

STATE OF RHODE ISLAND
COMMISSIONER OF EDUCATION

Ms. Doe, on behalf of her child,
STUDENT G. DOE,

Petitioner,

v.

RIDE No.: 23-005S

RHODE ISLAND DEPARTMENT OF
EDUCATION and the PROVIDENCE
PUBLIC SCHOOL DEPARTMENT,

Respondents.

**DECISION AND ORDER DENYING PETITIONER'S REQUEST
FOR AN INTERIM ORDER AND AN AWARD OF FEES**

Held: Petitioner's requests for an interim order and an award of fees during the pendency of his due process proceeding are denied as the evidence presented did not prove by a preponderance that his Safety Plan was not being implemented.

February 8, 2023.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On January 24, 2023, Petitioner, Ms. Doe, on behalf of her child, Student G. Doe (“Petitioner” or “G. Doe”), filed a request for an interim order hearing pursuant to R.I. Gen. Laws § 16-39-3.2 concerning the alleged failure of Respondents, the Rhode Island Department of Education (“RIDE”) and the Providence Public School Department (“PPSD”) to provide him “with a student safety plan as required by his individualized education programs.”¹ PPSD filed a response to Petitioner’s request that same day and asserted that there was a safety plan in place (the “Safety Plan” or “Plan”), as well as a revised safety plan in process, and attached a copy of the Plan and related IEP meeting notes dated May 5, 2022.

On January 25, 2023, Petitioner withdrew his January 24 Interim Order Hearing Request, without prejudice, and filed a revised request concerning the alleged failure of PPSD “to disclose and implement the student safety plan developed for [Student G. Doe] at his May 5, 2022 IEP meeting.”² Respondent submitted a letter dated January 25, 2023, from Emily Garcia, M.Ed., Special Education Director, Ocean State Academy Learning Center (the “Academy”), in response to Petitioner’s January 25 Interim Order Hearing Request, which appeared to refute Petitioner’s allegations.

Following a telephone conference on January 27, 2023 and the expedited submission of briefs by the parties on January 30, a Decision and Order was issued on January 31: (1) dismissing as moot that portion of the January 25 Interim Order Hearing Request alleging the failure to

¹ Presumably, the Petitioner named RIDE as a party due to its Commissioner’s delegated authority over PPSD under the Crowley Act. However, Petitioner alleges no facts concerning RIDE’s involvement in the relevant issues and RIDE did not appear in this matter. Therefore, Respondents will be referred to collectively as “PPSD” since, as will become clear, there is no need to rule as to the appropriateness of RIDE’s status as a party.

² On January 25, 2023, Petitioner also concurrently filed a Complaint requesting an IDEA due process hearing in connection with the same allegations.

disclose the Safety Plan; and (2) granting Petitioner a hearing on that portion of the Request that concerned the actual implementation of the Plan.

An evidentiary hearing was then held before the undersigned Hearing Officer on February 1, 2023.

II. JURISDICTION, BURDEN OF PROOF, AND STANDARD OF REVIEW

The Commissioner has jurisdiction over this dispute under R.I. Gen. Laws § 16-39-1 as it arose under laws “relating to schools or education” and also under R.I. Gen. Laws § 16-39-3.2 as Petitioner seeks an interim order pending an IDEA due process hearing.

As in most proceedings before the Commissioner, the Petitioner has the burden of proof. *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) (general presumption in administrative proceedings “favors the administrators” and places the burden of proof upon the party challenging the action “to produce evidence sufficient to rebut this presumption”).³

As to the standard of review, Petitioner must prove by a preponderance of the evidence that one or more elements of the Safety Plan is not being implemented by Respondent. *See, e.g., Ms. Doe, as parent and next friend of Student A. Doe v. Foster-Glocester Regional School District*, RIDE No. 22-045A (September 13, 2022), slip. op. at 2-3.⁴

³ *See also Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (“[a]bsent some reason to believe that Congress intended otherwise . . . the burden of persuasion [in special education cases] lies where it usually falls, upon the party seeking relief.”).

⁴ It is beyond the purview of the undersigned Hearing Officer to determine questions with respect to the effectiveness of the Safety Plan or the implementation thereof or whether any implementation or lack thereof may impact Student G. Doe’s IEP or the provision of FAPE as such questions are the subject of Petitioner’s pending IDEA due process proceeding.

III. FACTS

The facts set forth below were deduced from the documents introduced⁵ and testimony offered at the evidentiary hearing on February 1, 2023. Petitioner and Respondent were represented by counsel and testimony was elicited from Emily Garcia, M. Ed., Special Education Director of the Academy and Ms. Doe.

G. Doe, a twelfth-grade student enrolled in PPSD, is presently attending an out-of-district program at the Academy, which is a RIDE-approved private school located in North Providence, Rhode Island. G. Doe has a Safety Plan in place as part of his IEP which provides for, *inter alia*, a “one-on-one staff member” to be present with G. Doe at certain transitional points throughout the school day, including:

- upon arrival to school in the morning;
- while he is eating breakfast and escorting him to his classroom;
- transitioning him to his classroom teacher;
- supervising and engaging with him while he is eating lunch; and
- transitioning him back to his classroom teacher after lunch.

See Joint Exhibit 1, Safety Plan, at 3.

An incident report prepared by the Academy (the “Incident Report”) alleges that in the middle of January,⁶ G. Doe threw his yogurt while transitioning to his desk to eat breakfast in the classroom and attempted to leave the room. According to the Incident Report, Academy staff sought assistance and G. Doe was physically restrained and eventually calmed down. The Report suggests that there were numerous staff members involved but does not identify the author of the

⁵ Unless specifically noted to the contrary, all Exhibits referred to herein were admitted into evidence.

⁶ The exact date of the incident was not elicited in witness testimony, nor does it appear in the Incident Report, which was entered into the record as Petitioner’s Exhibit 2. Director Garcia, acknowledged under oath that she recalled the incident occurred “in the middle of January . . . a couple of weeks ago.” Hr’g Tr. at 12.

Report nor who, or how many, additional staff members were present in the classroom before, during, or at the conclusion of the incident.

Special Education Director Garcia testified that G. Doe has a one-on-one assistant throughout the school day as needed and called for in the Safety Plan and that a one-on-one staff member is always with him when transitioning from room to room. She further confirmed that there is always an extra staff member in the room to provide G. Doe with one-on-one support. *See* Hr’g Tr. at 18. Director Garcia clarified that the provision of the Safety Plan requiring staff to remain with G. Doe while he has breakfast and then to escort him back to the classroom⁷ does not take into account the fact that students at the Academy have breakfast in the classroom, as opposed to in a separate area. *Id.* at 20. Nonetheless, Director Garcia confirmed that a one-on-one staff member is present with G. Doe in the classroom when he has his breakfast. *Id.* Director Garcia also indicated that a one-on-one staff member was present with G. Doe at the time of the aforementioned January incident and that additional staff was called to the classroom to provide further support. *Id.* at 23.

Director Garcia also testified that the Academy had developed a preliminary “Behavior and Safety Plan” for G. Doe⁸ that was “for the support staff who work with [Student G. Doe] to ensure the safety of others, as far as technology use.” *Id.* at 36. She confirmed that the Behavior and Safety Plan did not replace the Safety Plan, but rather included additional components addressing Student G. Doe’s most recent behaviors. *Id.* at 37. Finally, while clarifying that both the Safety Plan and the Behavior and Safety Plan were being implemented for Student G. Doe, *see id.* at 37, 41, the Director acknowledged that the Behavior and Safety Plan was a draft and that the parties have a meeting scheduled on February 10 to review it. *Id.* at 43.

⁷ See Joint Exhibit 1, Safety Plan, at 3.

⁸ Petitioner’s Exhibit 5.

Ms. Doe testified that the first time she saw the Safety Plan and meeting notes from the May 5, 2022 IEP meeting was on January 24, 2023. *Id.* at 47. She acknowledged that she does not recall whether she executed an authorization to release Student G. Doe’s student records to Petitioner’s counsel.⁹ *Id.* at 48. Finally, she acknowledged having personal knowledge of the Safety Plan and had discussed the Plan while in attendance at the May 5, 2022 IEP meeting. *Id.* at 51. Finally, she stated that she received a copy of the IEP meeting notes and Safety Plan after the meeting but that the documents were not legible. *Id.*

IV. POSITION OF THE PARTIES

A. Petitioner

Petitioner argues that the only reasonable inference that can be drawn from Respondent’s counsel’s failure to provide his counsel with a copy of the Safety Plan upon request is that the Plan was not being implemented. Petitioner also argues that Respondent’s counsel’s failure to provide a copy of the Safety Plan amounts to a violation of the disclosure requirements set forth in 34 C.F.R. 300.600E.

Petitioner notes that there is no express indication in the Incident Report that a one-on-one staff member was present for Student G. Doe at breakfast, as required by the Safety Plan, and posits that any and all assistance referenced in the Incident Report came from staff members arriving from outside the classroom.

Petitioner also contends that RIDE should be a party to this action because “[t]he Commissioner has control and decision-making authority over the Providence Public School District” and “[e]very decision that comes out of Providence is a decision of RIDE.” Hr’g Tr. at

⁹ Petitioner’s counsel offered several email exchanges between Petitioner’s counsel and Respondent’s counsel into evidence whereby Petitioner’s counsel purports to request a copy of the Safety Plan from Respondent’s counsel. We attribute little, if any, relevance to this evidence.

60. Petitioner further argues that RIDE should be defaulted for failing to separately appear and respond to Petitioner's Interim Order request.

Finally, Petitioner maintains that Petitioner meets all the statutory requirements to be granted attorney's fees in this matter.

B. Respondent

Respondent argues that Petitioner has failed to meet Petitioner's burden to establish the need for issuance of an interim order concerning implementation of the Safety Plan and that the Safety Plan is, in fact, being implemented as attested to under oath by Director Garcia.

V. DECISION

Section 16-39-3.2 of the Rhode Island General Laws provides, in pertinent part, that “[i]n all cases concerning children, other than cases arising solely under § 16-2-17, the commissioner of elementary and secondary education shall also have power to issue any interim orders pending a hearing *as may be needed to ensure that a child receives education in accordance with applicable state and federal laws and regulations during the pendency of the matter.*” R.I. Gen. Laws § 16-39-3.2 (emphasis added). Here, Petitioner, who is awaiting an IDEA due process hearing concerning disclosure and implementation of the Safety Plan, has failed to show by a preponderance of the evidence that one or more components of the Plan are not being implemented. *See Larue, supra*, at 758-59 (general presumption in administrative proceedings “favors the administrators” and places the burden of proof upon the party challenging the action “to produce evidence sufficient to rebut this presumption”); *Doe v. Foster-Glocester Reg. Sch. Dist., supra* at 2-3.

Petitioner points to a single purported incident occurring in mid-January and claims that there was no one-on-one staff member present with G. Doe at the time. However, the evidence on

the record weighs heavily to the contrary. The Incident Report clearly refers to the presence of multiple staff members in the classroom. Although the Report does not set forth with particularity the number of staff members who were present in the moments leading up to the incident versus the number who responded to the call for further support from outside the classroom, neither does it indicate that there was only one staff member present or that, if there were more than one, that none of them were acting in the capacity of G. Doe's one-on-one. Significantly, Director Garcia's unrefuted testimony was that the Safety Plan was being implemented and that a one-on-one staff member was present with Student G. Doe at the time of the incident.

Petitioner also points to the mere existence and distribution of the Behavior and Safety Plan as evidence of Respondent's failure to implement the Safety Plan. However, the mere existence of this additional document does not constitute evidence that the Safety Plan was not being implemented. Indeed, the unrefuted testimony of Director Garcia was both that all components of the Safety Plan and the Behavior and Safety Plan were being implemented and that the parties already have a meeting scheduled to discuss the Behavior and Safety Plan.

In short, the evidence presented falls short of proving by a preponderance that the Safety Plan was not being implemented. Accordingly, Petitioner's request for an interim order is denied, and since he was not a "prevailing party," Petitioner's request for attorneys' fees pursuant to the Rhode Island Equal Access to Justice Act, R.I. Gen. Laws § 42-92-4, also is denied.

VI. ORDER

Therefore, for all of the above reasons, it is hereby ORDERED that:

1. Petitioner's Request for an Interim Order is denied as to all parties; and
2. Petitioner's prayer for an award of attorney's fees is denied.



SERGIO A. SPAZIANO, ESQ.
Hearing Officer for the Commissioner



ANGÉLICA INFANTE-GREEN,
Commissioner

Dated: February 8, 2023