

STATE OF RHODE ISLAND  
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

Student R. Doe

v.

Lincoln School Committee

DECISION

Held: Student Doe's parents will not be in violation of Rhode Island's compulsory attendance law for their child's absence from school for 24 of the 30-hour school week so that she can receive medically-necessary Applied Behavioral Analysis (ABA) therapy according to a schedule that gives her the energy and stamina necessary to benefit from such therapy. In developing an IEP based upon Doe's significantly-shortened school week, her IEP team will provide her with a free appropriate public education when it develops a program of general education, special education and related services that is reasonably calculated to enable her to make progress toward her goals in light of her circumstances at this time. The IEP team must convene quarterly to determine if Doe's school week may be increased to provide for additional educational services, without compromising her receipt of medically-necessary ABA therapy.

DATE: June 26, 2017

## Travel of the Case and Background:

On March 21, 2017, counsel for Doe's family filed a Hearing Request with Commissioner Ken Wagner regarding what they viewed as the Lincoln School Department's refusal to reasonably accommodate Doe's need for medically-necessary ABA therapy. The family had requested that Doe's school schedule continue to be significantly reduced so that she could benefit from intensive one-on-one ABA therapy provided in her home. With the documentation provided to the family's medical insurer that thirty-six (36) hours of ABA therapy is medically-necessary and appropriate pursuant to R.I.G.L. 27-20.11-1 et seq., Doe has been approved for thirty-six (36) hours of insurance-funded ABA behavioral therapy. The district sought to increase the number of hours that Doe spends in school from three mornings per week to five mornings during the 2016-2017 school year. It was communicated to the parents that their child's attendance for five half-days during the school week was determined by the IEP team to be required in order to provide her with a free appropriate public education (FAPE). An IEP calling for an increase in the number of hours Doe would be required to spend in school was rejected by Doe's parents, and the resulting dispute ensued.

Jurisdiction to hear this dispute arises under R.I.G.L. 16-39-1 and R.I.G.L. 42-87-5(c).<sup>1</sup>

## Issues

- Does Student Doe's need for Applied Behavioral Analysis (ABA) therapy, which her doctors have certified as medically necessary, require that the Lincoln School Department excuse her attendance at school for all but six (6) hours of the school week?
- Would an IEP developed by Doe's IEP team providing her with a program of general and special education and related services for six (6) hours of the school week provide her with a free appropriate public education?

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<sup>1</sup> The hearing request filed by counsel for Doe's parents alleges discrimination on the basis of Doe's disability, inter alia, in refusing to accommodate her disability-related need for a school attendance schedule which will enable her to receive her home-based, medically-necessary ABA services, in violation of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Discrimination on the basis of disability is also alleged to result from the district's conditioning her receipt of one-on-one paraprofessional support on her parents' relinquishing her right to receive medically-necessary and statutorily-mandated medical services in the nature of ABA therapy.

## Findings of Fact:<sup>2</sup>

- Doe is currently seven (7) years old and lives with her parents in Lincoln, Rhode Island. She has a diagnosis of autism and, since the age of three (3), has received a program of intensive, one-on-one ABA therapy provided in her home as well as a program of special education provided by the Lincoln School Department.
- Until the 2016-2017 school year, the district and Doe's parents agreed upon her school schedule.<sup>3</sup> However, during the 2016-2017 school year, when Doe was in first grade, the district sought to increase the number of hours Doe attended school. Members of her IEP team were concerned that increased educational services were needed in order for Doe to meet her IEP goals and objectives.
- Through its Director of Student Services, the district notified Doe's parents that it took the position that more time in school was needed for Doe to be provided with FAPE. The Director also communicated that she was uncertain that parents had provided sufficient documentation to excuse Doe's attendance from school to the extent that her parents sought to do so.
- The IEP team reconvened to review and revise Doe's goals and objectives to align with a school schedule in which Doe would attend school for half of the day, five days per week. Doe's parents rejected this IEP and on December 9, 2016, they were notified that the district was therefore not able to provide special education services to Doe, including the 1:1 paraprofessional assigned to provide supervision to insure her physical safety.
- Since Doe requires the services of a one-on-one aide so that she does not risk injury from climbing dangerously high or from eloping, she has not attended school since her parents' rejection of her IEP and the district's discontinuation of special education services.
- Doe currently requires thirty-six (36) hours of intensive, one-on-one ABA therapy as medically-necessary and appropriate treatment of autism. Because of her young age, attention span, energy<sup>4</sup>, and the availability of certified providers of

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<sup>2</sup> The facts in this case are not in dispute. The parties stipulated to certain facts at a pre-hearing conference held on May 9, 2017 and to other facts in a written Stipulation filed with the hearing officer on May 17, 2017.

<sup>3</sup> Doe attended school three mornings a week and received educational services in accordance with her IEP.

<sup>4</sup> Doe's stamina does not permit a different or later schedule for her ABA therapy.

this behavioral therapy, her schedule for ABA therapy includes four full days, three of which are school days, and two half-days.<sup>5</sup> This schedule enables her to attend school for only six (6) hours, i.e. three (3) hours on each of two school days.

- Student Doe’s Board Certified Behavior Analyst (BCBA) provides ABA therapy that addresses a variety of learning readiness skills during the 36 hours per week that she works with her.

### **Positions of the Parties:**

#### **The Appellants:**

The Appellants want their daughter to attend school and receive educational services, including special education and related services; however, at the current time she is able to attend school for only six hours per week. Given the intensity of her in-home, one-on-one ABA therapy at this time, she must be absent for a considerable portion of the school week. Although the district has suggested to Doe’s parents that they petition to home school their daughter for all or part of the school week, this is not an acceptable alternative from their perspective because characterizing ABA therapy as a program of “home instruction” could jeopardize the funding currently required of their medical insurer. At this point, it is important that Doe receive both intensive ABA therapy at the time of day when she has the stamina and energy to benefit from it and spend her remaining time in a school environment where she can receive speech/language therapy, occupational therapy and be with other children for part of the school week.

#### **Lincoln School Department:**

The district agrees that Doe’s ABA therapy is medically necessary and, at this age, must be provided according to a demanding schedule that precludes her school attendance for all but six (6) hours of the school week. However, the School Department views such a reduced school schedule as problematic in two respects:

- (1) Is Rhode Island’s compulsory attendance law violated?

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<sup>5</sup> She has a full day of therapy on Saturday. Providers are not available on Sundays.

(2) Will the Lincoln School Department provide Student Doe with FAPE with a school day/week that is substantially reduced to the extent required for her receipt of medically-necessary ABA therapy?

The School Department is aware of the Commissioner's ruling in *Student G. Doe v. Cumberland School Committee*, 026-13, decision dated December 4, 2013. This decision has been cited by the Appellants as authority for Doe's attendance to be excused to the extent required for her to receive medically-necessary therapy as requested by her parents. From the district's perspective, however, the absences sanctioned by the Commissioner in *Student G.* were de minimis and did not rise to the level of a substantial portion of the school week. In addition, unlike the situation in *Student G.*, it will not be possible to make up the educational services Doe would otherwise receive in the course of a more robust school week. Hence, the district has concerns about meeting its obligation to provide her with FAPE.

In the case of *Student G. Doe*, the Commissioner upheld a student's early release at 2:15 p.m. when the school day ended at approximately 3:20 p.m. so that he could receive medically-necessary ABA therapy in three-hour blocks of time after school each day. The IEP team was directed to develop an alternate means of providing the instruction missed during *G. Doe's* limited absences as a reasonable accommodation to the student's disability. In the case currently before the Commissioner, the extent of Doe's contemplated absences far exceeds those in *Student G. Doe, supra*. Making up 24 hours of instructional time is simply not feasible in light of Doe's current ABA therapy schedule. Although the parties have stipulated that learning readiness skills are being addressed by Doe's one-on-one BCBA, a substantially-reduced level of district-provided educational services would continue for as long as her condition requires this intensity of ABA therapy. Despite the fact that reduced educational services would be provided at the request (and with the consent) of Doe's parents, the district views such a situation as tantamount to a parent's withholding of consent to some, but not all, special education services proposed by the IEP team. Federal guidance<sup>6</sup> indicates that parents cannot "cherry-pick" services. If a district does not agree about whether a child would be provided with FAPE if the child did not receive a particular service, the parent may revoke consent to services "in their entirety" or may use the due process procedures to obtain a ruling that the service with

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<sup>6</sup> See Federal Register Vol. 73, December 1, 2008 page 73011 and the discussion of Section 300.300 (b)(4) of the IDEA Part B Regulations.

which the parent disagrees is not appropriate for their child. The Lincoln School Department seeks to insure that FAPE requirements are being met and seeks guidance from the Commissioner on these issues through resolution of this dispute.

## DECISION

This case presents important issues related to compulsory education and the provision of a free appropriate public education to students with disabilities in Rhode Island. Two general legal principles are at work in this case. First is the legal entitlement of children with disabilities conferred by the Individuals With Disabilities Education Act (IDEA) and by state law.<sup>7</sup> Under IDEA, each eligible child with a disability is entitled to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child's unique needs and that prepare the child for further education, employment, and independent living. 20 U.S.C. §1400 (d) (1) (A). The second principle, set forth in Rhode Island General Laws 16-19-1, entitled "Attendance required" states that:

- (a) Every child who has completed, or will have completed, six (6) years of life on or before September 1 of any school year, or who is enrolled in kindergarten, and has not completed eighteen (18) years of life, shall regularly attend some public day school during all the days and hours that the public schools are in session...

School attendance is not compulsory if the parent, or other person having control of the child proves that:

...the physical or mental condition of the child was such as to render his or her attendance at school inexpedient or impracticable...

Compulsory education statutes apply to students with disabilities in the same manner as they do to students without disabilities. Frequent and/or extensive absences from school, even for reasons of receiving medically-necessary treatment, may affect the student's ability to make adequate progress, access the general education curriculum and eventually to meet graduation requirements. Generally, any decision to shorten the school day (or week) of a student with a

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<sup>7</sup>20 U.S.C. §1400 et seq. Rhode Island General Laws 16-24-1 requiring the school committee of the city or town where a child with a disability resides to provide "the type of special education that will best satisfy the needs of the child with a disability..." in accordance with the Council on Elementary and Secondary Education's Regulations Governing the Education of Children With Disabilities.

disability is made by the members of the student's IEP team, since such decision must be for a specific purpose and designed to meet the student's unique needs. The record in this case reflects that there have been prior discussions of Doe's IEP team with respect to these issues.<sup>8</sup> Some members of the team have concerns, expressed by district counsel at the time of hearing, that by excusing Doe's absence to accommodate her intensive ABA treatment schedule, and in providing diminished educational services to her in what will be grade 2 next year, their decision may violate compulsory education requirements and may also undermine her receipt of FAPE.

The caution and concern of Student Doe's IEP team are well taken. The Commissioner's decision in the case of *Student G. Doe v. Cumberland School Committee*, cited above, (a case involving a request for early release for receipt of medically-necessary ABA therapy) established that "each request for early release must be reviewed and determined on its own merits."<sup>9</sup> The Commissioner determined that "individualized determinations must be made as to whether a child's physical or mental condition is such as to render his or her attendance at school inexpedient or impracticable." Furthermore, the 2013 decision clearly placed upon parents the burden of proof of presenting documentation that the child is not required to be at school "during all the days and hours that the public schools are in session."

A child with a diagnosis of Autism Spectrum Disorder (ASD) who is evaluated and determined eligible for special education has a developmental disability that falls within an eligible disability category established by IDEA and R.I. Board of Education Regulations Governing the Education of Children with Disabilities (2013). There are a number of sub-categories of this disability set forth in the Regulations. There is no one-size-fits-all approach to medical treatment, behavioral therapy, or educational programming for these children. Some degree of variability results from whether or not the child with ASD resides in a state that has passed legislation requiring insurance companies to provide medical insurance coverage for autism treatment.<sup>10</sup> In Rhode Island, medical coverage for treatment of autism spectrum disorders is required, with certain limited exceptions. A dollar amount limitation on coverage for ABA therapy, previously limited to \$32,000.00 per person per year, was removed by the General Assembly by an amendment to

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<sup>8</sup> Evidently the team last constructed an IEP which would require Doe to attend school five (5) half days.

<sup>9</sup> See page 16 of the decision.

<sup>10</sup> See "Autism, Insurance and the IDEA: Providing a Comprehensive Legal Framework" by Colleen D. Holland, *Cornell Law Review*, Vol 95:1253.

R.I.G.L. 27-20.11-3 in 2015.<sup>11</sup> In Rhode Island, coverage is conditional upon the provider being able to “furnish medical records or other necessary data which substantiates that initial or continued treatment is at all times medically necessary and appropriate.” See 27-20.11-4. This statute also envisions that, for some children with ASD, services required to be funded by Section 27-20.11-3 may also be a related service required to be provided under IDEA.<sup>12</sup>

This statutory scheme underlies and reinforces the approach taken in the Commissioner’s prior decision in Student G., i.e. that generalizations cannot be made with respect to legal obligations affecting children with autism spectrum disorder. Individualized determinations must be made and each case must be determined on the facts presented.

The parties have stipulated that Doe is currently receiving thirty-six (36) hours per week of medically-necessary and appropriate treatment funded by the family’s health insurance. Doe is making progress, but at this time the intensity of her ABA therapy has increased, not decreased. Her ABA treatment schedule precludes her attendance at school for all but six hours of the “days and hours that the public schools are in session”. Based on these facts, we find that her absences from school for the purpose of receiving intensive, one-on-one ABA therapy in her home are excused. This ruling does not stand for the proposition that an IEP team or other authorized school officials may or must shorten a student’s school day or week to accommodate all regularly-scheduled non-school medical or therapeutic appointments. As with the facts in Student G. v. Cumberland School Committee, we find in this case that the scheduling of Doe’s therapy during hours of the school day is required in order to treat her autism effectively. As in the prior case, we find it inadvisable to compromise the effectiveness of Doe’s treatment by requiring that she be present in school during the times when she must be at home to receive this therapy.

A “free appropriate public education” or FAPE includes special education and related services that are provided through an individualized education program.<sup>13</sup> “Special education” is defined

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<sup>11</sup> See P.L. 2015, ch. 141, art.5 §5, eff. June 30, 2015.

<sup>12</sup> See R.I.G.L. 27-20.11-6 which provides that “Nothing in this section shall be construed to alter any obligation of a school district or the State of Rhode Island to provide services to an individual under an individualized family service plan or an individualized education program, as required under the federal Individuals with Disabilities Education Act, or the provision of services to an individual under any other federal or state law...”

<sup>13</sup> See R.I. Regulations Governing the Education of Children with Disabilities, effective October 9, 2013. Section 300.17. for the full list of FAPE components.



as specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.”<sup>14</sup> “Specially designed instruction” means:

Adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>15</sup>

Taken together, the definitions cited above require that services outlined in an eligible student’s IEP be tailored to the unique needs of the student. This includes the duration of services, both in time and amount. Student Doe’s unique needs include her disability-related need for intensive medical treatment that requires her to be absent from school for a substantial portion of the school week at this time. It is this schedule, and not her parents’ desire to “cherry pick” from a menu of services presented in a more extensive IEP, that sets parameters on her educational programming at this time. Doe’s shortened school week will of necessity require the members of her IEP team to adapt and align her goals and objectives and to describe a reduced level of educational services than would otherwise be provided to her. The members of the team must develop Doe’s IEP in conformity with the requirements set forth in Sections 300.320-300.324 of the Regulations. In doing so, we find that the Lincoln School Department will be providing Student Doe with a free appropriate public education, as defined in Section 300.17 of the Board of Education Regulations.<sup>16</sup>

Doe’s need for a shortened school week and reduced level of educational services must be closely monitored by the district so that, as soon as her condition and treatment needs permit, her time in school can be increased. The IEP team has an ongoing obligation to make sure not

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<sup>14</sup> Id. Section 300.39(a).

<sup>15</sup> Id. Section 300.39(b) (3).

<sup>16</sup> This conclusion is consistent with the policy established by the R.I. General Assembly in its enactment of R.I.G.L. 27-20.11-1 et seq. In essence, the General Assembly has identified two funding streams for ABA therapy- one medical insurance and the other educational funding when ABA therapy is determined to be a “related service” required to provide a student with FAPE. Foreclosing a student from receipt of intensive (and expensive) ABA therapy covered by medical insurance would place heightened pressure on educational programming and on sources of educational funding. Arguments that ABA therapy is a related service required in order to provide FAPE for certain students may be bolstered by the recent U.S. Supreme Court decision in *Endrew F. v. Douglas County School District RE-1*, 580 U.S. \_\_\_\_\_m 2017 U.S. LEXIS 2015 (March 22, 2017).

only that her disability-related needs are met, but also that Doe is involved in and makes appropriate progress in the general education curriculum. At present, medical treatment of her disability will have an impact on her access to and progress in the general education curriculum to an undetermined degree. Doe’s parents and the other members of her IEP team must continue to work together to lessen this impact. Quarterly IEP reviews will enable Doe’s IEP team to review all relevant documentation, confirm the status of her treatment needs and, if possible, lengthen her time in the school setting.

Doe’s parents’ contention that Doe’s treatment needs entitle her to a shortened school week as a “reasonable accommodation” to her disability need not be addressed in this decision. The Lincoln School Department did not take the position that a shortened school week was an unreasonable accommodation, but rather that Doe’s absences may not be legitimate under our compulsory education statute. Therefore, our ruling on the compulsory attendance issue obviates the need to rule on whether Doe is entitled to a shortened school week as “reasonable accommodation” to her disability under Section 504.

The appeal is sustained.

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Kathleen S. Murray  
Hearing Officer

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Ken Wagner, Ph.D.  
Commissioner of Education

DATE: June 26, 2017