



### **Travel of the Case:**

A prior Commissioner's decision dated May 25, 2000, granted an interim order requested by Meghan G's parents on her behalf. It directed Meghan's immediate return to her school program at the Glen Hills School in Cranston, Rhode Island as soon as the details of her health care needs in school could be agreed upon. Meghan had been out of school for several months because of illness, and her ongoing medical condition required a detailed Health Care Plan to ensure Meghan's well being in school. On or about June 1, 2000 Meghan returned to school with all the components of a revised Health Care Plan clearly agreed upon, except for one – administration of a drug called Propulsid just prior to lunch. It was to be administered by Meghan's mother "until administration issues are resolved". The school year ended, and when Meghan's parents were informed during this summer that the Cranston School Department would continue to refuse to administer this medication during the upcoming school year, counsel for Meghan filed a Petition for an Interim Order. Objection to the August 3, 2000 petition was filed by the attorney for the Cranston School Department on August 10, 2000. By agreement, the matter proceeded to hearing on August 28, 2000. At time of hearing testimony and documentary evidence were received, and the parties placed their legal arguments on the record at that time. Preparation of the transcript was expedited and it was received by the hearing officer on September 5, 2000. In spite of all efforts to review this record, do the necessary research and complete the decision within the five day statutory time frame, this has not proved possible, given the complexity of the issues and the need to review the transcript in depth, rather than to rely on notes made at the time of the hearing.

### **ISSUES**

- Are certified nurse teachers employed by the Cranston School Department required to administer Propulsid to Meghan as a related service pursuant to her Individualized Education Plan?
- Does the Commissioner have jurisdiction to decide the issue described above even if there is no other "pending hearing" as described in R.I.G.L. 16-39-3.2?

## **Findings of Relevant Facts**

- Meghan G. is an eleven year old child enrolled in the third grade at the Glen Hills School in Cranston, Rhode Island.
- Meghan is a medically fragile child who suffers from multiple seizure disorder and uncontrolled vomiting/reflux. Petitioner's Ex.1.
- Meghan has an Individualized Education Plan which incorporates a separate and very detailed Health Care Plan. The health care plan was last revised on June 1, 2000. Petitioner's Ex.1; Tr.
- The Health Care Plan of June 1, 2000 lists "Doctor's Orders" and includes a notation regarding an order dated 5-31-00 from Dr. Athos Bousvaros calling for the administration of the drug Propulsid fifteen minutes before lunch. Petitioner's Ex.1.
- A note to this section of the health care plan indicates:  
Until administration issues are resolved, mother will administer Propulsid until end of school year. This does not relieve School Dept. of responsibility to administer this medication.  
Petitioner's Ex. 1.
- The Coordinator of Nursing Services for the Cranston Public Schools has not received a written doctor's order directing that Meghan be administered Propulsid during the 2000-2001 school year. Tr. p.118.
- The Coordinator of Nursing Services has made an assessment that administration of Propulsid to Meghan presents "overwhelming hazards" and would not be consistent with good nursing practice. Tr. p.101. She has made this assessment in consultation with the school physician for the Cranston School Department, Dr. Richard Ohnmacht. Tr. p.129. It is for these reasons that she refuses to administer Propulsid to Meghan in school, despite the current request for her to do so.
- Use of Propulsid is associated with the risk of serious, and sometimes fatal, ventricular arrhythmia's and its use is contraindicated for children and patients with "prolonged Q/T", an abnormal heartbeat (and a condition from which Meghan also suffers). Tr. pp. 61-62, 96-101; Petitioner's Ex.1; Respondent's Ex.A.
- The manufacturer of Propulsid, Janssen Pharmaceutica, in conjunction with the Food and Drug Administration, removed this drug from the market in the United States because of a decision that continued general prescription access to the drug posed unacceptable risks. Propulsid will continue to be available in the United States only through a limited access program. Respondents Ex.B and C.; Tr. p.32.
- Propulsid was removed from the market in the United States on or about July 14, 2000; it remained available in pharmacies until mid-August, 2000. Resp.Ex.B.

- On August 17, 2000 Meghan’s doctor prescribed a four month supply of Propulsid for her. It is her mother’s intent to continue to access this drug, if Meghan’s medical condition requires it, through the limited access program or Compassionate Use Program as it is sometimes called. Tr.p.32; Petitioner’s Exhibit 2;
- Meghan’s prescription for Propulsid calls for its administration three times a day. Tr.p.24; Pet. Ex.2;
- Although the information disseminated with the drug describes it as medication used to treat symptoms of nighttime heartburn due to reflux disease, school officials believe that it is prescribed to treat Meghan’s uncontrolled vomiting/reflux. Petitioner’s Ex1; Tr. p.96.;
- The Cranston school physician has tried unsuccessfully to reach Dr. Bousvaros, who prescribes this medication for Meghan to discuss the reasons for its administration, the risks, and the decision to give it to Meghan despite the contraindications for its use in her case. Dr. Bousvaros did not return several telephone calls made to him from the school physician, Dr. Ohnmacht. Tr. p.20, 127-128;
- Pending resolution of the issue of the district’s responsibility to administer Propulsid to Meghan before lunch, her mother has been going to school to administer it to her. However, during the summer when Meghan participated in an extended school year program at the Kent County YMCA, a program arranged by and paid for by the Cranston School Department, the nurse employed by the YMCA administered Propulsid to Meghan just prior to lunch each day. Tr. p.22-23;
- The last release signed by Mrs. G. which would permit the school doctor to talk to Dr. Bousvaros concerning the administration of Propulsid to Meghan covered the period May 31, 2000-June 30, 2000. Tr. p.28; Mrs. G. has no objection to signing a current, limited term release which would permit doctor-to-doctor communication on these medication issues. Tr.p.43.

## **Positions of the Parties**

### **The Petitioner**

The Petitioner argues that administration of Propulsid at school fifteen minutes before lunch each day is an essential supportive health service required for Meghan to access and benefit from her education. Administration of this medication has been established as a legally required “related service” because this service is incorporated into Meghan’s IEP and its attached Health Care Plan. Counsel argues that by including administration of Propulsid as item number 3 under “Doctor’s Orders” the parties have acknowledged both the actual

necessity for this medication and the status of its administration as a related health service provided under the Individuals With Disabilities Education Act, 20 USC 1400 et seq. Therefore Meghan has a clear legal entitlement to receive this medication at school, and to require the school nursing staff to administer it to her.

The Petitioner takes the position that it is not the prerogative of school health officials to second-guess the sometimes difficult decisions made by Meghan's parents concerning her medical treatment. These decisions are made by them in conjunction with their child's physician. Even if the administration of certain medication entails serious risks, it is not the function of the school nurse to reassess those risks. The process of weighing risks against benefits is a process engaged in by Meghan's parents in consultation with her physician. Although Meghan's parents wish that it were not necessary for Meghan to take medication known to have such serious potential side effects, it is their assessment and decision at this time that such treatment is necessary.

Counsel notes that even if it is the case that administration of Propulsid creates potential liability for the school district, there are other related health services provided in school which similarly create exposure to legal liability. Some health services are by their nature intricate and complex and include a certain degree of risk, but school health professionals are required nonetheless to provide them because of a child's entitlement to these services under IDEA. There is no exemption under IDEA for those related school health services which bring with them potential legal liability. No health law or regulation would be violated if the school nurse administered Propulsid to Meghan – or if the Commissioner were to order that this be done.

#### Cranston School Department

Counsel for the Cranston School Department argues that there is no evidence that administration of Propulsid to Meghan during the school day is an essential required supportive service. He denies that administration of this medication has been established in any of the documentation as a related school health service under IDEA. He argues that the Health Care Plan submitted into evidence does not indicate agreement on administration of Propulsid, much less agreement on who would be responsible for administering it at school.

The absence of agreement with respect to the issues surrounding administration of Propulsid is explained in part by the fact that school officials have received no direct communication from the physician who prescribed this medicine. Since the school physician's telephone calls to the prescribing doctor went unanswered, and the school doctor is the only person authorized to communicate with Meghan's doctor, basic information has not been provided to those involved in the school health program. It should not be surprising, he submits, for substantial questions to exist at this time. Thus, counsel argues, school officials are compelled to act on what information they do have and cannot conclude that their administration of this medication is required or that it would not be extremely dangerous. It is the district's contention that they have not been presented with a current doctor's order for administration of Propulsid at school or received an explanation as to why Meghan continues to take this medicine when it has been removed from the market.

Similarly, counsel argues, evidence presented at the hearing falls short of establishing that the school's administration of Propulsid is legally required as a related school health service. He takes issue with the Petitioner's contention that when the parties agreed to the elements of the Health Care Plan of June 1, 2000, their agreement extended to the necessity for Meghan to have this medicine administered during the school day. Despite Petitioner's counsel's argument that a consensus on this point was reached, he argues this was not the case.

School officials remain circumspect on the "administration issues," given the lack of communication, written or otherwise, from Dr. Bousraros and the information they do have – the general description of the risks and contraindications for Propulsid's use and its recent removal from the market. Counsel for the district argues that the same caution should be exercised by the hearing officer in carefully assessing whether the Petitioner has met the burden of proof for an interim order in this matter. He argues the record is devoid of evidence that administration of this medication is essential or that it is required as a related health service, i.e. that it must be administered during the school day in order for Meghan to access her school program.

As we understand the district's second line of argument, even if the record does establish that administration of Propulsid by the school nurse is a required related school health service under IDEA, the district should nonetheless be relieved of responsibility to have its nurses administer the medication because of the unique facts of this case. School health officials, including the school physician, have made an assessment that the risks to Meghan in taking this drug create an "overwhelming hazard". Furthermore, district officials have determined that a potential for liability exists should administration of the drug result in serious harm to Meghan. These factors are argued to excuse the Cranston School Department from providing what might otherwise be a required related service to this disabled child under IDEA. In addition, Counsel points out that school nurses have a professional obligation which would require them to refrain from administering this medication to Meghan, even if federal and state education laws require them to do so. He urges that this legal conflict must be taken into account in determining if an interim order should issue.

As a final matter, the school department argues that a procedural prerequisite to the Commissioner's authority to issue an interim order under R.I.G.L. 16-39-3.2 is absent. There is no "pending hearing." When an issue arises under IDEA, it should be resolved at a due process hearing at the local level. Counsel argues that given the present posture of this case, the Commissioner is without jurisdiction to issue an interim order.

### **DECISION**

At the outset we must note the divergence of the parties on the issue of what is in dispute between them. The petitioner explains that there is no disagreement with the school department in terms of the contents of Meghan's IEP or her Health Care Plan. Her perspective is that intervention is requested merely to enforce compliance with a written health care plan agreed to on June 1, 2000. Thus, counsel for the Petitioner sees no need for a due process hearing, the purpose of which would be to resolve disagreement as to what the IEP, and the Health Care Plan, should contain. In contrast, counsel for the Cranston School Department presents the issue much differently – that there was and is no agreement that administration of Propulsid during the school day is required in order for Meghan to access her educational program. See counsel's arguments in this regard at pages 73-74 and 156 of

the transcript. A second argument of the district is that even if this child's receipt of Propulsid at lunchtime is necessary, the school nurse should not, under the circumstances present here, administer it.

Whether or not the petitioner had understood the issue to be more narrowly defined prior to the hearing, the broader issue has been raised. It affects whether or not the merits of this dispute should ultimately be resolved by a due process hearing pursuant to the Regulations of the Board of Regents for Elementary and Secondary Education Governing the Special Education of Students With Disabilities. See Section One, IV, 7.0 of these regulations. In the past we have exercised our interim order authority in special education matters for the most part to enforce the requirements of existing IEP's. We have deferred disputes as to the content of the IEP document or the rights and responsibilities described therein to due process hearings. The district argues that this matter must be submitted to a due process hearing officer for consideration of what is in actuality a request to amend the existing health care plan and IEP. The due process hearing will address the issue of whether school nurses must administer this medication as part of the broader, related service issue. The Petitioner views the issue of whether Meghan must have this medication during the school day as resolved by the existing language in the Health Care Plan, Petitioner's Ex.1.<sup>1</sup> She argues the language in the plan reflects the parties' agreement that Meghan must have this medicine during the school day.

While it may be that those drafting the Health Care Plan understood the only issue with regard to Propulsid to be whether the school nurse would be required to administer it, the language of the Health Care Plan itself does not compel this conclusion. The note describes "administration issues" which were yet to be resolved. Several issues existed with respect to this medication, according to the testimony received at this hearing – why Meghan was taking it, the nature of the risks presented to her and whether it was required that she take it in school. At a point very close in time to the development of the Health Care Plan, the Coordinator of Nursing Services expressed the need for the school department to "explore the reasons" why Meghan was taking this medication and to determine if its administration could

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<sup>1</sup> During closing argument counsel for the Petitioner suggested on the record that the issue of whether Propulsid was required to be administered during the school day had been discussed at the meeting at which the June 1, 2000 Health Care Plan was drafted. As we noted at that time counsel's statements are not evidence.

be timed so as to avoid the need to administer it at school. (See footnote 3 page 3 of the Commissioner's May 25, 2000 decision in a case involving this same student.) Testimony in this case indicates that although a release was in effect which would have permitted Dr. Ohnmacht to talk to Dr. Bousvaros about these significant issues from May 31, 2000 to June 30, 2000, no discussions occurred. While it may be that these questions were nonetheless resolved to the district's satisfaction, there is insufficient evidence of this.<sup>2</sup> The weight of the evidence received supports the opposite conclusion – that substantial issues as to the necessity for this medicine at school existed even after the meeting at which the revised Health Care Plan was drafted. Given the district's assertion there was and is no agreement that Propulsid must be administered at school as a required school health service – we are not persuaded that the language contained in the Health Care Plan establishes agreement on this point by a preponderance of evidence.

Given our conclusion in this regard, it is our decision that the issues in dispute between the parties with regard administration of Propulsid, including whether it is a required school health service for Meghan, are properly submitted to a due process hearing officer. Either one or both of the parties should make the appropriate request for hearing pursuant to Regents' regulations.

Pending the due process hearing, it may be that an interim order should issue to ensure that Meghan receive the education to which she is entitled under state and federal law; however, the record before us at this time does not establish entitlement to an interim order. As previously discussed, there is no presumption that administration of this medication is necessary by virtue of its being listed as a related service in Meghan's present IEP. Our record contains no documentation in the way of a doctor's order, nor is there any testimony from the prescribing physician that Meghan must have this medication at lunchtime each school day. No proof has been submitted to document the reasons for its administration. The status of the record in this regard is most likely due to the Petitioner's understanding that there was no dispute with regard to this issue, but it nonetheless results in the record being

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<sup>2</sup> By inference the only evidence on this point we can discern from this record is the testimony of the Coordinator of Nursing Services as to the reasons for her refusal to administer Propulsid. She did not mention facts relating to the timing of or necessity for the medication.

substantially deficient on these points. It is on this basis that the request for an interim order is denied, without prejudice to a renewed request to be submitted at a later time.

In the hope that it may be helpful to the parties, a few additional observations on the status of the record and the arguments of the parties should be made. It is argued that the risks to Meghan in taking this medication present an overwhelming hazard to her. We have no evidence concerning the precise nature of the risks of this medicine to Meghan. As is the case with serious illness, any assessment of risk can only be made in the context of the benefit this medication confers on her at the present time. The school nurse has testified that although she herself is unaware of the use of Propulsid to treat uncontrolled vomiting, she is not suggesting that Meghan's physician is acting inappropriately in prescribing this medicine for her. See the transcript at page 121. We perceive the district's concerns for administration of this medication to Meghan as based more on the general information concerning this drug than on the facts of her individual condition. Direct and immediate communication between the school doctor and Meghan's doctor (which Meghan's mother has indicated she will authorize by the signing of a release) may resolve these concerns. If not, we will in all likelihood be required to address the issue of risk, and that of potential school district liability, in a formal way when the request for an interim order is renewed.

The request for an interim order is denied without prejudice at this time.

APPROVED:

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Kathleen S. Murray  
Hearing Officer

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Peter McWalters, Commissioner

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September 13, 2000  
Date