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January 30, 2020

Commissioner Angélica M. Infante-Green
Rhode Island Department of Education
255 Westminster Street
Providence, RI 02903

Re: *Request for Advisory Opinion*

Dear Commissioner Infante-Green:

Our firm represents the Barrington School Committee ("Committee"). This letter seeks an advisory opinion on behalf of the Committee in accordance with R.I. Gen. Laws §§ 16-1-5 & 16-60-6(9)(viii) on issues left unresolved in the decision of *Student E. Doe v. Barrington Sch. Dep't*, No. 18-051 A (Jan. 4, 2019) (hereafter "*E. Doe*"). That decision, which the Council on Elementary and Secondary Education ("Council") affirmed in a written opinion on August 20, 2019, is on administrative review before the Superior Court in *Barrington Sch. Comm v. Council on Elementary and Secondary Edu. and Student E. Doe by and through their Parent*, C.A. No.: PC-2019-10097. Concomitant with this submission, the Committee is requesting dismissal of that appeal with prejudice.

The purpose of the instant request for an advisory opinion ("Request") is to obtain guidance and direction on the administration of student discipline under the various overlapping and contradictory commands reflected in statutes adopted by the General Assembly over the past decades, and under the law commanding school districts to adopt written policies for the establishment of threat assessment teams adopted by the General Assembly in July 2019. *See* R.I. Gen. Laws § 16-21-23.2.

*E. Doe*, while relevant background, is no longer under challenge. By withdrawing the appeal and submitting this request, the Committee seeks to shift the focus from the facts of that case to the broader questions that the decision left unresolved. The hope is that the Commissioner's response will inform the practice of school districts throughout the state in balancing the rights of students to a quality education with the rights of school communities to a safe and secure environment.



*E. Doe* Background

In *E. Doe*, the Commissioner reversed the Committee decision to impose a three-day out of school suspension ("OSS") on an eighth-grade middle school student who had participated with three other eighth grade students in a conversation at lunch in the cafeteria on February 28, 2019. The conversation began with a discussion about what the students would do if there was a "shooter" at the school, and then turned to what the students would do if they were the shooter. This conversation took place two weeks after the shooting in Parkland, Florida in which a gunman opened fire at Marjory Stoneman Douglas High School, killing seventeen students and staff members and injuring seventeen others. *Id.* at 3, n.5. A student overheard the conversation and reported it to his or her parent, who made an anonymous phone call to the Barrington Police Department. Officers from the Police Department visited the home of each student that night. The next day, officers reported to the school and conducted a search of the lockers and backpacks of each student, including E. Doe. No criminal charges issued. *Id.* at 5.

Once the search concluded, school administrators interviewed each student in the presence of the school resource officer for approximately 20 to 30 minutes. After that, a licensed school social worker conducted a risk screening of E. Doe (and each of the three others) as part of the district's threat assessment protocol. The social worker concluded that E. Doe "does not appear to pose imminent danger to himself or to others." *Id.* at 6, 7. The principal imposed a three-day, OSS upon E. Doe and each of the three students who had speculated about being a shooter, to commence that same day.

E. Doe challenged the OSS on various grounds, arguing that E. Doe was found responsible through "guilt by association." *Id.* at 10-11. E. Doe did not challenge the OSS under R.I. Gen. Laws § 16-2-17.1, adopted by the General Assembly on July 1, 2016. The Commissioner invoked R.I. Gen. Laws § 16-2-17.1, however, and sustained E. Doe's appeal.[1] He found that E. Doe "was neither a 'disruptive student' under section 16-2-17(a), nor posed a 'demonstrable threat to students, teachers, or administrators' under 16-2-17.1." *Id.* at 12.

The Commissioner further found that "other issues raised by the facts provide a separate basis for this holding and are worth considering so as to hopefully provide some guidance for school administrators who may face similar issues." *Id.* at 13. Of relevance here are two aspects of that guidance.

First, the Commissioner found that the Committee had violated E. Doe's due process rights because the notice provided to E. Doe of the alleged misconduct "bore slight resemblance to the actual facts." *Id.* at 13. Specifically, the student handbook provisions proscribed "disruptive behavior," defined in part as conduct that "interrupts the orderly educational procedures of the school[,]" and unsafe behavior, defined in part as "[e]ngaging in or threatening to engage in behavior which would cause physical or emotional harm." *Id.* at 14 (inner citations omitted). The Commissioner concluded that E. Doe did not violate either aspect of these student code

[1] The decision issued under former Commissioner Ken Wagner, Ph.D.



provisions, finding that the "fact that an unidentified parent of an unidentified BMS student decided on the basis of an unidentified hearsay report from his or her child, to make an anonymous report to the Barrington Police Department, is not evidence that E. Doe actually engaged in, or threatened to engage in either, (a) the defined 'Disruptive Behavior'; or (b) other behavior which would cause 'physical or emotional harm' and thus constitute a Safety violation." *Id.* at 14. The Commissioner distinguished federal court cases upholding discipline for imposition of consequences on students who made verbal threats, and found that in those cases, unlike that presented by E. Doe, the "acts" were "reasonably construed" as "precursors to violence." *Id.* at 14-15, n.19. In contrast, he concluded, school officials knew prior to imposing the OSS that E. Doe did not present a "safety threat." *Id.* at 15.

Second, and relatedly, the Commissioner ruled in *E. Doe* that the administration should not have conducted a threat assessment because "there was no evidence that [E. Doe] posed 'any risk of safety to a student or the school.'" *Id.* at 17. The Commissioner noted that E. Doe and the other three students had spoken with members of the Barrington Police Department on the night of February 28th, and "assured [them] that nothing that was said was to be taken literally." *Id.* at 5. Additionally, the Commissioner relied upon the fact that the principal, "responding to the concerns generated by the presence of police at the school, notified parents, teachers and administrators about the anonymous tip by email, emphasizing that '[i]t was quickly determined that there was no threat to our learning community or environment.'" *Id.* at 6. The Commissioner therefore concluded that the district had no basis for conducting the threat assessment and directed that the completed Risk Screening Documentation Form be removed permanently from E. Doe's student record. *See id.* at 17.

Statutory Provisions

R.I. Gen. Laws § 16-2-17.1 provides:

> Suspensions issued shall not be served out of school unless the student's conduct meets the standards set forth in Section 16-2-17(a) or the student represents a demonstrable threat to students, teachers, or administrators.

R.I. Gen. Laws § 16-2-17(a) provides:

> Each student, staff member, teacher, and administrator has a right to attend and/or work at a school which is safe and secure, and which is conducive to learning, and which is free from the threat, actual or implied, of physical harm by a disruptive student. A disruptive student is a person who is subject to compulsory school attendance, who exhibits persistent conduct which substantially impedes the ability of other students to learn, or otherwise substantially interferes with the rights stated above, and who has failed to respond to corrective and rehabilitative measures presented by staff, teachers, or administrators.



R.I. Gen. Laws § 16-2-17(b) provides:

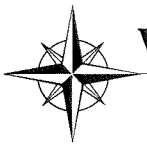
> The school committee, or a school principal as designated by the school committee, may suspend all pupils found guilty of this conduct, or of violation of those school regulations which relate to the rights as set forth in subsection (a), or where a student represents a threat to those rights of students, teachers, or administrators, as described in subsection (a). Nothing in this section shall relieve the school committee or school principals from following all procedures required by state and federal law regarding discipline of students with disabilities.

R.I. Gen. Laws § 16-21-18 provides:

> The school penalty for bringing or possessing a weapon as defined in 18 U.S.C. Section 921, a firearm or realistic replica of a firearm within school premises, premises being used for school purposes or activities, into a vehicle used for school transportation, or onto a roadway or path along which school children or teachers are walking to school shall be suspension from school for one year. This penalty will also be incurred when a student is not on school premises but when he or she aims a firearm or realistic replica of a firearm at school premises, school vehicles, or students, staff, or visitors attending school or in transit to or from school. This term of suspension may be shortened by the superintendent of schools on a case-by-case basis and under guidelines to be developed by the school committee with broad parent, teacher and community involvement.

R.I. Gen. Laws §§ 16-21-23.2(a) & (c)(1) provides:

> Each local school board or committee shall adopt written policies for the establishment of threat assessment teams, including the assessment of and intervention with individuals whose behavior may pose a threat to the safety of school staff or students consistent with the model policies developed by the school safety committee. The policies shall include procedures for referrals to community services or healthcare providers for evaluation or treatment when appropriate.
>
> Each district superintendent shall establish, for each school, a threat assessment team that shall include persons with expertise in guidance, counseling, school administration, mental health, and law enforcement. Threat assessment teams may be established to serve schools as determined by the district superintendent. Each team shall:
>
> (1) Provide guidance to students, faculty, and staff regarding recognition of threatening or aberrant behavior that may represent a threat to the community, school, or self . . .





Questions Presented

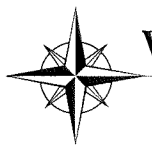
*E. Doe* appeared to hold that the Committee was foreclosed from imposing any disciplinary consequence upon E. Doe, including an in-school suspension, once it had determined that he did not intend to carry out the shooting and/or that the comments were made as a "kind of a joke." *E. Doe* at 4. This part of the holding leaves unclear the distinction between § 16-2-17.1, which permits an out-of-school suspension only when a student presents a "demonstrable threat," and § 16-2-17(b), which permits a school committee or school principal to impose a suspension on any student who either violates schools regulations "which relate the rights set forth in subsection (a), or where a student represents a threat to those rights of students, teachers, or administrators, as described in subsection (a)."

*E. Doe* also appeared to hold that the Committee was foreclosed from conducting any risk assessment of E. Doe once the Barrington Police Department had determined that it would not issue criminal charges, and once the administration had interviewed E. Doe to assess disciplinary consequences. This aspect of the holding must be reconciled with R.I. Gen. Law § 16-21-23.2, which vests in local school committees the mandate to "adopt written policies for the establishment of threat assessment teams, including the assessment of and intervention with individuals whose behavior may pose a threat to the safety of school staff or students consistent with the model policies developed by the school safety committee."

The Committee therefore seeks further guidance to address the above-referenced concerns, as well as related issues regarding the relationship between the laws pertaining to student conduct/discipline and the law pertaining to threat assessments, which became effective in July 2019.

The specific questions follow.

1. Is the meaning of "demonstrable threat," as set forth in R.I. Gen. Laws § 16-2-17.1 different from the meaning of a "threat, actual or implied of physical harm," as set forth in R.I. Gen. Laws § 16-2-17(a)?
    a. If so, what standard and evidence should a district use in assessing whether a student poses a "demonstrable threat"? What standard and evidence should a district use in assessing whether a student engages in conduct that constitutes a violation of school regulations which relate or represent a threat to the rights of students, teachers, or administrators to be "free from the threat, actual or implied, of physical harm"?
2. If a student's conduct does not meet the standard set forth in § 16-2-17(a) of a "disruptive student," and if the student does not represent a "demonstrable threat to students, teachers, or administrators," but the student engages in conduct that either violates "those school regulations which relate to the rights set forth in subsection (a) or represents a threat to those rights of students, teachers, or administrators, as described in subsection





(a)," as set forth in R.I. Gen. Laws § 16-2-17(b), is it lawful for the district to impose an in-school suspension on the student as a consequence?[2]

3. How should a district reconcile the mandate limiting a school district in imposing an out-of-school suspension, as set forth in R.I. Gen. Laws § 16-2-17.1, with the mandate requiring a school district to impose an out-of-school suspension, as set forth under R.I. Gen. Laws § 16-21-18?
4. Is it lawful for a district to remove a student from school when that student did not engage in misconduct under the "school regulations," including without limitation the student discipline code (R.I. Gen. Laws § 16-21-21), the dating violence policy (R.I. Gen. Laws § 16-21-30), or the bullying policy (R.I. Gen. Laws § 16-21-34), but who nonetheless is believed may represent a "threat, actual or implied, or physical harm" to the school community?[3]
    a. If so, is that removal to be characterized and/or reported to the Department of Education as an "out-of-school suspension"?
    b. If so, what standard and evidence should a district use in making this determination?
    c. If so, what standards should a district use to determine the duration of such removal and the criteria for return?
5. In implementing R.I. Gen. Laws § 16-21-23.2, are districts afforded the discretion to set the standard for determining whether an individual's "behavior may pose a threat to the safety of school staff or students"? If not, what standard applies in assessing whether an

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[2] The Committee assumes that "this conduct" in § 16-2-17(b) refers to that described in R.I. Gen. Laws § 16-2-17(a), so that if a student is "found guilty of this conduct," it means that he/she/they satisfy the definition of a "disruptive student" and may therefore be subject to an out-of-school suspension under R.I. Gen. Laws § 16-2-17.1. The Committee is questioning how to apply the other two bases for imposing a suspension set forth in R.I. Gen. Laws § 16-2-17(b): (1) a student is found guilty of a violation of those school regulations which relate to the rights set forth in subsection (a); or (2) a student represents a threat to those rights of students, teachers, or administrators, as described in subsection (a).

[3] Two recent decisions by the Commissioner indicate that the answer to that question may be "yes." *See M.R. Doe v. A Rhode Island Charter School*, No. 18-092K at 3 (Dec. 21, 2018) (holding that school district may exclude student from school "[s]eparate and distinct from a disciplinary exclusion based on misconduct" but instead as a "reasonable measure to protect students and staff members from foreseeable harm"); *A Doe v. A Rhode Island Charter School*, No. 18-066K at 8 (July 18, 2018) (holding that "outside the context of school discipline," public schools may exclude a student from school "until a satisfactory 'risk assessment' can be obtained"; such exclusion may be imposed "whether or not a disciplinary violation has occurred if school officials have "reason to be concerned for the student's safety and/or the safety of others"). In addition, the "Threat Assessment and Response Protocol," issued at part of the *Rhode Island Threat Assessment Teams Implementation Guidance* (July 2019), indicates at "Step 4" that if it is determined that the threat is a "very serious substantive threat," then a "student may be briefly placed elsewhere or suspended pending completion of" a "screen" for "mental health services and counseling" and "develop[ment] of a safety plan that reduces risk and addresses student needs." The Guidance "was developed by the Rhode Island School Safety Committee to provide school administrators and their community partners assistance in incorporating the threat assessment process for investigating, evaluating and managing targeted violence into strategies to create safe and secure school environments that enhance the learning experience for all members of the school community." *Id.* at 2.



individual should be referred to those who shall make the "preliminary determination that a student poses a threat of violence or physical harm to self or others"?

Conclusion

As indicated, the Committee is concomitantly dismissing the administrative appeal challenging the Council decision affirming *E. Doe*. In addition, it has expunged from the school records of E. Doe and the other three students who participated in the conversation on February 28, 2018 "any and all documents referring or relating to E. Doe's [and the other students'] suspension – including the March 1, 2018 Risk Screening Documentation Form, Petitioner's Ex. 2." *E. Doe* at 18.

The Committee looks forward to the Commissioner's guidance in this important and developing area of education law.

Sincerely yours,

Sara Rapport

Sara A. Rapport

cc: Barrington School Committee
Superintendent Michael B. Messore, III
Paul Sullivan, Esq.
Aubrey Lombardo, Esq.

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