federal court, it has exclusive jurisdiction over this matter and the Rhode Island Department of Education lacks jurisdiction.

If the Commissioner does consider this Petition for interim relief on its merits, counsel for the district argues that the Commissioner has consistently declined the invitation to create or change placements and has traditionally deferred to the due process procedures for placement determinations, absent extraordinary circumstances. There are no extraordinary circumstances present in this case other than that the parent is refusing to send her son to a placement which a court-appointed expert, IEP team, and due process hearing officer have determined is appropriate for him and is necessary for him to make educational progress at this point in time. If the Commissioner were to interpose his interim order authority to "create a placement" for this student, it would not be appropriate to order home tutoring because the evidence in this case clearly establishes that home tutoring would be inappropriate and would exacerbate school phobia from which he has suffered over the last several years.³

The placement at Bradley is actually this student's last agreed upon placement because on May 21, 2008, the parties entered into a Settlement Agreement and Consent Order (Joint Ex.A) when they resolved litigation pending at that time. The terms of the Order entered by Judge William Smith clearly govern the last agreed upon placement for this student. It specifies that the parties agreed to the appointment of an expert who was to dictate the terms of the student's education. Counsel argues that by the entry of this Order, Student Doe's mother and the district agreed to let the expert determine what Student Doe's educational placement would be. Since she has chosen Bradley (a decision that was supported by a consensus of the IEP team in the fall of 2008) this is his last agreed

² A copy of her complaint is Petitioner's Ex.1.

³ Counsel also notes that both parties agree that the Lincoln Middle School is not currently an appropriate placement for this student.

upon, or “status quo” placement. Thus, an interim order is not needed for Student Doe to be placed and receive an education appropriate for him, at Bradley.

Contrary to the assertions of counsel for Student Doe that Lincoln has no educational plan or placement for this student, the district did convene an IEP team which reached a consensus documented in a December 10, 2008 IEP (Petitioner’s Ex.2). Pursuant to that IEP, and consistent with the recommendation of the expert retained pursuant to the Order resolving prior litigation, the district has secured a placement for him for the upcoming school year at Bradley. The fact that Student Doe’s mother refuses to send him there does not negate this placement. The request for issuance for an interim order or the creation of an interim placement should therefore be dismissed and denied.

Findings of Relevant Facts

- Student Doe is a twelve year old student with disabilities that include Asperger’s syndrome, generalized anxiety and school phobia. Joint Ex.B; Pet.Ex. 1.
- Student Doe resides in the town of Lincoln with his mother and is enrolled in the Lincoln school system. He has not attended school for at least two school years⁴. He did receive five hours of home tutoring per week provided by the district from December-June of 2008. There was also a plan for his attendance in 6th grade at Lincoln Middle School during the 2008-2009 school year, but that plan was not successful. Joint Ex.B; Tr. p. 95.
- By November of 2008 Student Doe’s mother, special education staff of the district and an outside consultant⁵ all agreed that an out of district placement was necessary for Student Doe to be able to attend school and make academic progress. Pet. Ex. 1 (page 8 Par. 53-56); Pet. Ex. 2; Joint Ex.B⁶.
- An Individualized Education Program was subsequently developed for Student Doe. An IEP dated December 10, 2008 called for his placement in a year-round day school program. Pet. Ex.2.
- Since the development of the December 10, 2008 IEP and more specifically since special education staff advised Student Doe’s mother in January of 2009 that a placement had been secured for him at the Bradley Day School, the parties

⁴ His attendance was at one point an issue in truancy proceedings commenced by the district. See Joint Ex. B, p. 3.

⁵ An educational expert on autism utilized pursuant to a Court Order which will be described later in this decision.

⁶ The finding of the due process hearing officer, based on testimony she received, was that Student Doe has developed school phobia that prevents him from physically entering into the classroom and that requires therapeutic intervention. Joint Ex. B. p.17. Assuming a therapeutic day school program is successful, Student Doe will develop coping strategies that will allow him to make academic progress and transition to the public school setting. Joint Ex. B p. 19.

have been involved in a dispute with respect to his placement. The dispute was submitted to a due process hearing officer who issued a decision on April 15, 2009 rejecting the mother's contention that placement at Bradley would not provide him with a free appropriate public education. The decision also dismissed her request for home tutoring. Joint Ex.B.

- Student Doe's mother has appealed this decision to the United States District Court for the District of Rhode Island where it is currently pending. Pet. Ex. 1; Tr. p. 17.
- The placement at Bradley is unacceptable to Student Doe's mother, and in the complaint she filed in federal court she alleges that placing her son at Bradley will cause him a great deal of harm. Pet. Ex.1 (page 9 Par.63).
- There is currently no other alternative placement for Student Doe available. Tr. pp. 120-123; Joint Ex. B, p. 17. His mother offers no alternative to the placement offered by the district, but she does believe that the Wolf School could be an ideal placement, if her son were to be accepted there. Tr. pp. 35-37.
- Home tutoring is inappropriate for students with school phobia and could be detrimental to Student Doe's ultimate return to a school setting. Tr. p. 103; Joint Ex. B, p.11.
- In May of 2008 a Settlement Agreement and Consent Order was entered into by Student Doe's mother and the district. The order resolved litigation pending in federal and state courts at that time. The parties agreed that an expert would be retained to perform several specific functions, including:
 - assisting in the development of a transition plan for Student Doe to return to school (Lincoln Middle School); the selection of a 6th grade "team" for Student Doe; development of additional recommendations for his IEP team. Joint Ex. A.
- By the terms of the above-referenced Order, the parties agreed to follow the expert's recommendation⁷ for the entire 2008-2009 school year; Paragraph 11 of the Order indicated that either party reserved the right to call an IEP meeting to discuss concerns that might arise subsequent to the IEP meeting attended by the expert. If a disagreement were to arise "from said meeting" either party reserved the right to invoke their statutory right to mediation or due process. Joint Ex. A.

DECISION

The Lincoln School Committee moves to dismiss Student A.A.'s petition. The Committee asserts that the Commissioner lacks jurisdiction to hear requests for interim protective orders when there is a pending judicial proceeding in which a special education placement decision is under review pursuant to 300.516 of the Regulations. To our knowledge this is the first instance in which a school district has challenged the

⁷ As set forth in paragraph A. 3 (sic).

Commissioner's jurisdiction to hear a petition for issuance of an interim protective order in a special education dispute. The motion to dismiss does not elaborate on the reasons for the Commissioner's lack of jurisdiction, other than to argue that the parent's appeal in United States District Court places jurisdiction "solely" with the Court. We are not disposed to agree that the statutory jurisdiction in these matters conveyed upon the Court repeals the broad authority our General Assembly has given to the Commissioner under R.I.G.L. 16-39-3.2. The statute is broadly worded⁸ and has been liberally construed for over two decades to enable the Commissioner to act when necessary to protect students' rights to education. Although we would make no claim to exclusive jurisdiction as to placement issues under circumstances⁹ such as those here, we view R.I.G.L. 16-39-3.2 as creating authority the Commissioner may utilize "pending a hearing" so that a child will be educated "in accordance with applicable state and federal laws." The "hearing" referred to could be a hearing before the Commissioner, a due process hearing, or, as in this case, a hearing pending in federal court.

In the context of special education disputes, the Commissioner has been reluctant to "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. John A.U. Doe v. Coventry School Committee, decision of the Commissioner dated March 4, 1994. The Commissioner has utilized authority to issue interim protective orders to ensure that a child remains in his or her current educational placement and, in extraordinary circumstances, to create or change a placement. See John Doe v. A Rhode Island School District, decision of the Commissioner dated December 24, 1996; In Re: John C.L. Doe, decision of the Commissioner dated October 21, 1997; In Re: Meghan G., decision of the Commissioner dated July 19, 1999; In Re: Student M.S., decision of the Commissioner dated October 27, 2005. When health and safety factors require a modification of a child's placement, or there is a clear demonstration of inappropriateness of a child's current placement, the Commissioner has utilized interim order authority to address such situations. The School Committee's Motion to Dismiss is denied because it is our conclusion that the Commissioner has jurisdiction to entertain Student Doe's petition for issuance of an interim protective order to ensure that he receives an education in accordance with federal and state law. Issuance of the order he requests, however, would not provide such assurance. We will explain.

Student Doe's initial request was actually a request for an "interim placement" (See his August 3, 2009 letter to Commissioner Gist). Student Doe is not currently

8. The Commissioner's authority under 16-39-3.2 extends to "all cases concerning children" (except those arising under 16-2-17).

⁹ And would readily defer to the exercise of jurisdiction of the federal or state court in which an appeal in special education disputes is pending

attending school or receiving special education services. Both parties agree that Lincoln Middle School is not an appropriate placement for Student Doe because it is clear that his school phobia has become so severe that it precludes his attendance there. His mother will not agree to the proposed new placement at Bradley, even as an interim placement because she fears it will be harmful to him. In his memorandum, counsel for Student Doe describes home tutoring as an appropriate interim placement because it was “the last actual, peaceable uncontested status that preceded the pending controversy.”

On the other hand, the School Committee requests recognition of the Bradley School as the “last agreed upon placement” because the parties agreed to let an expert dictate placement and she has chosen Bradley Day School. The district submits that there are no extraordinary circumstances that would justify the Commissioner’s issuance of an interim order to change Student Doe’s last agreed-upon placement. The district disagrees that there is a need to create an interim placement for Student Doe and points out that only his “status quo” placement at Bradley will provide him with a free appropriate public education. His mother has simply chosen not to access this program. The district submits that the home tutoring she suggests as an “interim placement” would clearly not be an appropriate placement for him and, in fact, the evidence demonstrates that it would be harmful and impede his ultimate return to a school setting.

We find that the “last agreed upon placement” for Student Doe was Lincoln Middle School, where he apparently had an IEP that called for his attendance there. This placement is clearly inappropriate for him now and both parties agree that this is the case. Bradley is not his last agreed-upon placement, and we reject the argument of the district that Student Doe’s parent agreed to have the expert dictate what his placement would be. Review of the Court Order (Joint Ex.A) indicates that the role of the expert included selecting a sixth-grade “team” for Student Doe at Lincoln Middle School and providing recommendations for possible inclusion in his IEP. The parties agreed to be bound by her selection of a “team” and to follow her recommendations as set forth in paragraph A.3 (sic) for the entire 2008-2009 school year. We do not read the Court Order as delegating authority to the expert to dictate Student Doe’s placement in the event that his attendance at Lincoln Middle School proved impossible. In fact, Paragraph 11 of the Court Order clearly preserves his mother’s right to challenge any subsequent decision of the IEP team to change his placement. The IEP team, on recommendation of the expert, has made a decision to place him in a therapeutic out-of-district program. Student Doe’s mother has not, by virtue of the settlement reached in prior litigation, nor in any other way, agreed to this placement.

We cannot agree with the parent’s proposal that an appropriate interim placement for Student Doe is home tutoring. It is likely that litigation regarding

his school placement will be protracted. An extended period of home tutoring, if it were ordered as an interim placement, would, according to the evidence in this case, exacerbate Student Doe's school phobia and undermine his ultimate return to

a school environment. Thus, we must deny Student Doe's request for issuance of an interim order providing him with home tutoring pending the resolution of federal court proceedings. We retain jurisdiction of this case in order to ensure compliance with education law.

The Lincoln school department, according to the minimal record made at the interim order hearing, has made available to Student Doe a free appropriate public education at Bradley Day School. Student Doe's mother is free to contest the appropriateness of this placement. However, in the circumstances of this case, we find that it is incumbent upon her to have an alternative that would provide him with an education that complies with our state's compulsory education law. There is no alternative program of education in which Student Doe is or can be enrolled by his mother at the present time.¹⁰ Since Student Doe could presumably attend school with the therapeutic intervention the district proposes to initiate, her decisions have not only deprived him of special education services but any education whatsoever. This situation is at odds with our state's compulsory education law and, we believe, threatens Student Doe's welfare. We do not construe R.I.G.L. 16-19-1 to exclude a child such as Student Doe, from the requirement that he attend school, because, according to the evidence in this record, his school phobia can be addressed and is treatable. Although his mother is entitled to contest the proposed placement and even to withhold her consent to special education services altogether, she cannot utilize her rights under IDEA to undermine Rhode Island's compulsory education law.

In light of the above, the parties are directed to request that the federal court expedite its consideration of Student Doe's mother's appeal of the due process decision that the Bradley Day School will provide him with a free appropriate public education. If the Bradley placement is upheld by the federal court, Student Doe's mother must either place him there, or provide him with an alternative educational program that will meet compulsory education requirements. We will reconvene the hearing in sixty (60) days to be updated as to Student Doe's status¹¹ and take any further action necessary to implement this decision.

¹⁰ In her federal court complaint, she concedes that she "has not been able to find an alternative placement for (Student Doe) leaving Bradley as the only placement currently available" to him. At the time of the interim order hearing on August 7, 2009 Student Doe's mother testified about a potential placement for him at the Wolf School, but he had not been accepted at that time.

¹¹ Including his attendance as required under R.I.G.L. 16-19-1.

Student Doe's request for issuance of an interim protective order is denied and dismissed at this time.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Deborah A. Gist, Commissioner

August 31, 2009
Date