

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

HARMONY HILL SCHOOL AND
THE DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES

V.

FOSTER SCHOOL COMMITTEE

INTERIM ORDER AND FINAL DECISION

Held: The Foster School Department has paid the amount that it is obligated to pay for the cost of educating a student who was placed at the Harmony Hill by DCYF during school years 2010-2011 and 2011-2012. An additional amount that the parties have identified as being owed to Harmony Hill School (\$63,618.90) is the financial obligation of DCYF. Since ongoing educational operations of Harmony Hill School have been placed in jeopardy an interim order is entered requiring payment of this amount forthwith.

Date: February 27, 2013

Travel of the Case

On October 11, 2012 counsel for Harmony Hill School (Harmony Hill), a residential school in Chepachet, Rhode Island, filed an appeal with Commissioner Deborah A. Gist. The appeal requested an immediate hearing for a determination of whether or not the Foster School Department had failed to pay its special education “per pupil cost” for a Foster student placed at Harmony Hill by the Department of Children, Youth and Families (DCYF). The letter of appeal asserted that Harmony Hill was owed over one hundred and thirty-thousand dollars (\$130,000.00). A request was made that counsel for the Department of Children, Youth and Families attend the hearing so that the issue of liability for this monetary claim could be resolved.

The parties agreed to an initial hearing date of October 31, 2012 at which time it was determined that subpoenas for the appearance of witnesses and production of relevant documents were needed. After subpoenas were issued, the hearing was convened again on December 5, 2012. At the outset of the hearing, the parties stipulated that DCYF would be joined as a party to this appeal. Testimony was then taken and documentary evidence was received. It was agreed that written closing arguments would be submitted. This process was completed on January 18, 2013 at which time the record closed. On January 11, 2013 counsel for the school requested an expedited decision because Harmony Hill was in the midst of a financial crisis which impacted on its ability to continue to deliver services. This request was transmitted to the Commissioner pursuant to the Regents’ Regulations Governing Appeals to the Commissioner.¹

Jurisdiction to hear this dispute does not fall squarely within the parameters of the Commissioner’s authority to hear residency-related matters under R.I.G.L. 16-64-6, but it does clearly arise under R.I.G.L. 16-39-1.

Issue

- Does the Foster School Department (Foster) owe its local special education per pupil cost or the state average per pupil cost as “its share of the cost of educational services” (R.I.G.L. 16-64-1.1(c) provided to a Foster student placed by DCYF at Harmony Hill from December 13, 2010 through June 21, 2012.²

¹ The request was not granted, but based on the urgent need for a resolution of this issue, the hearing officer has determined that an expedited decision is in students’ best interests.

² There does not appear to be any dispute that if Foster does not owe the full amount claimed by Harmony Hill in this matter (\$136,876.89), the balance is owed by DCYF. Since Foster paid the state average per pupil per diem cost for this period (\$73,258.00) after the conclusion of the hearing, the amount presently in controversy is \$63,618.89.

Findings of Relevant Facts:

- On September 21, 2000 the Director of RIDE’s Office of Special Needs, Dr. Thomas P. DiPaola, sent a memorandum notifying all school district Directors of Special Education of the amounts that each district would be required to contribute to DCYF for the educational costs of children placed by DCYF in residential programs. Foster Ex.A.
- Mr. John Magner, Director of Special Education for the town of Foster, was aware that the town of New Shoreham had previously obtained a modification of the amount of its required contribution³ based on its low student population and the amount of its net special education expenditures. Based on this information and the fact that the Foster school district shared the same characteristics as New Shoreham, Mr. Magner took the position that Foster’s local per pupil cost (\$37,462.00 for that year) was statistically inappropriate and posed an undue fiscal hardship for his community. He wrote to Dr. DiPaola on November 30, 2000, and advanced arguments supporting his request that a “more equitable” formula be used for its contribution to the costs of educating a child placed by DCYF in a residential program. Tr. Vol.II, pp. 95-99; Foster Ex. D.
- Dr. DiPaola apparently⁴ agreed that Foster should be treated like New Shoreham, and responded to Mr. Magner that he would adjust the rate and note this on the annual per pupil cost listing by the use of an asterisk and a notation on the bottom of the chart. He advised Mr. Magner that he should plan on paying the state average per pupil special education cost “from here on in”. Tr. Vol.II, p. 101.
- In subsequent years, RIDE’s annual charts⁵ showing Rhode Island communities’ per pupil costs (and therefore their required contribution to the educational costs for children placed by DCYF in residential programs) included an asterisk in place of amounts for Foster and New Shoreham and a notation at the bottom that “*Foster and New Shoreham are exempt from standard formula calculations because of their low populations”. Foster Ex.A.
- Subsequent conversations with Dr. DiPaola confirmed that ongoing RIDE policy would be that Foster, and New Shoreham as well, would pay the state average per pupil cost for any child placed by DCYF in a residential program. Mr. Magner budgeted the state average per

³ The September 21, 2000 communication from Dr. DiPaola contained a chart listing each community’s “average per pupil costs for school year 2000-2001” and did not list an amount for New Shoreham.

⁴ Dr. DiPaola was not called as a witness in this case.

⁵ Beginning in April of 2007, these communications and charts were prepared by Kenneth Swanson, who succeeded Dr. DiPaola in the position of Director of the Office of Special Populations

pupil cost whenever he received information that a Foster child might be placed in a residential program. Tr. Vol. II, p. 102.

- Student N.M. is a Foster resident who entered DCYF custody and was placed at Harmony Hill School from December 13, 2010 to June 21, 2012. (Stipulation of the parties)
- On February 10, 2012 a member of the DCYF staff inquired at RIDE as to Foster's responsibility to contribute to the educational costs of a child in state care and what the district's per pupil cost was (the amount was not listed on RIDE's annual chart).⁶ RIDE's Director of the Office of Statewide Efficiencies, Cynthia S. Brown, provided DCYF with Foster's actual special education per pupil costs for the 2010-2011 and 2011-2012 school years, i.e. \$104,660.00 and \$81,532.00. Foster Ex.C. When she did so, Ms. Brown did not know that Foster and New Shoreham had been exempted from contributing their actual per pupil costs for children placed in a residential program by DCYF and instead had their rate fixed at the state average per pupil cost. Tr. Vol. II, pp. 76-79.
- The state average special education per pupil cost for school year 2010-2011 was \$43,276.00 and for 2011-2012 was \$49,546.00. Foster Ex.C. Using these rates, Foster would owe⁷ Harmony Hill \$73,258.00. Using Foster's per pupil special education costs as the rate, the school is owed \$136,876.89. (See letter of Attorney Mary Ann Carroll dated January 11, 2013).
- Based on the information it received from Ms. Brown with respect to Foster's per pupil special education costs, DCYF stopped making payments to Harmony Hill and the school then submitted invoices to Foster claiming a contribution toward Student N.M.'s educational costs based on the rates provided by Ms. Brown. Tr. Vol.II, pp. 78, 86, 105-107.
- Upon his receipt of these invoices, Mr. Magner questioned their accuracy and sought a resolution of the issue by calling Mr. Sienko at RIDE. Tr. Vol.II, pp.106-107.
- Discussions took place among administrators within RIDE as well as with RIDE and representatives of Foster and DCYF. No decision was made by RIDE that Foster owed a

⁶ The most recent annual RIDE communication had come from Carolyn Dias, Chief of RIDE's Office of Fiscal Integrity and Efficiencies and was issued on December 22, 2011. It superseded an October 5, 2011 communication from J. David Sienko, RIDE's Director of the Office of Student, Community and Academic Supports with respect to the subject of per pupil costs for school year 2011-2012. Ms. Dias' memo contained a chart of per pupil costs that included an asterisk for Foster and New Shoreham but did not include a notation as to what the asterisk meant. Foster Ex.A.

⁷ The Foster School Department has paid this amount to Harmony Hill School.

contribution that is calculated at a rate other than the state average per pupil special education cost. Tr. Vol. II, pp. 34-35; 52-61. Foster Ex. A, B and C.

Positions of the Parties

Harmony Hill School

Harmony Hill School provided educational services to Student N.M. during part of 2010-2011 and during the entire 2011-2012 school year. To date, Harmony Hill has not been paid at the full rate “provided”⁸ upon his placement –a fact which has strained its budget and jeopardized its continued operations. Student N.M. was placed at Harmony Hill by DCYF. Depending upon the outcome of this proceeding, either the Foster School Department or DCYF will owe Harmony Hill \$63,618.89. Counsel for Harmony Hill requests an expedited ruling because the school presently is in a financial crisis and must recover this amount as soon as possible in order to continue to provide important programming and much-needed services to Rhode Island children.

DCYF

Counsel for DCYF submits that Foster is responsible for the amount that is owed to Harmony Hill. She argues that the Commissioner must use Foster’s per-pupil special education cost - and not the state average per pupil cost - to calculate Foster’s per-diem rate for the period of Student N.M.’s attendance. There is no evidence that a different rate was ever established, calculated, or paid by the Foster School Department. Mr. Sienko of RIDE sought to investigate Mr. Magner’s claim that Foster’s contribution to the educational costs of children placed by DCYF in residential schools was calculated in a different manner. Although he did look at previous memos from RIDE that had been sent by his predecessors and noted that on several of the memos there was an asterisk that indicated that Foster and also New Shoreham were exempt from standard calculations, he could find no documentation within his office of how that was determined or what the rate would be.

⁸ The record does not indicate if the rate “provided” to Harmony Hill upon placement of a child at the school is an agreed-upon or contractual rate. The arguments of the parties would suggest that this is the case.

There was no evidence that any school department in the state had paid at a rate that was based on any separate or different formula than all of the other districts. Without further explanation and without a regulation, policy or practice that would establish if or how such “exemption” was to be implemented, the parties are left with nothing but speculation as to what a non-standard formula calculation would be.

As early as 2010, Foster actually had a per pupil rate assigned to its community. There was no evidence at that time that any exceptions were or should be made to adjust or modify that rate. Although historically for school districts that have less than ten (10) special education students, the rates were not published to protect confidentiality, it would be an irrational leap to assume that unpublished is synonymous with being exempted from the standard formula used to calculate that community’s contribution.

The facts here are that it has been at least ten (10) years or longer since Foster has had any children in DCYF care and placed in a residential program, so the Foster School Department has not “historically” paid any rate - average or otherwise. Although it may be the case that John Magner of the Foster School Department sent a letter over twelve (12) years ago asking to be exempted from the per-pupil rate, he never received a written response. Furthermore, he has not produced any evidence, witness or documentation of any kind to support his argument that the Foster School Department is exempt from the rates as established by RIDE. Foster’s payment of a state average per pupil cost or some other rate that is inconsistent with the rate calculations and methodologies used by all of the other cities and towns in Rhode Island is simply not supported by the evidence in this case.

With a change in the methodology for calculation of per pupil costs that was, at least briefly, implemented in the fall of 2011, RIDE has moved to eliminate the notation that previously appeared on charts listing Foster and New Shoreham with an asterisk in place of per pupil cost and making mention of an “exemption”. Foster did not rely on any prior notations with respect to its “exemption” since it has not paid a contribution toward the educational costs of children in DCYF care for a number of years. Given the significant changes in the information provided (and perhaps more importantly, eliminated) in the most recent RIDE charts, Foster is clearly obligated to pay Harmony Hill a contribution toward the costs of educating Student N.M. calculated based on its special education per pupil cost, and not the state average per pupil costs.

DCYF requests the Commissioner compel the Foster School Department to immediately make payment of the amount currently owed to Harmony Hill School.

Foster School Committee

Counsel for the School Committee points out that initially DCYF was paying the full tuition rate for Student N.M. to the Harmony Hill School. Upon receiving information from RIDE as to Foster's special education per pupil costs for the periods during which this student was placed there, DCYF reduced its payments for this student, expecting Foster to make up the difference based on these numbers. It was only when a demand was subsequently made by Harmony Hill to the Foster School Department for the payment of sums well beyond what it had budgeted that John Magner became aware that there was "confusion" with respect to his district's contribution rate. Implicitly, counsel argues that RIDE's investigation into the history of Foster's (and New Shoreham's) exemption should have settled this matter without the necessity of a hearing, but unfortunately did not.

The evidence introduced at the hearing dispels any confusion as to what Foster's rate has been- and continues to be- for its contribution to the educational costs of Foster students in DCYF care. In 2000, John Magner of the Foster School Department submitted a written request to RIDE to modify Foster's per pupil cost "rate" of contribution for the same reasons that New Shoreham's had already been modified. His request was granted by RIDE's Director of the Office of Special Needs, Dr. Thomas DiPaola. Dr. DiPaola determined that for both Foster and New Shoreham, the local per pupil cost formula would not apply, and instead the rate would be the state average per pupil cost. He notified Mr. Magner of this decision and indicated that the exemption would be noted by an asterisk on the annual chart listing per pupil costs for each community in Rhode Island and language describing an exemption for Foster and New Shoreham.

Counsel for the School Department submits that it was clearly the exemption of these two communities that was documented by the asterisk and language appearing on the annual charts issued by RIDE's Special Education Office over a ten-year period. The decision not to publish local per pupil rates for these communities had nothing whatsoever to do with protecting student confidentiality. Recent changes to the chart, and the reporting of per pupil rates for Foster and New Shoreham, should not be construed as a change in RIDE

policy. The testimony in this case confirms that no one at RIDE has made a decision to change the exemption heretofore existing for Foster and New Shoreham. In fact, changes to the chart were made by individuals who were unaware that contribution rates for these two districts had been modified by an exemption granted ten years previously. Therefore, the state average per pupil cost is the rate that Foster is obligated to pay.

If RIDE's decision to exempt Foster (and New Shoreham) constitutes "rulemaking" and should have been subject to the process set forth in the Administrative Procedures Act, (R.I.G.L. 42-35-1 et seq.) this does not affect the current validity of Foster's exemption. Pursuant to the Commissioner's decision in Harmony Hill School and DCYF v. Cumberland School Committee⁹, the provisions of the APA establish the validity of a rule that has been in effect for at least two years. Even if RIDE were of a mind to eliminate Foster's exemption at this point in time, it would have to "give some notice to Foster and some adherence to the rule-making process" under the APA prior to doing so. Mr. Magner has budgeted the state average per pupil cost for the last two years for this student, and to impose a higher cost retroactively on such a small district would be unjust and unfair. The hearing officer should find that Foster has paid its obligations for Student N.M. in full and any additional amount owed to Harmony Hill, which appears to be \$63,618.89, should be paid by DCYF.

DECISION

What emerged in the hearing in this matter, if not before, is clear and convincing evidence that the town of Foster, at the request of its school officials, was granted an exemption from the special education per pupil cost calculation of what it would owe when one of its children was placed by DCYF in a residential program. RIDE's exemption of Foster (as well as the town of New Shoreham) and the applicability of the state average per pupil cost to both of these small school districts, was evidenced by Mr. John Magner's November 30, 2000 letter (Foster Ex.D), his uncontradicted testimony as to the discussions he had with Dr. Thomas DiPaola of RIDE and the notations RIDE placed on subsequent charts that were distributed by RIDE over the next ten years.

We disagree with DCYF that throughout the course of the hearing there was "speculation" as to what the notation on RIDE's chart meant and how any exemption would

⁹ Decision of the Commissioner dated June 29, 2012

be implemented (DCYF memorandum at page 2). Mr. Magner's letter and testimony clearly explained the nature of the exemption and how it would be implemented if and when DCYF placed a Foster child in a residential program, thus triggering the need to make an assessment of Foster's financial contribution. The fact that Foster had not, prior to this dispute, actually paid the state average per pupil cost for one of its students does not invalidate the administrative decision RIDE made in 2000 that Foster and New Shoreham would be assessed the state average special education per pupil cost rather than their local per pupil cost. This administrative decision remained unchanged from 2000 up through the time this dispute arose and continued through the time of hearing in this matter. It was the state average per pupil cost that Foster's Director of Special Education used in making sure that the school budget included sufficient funds to cover Student N.M.'s placement at Harmony Hill. Mr. Magner became aware of the need for the inclusion of these amounts when he signed a document accepting financial responsibility for Student N.M. in December of 2010.

RIDE staff members who are currently involved in administration of RIDE policy and the calculation of rates testified that they were unaware of past communications between RIDE and Foster with respect to an exemption and that they had overlooked notations placed on the annual charts. When RIDE staff looked into the matter to determine the validity of Mr. Magner's claim of an exemption, they found limited documentation and, from the record of their internal communications, they were uncertain as to the legal effect that should be given to the facts of which they had become aware¹⁰. RIDE understandably sought to resolve the matter administratively by mediating the dispute between DCYF and Foster. Throughout this process, RIDE neither confirmed nor denied the validity of the exemption Foster claimed and made no determination of which of the two rates Foster should pay. RIDE remained neutral throughout the hearing, did not intervene as a party or submit arguments in this case. Witnesses from RIDE testified forthrightly and with

¹⁰ If the process should have been more formal and a better record made with respect to RIDE's decision in this regard, it was RIDE that should have utilized a more formal process and created and retained appropriate records. It could be argued that RIDE is obligated to follow the APA's rulemaking procedures in establishing methodologies for the calculation of rates for contribution to the educational costs of students placed in residential programs by DCYF. However, as pointed out in a recent challenge to RIDE's methodology for such calculations in Harmony Hill School and Department of Children Youth and Families v. Cumberland School Committee, decision of the Commissioner dated June 29, 2012, a de facto "rule" in effect for at least two (2) years would be enforceable absent a demonstration of prejudice. In this case, DCYF obviously seeks to enforce, not invalidate, RIDE's "rules" with respect to per pupil costs.

precision as to their investigation into the validity of Foster's claimed exemption and RIDE's unsuccessful attempts to help the parties reach a settlement.

Based upon the record made after a full hearing on the merits of this matter, and after consideration of the arguments of the parties, we find that Foster's per pupil rate is the state average special education per pupil cost by virtue of an existing exemption granted by RIDE. Thus, we order DCYF to pay the balance of the financial obligation for Student N.M.'s educational costs, i.e. \$63,618.90, to Harmony Hill School forthwith. This order is entered as both a final and interim protective order.

For the Commissioner,

Kathleen S. Murray
Hearing Officer

Deborah A. Gist, Commissioner

Date: February 27, 2013