

On December 18, 2020, the parents of Students B.R. and K.R. (Mr. and Mrs. Doe), filed a petition with the Commissioner on behalf of their children seeking an interim protective order to enjoin the North Kingstown School Department (the “NKSD”) from prohibiting their children from attending school in-person for the remainder of the first semester of the 2020-2021 school year. The prohibition was in response to Mr. and Mrs. Doe’s alleged failure to abide by the quarantine rules promulgated by the Rhode Island Department of Health (“RIDOH”) during the COVID-19 pandemic.

I. Preliminary Matters: Jurisdiction, the Interim Protective Order Statute and the Burden of Proof

The Commissioner has jurisdiction over Petitioners’ claim under R.I. Gen. Laws § 16-39-1, which confers jurisdiction over “any matter of dispute . . . arising under any law relating to schools or education.” *Id.* However, the NKSD argues that the Petition was “premature” as Petitioners had “failed to appeal the decision of the Superintendent to the North Kingstown School Committee.”¹

It is true that past practice as well as the doctrine of administrative exhaustion normally requires that a party appeal a dispute to their local school committee before the Commissioner will hear the case. Yet, as noted by the Rhode Island Supreme Court, administrative exhaustion “may not be required where the pursuit of administrative remedies would be futile or inadequate.”² Here, an appeal to the School Committee would be inadequate since in-person learning is scheduled to resume for some students in North Kingstown public schools on January 4, 2021, whereas according to its website, the next meeting of the North Kingstown School

¹ See NKSD’s Objection (NKSD Ex. 3), ¶ 10 at 2.

² *Doe v. East Greenwich School Department*, 899 A.2d 1258, 1267 (R.I. 2006), quoting *Pihl v. Massachusetts Department of Education*, 9 F.3d 184, 190–91 (1st Cir.1993).

Committee will not be until January 12, 2021.³ In addition, it is appropriate for the Commissioner to deviate from past practice since it is likely that legal issues similar to those raised here will be raised in other school districts before the end of the pandemic.

The Interim Protective Order Statute empowers the Commissioner “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.”⁴ However, the NKSD argues that the Statute is not applicable since B.R. and K.R. are merely being required to join the twenty per cent (20%) of students in the District receiving distance learning, and thus are “not being deprived of educational services.”⁵

Distance learning is of course an “educational service.” Yet, as has been emphasized by the Commissioner, “educational outcomes, social emotional health, and well-being of students are optimal when students can learn in-person.”⁶ Thus if, as argued by Mr. and Mrs. Doe, the exclusion of B.R. and K.R. from in-person learning was not justified as a matter of educational policy and was unfairly discriminatory, it would not be “*in accordance with applicable state and federal laws and regulations*” as stated in the Interim Protective Order Statute, and would represent the kind of imminent harm that the Statute was designed to prevent.

³ As per the schedule published in the NKSD website. See <https://4.files.edl.io/4c2b/04/07/20/142758-d60fee52-95ae-486c-9af7-d70f2c183a46.pdf>.

⁴ R.I. Gen. Laws § 16-39-3.2 (emphasis added). In most cases, an interim order issues to protect a disabled student’s “stay-put” right, i.e., the right to maintain “the status quo and ensur[e] that schools cannot exclude a disabled student or change his placement without complying with due process requirements.” See *Rosenfeld v. NKSD*, 2013 WL 4047468 at *1 (D.R.I., May 6, 2013), quoting *CP v. Leon Cnty. Sch. Bd.*, 483 F.3d 1151, 1156 (11th Cir.2007).

⁵ See NKSD’s Objection (NKSD Ex. 3), ¶ 2 at 1.

⁶ *Back to School RI: Health and Safety Guidance to Reopen Rhode Island’s Elementary and Secondary Schools* (RIDE, June 19, 2020) at https://www.ride.ri.gov/Portals/0/Uploads/Documents/COVID19/Back_to_School_RI_Guidance_6.19.20.pdf?ver=2020-06-19-120036-393; see also *Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment* (U.S. Dep’t. Education Office for Civil Rights, September 28, 2020) at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.

As for the burden of proof, as in most cases before the Commissioner, the petitioners – here, Mr. and Mrs. Doe – have the burden of proof. *See, e.g., Parents of CD v. McWalters*, 2005 WL 1984450 (Superior Court, August 15, 2005), slip. op. at *5 -*6.

II. Facts

An evidentiary hearing was held before the undersigned Hearing Officer on December 22, 2020, and both parties were represented by legal counsel. Mr. and Mrs. Doe testified in support of their Petition, and the NKSD’s Superintendent testified along with the Principal of Davisville Middle School (the “Middle School”) and the Nurse-Teacher assigned to the School. The following were the largely undisputed facts that were gleaned from the above testimony along with the documents placed into evidence by the parties.

1. B.R. is in the sixth grade at the Middle School.
2. B.R. has been diagnosed with “OCD [obsessive compulsive disorder], anxiety and tics (dry cough, clearing throat, squinting and scratching),”⁷ and according to Mrs. Doe, also has been diagnosed with autism spectrum disorder.
3. Despite his diagnosis, B.R. has made academic progress such that he has not had an individualized education program in effect for several years, and never had a Section 504 plan.
4. K.R. is in the tenth grade at North Kingstown High School (the “High School”).
5. Although all parents in North Kingstown have the option of choosing distance learning for their children, at all times relevant here the Middle School was open for in-person learning, whereas the High School followed a hybrid schedule with limited access to in-person learning.

⁷ See October 23, 2020 letter from Romi Webster, M.D. (Petitioners’ Ex. 1).

6. On September 21, 2020, and then again on October 21, 2020, B.R. was reported as exhibiting symptoms associated with COVID-19 while in school. On each occasion, he was sent to the School Nurse, who testified that B.R. was observed coughing. B.R. was kept isolated and Mrs. Doe was contacted and asked to take him home.

7. When Mrs. Doe picked up her son from the Middle School on September 21 and October 21, she was told by the School Nurse that B.R. should not return to school without having received a negative COVID-19 test, and the School Nurse informed Mrs. Doe where and how to obtain a test. In addition, the School Nurse emphasized to Mrs. Doe that “RIDOH has been very clear that ‘household contacts of a probable case must quarantine pending test results.’”⁸

8. Following the September 21 dismissal, B.R. received a COVID-19 test and returned to school in-person on September 23 after having received a negative test result.

9. However, following the October 21 dismissal, B.R. was sent back to school in person on October 23 before having actually received a negative test result, which was not received until October 25. He also attended school in-person on November 4, 5, and 6.

10. K.R. also attended the High School in-person on October 29 and November 2.

11. Mr. Doe, who felt “out of sorts” on or about November 3, obtained a COVID-19 test on that date, and on November 6, learned that the tests results were positive.

⁸ See November 12, 2020 letter from the Middle School Principal to Mr. and Mrs. Doe (Respondents’ Ex. 1). RIDOH has advised that: “[i]f you have symptoms, isolate yourself from other people in your home as much as possible while you wait for your results,” and explained that “[p]eople who are in isolation should stay home until it’s safe for them to be around others. At home, anyone sick or infected should separate from others, stay in a specific “sick room” or area, and use a separate bathroom (if available).” See *COVID-19 Testing for K-12 Students and Staff* (RIDOH) at <https://covid.ri.gov/testing/testing-k-12-students-and-staff>.

12. B.R. and K.R. then received COVID-19 tests, and on or about November 6, 2020, B.R. and K.R.'s test were both reported as positive.⁹

13. B.R.'s presence at the Middle School on October 23 and on November 4, 5 and 6, and K.R.'s presence at the High School on October 29 and November 2, meant that some twenty-two (22) members of the Middle School community who had been exposed to B.R. on his school bus and while in school,¹⁰ and a similar number of members of the High School community – including the entire High School tennis team – were forced to quarantine.¹¹

14. On November 12, 2020, the principals of both the Middle School and the High School wrote separately to Mr. and Mrs. Doe to inform them that their children were prohibited from attending school in-person for the remainder of the 2020-2021 school year.¹²

15. Mr. and Mrs. Doe appealed to the NKSD Superintendent, and after a hearing, the Superintendent reduced the period during which the children were barred from attending in-person learning, and informed them on November 20 that the children would be permitted to resume in-person attendance during the second semester, which is scheduled to begin on February 3, 2020.¹³

16. In so ruling, the Superintendent stated that:

I remain concerned that you were ignoring what we perceive as clear caution signs on November 4, 5, and 6. Students with probable symptoms need to be

⁹ According to RIDOH, “[a]nyone who tests positive needs to isolate for at least 10 days from the first date they developed symptoms. You can return to school or work after 10 days if you have been fever-free for 24 hours without taking a fever-reducing medicine and if your symptoms have improved.” See *COVID-19 Testing for K-12 Students and Staff* (RIDOH) at <https://covid.ri.gov/testing/testing-k-12-students-and-staff>.

¹⁰ See November 12, 2020 letter from the Middle School Principal to Mr. and Mrs. Doe (Respondents’ Ex. 1).

¹¹ RIDH has advised that one should “[q]uarantine if you have been in close contact with someone with COVID-19,” and explained that “[c]lose contact means you’ve been within 6 feet of someone with COVID-19 for a total of 15 minutes or more in a 24-hour period.” And further, that you should “[s]tay home (quarantine) for 10 days from the day they were last with you.” See *COVID-19 Testing for K-12 Students and Staff* (RIDOH) at <https://covid.ri.gov/testing/testing-k-12-students-and-staff>.

¹² See November 12, 2020 letter from the Middle School Principal to Mr. and Mrs. Doe (Respondents’ Ex. 1) and letter (undated) from the High School Principal to Mr. and Mrs. Doe (Petitioners’ Ex. 5).

¹³ See November 20, 2020 email from the Superintendent to Mr. and Mrs. Doe (NKSD Ex. 2).

tested and are required to quarantine according to RIDOH guidelines. In the case that your husband was being tested, it is clear that both testing and quarantine protocols for your children were ignored for days. Once your children's positive diagnosis came in, the district was now left with two situations in which many other students and staff in two schools now had to quarantine. Your decision not to act sooner needlessly put their lives in jeopardy. Further consequence of your inaction led to other parents needing to be home with their children and not being able to go to work. This could have all been avoided had you been more attentive to quarantining at the point of Mr. [Doe's] symptoms and decision to test.

Due to this potential impact on others when students and families do not follow RIDOH quarantine protocols, it is important that schools take steps to be confident in students' adherence to the safety protocols while they are attending in-person. While I am adjusting the period of mandatory distance learning issued by the principals, I share their concern that parents be honest with us and strictly follow safety protocols. I need you to know that if we discover another similar disregard for the safety of others in our school community, I reserve the right to extend this suspension from in-school learning as needed.¹⁴

17. The Superintendent's ruling would result in B.R. missing a total of fifteen (15) days of in-person learning at the Middle School, and K.R. would miss seven (7) or eight (8) days of in-person learning at the High School.

III. Positions of the Parties

1. Mr. and Mrs. Doe

Mr. and Mrs. Doe alleged that both their children "need in-school learning," adding that this was particularly true with respect to B.R. due to his special needs. And Mrs. Doe emphasized that exclusion from school was causing B.R. "great anxiety."¹⁵ At the same time, they implicitly conceded that they may have been mistaken when, after their children either had experienced symptoms associated with COVID-19 or had been exposed to a family member

¹⁴ See *id.*

¹⁵ See Petition, ¶ 4 at 2.

exhibiting the symptoms, they nonetheless sent the children to school without having first received a negative COVID-19 test.¹⁶

However, Mr. and Mrs. Doe argued that their mistake should not be imputed to their children, who “should not be stigmatized” because they subsequently tested positive for COVID-19. They made the point that under applicable RIDOH guidelines, B.R. and K.R. were cleared to return to school in-person on November 17, 2020, and thus maintained that prohibiting them from doing so was unfair and violated the state’s compulsory attendance law.¹⁷

2. The NKSD

The NKSD emphasized that prior to testing positive for COVID-19 in November, B.R. had been sent home from school twice with symptoms associated with COVID-19, and each time, the applicable protocol and RIDOH guidelines, as well as instructions with respect to where and how to obtain the necessary COVID-19 test, were provided to Mrs. Doe by the School Nurse. Yet, according to the NKSD, Mrs. Doe “ignored” these “clear caution signs” and violated RIDOH guidelines.¹⁸

Moreover, counsel for the NKSD noted that the NKSD Superintendent had reduced the length of the ban from in-person learning originally imposed by the Middle School and High School Principals and emphasized that the ban eventually imposed – which counsel emphasized would only be applicable for, at most, fifteen (15) school days – was necessary in order to send a strong message to the NKSD community that adherence to RIDOH guidelines would be strictly enforced. According to the Superintendent, the failure to send such a message would make it

¹⁶ As noted, K.R. attended the Middle School on October 23 and November 4, 5 and 6, and K.R. attended the High School on October 29 and November 2.

¹⁷ See R.I. Gen. Laws § 16-19-1(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 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 in the city or town in which the child resides.”).

¹⁸ See November 20, 2020 email from the Superintendent to Mr. and Mrs. Doe (NKSD Ex. 2).

more likely that other parents would be cavalier in their adherence, which would result in additional spread of COVID-19, and eventually, undermine the District’s continued ability to provide in-person learning.

IV. Decision

The NKSD is justly proud of its success in performing the very difficult task of providing in-person learning to students during the COVID-19 pandemic. It credits this success, in part, to its vigilance in ensuring that the community it serves adheres to RIDOH guidelines regarding quarantine and isolation. The Principals of the Middle School and the High School and the NKSD Superintendent were thus justly alarmed by what appeared to be Mr. and Mrs. Doe’s cavalier approach to these guidelines. Nor is it surprising that these school officials would, with the best of intentions, want to send a clear message to their community that this cavalier approach – and what appeared to be Mr. and Mrs. Doe’s willful failure to adhere to guidelines that had been clearly spelled out and repeated – would not be tolerated.

However, the NKSD presented no evidence to support the notion that denying children in-person learning was a necessary and/or effective way to send a message to adults about the need for such compliance. On the other hand, there is plenty of evidence to suggest that the children, and especially B.R., might well be harmed by denying them the opportunity to engage in in-person learning. As was noted, the Commissioner has emphasized that “educational outcomes, social emotional health, and well-being of students are optimal when students can learn in-person.”¹⁹

Finally, it should be noted that although the “intuition that sons and daughters must sometimes be punished for the sins of the father may be deeply rooted in our consciousness,”²⁰

¹⁹ See note 6, *supra*.

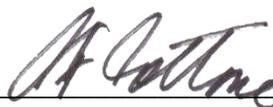
²⁰ See *Tison v. Arizona*, 481 U.S. 137, 184 (1987) (Justice Brennan, dissenting), noting that:

the Rhode Island Supreme Court recognized some time ago that “it is time, and past time” to “discredit[] and repudiate[]” the notion that “the sins of the father” should be visited upon “hapless offspring.”²¹ As noted by the First Circuit Court of Appeals, “[w]hile ‘[t]he gods [v]isit the sins of the fathers upon the children,’ Euripides, *Phrixus*, frag. 970, in the absence of evidence, the law must not.”²²

V. Order

For all of the above reasons:

1. Mr. and Mrs. Doe’s Petition on behalf of B.R. and K.R. is granted; and
2. NKSD is enjoined from prohibiting either B.R. or K.R. from attending school, in-person, as soon as school resumes following the Holiday Recess.



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



ANGÉLICA INFANTE-GREEN,
Commissioner

Dated: December 29, 2020

[t]he prophets warned Israel that theirs was ‘a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate [Him].’ *Exodus*, 20:5 (King James version). See, e.g., Horace, *Odes III*, 6:1 (C. Bennett trans. 1939) (‘Thy fathers’ sins, O Roman, thou, though guiltless, shall expiate’); W. Shakespeare, *The Merchant of Venice*, Act III, scene 5, line 1 (‘Yes, truly, for look you, the sins of the father are to be laid upon the children’); H. Ibsen, *Ghosts* (1881).

Id.

²¹ See *In re Estate of Cherkas*, 506 A.2d 1029,1031 (R.I. 1986).

²² *U.S. v. St. Michael’s Credit Union*, 880 F.2d 579, 601 (1st Cir. 1989).