

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

B. DOE

v.

BRISTOL-WARREN REGIONAL SCHOOL DISTRICT  
AND MOUNT PLEASANT ACADEMY

### INTERIM ORDER DECISION

Held: Parent's request for an Interim Protective Order to maintain her disabled child's placement at Mount Pleasant Academy is denied. Mount Pleasant Academy is a private school at which this student was placed by the Bristol-Warren Regional School District. Mount Pleasant Academy has determined that this student no longer meets the criteria for attendance at the school and his 504 team has recommended that he attend a different therapeutic day school in order to avoid further behavioral regression. Notice of the school's decision has been provided to the Bristol-Warren Special Education Director and the district has secured a placement for this student at another therapeutic day school. There is no legal basis for issuance of an interim protective order under these circumstances and neither the LEA nor RIDE has the authority to compel a private school to maintain an LEA placement.

DATE: November 3, 2016

## **Travel of the Case:**

On October 12, 2016 Doe's parent filed a request for issuance of an "Interim Stay Put Order" so that her son could continue in attendance at Mount Pleasant Academy, a private school located in Providence, Rhode Island. Doe's parent and Leslie Anderson, the Director of Special Education for the Bristol-Warren Regional School District had received notice on October 7, 2016 from the Director of this school that he had made a decision that Doe's "treatment and education should proceed in a different facility." The notice indicated that Doe would be allowed to remain in attendance through October 21, 2016 to allow the district time to find an alternate placement. On October 19, 2016 the Director informed both Ms. Anderson and Doe's parent that his placement would be extended for three additional weeks, up to and including Wednesday, November 9, 2016 if Bristol-Warren, as the LEA, required that time to secure a suitable placement for Doe.

The matter was assigned for hearing, pursuant to R.I.G.L. 16-39.3.2 which authorizes the Commissioner to issue interim protective orders as may be needed to ensure that a child receives education in accordance with applicable state and federal laws and regulations. Initially, only the school district as the LEA was noticed as a party to these proceedings, but upon request of Doe's parent and the district, Mount Pleasant Academy was provided with notice and asked to respond to Doe's petition.

On October 21, 2016 a hearing was held and the parties presented evidence in support of their respective cases. At the hearing, it became evident that Mount Pleasant Academy, which operates a program of special education approved by RIDE,<sup>1</sup> was required by Section 300.903(i) of the

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<sup>1</sup>The conditions for RIDE's approval of a program of special education for purposes of the Individuals with Disabilities Education Act, 20 USC §1400 et seq. apply equally in the context of Section 504 of the Rehabilitation Act of 1973, 29 USC §794 and its implementing Regulations, 34 CFR §104.1 et seq. The

Regulations Governing the Education of Children With Disabilities (effective October 9, 2013) to utilize written administrative procedures in the “emergency and early termination” of students. Mount Pleasant Academy took the position that it had complied with its written administrative procedures in terminating Doe’s placement, however both the hearing officer and counsel for Bristol-Warren expressed concern that the decision to terminate Doe’s placement had not been made at a meeting of his 504 team.<sup>2</sup> At the conclusion of the hearing, the parties agreed that a 504 team meeting would be scheduled and the issue of termination of Doe’s placement would be considered by the members of the team.

On October 24, 2016 the hearing officer wrote to the parties and requested the submission of additional exhibits so that a full and fair ruling on the request for an Interim Order could be made:

- A copy of Doe’s current 504 Plan;
- A copy of the decision of the 504 team after it met to consider Doe’s early termination from Mount Pleasant Academy;
- A copy of the decision of the 504 team as it may relate to Doe’s proposed enrollment at any different facility or school;

Counsel for Bristol-Warren submitted a copy of Doe’s 504 Plan that same day and indicated that a 504 meeting would be convened on October 28, 2016. The 504 team met as scheduled and a copy of the 504 team sign in sheet and meeting minutes were provided to the hearing officer. On October 29, 2016 Doe’s parent submitted a written statement and additional arguments in support of her request for an interim order. The Director of Mount Pleasant

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Director responded affirmatively when asked if the written procedures on “Early Termination of Placement” applied in the context of Section 504. See Tr. p.57; MPA Ex. A.

<sup>2</sup>Doe’s parent testified that she was unaware of any required administrative procedures that might be applicable to an early termination of her son’s placement. Tr. p.28; however, upon becoming aware of these written administrative procedures, she took the position that such procedures had not been followed and therefore the preconditions to termination of his placement at Mount Pleasant Academy had not been met. Tr. p.73.

Academy objected to this additional statement becoming a part of the record in this case and his objection was noted. The record in this case closed on October 31, 2016 and, although five (5) working days is allowed for a decision, the urgency of the issues prompts a more expedited decision.

**Factual Background and Positions of the Parties:**

The Bristol-Warren School District has fulfilled its obligation to provide Doe, a student with a disability who resides in the district, with a free appropriate public education by placing him in Mount Pleasant Academy for the last four and one-half years. This private school operates an approved program of special education and provides integrated, intensive clinical and educational services to children with emotional, behavioral, and learning difficulties. Doe has made considerable growth behaviorally and emotionally at this school and he is doing well academically. On April 7, 2016 his IEP was replaced by a Section 504 Accommodation Plan which calls for several accommodations, including a behavior management system which includes (when necessary) physical restraint as well as individual and group therapy with daily access to clinical supports. It continues to be the recommendation of his 504 team, as recently as its October 28, 2016 meeting, that he continue to receive all of these accommodations and that they be delivered in a therapeutic environment.<sup>3</sup>

According to the school's director, the psychiatrist at Mount Pleasant Academy, and the teachers who attended the October 28, 2016 team meeting, Doe requires the same level of care, but with a "fresh start" at another facility because he is no longer benefitting from his placement at Mount Pleasant

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<sup>3</sup> These recommendations were made by a consensus of the 504 team at its meeting. Doe's parent disagreed on the need for a specific reference to physical restraint in his accommodation plan and in the recommendation for a therapeutic environment. Her disagreement is indicated in the team meeting minutes of October 28, 2016.

Academy. The director testified that beginning in February of the 2015-2016 school year, Doe's behavior began to regress and he exhibited increasing disregard for program rules, disrespect for school staff, and made threats to other children and to staff members. In early October of this school year these behaviors escalated to the point that two members of the school staff approached the director separately with requests to increase the staff to student ratio in Doe's classroom, to address their concerns of increased safety risks.

The school's psychiatrist indicated by letter dated October 20, 2016 that Doe has become more defiant with staff, more disrespectful and gets into conflicts with peers. He has stopped working in therapy and refuses to participate in group therapy. In his opinion, Doe has plateaued in treatment to the point that he is no longer benefitting from his placement at Mount Pleasant Academy. Doe's parent disagrees with the assertion that he has plateaued and disputes the conclusion that he has regressed in the past twelve months. At the October 28, 2016 meeting, Doe's parent requested the reasons for the team's recommendation of a "fresh start." Doe's teacher displayed behavior charts and indicated that data this year does not show a "steady school year."<sup>4</sup> Doe's parent disagrees with the staff's conclusion that Doe is not benefitting from the therapeutic environment at Mount Pleasant Academy because he is not participating in therapy. However, the members of his clinical team affirm that this is so and are concerned that he will experience further behavioral regression unless he transfers to a different facility.

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<sup>4</sup> At the time of hearing, Doe's parent submitted behavior charts indicating that he had received high scores on behavior on several days during the month of October.

From the parent's perspective, both the October 7, 2016 decision of the school's director (to terminate his placement)<sup>5</sup> and the October 28, 2016 recommendation of his 504 team that he requires a "fresh start" in a different therapeutic environment are not supportable. Moving her son from Mount Pleasant Academy<sup>6</sup> to another school at this juncture will unnecessarily disrupt his eight grade year and cause him great stress and emotional turmoil. He will have to make yet another transition to high school at the end of this school year. Furthermore, the timeline now in place for this transition to occur is so short (November 9, 2016) that it is virtually impossible for her, with the district's assistance, to secure a suitable alternate placement.

The petitioner submits that at no point in the past has she agreed that Mount Pleasant Academy is not an appropriate placement for her son, despite the director's claim that she did so in mid to late July. She does not agree that it has been demonstrated that the school can no longer meet his educational and behavioral needs and she asserts that when his 504 team met on October 28, 2016 it did not make the required finding that Mount Pleasant Academy can no longer meet his behavioral and academic needs. She submits that there is nothing in her son's behaviors that could not be managed by the school and it is precisely these same behaviors that warranted his placement there in the first place.

If there has been a regression in behavior, it is because the director has refused to advance him to a class of older students who form his peer group. His frustration and depression have increased because his request to be placed in this classroom has been denied. A purported concern that a student (in the older class) and Doe were involved in a prior altercation

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<sup>5</sup> Petitioner's Ex.1 includes an October 7, 2016 email from the school's director, Jeffrey Brusini, notifying both Leslie Anderson, the director of Special Education for Bristol-Warren and Doe's parent of his decision.

<sup>6</sup> Mount Pleasant Academy educates students through Grade 8.

does not explain this decision because there is no current safety issue as the two students are now somewhat friendly. Doe's parent attributes both the decision to exclude her son from that classroom and the decision to terminate his placement to a conflict that has developed between her and the school's director.

The position of the Bristol-Warren school district is that when a private school notifies the LEA that it is no longer willing to maintain a student, for whatever reason, the obligation then falls on the school department to find another placement that can deliver the services in the document<sup>7</sup>, in this particular case in the 504 at a therapeutic day placement.<sup>8</sup> The district has offered to place Doe in a therapeutic day program at the Bradley School<sup>9</sup> and feels that by placing Doe there for implementation of his 504 Plan, it has fulfilled its obligation under 34 CFR Sec. 104.33 to provide him with a free appropriate public education. The district continues to work with Doe's parent to identify other available placements and to secure a placement that is agreed to by both parties.

Counsel for Bristol-Warren submits that the district cannot compel Mount Pleasant Academy, or any private facility, to keep a child beyond when they want to.<sup>10</sup> When presented at the hearing with the issue of the requirement for the 504 team to meet to make a decision with respect to termination of this placement, pursuant to the school's required "early termination" procedures, counsel agreed that a meeting needed to, and would be, convened to discuss whether or not Doe should remain at Mount Pleasant Academy or transition to a different facility. Although the meeting minutes from October 28, 2016 do not reflect that the district took a position on

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<sup>7</sup> services that are called for in an IEP or, as in this case, a 504 Plan.

<sup>8</sup> Tr.p.23.

<sup>9</sup> The meeting minutes of October 28, 2016, indicate that the 504 team, including the Petitioner and the LEA representative, Ms. Anderson, discussed at least two other potential placements for Doe.

<sup>10</sup> Tr. p. 61.

whether Doe's placement should be terminated at this time, counsel for the district submits that the district's position was and is that, given the breakdown in the relationship between family and school, Mount Pleasant Academy is no longer the best placement for Doe.

**Discussion:**<sup>11</sup>

The Petitioner has presented no legal argument in support of her request that the Commissioner enter an Interim Order compelling Mount Pleasant Academy, a private school, to continue his placement there. She has done her best to present a factually compelling case that there is no need to uproot her son from the school that he has attended for the last four years, where he is doing well academically and at a point so close to his anticipated transition to high school. She requests that an Interim Order maintain him in this private school because doing so is in his best interests. She contends that the school has not proven that it is unable to educate her son at this time. Doe's parent advocates very well for what she perceives as her son's best interests, but an independent review of both the facts and applicable provisions of education law do not establish that she is entitled to issuance of an interim order. The Commissioner, like the LEA, has no authority to compel a private school to continue an LEA's placement of a student in a private school setting.

If it were the Bristol-Warren Regional School District that sought to move Doe out of his current "placement" and into another "placement" the parent would have available recourse, but not without significant legal hurdles in order to obtain interim order relief. One of these initial hurdles would be that Section 504 does not include a "stay put" provision, either by

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<sup>11</sup> Given Doe's parent's need to consider alternate facilities and to work productively with the Bristol-Warren School Department in the next few days to secure a placement, the Discussion in this decision has been condensed.

statute or implementing regulations. A parent can invoke the “stay put” provision of the IDEA when a school system proposes a “fundamental change in, or elimination of, a basic element of the then-current education placement.” Laster, et al. v. District of Columbia et al., 394 FSupp 2d 60 (2005). However, when an LEA is presented with the decision of a private school that it will no longer accept a student, its obligation is to find a similar placement alternative that fulfills the requirements of the IEP during the pendency of administrative and judicial proceedings. Laster, supra at 65-66. Simply stated, the “then-current” education placement becomes “unavailable.”<sup>12</sup>

In most cases, a private school is not a proper party to an action under IDEA, or Section 504.<sup>13</sup> A private school is not an LEA (local educational agency) or an SEA (state education agency) and is not a recipient of federal funds operating a public elementary or secondary education program. Private schools, therefore, have no responsibility to meet the requirements of IDEA or to provide a free appropriate public education to students under the Regulations implementing Section 504.<sup>14</sup> There has been no proof that Mount Pleasant Academy has acquired any status beyond that of a private school providing the services called for by Doe’s current Section 504 Plan. There has been no showing that the school functions as an alter-ego or instrumentality of the state or an LEA and, in fact, it is a school operated by Family Service of Rhode Island, a non-profit corporation. Thus, claims arising under IDEA and

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<sup>12</sup> See the discussion in Rapp, Education Law, Section 10C.10(3) (c) “Unavailable Placement”.

<sup>13</sup> But see St. Johns bury Academy v. D.H. 20 F. Supp. 2d 675, (D.Vt. (1998), a case in which a private school was found to be a “hybrid” institution (with markings of both a private and a public school) as the educational provider for virtually all of a district’s secondary students and thus subject to IDEA. It must also be noted that a private school would be a proper party to certain actions under Section 504 if it were a recipient of federal financial assistance and the claim was one of illegal discrimination on the basis of disability. Also R.I.G.L. 42-87-2 prohibits discrimination on the basis of disability by entities regulated by the state (such as a private school operating an approved program of general or special education) and confers jurisdiction with respect to violations of this statute in elementary and secondary education to RIDE. The Petitioner’s claim arises under provisions requiring the provision of a free appropriate public education.

<sup>14</sup> See 34 CFR § 104.33 “Free appropriate public education”.

Section 504, including those seeking the procedural safeguard of IDEA’s “stay put” provision, are not available to maintain a student’s placement when a private school, rather than a LEA, has determined that the student’s placement will terminate.

Mount Pleasant Academy conducts a program of special education approved by RIDE and is required by applicable state regulations<sup>15</sup> to use written administrative procedures for:

...early termination of children including prior consultation with the special education director in the school district of the child’s residence in order to provide for an orderly transfer of responsibility back to this special education director.

Although the language of the written procedures applicable to early termination from Mount Pleasant Academy is not without ambiguity, it is our conclusion that the school has substantially complied with the written administrative procedures that it currently has in place.<sup>16</sup> See Exhibit A (attached hereto as Appendix A). The record indicates that Doe’s 504 team has met and by consensus determined that he would be better served in an alternative setting at this time. Although the precise finding that the school is “unable” to meet Doe’s needs was not made, we do not construe this language

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<sup>15</sup> Specifically Section 300.903 (i)(1) of the Regulations Governing the Education of Children With Disabilities (effective October 9, 2013).

<sup>16</sup> R.I. Regulations require “written administrative procedures” for early termination so that an orderly transition will be made. Some states have gone further to require a substantive determination before early termination can occur, e.g. that the current placement cannot implement the IEP and provide FAPE. See New Hampshire Rules For The Education of Children With Disabilities, Ed 1114.12 “Change in Placement or Termination of the Enrollment of a Child With a Disability.” New Jersey requires that when a receiving school is considering the termination of a student’s placement prior to the end of the student’s academic year, the receiving school must contact the district board of education, which shall convene an IEP meeting and determine the student’s new placement. The student may be terminated only after written notice of the new placement has been provided to parents. Such termination “shall be in accordance with the provisions of the contract between the receiving school and the district board of education.” 6A:14-7.7 (a); Massachusetts requires that termination, even in emergency circumstances, be preceded by notice to the enrolling public school district and the district’s assumption of responsibility for the student. 603 CMR 28.09 (12)(b);

literally, so as to preclude Mount Pleasant Academy from making a decision to terminate a student's placement for other sound reasons. Such an interpretation would go beyond the requirement for written administrative procedures and would hamper the school's discretion to terminate a student's placement when the student no longer met the criteria for attendance or was no longer benefitting from the school's therapeutic program. Such was the finding of the school's director and the determination of the 504 Team in this case.

The Petitioner's request is, for the foregoing reasons, denied.

Since the situation is not shown to be an emergency termination, we would request that Mount Pleasant Academy continue to work with the district to provide sufficient time for it to secure a placement which is acceptable to the Petitioner. The district has indicated that it would prefer that Doe's placement be acceptable to his parent. Since Mount Pleasant Academy is effectuating Doe's termination at a point in the school year when many schools have already filled available seats, we request, but do not direct, that the school extend Doe attendance until an alternative placement is secured.

For the Commissioner,

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Kathleen S. Murray,  
Hearing Officer

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Ken Wagner, Ph.D.  
Commissioner

DATE: \_\_\_\_\_

