

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

STUDENT F. DOE,	:
<i>Petitioner</i>	:
	:
v.	:
	:
PROVIDENCE PUBLIC SCHOOL	:
DEPARTMENT,	:
<i>Respondent</i>	:

DECISION

Held: Parents’ appeal of school board’s affirmation of decision to transfer elementary school student denied and dismissed as evidence established that elementary school principal complied with district policy when suspending student and referring disciplinary matter to district student affairs office, which acted reasonably when it decided, after a hearing, to transfer student to an elementary school with larger behavioral support staff.

DATE: April 25, 2014

1. Jurisdiction and Travel of the Case

Student F. Doe's parents filed an appeal with the Commissioner on behalf of F. Doe seeking to reverse a decision of the Providence School Board ("PSB") affirming the Providence Public School Department's ("PPSD's") decision to transfer F. Doe, who is in third grade, from the Alan Shawn Feinstein Elementary School at Broad Street ("Feinstein") to the Robert L. Bailey IV Elementary School ("Bailey").

Following a consistent pattern of disruptive conduct and two one-day suspensions in only the first month of the 2013-14 school year, Feinstein's principal decided on September 18, 2013 to suspend F. Doe for a third time, and the next day referred the matter to the PPSD's Student Affairs Office (the "SAO"). Following an evidentiary hearing before Student Affairs Director Roxanne Archibald, the SAO on October 1, 2013 concluded that the suspension and the referral to the SAO had been appropriate, and made the decision to transfer F. Doe to Bailey, which allegedly had a much larger behavioral support staff than Feinstein.

F. Doe's parents appealed to the Superintendent, and following another hearing before PPSD's Chief Operating Officer, Bernie Luger, III, the SAO decision was affirmed on or about October 23, 2013. F. Doe's parents then appealed to the PSB, which, after another hearing, affirmed the SAO decision on January 27, 2014.¹ This appeal followed on January 31, 2014.

Jurisdiction here is present pursuant to RIGL § 16-39-2. After a voluntary, although ultimately unsuccessful, mediation session on April 1, 2014, yet another evidentiary hearing with respect to the matter (the fourth) was conducted on April 10, 2014 before the undersigned, *de*

¹According to PPSD's counsel, the audio recording of the hearing before the SAO was frequently inaudible due to excessive background noise, and thus the relevant testimony had to be repeated before the PSB.

novo.² F. Doe's parents appeared at the hearing *pro se*. The PSB was represented by an Assistant City Solicitor.

The PPSD was providing F. Doe with tutoring at home following his suspension from Feinstein on September 18, 2013. However, tutoring services were discontinued at some point after the PSB's denial of F. Doe's second appeal on January 27, 2014; and when, following the PSB decision, F. Doe's parents continued to refuse to enroll their son at Bailey, the PPSD commenced truancy proceedings in Family Court, which are pending. *See In re F Doe*, C.A. No. FC P 2014-0037CR.

2. Facts and Testimonial Evidence

F. Doe is a third grader who, although academically capable, has serious behavioral issues. According to Feinstein's principal (Dr. Cynthia Scheller), F. Doe consistently engaged in unacceptable and disruptive conduct in the classroom throughout second grade, conduct which, according to Dr. Scheller as well as his third grade teacher (Melissa Murphy Bradshaw), only became more frequent and intense.³

Dr. Scheller testified that while in second grade, F. Doe was referred to a Targeted Support Team ("TST"), which included certain teachers, his parents, as well as the school social worker and psychologist.⁴ The TST developed an individualized behavioral plan pursuant to the Positive Behavioral Intervention System ("PBIS") adopted by the PPSD. According to Ms.

²*See Slattery v. School Committee of City of Cranston*, 116 R.I. 252, 262, 354 A.2d 741, 747 (1976) ("This court has held on several occasions that § 16-39-2, in requiring that appeals from school committee actions to the Commissioner of Education are heard only '***' after notice to the parties interested of the time and place of hearing ***' contemplates a *de novo* hearing by the commissioner"). A hearing *de novo* is one which is heard as if for the first time, i.e., as an entity with original, as opposed to appellate, jurisdiction, would hear it. *See Black's Law Dictionary* at 649 (West, 1979).

³ The relevant facts as recounted by Dr. Scheller and Ms. Murphy Bradshaw are not in dispute, at least not in any material respect.

⁴ Dr. Schiller only became principal of Feinstein in March of 2013, and thus as to events prior to that time, was testifying based upon her familiarity with F. Doe's file and other pertinent documents. She testified before the PSB that F. Doe had been suspended eight (8) times during second grade for a variety of offenses, including hitting or kicking other students, or just leaving the classroom and taking off into the school. *See Respondent's Ex. C* (transcript of PSB hearing on January 6, 2014) at 55-56.

Murphy Bradshaw, the essential features of the plan involved establishing certain basic expectations relative to proper conduct. F. Doe was required to maintain a clipboard in his possession and would check in periodically throughout each day, receiving one of four points for each category of expectations, i.e., “1” for “met none,” 2 for “met some,” “3” for “met most,” and 4 for “met all.”⁵

Despite the plan, both Dr. Scheller and Ms. Murphy Bradshaw provided essentially unimpeached testimony that F. Doe’s behavioral issues increased in frequency and intensity in third grade, such that he was routinely acting out in class and would regularly: (a) shout “shut up!” and yell various other epithets at the teacher and fellow students during class; (b) roam around the class, stepping upon pipes located near the windows, or climb onto “rungs” that were on the wall; and (c) make physical contact with fellow students and disturb material on their desks. Both Dr. Scheller and Ms. Murphy Bradshaw also testified that F. Doe’s conduct did not seem to be provoked by any particular incident or the conduct of another student, and Ms. Murphy Bradshaw stated that the inappropriate conduct reached such a level that it was impossible to run an effective classroom, and was adversely affecting other students.⁶

(a). The September 18, 2013 Suspension

Things came to a head on September 18, 2013. According to Dr. Scheller, between 9:30 and 10 a.m. that morning she observed Ruth Hirst Trottier, a physical education teacher, and F. Doe outside her office. F. Doe was physically trying to grab a clipboard out of Ms. Hirst

⁵ Initially, the scores were based upon a “0” – “3” system, but it quickly became apparent that F. Doe was “triggered” by the use of “0,” and thus a four point system starting with “1” eventually was adopted.

⁶ Indeed, Dr. Scheller testified that there had been occasions when noise generated by F. Doe’s “banging” interrupted the work being done in adjoining classrooms. The description of F. Doe’s classroom conduct was corroborated by the testimony of fellow third graders at the PSB hearing on December 2, 2013. *See* Respondent’s Ex. A (transcript of PSB hearing on that date) at 7-11, Ex. B (transcript of PSB hearing on December 18, 2013) at 5-6, 30-32. (Why PPSD concluded it was a good idea to ask such young students to testify in public is another question.)

Trottier's grasp and was shouting that he did not want Ms. Hirst Trottier, who he called "stupid" and a "liar," to put "0's on his report."

Dr. Scheller, who testified that she had a good relationship with F. Doe and had often sat with him in her office until he "quieted down," claimed she took F. Doe back to gym, where he immediately began climbing "rungs," and then grabbed hold of a rubber chicken that was for some reason nearby and began kicking it. Finally, he attempted to exit the school via the front door, which, according to Dr. Scheller, she had never seen him attempt before. Dr. Scheller blocked his path, and decided to bring him to Jean Rossi, from special education, so he could hopefully quiet down. F. Doe then just "took off" somewhere in the school.

It was at this point, as a result of the recounted behavior, that Dr. Scheller testified that she made the decision to suspend F. Doe for a day, which as noted, was his third such suspension since school started only a few weeks earlier.⁷ Both Dr. Scheller and Ms. Murphy Bradshaw both testified that they had tried everything in their power to make it possible for F. Doe to stay in class without posing an undue risk to himself or other students, or unduly interrupting other students.

Dr. Scheller immediately called F. Doe's parents and informed them that she had again suspended F. Doe for a day, although neither parent was then available to pick F. Doe up from school. Ten to fifteen minutes later, Ms. Rossi, who located F. Doe somewhere in the building, arrived at Dr. Scheller's office with him. Dr. Scheller then informed F. Doe that his parents would be picking him up, but did not recall whether she told him at that time that he had been suspended for a day. F. Doe then left Dr. Scheller's office with Ms. Rossi.

⁷ According to Dr. Scheller, F. Doe's first third grade suspension occurred on the second day of school. The second suspension occurred when he simply walked away from the school psychologist.

According to Dr. Scheller, Ms. Rossi returned to her office with F. Doe about 45 minutes later, explaining that she had lunch duty. F. Doe seemed calmer (had “de-escalated,” in Dr. Scheller’s words), and so, having commitments herself and not having anywhere else to take him, Dr. Scheller asked Ms. Murphy Bradshaw if she would be willing to accept him back into class until his father arrived, and Ms. Murphy Bradshaw acceded to the request.⁸

After he was returned to his class, Ms. Murphy Bradshaw recounted the following three separate incidents in some detail, all of which occurred sometime just before lunch and 1:15 p.m.:

- (1) on their way back from lunch, F. Doe kicked a student while he was bending down to tie his shoes, without any apparent provocation. The student, who was brand new to the school, said he was “O.K., but looked upset;”⁹
- (2) after arriving in the class after lunch, F. Doe began banging on the cabinets with his clipboard and throwing school supplies around the classroom. He then climbed onto pipes near the windows and began calling to individuals outside. Then he intentionally jumped onto or kicked a girl in the class, causing slight injury to her shin, which drew blood and necessitated a visit to the nurse. F. Doe had no discernible reason for jumping upon or kicking the girl, and there had been no history of any animosity between the two;¹⁰ and
- (3) soon thereafter, F. Doe began running around the classroom shouting “shut up,” to both Ms. Murphy Bradshaw and other students, and then twice punched a girl in the stomach, causing her to cry, again without any evident provocation.¹¹

Following these incidents, Ms. Murphy Bradshaw called the principal’s office at approximately 1:15 p.m., at which point F. Doe was returned to the office and then picked-up by his father at approximately 1:30 p.m.

⁸ Dr. Scheller said it was not unusual to return a suspended student to his or her class when parents were delayed getting to the school to pick up the student. She testified that in her opinion, being in class was preferable to sitting alone, doing nothing, in the school office.

⁹ The testimony was corroborated by the student who was kicked and others at the PSB hearings on December 2 and 18, 2013. *See* Respondent’s Ex. A at 7-8.; Ex. B at 10;

¹⁰ The testimony was corroborated by the student who was jumped on and/or kicked and others at the PSB hearing on December 18, 2013. *See* Respondent’s Ex. B at 42-47;

¹¹ The testimony was corroborated by the student who was punched and others at the PSB hearings on December 18, 2013. *See* Respondent’s Ex. B at 13-19, 39-40.

Dr. Scheller made the decision to refer the matter to the SAO the next day, on September 19, 2013.

(b). The Seeds of Mistrust

F. Doe's parents adamantly refused at various times (including both at the end of second grade and at the beginning of third grade) to allow F. Doe to be evaluated by what PPSD refers to as a "Referral Team," or a "Team of Qualified Professionals" ("TPQ").¹² According to Dr. Scheller, a TPQ referral is made when it appears that the strategies developed by a TST are not optimally effective.

F. Doe's parents evidently were convinced that such a referral would inevitably result in a finding that F. Doe needed "special education," and/or would result in a recommendation that F. Doe take medication, alternatives which they adamantly opposed, apparently on principle. In addition, they intimated that the behavioral plan developed for F. Doe had not been carefully followed, and in any event, was not given enough time to make a difference at Feinstein.

Yet, the precise basis of F. Doe's parents' opposition to a TPQ referral remains unclear. What is clear from the evidence is that the relationship between F. Doe's parents and the PPSD deteriorated. Indeed, Mrs. Doe went from a parent who volunteered at the school on a regular basis, both in F. Doe's classroom and in the kindergarten classroom of her daughter, to one who began surreptitiously recording conversations with teachers and administrators, and who created a web site where she posted various documents that she believed evidenced that F. Doe was being treated unfairly at Feinstein. For her part, Dr. Scheller testified that she felt "under attack."

The evidence suggests at least three causes for the worsening relationship: (a) the refusal to grant F. Doe's parents' request for a specific third grade teacher; (b) the decision not to allow

¹² In addition to a psychologist, social worker, and parents, the TPQ typically consists of a speech therapist, special education coordinator and principal.

Mrs. Doe to volunteer in F. Doe's class; and (c) the service of a "no trespassing" order by the Providence Police Department.

F. Doe's parents had specifically requested that F. Doe be assigned to a "firm" third grade teacher, and not be placed in Ms. Murphy Bradshaw's third grade class.¹³ According to Dr. Scheller, she denied the request because: (a) she believed that Ms. Murphy Bradshaw was in fact a "firm" teacher; and (b) F. Doe had had several run-ins with various students in the only other available third grade class, making assignment to that class less than desirable.¹⁴

According to Dr. Scheller, her decision to prohibit Mrs. Doe from volunteering in F. Doe's third grade class was prompted, in part, by a complaint made by a representative of the teachers' union, who advised that F. Doe was taking notes in the classroom with respect to the activities of children other than F. Doe. Also, Dr. Scheller was advised that Mrs. Doe was not signing in and out, as required, when she entered and exited the school, despite being advised to do so. Also, according to Ms. Murphy Bradshaw, although F. Doe's behavior was much improved when his mother was in the classroom, it became especially outrageous as soon as she left.

Dr. Scheller made clear that she prohibited Mrs. Doe from volunteering in F. Doe's class due to: (a) the reported overall negative effect of Mrs. Doe's presence in the classroom upon F. Doe's behavior; and (b) Mrs. Doe's refusal to stop taking notes with respect to other children.

¹³ Ms. Murphy Bradshaw had taught F. Doe's older brother in the past without incident, but Mrs. Doe for some reason came to the conclusion that she was not sufficiently "firm" for F. Doe.

¹⁴One of the incidents in second grade resulted in a request to Mrs. Doe that she no longer volunteer in class, as had occurred in his third grade class. Dr. Scheller testified that when in second grade, F. Doe allegedly threw the contents of a pencil sharpener around the class. F. Doe alleged he had been threatened by a girl holding a pencil. The girl in question testified that F. Doe came up upon her suddenly from behind as she was sharpening her pencil, and she had no intention to threaten him. When investigated by Dr. Scheller, the girl apologized to F. Doe for making him feel threatened, even while continuing to deny that she intended to do so, and was not disciplined. F. Doe's parents evidently did not believe that the incident was handled appropriately, but did not indicate precisely why, or suggest how it could have been handled differently.

Neither fact was denied by Mrs. Doe who continued, at least for a time, to volunteer in her daughter's kindergarten class at Feinstein, with Dr. Scheller's knowledge and consent.

On December 3, 2013, Mrs. Doe received a letter from Mr. Luger, PPSD's Chief Operating Officer which, while making no mention of the web site, stressed Mrs. Doe's need to comply with the school visitation policy. *See* Petitioner's Ex. 5. Yet, Mrs. Doe evidently continued to ignore the policy, and thus Dr. Scheller decided that Mrs. Doe should no longer be permitted access to the school for any reason.

Mrs. Doe received another letter from Mr. Luger dated December 30, 2013 which did reference the web site and which stated that her recordation of conversations while at the school without permission constituted "a violation of the Federal Education Right to Privacy Act ('FERPA') and School Board policy." *See* Petitioner's Ex. 6. The December 30 letter went on to claim that Mrs. Doe had "shown a disregard for the safety and privacy of our students and staff," and that her continued presence at the school was "disruptive and counterproductive to public safety and our educational goals." *Id.* She also was notified that a "no trespassing order" prohibiting her from being on school grounds would be issued. *Id.* Mr. Luger then provided the Provide Police Department with the required affidavit so such an order could issue, *see* Petitioner's Ex. 7, and the police served Mrs. Doe with a "no trespassing" order at her home on or about December 30, 2013.

No precise evidence was presented to the undersigned concerning the extent of Mrs. Doe's non-compliance with the school's visitation policy, or with respect to PPSD's efforts to gain her compliance before deciding to involve the police. Mr. Luger did testify that he routinely involved the police and requested such "no trespassing" orders in response to reports of non-compliance with a school's access policies. Not surprisingly, relations between F. Doe's

parents and the school administration went even further down-hill after the visit from the Providence Police Department.

(c). The SAO Decision and Appeals

As noted, after making the decision to suspend F. Doe on September 18, 2013, Dr. Scheller decided the next day to refer the matter to the SAO. On or about October 1, 2013, the SAO concluded after a hearing that the suspension and referral had been appropriate, and decided that F. Doe should be transferred from Feinstein to Bailey, effective immediately.

According to Mr. Luger, who, as noted, heard the first-level appeal from the SAO decision on behalf of the Superintendent, his October 23, 2013 decision to affirm the SAO was made only after taking the testimony of involved students and teachers, as well as Feinstein’s principal and social worker, and was premised upon the belief that Bailey had a much larger behavioral support staff than Feinstein, which was not refuted by F. Doe. The essence of Mr. Luger’s unimpeached testimony was that at Bailey, F. Doe would receive needed individual attention without completely tying up the primary teacher to the detriment of all the other students without behavioral issues.¹⁵ However, F. Doe’s parents continued to refuse to send F. Doe to Bailey, and appealed the decision to the PSB, and after a third hearing, the PSB affirmed the result below on January 27, 2014.

3. Documentary Evidence

As noted, Mrs. Doe created a web site containing documents which she believes serves as evidence that F. Doe was treated unfairly at Feinstein. At the hearing before the undersigned, F. Does’ parents moved for admission of the entire web site into evidence. The web site essentially consisted of the following:

¹⁵ Although Bailey is, in PPSD parlance, F. Doe’s “neighborhood school,” i.e., the closest school within a mile from his home, this fact was not deemed significant by Mr. Luger.

- (a) a five page statement of Mrs. Doe;
- (b) twenty-six pages of e-mails to and from PPSD staff;
- (c) teacher's notes from September 18, 2013;
- (d) a one-page letter from Mr. Luger to Ms. Doe dated December 3, 2013;
- (e) a one-page letter from Mr. Luger to Ms. Doe dated December 30, 2013;
- (f) an affidavit to Providence Police Department from Mr. Luger re No Trespass Order; and
- (g) various recordings of conversations and meetings with PPSD staff concerning F. Doe.

PPSD stipulated to the entry in full of exhibits consisting of the web site material described in (a) – (f), above, and thus Petitioners' Exs. 2 – 7 were admitted in full. *See* Joint Exhibit 1.¹⁶ However, PPSD did object to the entry of the audio recordings on the web site, as well as to F. Doe's parents' separate motion to admit sound recordings of the roughly sixteen (16) hours of testimony taken before Mr. Luger in connection with the first level appeal from the SAO decision. Counsel for PPSD represented that the audio tapes were inaudible due to excessive background noise.¹⁷

In response, F. Doe's parents withdrew their motions as to both the recordings of PPSD employees and of the SAO appeal.

4. Discussion

The Commissioner is well aware that there is an increasing and justifiable concern that out-of-school suspensions are too readily employed as disciplinary measures. The problem is not unique to Providence, nor even to Rhode Island, and is especially prevalent in minority communities. *See* U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection, *Data Snapshot: School Discipline*, Issue Brief No. 1 (March 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>. Indeed, the Board

¹⁶ Petitioners' Ex. 1 consisted of their one-page appeal to the Commissioner.

¹⁷ As noted, counsel took the same position before the PSB, and thus much of the testimony was re-taken before the PSB.

of Education’s statutory predecessor adopted specific *Regulations for Governing Disciplinary Exclusions of Students from School* (as amended, 9/19/88) (the “State Suspension Regs.”), and thus, cases involving suspensions receive especially close attention.

Pursuant to the State Suspension Regs., PSB adopted a Code of Behavior (the “Code”) applicable to all schools within the PPSD. *See* Ex. B to Respondent’s Ex. B (transcript of PSB hearing on December 18, 2013). There are three levels of violations under the Code. Level 2 violations include: (a) chronic Level 1 behavior;¹⁸ (b) physical assault; (c) immediate threat of harm to self; (d) leaving school grounds without permission; and (e) leaving school building. *Id.*

The consequences listed in the Code with respect to a Level 2 violation include, among other things, suspension, as well as referral to the SAO. *Id.* Upon referral, the SAO conducts a hearing and decides the appropriate course of action, subject to an aggrieved parties’ right to appeal the decision to the Superintendent, and eventually if necessary, to the PSB. *Id.*

Here, the evidence---as recounted by the essentially unimpeached testimony of Dr. Scheller and Ms. Murphy Bradshaw, as well as by many others who testified before the PSB-- makes clear that F. Doe’s behavior on September 18, 2013, as well as prior to that day, constituted one (if not all) of the Level 2 violations noted in (a) – (e), above. Thus, Dr. Scheller was acting pursuant to the Code when she decided to suspend F. Doe and to refer his case to the SAO.

The evidence also makes clear that F. Doe’s parents are motivated by a genuine and sincere concern over their son’s welfare. Their adamant refusal to allow F. Doe to be evaluated

¹⁸ “Chronic” is defined as “three (3) or more instances of a similar behavior defined in Levels 1, 2 and 3 for which interventions are not having observable impact.” *Id.* Relevant Level One violations include: (a) defiance; (b) disrespectful language or gestures; (c) out of seat; (d) talking back; (e) refusal to follow directions; (f) leaving class without permission; (g) calling out; (h) yelling; (i) aggression; (j) pushing, shoving; (k) throwing items; and (l) harassment. *Id.*

by a team of PPSD professionals (the TPQ) was based in large part upon a lack of trust stemming from their belief that their son was being treated unfairly at Feinstein.

Yet, despite all the testimony and all the documents introduced by F. Doe's parents, there was scant evidence, either here or before the PSB, that F. Doe was in fact treated unfairly or inappropriately. Indeed, the evidence supports the conclusion that when dealing with F. Doe's behavioral issues, both Dr. Scheller and Ms. Murphy Bradshaw not only complied with the Code and other applicable procedural rules, they acted as dedicated professionals and went out of their way to do everything possible to enable F. Doe to stay at Feinstein. In fact, the evidence supports the conclusion that it was the failure of F. Doe's parents to permit the recommended referral and evaluation, rather than any inappropriate conduct by anyone at Feinstein, which prevented F. Doe from obtaining the help he needs in order to function at the school.

One might question whether it is sound policy for PPSD to "routinely" involve the police in matters involving a well-known parent's failure to comply with a school's access policy, as Mr. Luger testified was the case at the PPSD. If there ever was a chance that F. Doe's parents would trust PPSD to comprehensively evaluate their son, it certainly was not made more likely by the visit made to their home by the Providence Police Department, which seemed ill-advised under the circumstances. Indeed, Mr. Luger's December 30 letter to F. Doe's parents, *see* Petitioner's Ex. 6, suggests that the no trespass order was motivated more by outrage at the web site and Mrs. Doe's surreptitious recordings of school employees, than by any violation of school visitation policy.¹⁹

¹⁹ The Commissioner takes no position as to the legality of either Mrs. Doe's conduct in recording conversations while a volunteer at Feinstein, or of her creation of a web site. Even if Mrs. Doe is legally correct that: (a) her recordation of conversations did not violate state law under RIGL § 11-35-21(c)(3) (not unlawful to record "where the person is a party to the communication"); and (b) her creation of a web site did not violate the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, the evidence does not support the contention that these activities were relevant to the instant appeal, which concerns the decision to transfer F. Doe to Bailey, not the propriety of his mother's activities.

Yet, the fact that the PPSD's decision to involve the police may have been premature and counter-productive does not support overturning the substantive decision it made to transfer F. Doe to an elementary school nearer to his home with greater resources to deal with his behavioral issues. Nor does it support F. Does' parent's claim that their son, without benefit of appropriate diagnostic testing by qualified professionals, would be better off staying at Feinstein, which had clearly established its inability to effectively deal with his inappropriate behavior.

5. Conclusion

For all the above reasons, the appeal of F. Doe is hereby denied and dismissed.

Anthony F. Cottone, Esq.
Hearing Officer

Approved:

Deborah A. Gist
Commissioner of Education

Date: April 25, 2014