

STATE OF RHODE ISLAND

COMMISSIONER OF EDUCATION

DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES

v.

FOSTER-GLOCESTER REGIONAL SCHOOL DISTRICT

v.

RHODE ISLAND DEPARTMENT OF EDUCATION

**Decision**

Held: Foster-Glocester, as the school district of residence under R.I.G.L. 16-64-1.1, is financially and educationally responsible for child in DCYF care who was placed by the Family Court at the Bennington School in Vermont for non-educational reasons.

Date: July 7, 2014

## **Introduction**

This is a request by the Department of Children, Youth and Families (DCYF) to assign the financial and educational responsibility for student Doe to the Foster-Glocester Regional School Department pursuant to chapter 64 of Title 16 of the General Laws of Rhode Island.

## **Background**

Student Doe is a resident of Glocester, Rhode Island. She has been identified as a child with a disability. Her last individualized education program (IEP) with the Foster-Glocester Regional School Department placed her in a self-contained class in a district school building.

In the summer of 2013, Doe's guardian ad litem asked the Rhode Island Family Court to place Doe at the Bennington School in Bennington, Vermont. The Family Court ordered a placement at the Bennington School on August 1, 2013. In so ordering, the Court found that there were no suitable in-state facilities available for Doe, that Doe needed an individualized treatment plan, and that the placement at the Bennington School was in the child's "best interest." DCYF was ordered to fund the placement and pursue its administrative remedies to seek reimbursement from the LEA. [Petitioner's Exhibit 4].

Doe's case was reviewed two months later. On October 3, 2013, the Family Court entered a formal decree finding, in part, that:

- The Bennington School is a residential treatment program which includes the delivery of educational services,
- The placement of Doe at the Bennington School was a non-educational placement decision,
- Doe's placement at the Bennington School was based on her need for therapy and on the recommendation of her psychiatrist at Bradley Hospital, and
- Doe requires care in a residential program on a 24-hour-per-day basis in order to provide for her mental health treatment and for her own safety and the safety of others.

The Foster-Glocester Regional School District did not receive prior notice of the Family Court proceeding nor did it participate therein. There has been no appeal of the Family Court's order placing Doe at the Bennington School.

In this proceeding, DCYF has filed a motion for summary judgment seeking an order

compelling the Foster-Glocester Regional School District to accept administrative and financial responsibility for Doe’s education at the Bennington School. The School District has filed a motion to dismiss for lack of subject matter jurisdiction, a cross-motion for summary judgment, and an objection to DCYF’s motion for summary judgment. The Department of Education (RIDE) has filed an objection, in part, to the School District’s motion for summary judgment and an objection to the School District’s motion to dismiss.

**Positions of the Parties**

Given that Doe is a resident of Glocester, DCYF contends that the Foster-Glocester Regional School District bears financial and educational responsibility pursuant to §§16-64-1.1(c) and 1.3(b). The former statutory provision states in pertinent part that

Children placed by DCYF in a residential treatment program, group home, or other residential facility, whether or not located in the state of Rhode Island, which includes the delivery of educational services, provided by that facility . . . shall have the cost of their education paid for as provided for in subsection (d) of this section and §16-64-1.2. The city or town determined to be responsible for DCYF for a per-pupil special education cost pursuant to §16-64-1.2 shall pay its share of the cost of educational services to DCYF or to the facility providing educational services.

R.I.G.L. 16-64-1.2 states that the “residence of the parent(s) of a child placed in the care and custody of the state” shall determine “the city or town to be responsible for the per-pupil special education cost of education to be paid . . . pursuant to §16-64-1.1(c).” R.I.G.L.16-64-1.3(b) states that “[t]he city or town responsible for payment under §16-64-1.1(c) . . . shall be responsible for the free, appropriate public education, including all procedural safeguards, evaluation and instruction in accordance with” the Board of Education’s special-education regulations.

The Foster-Glocester School District moved to dismiss this matter on three grounds. First, it contends that subject matter jurisdiction is lacking for DCYF’s request to be decided under chapter 39 of Title 16 of the Rhode Island General Laws. It asserts that under federal law, employees of the state education agency (SEA), or RIDE, cannot determine a placement for a child with a disability. RIDE has accepted federal special-education funds and adopted its own regulations concerning the education of children with disabilities. RIDE therefore must comply with federal law and its own regulations and cannot apply a payment statute, i.e., §§16-64- 1.1(c)

and 1.3(b), in a proceeding under Chapter 39 of Title 16 to force Foster-Glocester to change Doe's educational placement. Second, if the Commissioner assumes jurisdiction of this matter, she cannot endorse the placement of a child with a disability in disregard of the IEP process nor can the Family Court bypass IDEA-required procedures to determine a free appropriate public education (FAPE) in the least restrictive environment (LRE). A Foster-Glocester IEP team has determined that a placement for Doe in a self-contained class at Ponaganset Middle School is appropriate. Under Rhode Island's special-education regulations, a residential placement is more restrictive than a self-contained class in a district school building. Third, if the Commissioner assumes jurisdiction and addresses Doe's placement, further fact-finding needs to be conducted with regard to whether Foster-Glocester was given notice and the opportunity to be heard before it can be billed for the educational services provided to Doe at the Bennington School. The School District notes that it is not seeking to review the Family Court's decree; it is only saying that it cannot be forced to pay for a placement which disregards FAPE and LRE requirements and due process. The District asserts that the Commissioner's recent decision in *In Re: Residency of Student C. M. Doe*<sup>1</sup> was in error because DCYF cannot unilaterally choose a placement and the Family Court cannot pre-empt an IEP-team decision or deny the school district involvement in the placement process. Summary judgment cannot be granted because of outstanding questions of fact as to whether Foster-Glocester was afforded adequate notice before it was billed for Doe's educational services at the Bennington School.

Upon Foster-Glocester's motion, RIDE was made a party to this case. RIDE objects in part to DCYF's motion for summary judgment. It submits that Foster-Glocester, as Doe's district of residence, bears the legal responsibility for ensuring that she receive FAPE. RIDE contends, however, that Foster-Glocester's claim that Doe's placement at the Bennington School does not provide her with FAPE must be resolved by an impartial due process hearing officer pursuant to the due process complaint system contained in the federal Individuals with Disabilities Act (IDEA). Reading Title 16 of the Rhode Island General Laws *in pari materia* with IDEA and its implementing federal and state regulations, RIDE asserts that there is a "disagreement about FAPE" under §300.148(b) of the regulations. The Foster-Glocester School Department therefore must file an IDEA due process complaint and have the disagreement resolved by an impartial hearing officer, not a RIDE employee, in accordance with

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<sup>1</sup> September 27, 2013.

§300.511(c) of the regulations, which states that the impartial hearing officer cannot be an employee of the SEA. DCYF’s request for reimbursement must be stayed pending the impartial hearing officer’s resolution of the School Committee’s FAPE claim. Citing IDEA [20 USCA 1412(a)(5)(B)(i)], RIDE argues that the SEA cannot use a statutory funding mechanism to deny FAPE to disabled children. Under §300.146 of the regulations, the LEA is responsible for FAPE and the provision of procedural safeguards. A non-educational placement by the Family Court does not relieve the LEA of the duty to file for a due process hearing if the LEA believes the Court placement violates FAPE.

According to RIDE, Foster-Glocester must be ordered to “file an IDEA due process complaint forthwith . . .” In addition,

[t]he fact that the Family Court made a ‘non-educational’ placement does not, standing alone, relieve the School Committee of its obligation to ensure that FAPE is provided. It will be the job of the IDEA hearing officer to determine what effect, if any, the Placement Order should have at the due process hearing, and whether or not some effort to supplement the Family Court record and/or move to modify the Placement Order, would be appropriate.<sup>3</sup>

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<sup>3</sup> No doubt, defining the boundary between the IDEA and Family Court jurisdiction over ‘children with disabilities who by reason of any disability requires special education or treatment and other related services’ under R.I. Gen. Laws §8-10-3(a)(2) can be difficult (sic) task, but here it is a task which, if necessary, is for the IDEA hearing officer, at least in the first instance. [RIDE’s Objection, p. 8].

RIDE states that the Commissioner of Education can neither contravene a non-educational placement by the Family Court nor compel the LEA to make reimbursement for a placement which the LEA believes violates FAPE without first requiring the LEA to follow the IDEA due process procedure. RIDE asserts that the IDEA procedures must be ensured, that LEAs have standing to file due process hearing complaints, that LEAs are entitled to have those complaints decided by impartial due process hearing officers, and that RIDE’s approach to this question is not inconsistent with *C.M. Doe* because, unlike that case, Doe’s residency is not disputed, and the Fostering Connections Act is not involved. Also, the Commissioner in that case “recognized [the LEA’s] right to proceed under the IDEA if it ‘continues to take the position that Student Doe’s placement does not provide her with a FAPE.’” [RIDE’s Objection, pp. 10-11].

In response, Foster-Glocester argues that the Commissioner has no authority to order a school district to request an IDEA due process hearing in these circumstances. The District states that IDEA does not afford LEAs standing “to seek administrative ratification” of what the child’s IEP team previously determined to be an appropriate placement. The responsibility for challenging a placement rests with the party aggrieved by the placement, here, the parent. In addition, the challenging party bears the burdens of proof and persuasion, not the LEA. [School Committee Memorandum, p. 2].

According to Foster-Glocester, RIDE’s approach is impractical: “the LEA, as the moving party, would have the burden to persuade a hearing officer that it had not violated the law when it convened an IEP team for a student subsequently placed in DCYF custody.” [Memorandum, p. 10]. RIDE responds that “Foster-Glocester would not be challenging the IEP, but seeking to enforce it.”

Doe’s parents agree with the placement at the Bennington School. They have not filed an IDEA due process hearing complaint with regard to the Foster-Glocester IEP team’s decision nor do they have any plans to do so.

## **Discussion**

Our analysis of this case centers on our September 2013 decision in *In Re: Residency of Student C.M. Doe*. That case presented two main questions: (1) which city or town is the student’s residence for school purposes and (2) whether the school district of residence is financially and educationally responsible for the educational placement ordered by the Family Court.

Based on the fact that the Family Court placed the student in a group home located in Newport in February 2013, we found C.M. Doe to be a resident of Newport. In considering Newport’s financial responsibility for Doe’s Family Court-ordered placement at a secondary-level school for students with behavioral needs located in Providence, we stated

The judge found, based on a host of factors that it was in [C.M. Doe’s] ‘best interests’ to remain in attendance at the High Road School. The Court ordered that she remain at the High Road School and complete her education there. Although Newport submits that this decision was not made by an IEP team pursuant to the process required by IDEA and that it does not provide Student Doe with FAPE in the least restrictive environment, we must consider Newport’s arguments in this respect only as they relate to the issue of educational and financial responsibility for

this child. The Commissioner has no authority to review a decision of the Family Court [footnote omitted] and it would not be appropriate for the Commissioner to re-examine the decision of the judge presiding in Student Doe's case.<sup>2</sup>

After discussing the applicability of the federal Fostering Connections Act to the Family Court's determination that an educational placement at the High Road School was in C.M. Doe's "best interests,"<sup>3</sup> the Commissioner recognized that "Newport stands ready to provide what it has determined to be FAPE for this student -- 'the same free, appropriate public education provided to all other residents of the city' at a school within the Newport public school system."<sup>4</sup> The Commissioner further stated that

Newport will be fulfilling its statutory obligation by paying for the tuition for Student Doe at a court-ordered educational placement -- a placement which its IEP team did not determine was appropriate for Student Doe based on the information available at the time the IEP team was convened. Despite the lack of congruence between the facts of this case and the provisions of R.I.G.L. 16-64-1.1, we determine that these provisions are applicable to the facts here and that they do place educational and financial responsibility for Student Doe on the city of Newport and the Newport School Department.<sup>5</sup>

Finally, noting that children in DCYF care and custody do not lose their entitlement to FAPE in accordance with state and federal law, the Commissioner saw the task at hand as ensuring that the "equally binding" requirements of two federal laws, i.e., the Fostering Connections Act and IDEA, are harmonized. Accordingly, to support her interpretation of §16-64-1.1 in this regard, she directed Newport, as the LEA with educational responsibility for Student Doe

to take appropriate steps to raise any concerns that it may have as to Student Doe's placement at the High Road School, the need for the development of a current IEP, transition planning and services, etc. before the Family Court, if it has not already done so. If Newport continues to take the position that Student Doe's placement does not provide her with FAPE, a report describing the factual and legal basis for such position must be submitted to RIDE's Director of the Office of Student,

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<sup>2</sup> Decision, September 27, 2013, p. 8.

<sup>3</sup> In this regard, the Commissioner noted her authority under §16-60-6(5) to coordinate "the various elementary and secondary educational functions among the educational agencies of the state including local school districts and to encourage and to assist in the cooperation among them so that maximum efficiency and economy may be achieved."

<sup>4</sup> *Ibid.*, pp. 8-9.

<sup>5</sup> *Ibid.*, p. 9.

Community and Academic Supports so that he can determine what additional steps, if any, RIDE must take in this matter.<sup>6</sup>

In this case, there is no dispute as to Doe's residency for purposes of §16-64-1.1: it is Foster-Glocester. The remaining question is whether the Foster-Glocester Regional School District is financially and educationally responsible for Doe's placement at the Bennington School in Vermont. Applying our decision in *C.M. Doe* to the circumstances of this case, we hold that it is.

As discussed above, in *C.M. Doe* we reviewed an educational placement made by the Family Court which, according to the school district of residence, did not comport with the procedures and requirements of IDEA. In doing so, we established the following principles: (1) the Commissioner of Education has jurisdiction over disputes arising under §16-64-1.1; (2) in deciding those disputes, the Commissioner will not review or re-examine a decision of the Family Court; (3) the school district's arguments with regard to FAPE and LRE in a §16-64-1.1 case are to be considered only as they relate to the issue of educational and financial responsibility of the student; and (4) to ensure that children in DCYF custody do not lose their entitlement to FAPE, the school district of residence must raise any questions in this regard with the Family Court and RIDE's Office of Student, Community and Academic Supports.

This case concerns a child in DCYF care and custody who has received a non-educational placement by the Family Court.<sup>7</sup> The placement was made for Doe's mental health and for her own safety and the safety of others. The placement at the Bennington School was found to be in Doe's "best interest." The Family Court dealt with Doe as a person, not a student. This is entirely understandable in that without a healthy person, there cannot be a productive student. As we understood the Family Court proceeding in *C.M. Doe*, the educational placement was made in accordance with the child's "best interests" under the Fostering Connections Act. The child's rights and protections under IDEA had to be accommodated with her rights under another federal statute. Here, we have a non-educational placement found to be in student Doe's "best

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<sup>6</sup> *Ibid.*, p. 10.

<sup>7</sup> RIDE did not place Doe at the Bennington School nor is it determining the appropriateness of her educational placement there. We are merely making a determination under Chapter 64 of Title 16 as to which public school district is financially and educationally responsible for student Doe. We are also acting consistent with the provision in the Family Court's August 1, 2013 decree that DCYF pursue its administrative remedies to obtain reimbursement from the responsible LEA. Furthermore, Doe's parents have not objected to RIDE's involvement in this matter, which is not an impartial due process hearing subject to §300.511 of the Board's Regulations Governing the Education of Children with Disabilities.

interest.” Her rights under IDEA have to be accommodated with her mental health and safety needs. We cannot think of a more paramount interest for a child.

In tending to Doe’s health and safety, the Family Court found it necessary to place her in a residential treatment program in Vermont. While Doe’s parents remain in Gloucester and thereby establish residency for purposes of financial and educational responsibility under §16-64-1.1, their daughter is a long way from Ponaganset Middle School. For all practical purposes, Doe is a resident of Bennington, Vermont. She cannot commute to Ponaganset Middle School. Her rights to IEP team meetings, FAPE and LRE apply to her new home -- the Bennington School in Vermont. Again, we are merely recognizing the fact that children are persons first, students second. Foster-Glocester, as the Rhode Island school district of residence under §16-64-1.1, must tend to Doe’s educational needs after her personal needs have been addressed by the Family Court. Doe’s rights under IDEA, which are essential to her educational needs, must be accommodated in this fashion as well.<sup>8</sup>

The Foster-Glocester School Department argues that *In Re: Residency of C.M. Doe* was wrongly decided. The School Department’s arguments in this regard are articulate and well-intentioned. These arguments, quite naturally, come from an educational perspective. As explained above, however, the Family Court’s involvement with Doe obligates us to take a broader perspective. This perspective reveals a troubled girl who needs the treatment and environment afforded by the Bennington School in Vermont on a 24-hour-per-day basis. We cannot underestimate this perspective. We must give it primary consideration. The principles enunciated in our *C.M. Doe* decision do just that. We therefore decline to reverse or modify that decision. We find it to be controlling here.

Putting aside RIDE’s failure to apply direct precedent to this case, we do not understand how its approach to resolving this type of dispute furthers the Commissioner’s duty under §16-60-6(5) to coordinate state educational agencies so as to achieve maximum efficiency and economy. RIDE’s proposed approach will result in more litigation, greater expense, longer delays and an IDEA due process hearing officer confronted with the same Family Court order that we ourselves said in *C.M. Doe* that we would not review or re-examine.

Section 300.148(b) of the Board of Education’s Regulations Governing the Education of

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<sup>8</sup> If C. M. Doe’s rights under IDEA can be harmonized with her right as a foster child to remain in her original school of enrollment when she is moved to a foster home in a different city, surely student Doe’s rights under IDEA can be harmonized with her mental health and personal safety needs.

Children with Disabilities does not apply to this matter. Entitled “Placement of children by parents when FAPE is at issue,” §300.148 applies to LEAs who have “made FAPE available to the child and the parents elected to place the child in a private school or facility.” Subsection (b) states that “[d]isagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures . . .” Doe’s placement was non-educational. It was not made by her parents and they are not seeking reimbursement for the cost of the placement at the Bennington School. Even if an IDEA due process hearing were a viable means to resolve a dispute between DCYF and a school district under §16-64-1.1, §300.148 of the Regulations does not provide a route to that forum.

Section 300.325 of the Board’s Regulations does provide a template as to how disputes of this nature can be resolved consistent with §16-60-6(5). Entitled “Private school placements by public agencies,” subsection (a)(1) states that “[b]efore a public agency places a child with a disability in, or refers a child to a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with” IEP process requirements. These requirements specify the composition of the IEP team, which would necessitate representation from the LEA. The definition of “public agency” in §300.33 of the Regulations includes “political subdivisions of the State that are responsible for providing education to children with disabilities.” R.I.G.L. 42-72-15(o) ensures that “[e]very child placed in the care of [DCYF] shall be entitled to a free appropriate education, in accordance with state and federal law.” Subsection (a)(2) states that the public agency “must ensure that a representative of the private school or facility attends the [IEP] meeting.” Participation in the meeting may take place by telephone. Subsection (b) addresses the manner in which, after a child with a disability enters a private school or facility, the IEP is reviewed and revised. We find that §300.325 of the Regulations provides for LEA involvement in non-educational placements such as Doe’s and thereby addresses Foster-Glocester’s concerns about notice, opportunity to participate and due process in general.

We understand and endorse Foster-Glocester’s due process concerns in this case. In light of the distance to the Bennington School, however, we do not find that the School Department’s lack of participation in Doe’s placement and IEP development is a defense to its payment obligation under §§16-64-1.1(c). As we previously noted, Foster-Glocester’s proposed place-

ment for Doe at Ponaganset Middle School simply is not feasible after the Family Court addressed Doe's personal issues and needs. Any concerns that Foster-Glocester has about the educational services that Doe is receiving at the Bennington School may be raised with the Family Court or RIDE as we specifically discussed in the *C.M. Doe* decision.

## **Conclusion**

Upon consideration of the arguments in the motions and objections filed herein, under *In Re: Residency of C.M. Doe*, the Commissioner of Education has jurisdiction over DCYF's request and, for the reasons set forth above, the Foster-Glocester Regional School District is financially and educationally responsible for student Doe while she attends the Bennington School in Vermont. In this regard, Foster-Glocester shall, consistent with R.I.G.L. 16-64-1.1(c), pay its per-pupil special education cost to DCYF or the Bennington School.

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Paul E. Pontarelli  
Hearing Officer

Approved:

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Deborah A. Gist  
Commissioner of Education

Date: July 7, 2014