

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

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In Re: Student M.S.

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INTERIM ORDER

Held: Pending a due process hearing which will address several issues, including the location of speech and occupational therapy services for this student, the district is ordered to provide speech therapy and occupational therapy to him at his home.

DATE: October 27, 2005

Travel of the Case

On October 6, 2005 Commissioner Peter McWalters received a request for an interim protective order on behalf of Student M.S.'s parents. The petition was assigned to the undersigned for expedited hearing and decision pursuant R.I.G.L. 16-39- 3.2. On October 17, 2005 hearing was held by agreement of the parties and at that time testimony was taken and documentary evidence was received. The record was left open until October 20, 2005 to enable the North Kingstown school department to determine whether two documents offered into evidence should become part of the record in this case. Because of the time constraints of the statute on interim protective orders, and the need for an expedited decision in this matter, the decision is based on the notes made by the hearing officer, and the documents entered into the record at the time of hearing.

Issue

Should the North Kingstown school department provide speech/language therapy and occupational therapy to this student in his home pending the outcome of a due process hearing?

Findings of Relevant Facts

- Student M.S. is a four-year-old student who resides in North Kingstown with his parents. He presently receives special education and related services pursuant to an Individualized Education Program developed for him on September 20, 2004. Petitioner's Ex.2.
- His current placement is in a private preschool program in North Kingstown, which he attends on an average of two days per week. He attends either a morning or afternoon session. His IEP also calls for speech/language therapy and occupational therapy to be provided each week by professionals in the North Kingstown school department. His IEP notes that these related services will be provided in a "therapy room". Pet.Ex.2
- Student M.S. has been diagnosed with hypogammaglobulinemia, an immune deficiency disease which puts him at increased risk of infection. For this reason, his IEP requires that all surfaces, materials, and equipment be wiped with an anti-bacterial spray prior to his use. Pet.Ex.2.
- Last year Student M.S. received his speech/language and occupational therapy services on a one-on-one basis, in an "office-type" room at the Fishing Cove School in North Kingstown. The surfaces and materials in the therapy room were cleaned each time prior to his therapy session. Testimony of Student M.S.'s mother.
- Student M.S. missed twenty-four out of a total of thirty-four sessions during school year 2004-2005 because of his medical condition. His absences occurred when daily tests indicated his "numbers were low", i.e. his increased susceptibility to infection on

those days, and his mother's exercise of judgment that he should be kept home until he received appropriate treatment. Testimony of Student M.S.'s mother.

- North Kingstown school officials have taken the position that Student M.S. is not entitled to make up the therapy sessions he missed last year because of his illness. Testimony of Barbara Smith, the early childhood special education coordinator for the town of North Kingstown; testimony of Student M.S.'s mother.
- For school year 2005-2006 the site of Student M.S.'s therapy sessions has been changed to the Davisville School, to a large room divided into three separate areas in which children simultaneously receive speech/language and occupational therapy.
- On the first day he attended a therapy session at the Davisville School, another child who had a cold was seated next to him while each received occupational therapy from a separate specialist. Pet.Ex.3.
- When a concern about exposure to germs from other children was raised with school officials, Mrs. S. was told that her son would be alone in the therapy room when he received services. Nonetheless, on subsequent occasions when Student M.S. has gone to school for therapy, other children have been in the room at the same time, in areas partitioned off by room dividers. On these occasions, Student M.S. has left the room without receiving his therapy. Testimony of his mother.
- On at least two occasions when Student M.S. was scheduled for therapy and was present at the room when the student before him finished, the surfaces were not cleaned with anti-bacterial spray. On at least one of these occasions, Student M.S. left school without receiving his therapy.¹ His mother has actually observed the surfaces being cleaned only one time. Testimony of Student M.S.'s mother.
- Mrs. S. has received assurances from school personnel that Student M. will be alone in the therapy room when he receives services and that the precaution of wiping all surfaces and toys will be followed as indicated in his IEP.
- Mrs. S. has requested a due process hearing to address several issues that have arisen, including the issue of the site to be used and precautions to be taken in providing Student M.S.'s speech and occupational therapy. A prehearing conference is scheduled for November 5, 2005.

Positions of the Parties

North Kingstown School Department

Counsel for the School Department takes the position that the site presently used for providing this student with his speech and occupational therapy services at Davisville School is a safe environment for him. It includes the precautions called for in his current IEP. The School Department points out that the IEP makes no mention of the need for services to be provided at home, as requested by the parents in this petition. While it may be the parents' contention in this hearing that the only safe environment in which their son can receive these services is his home, this has not been established by sufficient

¹ Notes from the hearing do not indicate what happened on the other occasion when Mrs. S. actually observed that the table was not cleaned after the previous student.

evidence at this hearing. In fact, prior to the interim order hearing, school officials had not received any medical documentation of his inability to receive these services in a public school setting. The School Department notes that Student M.S. attends a private preschool where he is not isolated from other children and in which precautions are not substantially different from those taken at Davisville. Thus, the parents' position that therapy services must be provided in his home is a "curious inconsistency" which remains unexplained on this record. For these reasons, counsel argues that the request for an interim order should be denied and any issues as to changes in his placement be deferred to the pending due process hearing.

Student M. S.

Counsel for the family argues that the environment in which the School Department proposes to service the needs of this student this year poses serious risks to his health. Pending resolution of this issue, as well as others, by a due process hearing officer, it is necessary to issue a protective order directing that services be provided in the protective environment of his home. Otherwise, counsel submits, it is clear that he will not receive the therapy services described in his IEP. He will effectively be denied these services until such time as the due process hearing concludes and a decision is issued.

The current IEP requires that the surface areas and materials be cleaned with antibacterial spray prior to each and every time that Student M.S. uses them. This precaution has not been followed each and every time Student M.S. has appeared at Davisville for his therapy sessions. In addition, when she expressed concern about exposure to germs from other children in the therapy room, Mrs. S. was told that he would be alone in the room when he was there for his therapy. Despite these assurances, Mrs. S. has had to leave the therapy room with her son on several occasions because other children have been present when they arrive for his services. Thus, this year's therapy room and its conditions present a threat to this student's health and safety. Pending the due process hearing, an interim order requiring the district to provide these services in the cleanliness and safety of this student's home is necessary. The need for an interim order is emphasized by the fact that when Student M.S. missed therapy because of his medical condition during school year 2004-2005, school officials determined that he is not entitled to make up the missed sessions². A gap in services again this year due to his inability to access services at Davisville would only cause him to fall further behind in his language, speech and motor development.

DECISION

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. Within the context of issues arising under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) interim

² One of the issues before the due process hearing officer is his claim for compensatory services.

order authority has, for the most part, been used to maintain a student in his or her status quo placement, i.e. a “stay put” order. Restraint in the issuance of orders which would have the effect of altering the status quo, or creating a new placement, is clearly required in a system which provides for its own resolution of placement issues by IEP teams and due process hearings.³ However intervention to adjust the delivery of special education services to students pending a due process hearing has occurred in a narrow line of cases, when the record demonstrates that “extraordinary circumstances” are present. Proof of such circumstances is much like a showing of irreparable harm in a preliminary injunction context.

On this record, it is clear that without certain environmental precautions, Student M.S. is not able to receive therapy services. There is also evidence that throughout the entire school year 2004-2005 his ability to access speech/ language and occupational therapy services was compromised by his medical condition. The likelihood of another gap in services occurring while the parties participate in due process proceedings is clear on this record. Pending resolution of exactly which environmental precautions are required in order for this student to receive the services outlined in his IEP, it is our decision that an interim order is necessary to permit him to access services without putting his health and safety in jeopardy. The serious threat to his health posed by the current environmental conditions at the Davisville School constitute “extraordinary circumstances” warranting issuance of this interim order. Also, as we view the record, it is the change the district has made this year in going from the Fishing Cove environment to that at Davisville that has exacerbated, if not created, these issues.⁴

We find on this record that school personnel have not followed the germ-proofing precaution identified in this student’s IEP on each and every occasion that he has been in attendance at school to receive his services. We also find that there is another environmental precaution, not identified in the IEP which has become a de facto precaution⁵, i.e. that other students not be in the room when he receives therapy. Such was the situation last year at the Fishing Cove School. This year school officials indicated their agreement with this condition on at least on two occasions, according to the record made at the interim order hearing. Yet, for reasons not explained in the record, they have not ensured that Student M.S. is the only child in the therapy room when he receives his services. Given that the mother tested whether both of these conditions would be met prior to filing the petition for issuance of an interim order, it is appropriate that we order that services be provided in a setting which will ensure these environmental precautions-- his home. Pending a decision by the due process hearing officer, the North Kingstown school department will provide speech/language therapy and occupational

³ See the recent decision of the Commissioner in *L. Doe v. Burrilville School Committee*, October 3, 2005. See also *In Re: John C.L. Doe*, decision of the Commissioner dated October 21, 1997 (n.b.page5).

⁴ The evidence in this record does not support, nor should the issuance of interim relief imply, that we agree with a contention that the only site at which it is safe for Student M.S. to receive services is his home. We decide only that the current environment at Davisville is not adequately safe, and on an interim basis, he should receive therapy services in his home.

⁵ See the discussion of de facto environmental precautions found to be part of the status quo for a similarly endangered student in *In Re: Meghan G.*, decision of the Commissioner dated July 19, 1999.

therapy in this student's home, according to a mutually convenient schedule, at the frequency provided for in his current IEP.

For the Commissioner,

Kathleen S. Murray
Hearing Officer

APPROVED

Peter McWalters, Commissioner

October 27, 2005
Date