

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER  
OF  
EDUCATION

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**In Re: Meghan G.**

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**INTERIM ORDER**

Held: Until further information is available to the IEP Team concerning the precautions necessary to maintain a safe environment for this student, including factors relating to qualifications of her personal care attendant, an interim order will issue to ensure her safety.

**DATE:** July 19, 1999

## **Travel of the Case**

A petition for issuance of an interim order was filed with Commissioner Peter McWalters on July 8, 1999. It was assigned to the undersigned for hearing and decision on July 9, 1999, and an expedited hearing was held by agreement of the parties on July 14, 1999. Testimony and documentary evidence was received at the hearing and legal arguments were made by counsel for the parties. Because of the time constraints of the statute, R.I.G.L. 16-39-3.2 “Interim Protective Orders,” and the need for expedited decision in this matter, the decision is based on the notes made by the hearing officer, and the documents entered in the record at time of hearing.

## **Issue**

Should the Cranston School Department be ordered to assign a scent-free teacher assistant who does not smoke<sup>1</sup> to serve as a personal care attendant for this student?

## **Findings of Relevant Facts**

- ◆ Meghan is a ten-year-old student presently enrolled in the Cranston school system.
- ◆ Meghan has an individualized education program (IEP) which calls for the services of a one-on-one teacher assistant who functions as her personal care attendant.
- ◆ Meghan’s IEP calls for her to participate in an eight-week summer program with the ongoing support of a personal care attendant. App. Ex. 1
- ◆ Meghan has an intractable seizure disorder, and it has been documented that various smells can induce seizures. App. Ex. 2

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<sup>1</sup> The petition filed in this case requested that the individual also not drink coffee, but testimony at the hearing clarified that with certain precautions, a coffee drinker could be assigned to work with this student.

- ◆ Two of the smells which can induce seizures in Meghan are those from coffee and cigarettes.
- ◆ For the past two years, Meghan's one-on-one teacher assistant, who is in constant physical proximity with her due to the nature of the child's disorder, has been free from scents, been a non-smoker, and did not drink coffee.
- ◆ Meghan's mother testified that a scent-free personal care attendant, and strategies used to reduce Meghan's exposure to certain smells, had greatly reduced the frequency of her seizures in school.
- ◆ Because of unexpected surgery, her present aide is unable to work with Meghan in this year's summer program.
- ◆ The replacement initially assigned by the district smokes cigarettes and drinks coffee, but promised to refrain from both of these activities while working with Meghan. Meghan's mother rejected this person because she felt these precautions were inadequate.
- ◆ Since August of 1997, the district has utilized a document entitled "Information on Meghan" which lists certain qualifications for the teacher assistant. It includes the requirement that the individual be unscented and not use cigarettes or drink coffee. This document has been utilized in the job selection process which occurs annually for teacher assistants employed by the district.
- ◆ Upon learning of Meghan's mother's objection to the assignment of a teacher assistant who smokes and drinks coffee, the district sought to find an aide who met the criteria of being "unscented."

- ◆ Meghan's Mother has refused to send her to the summer program because she has concluded that her daughter is likely to have more frequent seizures if her personal care attendant does not meet the criteria previously established.
- ◆ The district has made its best efforts, although unsuccessful to date, to hire an aide who meets the qualifications of being scent-free and meets other qualifications for assignment to this particular child. As recently as July 9, 1999, the school department mailed a job posting to all members of its teacher assistant bargaining unit. It plans to interview qualified applicants beginning July 19, 1999. Resp. Ex. A.

### **Positions of the Parties**

#### The School Department:

The Cranston School Department clearly recognizes the strategies that its own professional staff have used in implementing a successful school program for this child and in making the school environment as safe as possible for her. The district did not challenge the testimony presented which identified this child's reduced incidence of seizures and linked such fact to, among other things, her aide's close contact and the fact that she was scent-free. Perhaps because the summer program is outdoors and there has been some difficulty in finding a teacher assistant who meets the scent-free criteria, the district takes the position that despite its assignment of a scent-free individual in the past, there is no legal obligation to do so now. Clearly, it is the district's position that it has and will continue to make best efforts to find a person who meets these criteria.

### The Petitioner:

Counsel for Meghan's mother takes the position that the district cannot "back away from" the assignment of a scent-free individual to serve as Meghan's personal care attendant. Given the mother's testimony as to the serious and immediate consequences<sup>2</sup> that result from Meghan's close contact with certain smells, especially coffee and tobacco, assignment of a scent-free individual is a necessary component of her program. If this aspect of her school environment is altered, even in an outdoor camp program, she cannot participate without an immediate threat to her health and safety. Furthermore, she argues, the district has implicitly recognized this in its consistent use of the document "Information on Meghan" (App. Ex. 3) in selecting the teacher assistant who would be assigned to Meghan.

### Decision

The unexpected absence of Meghan's long-term teacher assistant has raised both the factual and legal issue of what qualifications such person must have. From a factual standpoint, such determinations are usually made by the IEP team in considering information from a variety of sources. The IEP describes the special education and related services, program modifications, etc. which constitute a child's free appropriate public education. Megan G. is entitled to such free appropriate public education pursuant to IDEA, 20 USC § 1400 et seq., as well as Section 504 of the Rehabilitation Act of 1973.

In this case the Individualized Education Program for Meghan does not include reference to any scent-free characteristics for her personal care attendant or to the fact that such person must be a non-smoker. Yet, there is considerable evidence in the record that such characteristics have become necessary attributes of such person. This and other strategies

employed by the district's staff have reduced the number and severity of seizures experienced by this child in school. To date, however, these de facto elements of Meghan's program have not been included in her IEP<sup>3</sup>.

We would expect that required elements of her program such as a description of characteristics of Meghan's personal care attendant and description of strategies to reduce seizures would at some point be discussed by the IEP team. Additional medical documentation requested by the special education office and feedback from professional staff who have developed a successful system of reducing the contact that Meghan has with certain smells would be considered at that time. The factual conclusions reached by the team as to what is "necessary," including the characteristics of her aide<sup>4</sup>, will be documented in the IEP and thereby become binding on the Cranston School Department.

Until such process runs its course and the IEP team has opportunity to consider all relevant facts on these issues, the commissioner nonetheless has authority to respond to the evidence in this record so that this student can safely participate in her school program. The commissioner has authority to issue interim orders under R.I.G.L. 16-39-3.2 for the purpose of ensuring that a child receives education in accordance with applicable state and federal laws and regulations. Many times this authority has been utilized to issue a "stay put" order to maintain the status quo placement pending resolution of a dispute between parents and a school district as to what constitutes an appropriate placement. This authority can also be utilized to alter the status quo or even create a placement for a child. In prior decisions we have recognized that such authority should not be used to short-circuit the IEP process or due

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<sup>2</sup> Mother testified that Meghan's response to coffee and tobacco smells was instantaneous and severe seizures.

<sup>3</sup> The parties referred to "Health Plan" which may contain references to strategies used to reduce the number of Meghan's seizures, but this is not an exhibit in this proceeding.

<sup>4</sup> and back-up aide, as determined by the team.

process hearing system for dispute resolution in special education matters. See In Re John C.L. Doe, decision of commissioner dated October 21, 1997; n.b. page 5. We have, however, identified issues of health and safety and protection of student rights as “extraordinary circumstances” warranting such intervention.

Given the record at the interim order hearing, such safety issues are present in this case. It is clear that precautions must be taken to eliminate Meghan’s close contact with individuals who are not scent free and who are smokers. Evidently, a coffee drinker could serve as her attendant as long as procedures are used to eliminate the coffee smell. Without these precautions, based on the limited record before us, it is demonstrated that Meghan will not be able to participate safely in her extended school year program. The district is directed to assign a personal care attendant who is scent-free, a non-smoker and who agrees to remove the smell of coffee using procedures to be identified by Meghan’s mother. This interim order shall be in effect until the subject of environmental precautions is considered by the team and resolved by the IEP process.

The request for compensatory educational services is denied at this time, but will be reconsidered if unreasonable delay in securing an aide occurs.

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

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July 19, 1999  
Date