STATE OF RHODE ISLAND
COMMISSIONER OF EDUCATION

STUDENT M. DOE, by her parent, Ms. Doe, *Petitioner*	:	
v.	:	RIDE No. 23-044A
FOSTER-GLOCESTER REGIONAL SCHOOL COMMITTEE and JOHNSTON SCHOOL COMMITTEE, *Respondents*	:	

DECISION AND ORDER

Held: The petition of a seventeen-year-old student with a disability who suffers from autism, cerebral palsy and an anxiety disorder for an interim protective order mandating that she be enrolled as a high school senior in the school district she had attended since pre-school after she moved out of the district was granted pursuant to the IDEA's "stay put" provision.

October 11, 2023

On October 3, 2023, Ms. Doe filed a complaint with the Department of Elementary and Secondary Education's ("RIDE's") Legal Office seeking an interim protective order to compel the Foster-Glocester Regional School District ("FGRSD") to immediately enroll her child, Student M. Doe, a seventeen-year-old student with a disability within the meaning of the federal Individuals with Disabilities Education Act (the "IDEA"), as a senior at Ponaganset High School ("PHS"). FGRSD refused to enroll M. Doe at PHS because M. Doe was at all relevant times a resident of Johnston, Rhode Island, and the Johnston Public School District ("JSD") was capable of providing M. Doe with the educational services mandated under her individualized education program (her "IEP").

I. Facts

The following facts were gleaned from the sworn testimony taken at a hearing before the undersigned RIDE Hearing Officer on October 10, 2023, and the documents that were entered into evidence at the hearing. Testimony was elicited from Ms. Doe (who appeared *pro se*); Brad Wilson, Director of Special Education for the Northwest Special Education Region; Renee Palazzo, Superintendent of Schools at the FGRSD; Dr. Bernard DiLullo, Jr., Superintendent of Schools at the JSD; and Edda Carmadello, currently Assistant Superintendent of Schools at the JSD, but at all relevant times Director of Special Services at the JSD.

1. M. Doe is a seventeen-year-old high school senior who has been diagnosed with cerebral palsy, autism and an anxiety disorder, and has an IEP that was drafted by an IEP Team at FGRSD. *See* FGRSD Ex. 1.

2. M. Doe has attended schools in the FGRSD since pre-school and completed her junior year at PHS, where she was enrolled in PHS's Special Education "Life Skills" program,

which combines instruction on basic skills with physical therapy and a focus on career development and the transition from school to employment.

3. Sometime during 2022, while M. Doe was attending PHS as a junior, Ms. Doe and M. Doe moved to Johnston, Rhode Island.

4. On January 19, 2023, PHS's Principal wrote Ms. Doe to advise her that M. Doe "no longer resides in the town of Glocester" and "is no longer eligible to be enrolled as a student at [PHS]." *See* FGRSD Ex. 3. However, FGRSD's Superintendent, Renee Palazzo, agreed to permit M. Doe to complete her junior year at PHS.

5. Ms. Doe began the process of enrolling M. Doe as a student in the JSD, *see* JSD Ex. 1, but just prior to the start of school Ms. Doe met with the JSD Superintendent, Dr. Bernard DiLullo, Jr., and expressed her concern that M. Doe was not doing well in anticipation of the change of school during her senior year. Superintendent DiLullo reviewed M. Doe's IEP, *see* FGRSD Ex. 1, and her Career Development Plan, *see* FGRSD Ex. 2, and met subsequently with Ms. Doe on "multiple occasions" to discuss these concerns.

6. According to Ms. Doe, M. Doe had been managing her anxiety well and had lost weight during the prior year at PHS, but was now regressing in anticipation of the change of school and her inability to continue at PHS with the friends she had made over the years. Ms. Doe testified that M. Doe "cannot get out of bed" and has refused to attend school in Johnston.

7. On September 19, 2023, Ms. Doe met with Edda Carmadello, who was then Director of Special Services at the JSD, along with other members of the JSD team, and presented them with a September 19, 2023 letter from Jessica M. DiRocco, a Doctor of Nursing Practice at Atwood Pediatrics, Inc., where M. Doe had been treating for several years. Nurse DiRocco stated that M. Doe "has autism and severe anxiety and would benefit socially

emotionally and academically by remaining in a familiar school system." *See* attachment to Joint Ex. 1.

8. The parties all agreed that: (a) at all relevant times M. Doe resided in Johnston for school residency purposes; (b) the Life Skills programs being offered by FGRSD and the JSD are equivalent; and (c) JSD is capable of providing the educational services mandated under M. Doe's IEP.

9. Yet, JSD Superintendent DiLullo and JSD Director of Special Services Carmadello (who is now JSD Assistant Superintendent) both testified that in their opinion, it would be in M. Doe's best interest for her to remain at PHS for her senior year.

10. Superintendent DiLullo initially informed Ms. Doe that JSD would be willing to pay FGRSD tuition so that M. Doe could continue attending PHS, assuming at the time that the cost would be comparable to the tuition payments for students in a career and technical education pathway program, which is approximately $17,000 per student. In fact, FGRSD Superintendent Palazzo informed Superintendent DiLullo that should M. Doe be re-enrolled at PHS, the tuition for M. Doe would be $117,00, which Superintendent DiLullo was not willing (or authorized) to pay, and he informed Ms. Doe that as a result, M. Doe would have to be enrolled in Johnston Senior High School.

11. In addition to the letter from Atwood Pediatrics, Ms. Doe introduced the following in support of her contention that her daughter should remain at PHS:

(a) a September 11, 2023 letter from a neighbor who works in some unknown capacity at Hasbro Children's Hospital who stated that "[a] child with disabilities or any child arriving at a new school senior year especially knowing no one is a battle," and "Knowing their background, I really cannot understand why this child is unable to attend her senior year [at PHS]"; and

(b) a September 10, 2023 letter from a former patient representative at the Children's Rehabilitation Unit at Hasbro Children's Hospital who stated that:

(i) "I have known this beautiful young lady since she was a baby and have watched her go from non-verbal and unable to walk into a thriving young lady who has so much to offer this world. She has thrived at Ponaganset. She has friends, plays sports and actually made it to senior year[;]"

(ii) "It is so life altering for anyone with cerebral palsy then a diagnosis of autism to be accepted and not made to feel less than. She has overcome so much in her life already and that all happened because of consistency. She needs to be where she is comfortable and is surrounded by familiarity[;]" and

(iii) "I ask you to please reconsider you decision and let her finish her academic career at Ponaganset High School. No child should have to be made to feel unwelcome and left behind."

Petitioner's Ex. 1.

12. Finally, JSD has agreed that in the event that M. Doe completes her senior year at PHS, any additional special education services that may be required following the completion of her senior year at PHS will be provided by JSD as long as she continues to reside in Johnston for school residency purposes under R.I. Gen. Laws § 16-64-8.

II. Positions of the Parties

1. Ms. Doe

Ms. Doe has not challenged the opinion of those from both FGRSD and JSD who have testified that the Life Skills programs at FGRSD or JSD that would be available for her daughter are equivalent. Yet, although she is not a lawyer and thus does not employ legal terminology, she nonetheless has effectively claimed in her own words that despite the equivalency of the two programs: (a) M. Doe is unable to handle the stress associated with a change of schools for the first time in her life and as a result, has been regressing; (b) will likely be unable to take advantage of any program if she is forced to change schools; and therefore (c) the refusal to enroll her daughter at PHS so she could complete her senior year with students she has been with

since pre-school is a denial of the free, appropriate, public education (the "FAPE") mandated under the IDEA.

2. FGRSD

FRGSD argued that the undisputed fact that: (a) M. Doe resides in Johnston for school purposes under R.I. Gen. Laws § 16-64-1; (b) the programs being offered by FRGSD and JSD are equivalent; and (c) that JSD can provide all the educational services required pursuant to M. Doe's IEP, mandates that M. Doe attend school in Johnston.[1] FGRSD argues that it is not legally required to honor M. Doe's choice of location even if it would be in her best interest to do so, as long as the requisite educational services mandated by her IEP can be provided.

3. JSD

Although opining that it would be in M. Doe's "best interest" for M. Doe to remain at PHS for her senior year, JSD nonetheless has effectively required that M. Doe enroll in Johnston High School because it is unwilling or unable to pay FGRSD tuition in the amount demanded ($117,000).

III. Decision

1. Jurisdiction and Burden of Proof

The Commissioner's jurisdiction over M. Doe's request for an interim order is clear under R.I. Gen. Laws § 16-39-3.2, which is entitled "[i]nterim protective orders," and which provides that:

[1] And there evidently is no dispute over the fact that R.I. Gen. Laws § 16-64-8, which provides that when a student "is a senior or about to enter his or her senior year, the student shall be allowed to complete his or her senior year in his or her original city or town of residence," *id*., is inapplicable since Ms. Doe and M. Doe moved to Johnston prior to the completion of M. Doe's junior year. *See Student N. Doe v. North Kingstown School Committee*, RIDE No. 20-62A (September 30, 2020) (Student, who moved out of his school district before completing his junior year, was neither a senior nor "about to enter his senior year," and thus was not entitled to complete his senior year in the district from which he had moved under R.I. Gen. Laws § 16-64-8).

> *[i]n all cases concerning children*, other than cases arising solely under § 16-217, *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.* Hearings on these interim orders shall be conducted within five (5) working days of a request for relief and the decision shall be issued within five (5) working days of the completion of the hearing. These interim orders shall be enforceable in the superior court at the request of any interested party.

Id. (emphasis added). Since this is a "case involving children" and it did not arise under § 16-217 (which has been repealed), the Commissioner has jurisdiction.

However, since the IDEA is designed to assure the independence of due process hearing officers from the state agencies that appoint them, employees of state agencies like RIDE are prohibited from acting as due process hearing officers under the IDEA and adjudicating the merits of a claim that a student has been denied the FAPE mandated under the Act. *See* 20 U.S.C. § 1415(b)(2). As one court has noted, the prohibition "was intended exclusively to benefit [disabled] children and their parents and guardians by insuring absolute impartiality in the administrative process." *Colin K. v. Schmidt*, 536 F. Supp. 1375, 1384 (D.R.I. 1982) (Pettine, J.).

Thus, the ultimate decision with respect to whether FGRSD's refusal to enroll M. Doe in PHS was a denial of FAPE must be be resolved pursuant to the IDEA due process procedures, *see Regulations Governing the Education of Children with Disabilities* (the "Sped. Regs."), 200 RICR-20-30-6.8.1, *et seq.*,[2] and the jurisdiction of the Commissioner here is limited to the enforcement of the IDEA's "stay put" provision. The provision makes clear that:

[2] In Rhode Island, local school districts and other local education agencies are directly responsible for the delivery of a FAPE, and RIDE's Commissioner is responsible for overseeing and ensuring compliance with the IDEA. Parents may file a formal complaint with RIDE's Office of Student, Community and Academic Supports ("OSCAS") and seek a due process hearing before an independent hearing officer. The final decision of a due process hearing officer is subject to judicial review.

> [e]xcept as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, *unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child*, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C.A. § 1415(j) (emphasis added);[3] *see also* 34 C.F.R. § 300.518 (2006) (to same effect); Sped. Regs., 200 RICR-20-30-6.8.1(S) (incorporating 34 C.F.R. § 300.518).

However, the right to stay put under the IDEA is only triggered upon the filing of a due process complaint, *see* Perry A. Zirkel, *Stay-Put Under the IDEA: The Latest Update*, 404 Ed. Law Rep. 398, 400 (2022), something that Ms. Doe attempted, but did not accomplish. It appears that Ms. Doe attempted to file a due process complaint with OSCAS, but whether because of how she explained the material issues or simply some misunderstanding by OSCAS, the case was understood by OSCAS to be a residency matter not involving FAPE, and OSCAS told her to file a petition for a residency hearing with the Commissioner.[4] In fact, Ms. Doe is effectively claiming that FGRSD's refusal to enroll her daughter in PHS is a denial of FAPE, but to dismiss M. Doe's claim for relief here because her attempt to file a due process complaint with OSCAS was improperly rejected would only require that the same case be heard after she makes the requisite filing and OSCAS initiates the mandated due process procedures, which makes little practical sense and would result in unnecessary delay.

As will be discussed, the IDEA's stay-put provision functions as "an automatic preliminary injunction," and just as "the findings of fact and conclusions of law made by a court granting [or denying] a preliminary injunction are not binding at a trial on the merits," the Commissioner's findings here will not be binding upon a due process hearing officer. *See Letter*

[3] The referenced subsection (k)(4) concerns placements during appeals and thus is inapplicable.
[4] This information was not part of the record but was provided to the Hearing Officer from OSCAS after he inquired as to the status of the matter.

to Goldstein (U.S. Department of Education's Office of Special Education Programs, October 18, 2012), citing *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982).[5] As a result, any order here is pursuant to the Commissioner's interim order authority under R.I. Gen. Laws § 16-39-3.2 and will be expressly contingent upon Ms. Doe's re-filing of a due process complaint.

As to the burden of proof, it is upon the party seeking to change the placement of a child during the pendency of an IDEA due process proceeding. *See* IDEA, 20 U.S.C.A. § 1415(j) (quoted *supra*); 34 C.F.R. § 300.518 (2006) (to same effect); and the Sped. Regs., 200 RICR-20-30-6.8.1(S) (incorporating 34 C.F.R. § 300.518). And the United States Supreme Court has noted that "[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." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005).

2. The IDEA's "Stay Put" Provision

The IDEA's stay put provision "functions, in essence, as an automatic preliminary injunction." *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir.1982). "The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." *Id*. (citations omitted).[6] As noted by the Fourth Circuit:

> [t]he utility of section 1415(j) is thus easily understood. It guarantees an injunction that prohibits a school board from removing the child from his or her current placement during the pendency of the proceedings. The injunction is automatic; the party seeking it need not meet the usual requirements for obtaining

[5] Available at https://sites.ed.gov/idea/idea-files/policy-letter-october-18-2012-to-steven-l-goldstein-esq/.
[6] *See also Honig v. Doe*, 484 U.S. 305, 323 (1988) (describing the language of the stay put provision as "unequivocal" in that it states plainly that "'the child shall remain in the then current educational placement.' "); *Joshua A. v. Rocklin Unified School Dist*., 559 F.3d 1036, 1037 (9rh Cir. 2009) ("[a] motion for stay put functions as an 'automatic' preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief."); and *Arlington Cent. School Dist*. v. L.P.,421 F.Supp.2d 692 (S.D.N.Y. 2006) (Stay put provision "has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships.").

> preliminary injunctive relief. *See Safety–Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir.2001). Thus, when presented with an application for section 1415(j) relief, a district court should simply determine the child's then-current educational placement and enter an order maintaining the child in that placement.

Wagner v. Board of Educ. of Montgomery County, 335 F.3d 297, 301 (4th Cir. 2003).

According to the First Circuit, the stay put provision "is designed to preserve the status quo pending resolution of challenge proceedings under the IDEA . . . and ensures that the student remains *in the last placement that the parents and the educational authority agreed to be appropriate*.'" *Doe v. Portland Public Schools*, 30 F.4th 85, 90-91 (1st Cir. 2022), quoting *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3 (1st Cir. 1999); *see also Letter to Goldstein, supra* ("the IDEA presumes that the child's current educational placement is the last agreed-upon placement where the child must remain until the completion of administrative and judicial proceedings.")

Here, the last placement that M. Doe and the educational authorities agreed was appropriate was PHS, and thus under the law applicable to the IDEA's stay put provision, the Commissioner should enter an order requiring FGRSD to enroll M. Doe in PHS (to become effective when M. Doe files a due process complaint).

It is true that, as FRGSD has argued, school districts are not required under the IDEA "to do more than to provide a program reasonably calculated to be of educational benefit to the child; they are not required to educate the child to his or her highest potential." *Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 802 (7th Cir. 2004). However, whether M. Doe's disability renders her incapable of accessing the Life Skills program at JSD after having been transferred from the school district she has attended since pre-school, and if so, whether that constitutes a denial of FAPE, are issues for the due process hearing officer. For

present purposes, it is sufficient to note that no parties appeared to disagree that it would be in M Doe's best interest to remain at PHS.

Finally, if FGRSD and JSD cannot agree on the amount of tuition to be paid by JSD to FGRSD in the event M. Doe is enrolled in PHS, FGRSD should file a petition with the Commissioner and the matter will be heard and decided. It is simply not relevant to the matter at hand.

IV. Order

For all the above reasons:

1. The Petition of M. Doe for an interim protective order to compel the Foster-Glocester Regional School District to immediately enroll her child, Student M. Doe, as a senior at Ponaganset High School, is hereby granted;

2. Foster-Glocester Regional School District shall immediately enroll Student M. Doe, as a senior at Ponaganset High School;

3. Provided, however, that this Order shall not become effective unless and until Ms. Doe files a due process complaint on behalf of M. Doe with the Office of Student, Community and Academic Supports at the Rhode Island Department of Elementary and Secondary Education and notice of said filing is provided to the Superintendent of the Foster-Glocester Regional School District.

ANTHONY F. COTTONE, ESQ.,
as Hearing Officer for the Commissioner

ANGÉLICA INFANTE-GREEN,
Commissioner

Dated: October 11, 2023