STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

J.P., as parent and next friend of STUDENT P. DOE,
Petitioner

v.

WILLIAM M. DAVIES, JR. CAREER & TECHNICAL HIGH SCHOOL,
Respondent

DECISION

Held: Parent's appeal of vocational high school's withdrawal of its provisional acceptance of her child is granted since: (1) evidence supported conclusion that student had "passed" all eighth grade classes, as required by high school's provisional acceptance letter; and (2) the high school was in a better position to avoid any loss or confusion by clarifying what specific numerical grades were required for admission.

October 14, 2014

1. Jurisdiction, Standard of Review and Burden of Proof

Petitioner, J.P. (the "Petitioner" or "Mrs. Doe"), as parent and next friend of STUDENT P. DOE, filed an appeal with the Commissioner seeking to reverse a decision of the Respondent, WILLIAM M. DAVIES, JR. CAREER & TECHNICAL HIGH SCHOOL ("Respondent" or "Davies"), a regional vocational school, to withdraw P. Doe's provisional acceptance into the school due to the fact that she allegedly failed several eighth grade courses. (A copy of the August 21, 2014 petition was accepted into evidence without objection as Petitioner's Exhibit 3).

Jurisdiction here is present pursuant to RIGL § 16-39-2.

After a voluntary, although ultimately unsuccessful, mediation session on September 16, 2014, a short evidentiary hearing with respect to the matter was conducted on October 6, 2014 before the undersigned hearing officer. P. Doe and her parents, P. Doe's mother and Petitioner, and P. Doe's father, Mr. Doe, appeared *pro se.* The Director of Davies, Victoria A. Gaillard-Garrick, appeared on behalf of the school, which was represented by Attorney Vincent F. Ragosta.

The Rhode Island Supreme Court has held on several occasions that appeals to the Commissioner under chapter 39 contemplate a hearing *de novo*. *See, e.g., Alba v. Cranston School Committee*, 90 A.3d 174, 184-85 (R.I. 2014) (quoting rule); *Slattery v. School Committee of City of Cranston*, 116 R.I. 252, 262, 354 A.2d 741, 747 (1976) ("one who appeals to the commissioner is entitled to '*a de novo* hearing' and not 'merely a review of [the] school committee action'"); *School Committee of City of Pawtucket v. State Bd. of Ed*., 103 R.I. 359, 364, 237 A.2d 713, 716 (1968) (commissioner's jurisdiction "considerably broader than that of this court in reviewing an appeal" since "it is clear that § 16–39–2 and precursory legislation give the commissioner of education the right to make a *de novo* decision in examining and deciding the issue involved").[1]

[1] 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).

However, the fact that the hearing is *de novo* does not negate the general presumption in administrative proceedings which "favors the administrators" and places the burden of proof upon the party challenging the action "to produce evidence sufficient to rebut this presumption." *See Larue v. Registrar of Motor Vehicles, Dept. of Transp.*, 568 A.2d 755, 758-59 (R.I. 1990), citing *Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir.1988).

2. Facts and Evidence

Unless noted, the following facts were not in dispute.

P. Doe attended eighth grade at the Nathan Bishop Middle School in Providence ("Nathan Bishop") during the 2013-14 school year. She applied to Davies because, according to Mrs. Doe, it had an excellent culinary arts program and P. Doe's ultimate goal was to enroll in such a program at Johnson & Wales University.

On or about February 7, 2014, Davies sent P. Doe a form letter stating that she had been "provisionally accepted for entrance into Grade 9 for September 2014." (A copy of the February 7 letter was accepted into evidence without objection as Petitioner's Exhibit 3). The letter went on to state that:

> **[y]our acceptance is contingent upon successfully passing all eighth grade courses or attending summer school to obtain passing grades for the eighth grade school year.** If you have not passed all eighth grade courses, your acceptance will be withdrawn.

Id. (emphasis in original).

P. Doe's "final" grades for eighth grade included two "D minuses" (representing between a 60 and a 63), in Spanish II and Algebra 1, and a "D" (representing between a 64 and a 66) in English. (A copy of P. Doe's final eighth grade report card from Nathan Bishop was accepted into evidence without objection as Petitioner's Exhibit 4).

Mr. and Mrs. Doe testified that they believed that P. Doe had "passed" all of her eighth grade courses and had "graduated" from Nathan Bishop, which was evidenced, they alleged, by the fact that

P. Doe had received no "F's" and had been permitted to attend graduation ceremonies at the middle school. In addition, Mrs. Doe alleged that she had been informed by P. Doe's guidance counselor at Nathan Bishop, as well as by Gina Silva, an official from the Providence Public School Department (the "PPSD"), that students who did not "graduate," but were merely being "socially promoted," were (unlike P. Doe) not permitted to attend graduation ceremonies at the middle school.[2]

On or about July 22, 2014, Ms. Gailliard-Garrick sent P. Doe a notice informing her that her provisional acceptance into Davies was "withdrawn due to multiple course failures for the eighth grade school year." (A copy of the July 22 letter was accepted into evidence without objection as Respondent's Exhibit 1). Ms. Gailliard-Garrick noted that in addition to minimum scores on certain standardized tests, students were required to pass all grades during the eighth grade school year to meet the minimum standard for admission to Davies.

In P. Doe's case, although the relevant standardized test scores were satisfactory, neither the "D minuses" nor the "D" were "passing grades," according to Ms. Gailliard-Garrick. Although she testified that she was not aware of any publicized policy regarding what constitutes a "passing" grade at Nathan Bishop, Ms. Gailliard-Garrick explained that she had discounted the fact that P. Doe was permitted to attend graduation ceremonies because, contrary to what Mrs. Doe had testified she had been told, Ms. Gailliard-Garrick claimed that she had been informed by officials at the school that all students at Nathan Bishop were permitted to attend graduation ceremonies, whether they had been "socially promoted" or had actually "passed" all grades.[3]

Thus, since she could not locate a meaningful definition of what was required to "pass" a course at Nathan Bishop, Ms. Gailliard-Garrick determined on her own that a student at Nathan Bishop would need a "70" to meet Davies' admission requirement, a conclusion that she testified she had reached based upon the fact that Davies itself, as well as certain other public school districts whose

[2] Davies' counsel did not object to the introduction of the hearsay testimony as such, but suggested that its hearsay nature should be considered by the hearing officer when evaluating its credibility.
[3] The *pro se* petitioner did not object to the introduction of this hearsay testimony.

students apply to Davies, had adopted "70" as the minimum passing grade.[4] Ms. Gailliard-Garrick's position was that since Nathan Bishop evidently did not have a meaningful definition of what constituted a "passing" grade, she did her best to fill this perceived gap with relevant information that was available, but at the same time she readily admitted that it was Nathan Bishop's policy—not Davies' policy, or the policy of some other school district—which was relevant. Significantly, Ms. Gailliard-Garrick admitted that there was no way for P. Doe or her parents to have known of her conclusion prior to their receipt of the July 22 letter from Davies withdrawing P. Doe's provisional acceptance.

Mr. and Mrs. Doe and P. Doe each testified that, based upon the information from various school officials, they had relied upon the fact that P. Doe had "passed" all her eighth grade courses and had "graduated" from Nathan Bishop, and by the time they were aware that Davies evidently required a minimum final grade of "70" in each subject, it was too late to enroll P. Doe in summer school, or to apply and gain her admission at another technical/vocational school with a culinary arts program, such as the Providence Career and Technical Academy, which, they alleged, has a long waiting list.

Since September, P. Doe has been attending school at a charter school—E-Cubed Academy in Providence—but still very much wants to attend Davies.

3. Discussion

Traditional contract law has been applied in cases involving both the public and private school admission process, *see* Elizabeth Bunting, *The Admissions Process: New Legal Questions Creep Up the Ivory Tower*, 60 Ed. Law Rep. 691 (West 1990), and suggests that: (a) P. Doe's application for admission to Davies can be viewed as an "offer," and (b) Davies' February 7, 2014 form letter stating that P. Doe had been "provisionally accepted" can be viewed as a "conditional acceptance," or "counter-offer," which P. Doe could "accept" by (c) "successfully passing all eighth grade courses or

[4] Notice is hereby taken pursuant to RIGL § 42-35-10 that students from Central Falls, Cumberland, Lincoln, Burrillville, North Smithfield, Smithfield, Pawtucket and Woonsocket are eligible to apply to Davies, and that *at least* two of the covered school districts, i.e., Lincoln and Smithfield, have promulgated policies setting "70" as necessary to "pass" a subject in middle school.

attending summer school to obtain passing grades for the eighth grade school year." *See* Petitioner's Exhibit 3. *See, e.g., Ardente v. Horan*, 117 R.I. 254, 259-60, 366 A.2d 162, 165 (1976) (stating general contract law principles).

The dispositive question, then, is whether P. Doe in fact passed all of her eighth grade classes at Nathan Bishop, thereby "accepting" Davies' counter-offer. The consideration necessary to contract formation would either be: (a) P. Doe's actual performance; or (2) her detrimental reliance on Davies' promise, evidenced by her (and her parents') failure to timely enroll P. Doe for summer school, or apply to another vocational/technical school.[5]

The Petitioner's claim that P. Doe "passed" all her eighth grade classes is supported by: (a) P. Doe's final report card, which makes no mention of any "failing" or "unsatisfactory" final grade. *See* Petitioner's Exhibit 4; (b) her testimony that both P. Doe's guidance counselor at Nathan Bishop and a PPSD official informed her that P. Doe had "passed"; and (c) her claim that Nathan Bishop students who did not pass were not permitted to attend graduation ceremonies, unlike P. Doe.

Davies presented no evidence to rebut (a) or (b), above, and so even if one were to assume that all students at Nathan Bishop were permitted to attend the graduation ceremonies (as Ms. Gailliard-Garrick testified she had been informed), the preponderance of the uncontradicted evidence would still support the conclusion that P. Doe had in fact passed all of her eighth grade classes and thus effectively accepted Davies' February 7, 2014 counteroffer.[6] Thus, Davies' withdrawal of P. Doe's acceptance was in error and violated its agreement with her.

Alternatively, even if one were to assume for argument's sake that the traditional elements of a contract were not present, contractual obligations may be enforced under the doctrine of constructive, or quasi, contract. *See, e.g., Hurdis Realty, Inc. v. Town of North Providence*, 121 R.I. 275, 279, 397

[5] Consideration, which can be defined as the "right, interest, profit or benefit accruing to one party" to a contract, or the "forbearance, detriment, loss, or responsibility, given suffered, or undertaken by the other party," *see Black's Law Dictionary* at 277 (West, 1979), is a necessary element of any enforceable contract.

[6] Although it is not necessary to reconcile the conflicting testimony or make any finding here as to whether students at Nathan Bishop are in fact "socially promoted," this should not be interpreted to suggest that the Commissioner in any way condones the practice.

A.2d 896, 898 (1979) (doctrine of constructive or quasi-contract applies to public and private entities and provides that "'the obligation arises, not from consent of the parties, as in the case of contracts, express or implied in fact, but from the law of natural immutable justice and equity'"). As was noted by the Supreme Court of Illinois in a not entirely dissimilar case involving the claims of various unsuccessful medical school applicants who alleged that the school had violated its contract with them by using unpublished admission criteria:

> [t]he right to recover on a 'constructive contract,' although phrased in contract terminology, is not based on an agreement between parties but is an obligation created by law. 'Such contracts are contracts merely in the sense that (they) * * * are created and governed by the principles of equity.'

Steinberg v. Chicago Medical School, 69 Ill.2d 320, 335, 371 N.E.2d 634, 641 (1977) (citation omitted).

While one may sympathize with Ms. Gailliard-Garrick's predicament, it hardly seems fair to P. Doe to hold her to a standard of which she could not possibly have been aware. As Ms. Gaillard-Garrick has admitted, it was the grading policy in effect at Nathan Bishop which was relevant, and P. Doe was told that this policy required merely her not getting an "F." Moreover, the reliance of P. Doe and her parents upon the representations of Nathan Bishop's guidance counselor and a PPSD official that a "D minus," although perhaps not commendable, was nonetheless a "passing grade," was reasonable, and their failure to timely enroll P. Doe for summer school, or apply to another vocational/technical school, understandable.

Placing the risk of loss on the entity in the best position to avoid the loss has been a guiding equitable principle of American and Anglo Saxon law for centuries. S*ee* Robert J. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 51 Ohio St. L.J. 1127, 1147 (1990). Applying the principle here leads to an obvious conclusion. Certainly, Davies was in a better position to avoid any loss by simply making clear what it meant by "passing all eighth grade courses" in its letter of provisional acceptance.

In short, Davies—which necessarily accepts applications from a variety of school districts which its director knew had in some cases differing definitions of "passing"— should have made clear that a grade of 70 or above in all courses was required for admission. Thus, it is Davies, not a reasonably unsuspecting student, which should bear the consequences of its failure to fully inform P. Doe of the conditions attendant to its provisional acceptance.

5. Conclusion

For all the above reasons, the appeal filed on behalf of P. Doe is granted and Davies is required to admit her to the school, forthwith.

For the Commissioner,

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Anthony F. Cottone, Esq.
Hearing Officer

Dated: October 14, 2014

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Deborah A. Gist,
Commissioner