

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

PARENT OF STUDENT P. DOE

V.

PROVIDENCE SCHOOL BOARD

**DECISION ON REQUEST
FOR REASONABLE LITIGATION EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Held: The Petitioner's claim for reimbursement of reasonable litigation expenses under the Equal Access to Justice Act is denied because she is not a "prevailing party" and because the Providence School Board was substantially justified in actions leading to the hearings and in its position during the proceedings of May 16, 2012 and May 29, 2012.

DATE: September 19, 2012

Travel of the Case:

On May 10, 2012 Commissioner Deborah A. Gist received an Interim Protective Order Hearing Request on behalf of Mrs. P. Doe, the parent of a student enrolled in Providence. The request for hearing indicated that her daughter, a student at Classical High School, had been denied access to school since May 9, 2012 despite the submission of documentation confirming that she had been medically cleared to resume school attendance following her discharge from a local hospital. Mrs. Doe also sought enforcement of the Board of Regents' Regulations Governing the Education of Children with Disabilities to require the district to follow up on her request for a determination of whether her daughter was eligible for special education services. She alleged that the district had failed to schedule an eligibility determination meeting within the regulatory timeframe of sixty (60) days.

This matter was assigned to the undersigned, and a hearing was scheduled for May 16, 2012 at which time preliminary arguments and evidence were presented by both parties. The hearing was then continued at the request of counsel for the Providence School Board because the Board had not been able to secure the attendance of a witness it viewed as essential to its case. The witness was a physician who had treated Student Doe during her recent hospital stay. A continuance was granted by the hearing officer based upon the School Board's argument and initial evidence demonstrating that there was some factual basis for the concern that Student Doe's return to the school setting posed a danger to herself and/or other students and staff members at Classical High School. Upon the granting of the continuance, the Petitioner decided that in the interim she would accept tutoring services that the district had previously offered.

When the hearing reconvened on May 29, 2012, counsel for the School Board placed on the record the fact that she was still unable to secure the attendance of Student Doe's treating physician. She did, however, proceed to call Student Doe as a witness and, after a series of questions directed to her, withdrew the Board's objection to her re-entry to Classical High School. Counsel for the Board indicated that Student Doe would be allowed back into school the next day without any conditions placed upon her return. The parties then agreed that they would work together on a short-term strategy to prepare Student Doe for certain exams that were scheduled for the following week. It was also agreed by the parties that exams in other subjects would be deferred until after Student Doe could receive additional tutoring and

complete outstanding assignments in these subjects. The basis for additional tutoring was that Student Doe's illness had resulted in her intermittent school attendance during the year.¹

The hearing officer retained jurisdiction of the matter so that any dispute with respect to the short-term strategy to prepare Student Doe for the exams she would be taking the following week could be resolved quickly. It was agreed by the parties that counsel for the Petitioner would then submit his request for attorneys' fees² with a supporting memorandum, and that counsel for the School Board would then submit her response. The Petitioner's counsel filed his Amended Request for Litigation Expenses on August 2, 2012 and counsel for the Providence School Board filed her Objection to this Request on August 20, 2012. After requesting leave to file a response to the Board's Objection, counsel for the Petitioner did so on August 31, 2012. The record with respect to the issue of the Petitioner's entitlement to reasonable litigation expenses closed on September 13, 2012 when the hearing officer received a copy of the transcript of the hearing.

Under R.I.G.L. 42-92-3 the decision of the "adjudicative officer" (in this case the undersigned) must be made a part of the record and include written findings and conclusions. Also, pursuant to the statute, no other agency official may review the award. Findings and conclusions with respect to the Petitioner's request are set forth below:

Findings and Conclusions:

- The Request for an Interim Protective Order filed by the Petitioner under R.I.G.L. 16-39-3.2 was not resolved by formal decision of the Commissioner, by a consent decree, or by any other "favorable ruling on the merits" of this matter.³ This dispute was resolved when counsel

¹ Additional academic support, including tutoring if necessary, is required in such cases, pursuant to Section G-14-1(e) of the Basic Education Program (June 4, 2009)

² Counsel had indicated in letters to Commissioner Gist dated May 14, 2012 and May 17, 2012 that if he was successful with either of the interim order requests on the Petitioner's behalf, it was his intent to seek attorney's fees for this action. He confirmed that he would be making a request under R.I.G.L. 42-92-1 at the time of hearing. That part of the interim order requested to compel an evaluation team meeting was moot at the time of hearing on May 16, 2012, since the eligibility team was scheduled to meet that afternoon.

³ In his August 31, 2012 Response Reply to Providence's Objection, counsel argues that the Hearing Officer issued a "directive" to the district to provide tutoring services and retained oversight to ensure that this occurred. He argues that such action constitutes a favorable ruling on the merits and therefore the Petitioner is a "prevailing party" under the Equal Access to Justice Act. We would note, however, that the record reflects that prior to the hearing and at various points during the May 16, 2012 hearing, the district offered to provide tutoring to Student Doe for the remainder of the school year. See Transcript at pages 8, 10-11, 19-20, 30-32. At the conclusion of the May 16, 2012 hearing, counsel for the Petitioner accepted tutoring on his client's behalf until the hearing could be concluded and a decision issued. Tr.p.73.

for the Providence School Board withdrew the district's objection to Student Doe's return to school during the second day of hearing, May 29, 2012. Tr. pp. 114-116.

- The Providence School Board's reason for denying the Petitioner's daughter access to Classical High School after her discharge from the hospital was factually supported. See PSB Ex. A and B⁴ and testimony of Paula Shannon, Chief Academic Officer of the Providence School Department. Tr. pp. 27-30.
- Throughout the period May 8, 2012 through May 29, 2012 (the date of the second hearing in this matter) the Providence School Department's denial of Student Doe's access to her regular high school environment was substantially justified by a legitimate concern that her attendance posed a danger to her safety and the safety of other students and staff at Classical High School. PSB Ex. A and B and testimony of Paula Shannon at pages 27-30.
- The Providence School Board has a legal duty under common law to protect the health, safety and welfare of its students during their attendance at school. Staff of the public schools act *in loco parentis*. Under state law, R.I.G.L. 16-2-17 students and staff in our public schools also have a "right to a safe school".⁵ In light of the evaluations that district officials had received, and in particular the concerns expressed therein with respect to Student Doe's fire-setting behaviors, along with the staff's knowledge of her recent hospitalization, the Providence School Department had a duty⁶ to protect students and staff from any unreasonable risk of harm that may have been created by Student Doe's return to school.
- The position of the Providence School Board throughout the proceedings, i.e. that the direct testimony of Student Doe's treating physician was needed to substantiate that Student Doe's return to school did not pose a threat to her safety or the safety of others⁷ was a position that was reasonable and substantially justified. In light of the evaluations it had received with

⁴ Both Exhibits A and B were marked as full exhibits according to the record of the hearing of May 16, 2012. Tr. pp. 35-36.

⁵We should note that IDEA establishes specific rules and procedures for the change in placement/exclusion from school of students eligible for special education. The procedural protections for special education students extend to those students who have been referred by their parent for a determination of eligibility, as Student Doe had been at the time of these proceedings. These procedures apply to disciplinary exclusions and to situations in which an LEA believes that "maintaining the current placement of a child is substantially likely to result in injury to the child or others". See Section 300.532-300.534 of the Rhode Island Board of Regents for Elementary and Secondary Education Regulations Governing the Education of Children With Disabilities (July 1, 2010).

⁶ It could be argued that given such information, the district had a "special duty" to students and staff at Classical High School to protect them from any unreasonable risk of harm.

⁷ See Tr. pp. 11-12.

respect to Student Doe's fire-setting behaviors and how they were affected by stress, together with the timing of her release from the hospital just prior to exams, the district acted reasonably and with substantial justification in refusing her re-entry pending her doctor's testimony in this matter.

Discussion

Based on these findings and conclusions, the application of the Petitioner for an award of reasonable litigation expenses incurred in connection with these interim order proceedings is hereby denied. The record in this matter reflects that the attorneys for both parties provided expert legal representation to their respective clients and performed a voluminous amount of work in a very short time frame. Interim order requests, and particularly matters involving students excluded from school, are expedited, as they should be. Counsel for both parties navigated a complex area of education law and worked under difficult circumstances to ensure that their respective clients' legal rights were protected.

Kathleen S. Murray
Hearing Officer

Date: September 19, 2012