

**STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS**

**COMMISSIONER OF  
EDUCATION**

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**Student M.**

**v.**

**Cranston School Department**

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**DECISION**

**Held:** The application for interim relief  
must be denied.

**DATE: January 12, 2009**

## **Jurisdiction and Travel of the Case**

The student who is the subject of the present hearing has an IEP calling for him to have a fulltime one-on-one aide during the school day. The aide the student had in prior school years has been bumped into another position as a result of a collective bargaining agreement. The parents of the student in this case have filed for a due process hearing under the IDEA to clarify this student's IEP in regard to the specific skills that this student's aide needs to have. In terms of the present hearing before the Commissioner of Education the petitioning parents, "are seeking, as his stay out placement, first, a finding as to the skills and abilities needed by an aide in order to facilitate [the student] throughout his school day, and a finding as to what these skills and abilities were for the last – with respect to the last agreed upon placement, and an order that on an interim basis, pending a full hearing, [the school district] assign an individual who has all these skills and abilities." Jurisdiction is present under R.I.G.L.16-39-1, R.I.G.L.16-39-2, and R.I.G.L.16-39-3.2.

## **Positions of the Parties**

### **The Parents**

The parents contend that the only person presently qualified to serve as aide for this student is the aide that he had in prior years. The parents do not, of course, contend that only this person could serve as aide for this student. The simply contended that no aide, including the aide presently assigned to this student, has demonstrated the skills needed to fill this demanding position. They contend that seniority cannot be the guiding principle in assigning an aide to this student.

### **The School District**

The school district contends that the present aide it has assigned to this student is fully qualified to perform the duties of the position.

## **Findings of Fact**

1. The student in this case is eight years old. As a result of a brain hemorrhage he has cerebral palsy of the quadriplegic spastic type, he is legally blind, and non-ambulatory. He needs a great deal of assistance to accomplish virtually all physical activities, including moving, eating, toileting, and personal care activities.<sup>1</sup>
2. "His head needs to be supported at all times, whether it be in the appropriate equipment. His head needs to be supported appropriately and safely while lifting him, while transitioning him from one piece of equipment to either a changing

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<sup>1</sup> Transcript, Vol. I, page 26.

- table or another piece of equipment. He needs to be supported so as not to allow the head to fall back in an abrupt manner.”<sup>2</sup>
3. He is multi-handicapped and does not have much dexterity in his hands and his aide needs to help him to improve his dexterity.<sup>3</sup> He does not have much ability to control his trunk or to stabilize himself. He therefore must be carefully positioned on any equipment he may use. Without adequate support he will topple over.<sup>4</sup>
  4. He is a friendly, loving, and social child. He enjoys stories and music. He has a good sense of humor.<sup>5</sup>
  5. This student, of course, must have a one-on one aide during the school day.
  6. This student's physical limitations make it difficult for him to speak and to make himself understood.<sup>6</sup> It takes time for people to learn to effectively understand his speech.<sup>7</sup> With experience others increase their ability to understand this student.<sup>8</sup> Because of this fact the student’s aide may need to facilitate communication between the student and other students and school staff members. The aide must carefully balance the need to encourage this student to learn to speak clearly on his own with the need to ensure that others understand what this student is trying to communicate.<sup>9</sup> This student’s receptive language skills are very good.<sup>10</sup>
  7. This student needs help in transitioning between the various physical therapy equipment he needs to use in the course of the day. His aide must be skilled in making these transitions safely and effectively and have the physical strength to carry out this responsibility. Since this student has limited use of his limbs he would have difficulty in protecting himself from injury if he were to be dropped.<sup>11</sup> The aide must also understand what item of equipment the student should be using at any particular time. The student needs to make use of many items of equipment and physical support throughout the school day.<sup>12</sup> (e.g. a regular wheelchair, a motorized wheelchair, a Rifton chair, a gait trainer, orthopedic braces, and a SWASH and AFO to respectively support his trunk and ankles)<sup>13</sup> This student must be checked frequently to ensure that his braces are not chaffing his skin.<sup>14</sup>

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<sup>2</sup> Transcript, Vol. I Page 28. See: Exhibit 1.

<sup>3</sup> Transcript, Vol. I Page 28. See: Transcript, Vol II, page 37

<sup>4</sup> Transcript, Vol. I Page 29.

<sup>5</sup> Transcript, Vol. I Page 24.

<sup>6</sup> Transcript, Vol. I Page 24.

<sup>7</sup> Transcript, Vol. II Page 14. Transcript Vol. III, page 7.

<sup>8</sup> Transcript, Vol. III Page 25.

<sup>9</sup> Transcript, Vol. II Page 15.

<sup>10</sup> Transcript, Vol. I Page 34.

<sup>11</sup> Transcript, Vol. II Page 20.

<sup>12</sup> Transcript, Vol. I Page 61.

<sup>13</sup> Transcript, Vol. I Page 58.

<sup>14</sup> Transcript, Vol. I Page 23.

8. An aide for this student must be prepared to help this student socialize with other students.<sup>15</sup>
9. Since this student's muscles can become rigid his aide needs to know how to stretch these muscles to help the student avoid spasticity. If his spasticity is not adequately addressed pain and serious injury could result.<sup>16</sup>
10. The aide must be skilled in the use of the computer equipment and software the student needs to use in class.
11. This student is placed in a regular education classroom and he has at least solidly average cognitive abilities.
12. Before the start of the 2008-2009 school year, this student had had the same aide for several years.<sup>17</sup> This aide had started to work with this student when he attended the Crayons Child Care Center and she was familiar with him from working with an agency, not related to the public schools, which provided home care to children with medical needs.<sup>18</sup> She continued in this role when this student enrolled in public school through a selection process conducted by the school district. There is no doubt that this aide carried out her responsibilities in an effective and conscientious manner. She cares about the success and well being of her charge. She has an excellent personnel relationship with the student and with his parents. This aide had the skill set that matched this student's needs.<sup>19</sup>
13. Just before the start of the 2008-2009 school year personnel changes triggered a bumping process under a collective bargaining agreement. The upshot of this bumping process was that the student's aide was removed as his aide and reassigned to a position as a school bus monitor. A new aide was assigned to this student.<sup>20</sup> This aide, however, almost immediately went on sick leave.<sup>21</sup> Another new aide was then assigned to this student. There is at least the possibility that the aide who is on sick leave may seek to return to the aide position she so briefly held.
14. We find that the aide position at issue requires the ability to receive in-service instruction on how to care for this student, a caring and patient disposition, a measure of physical strength, and the ability to work with professional staff to ensure that this student's academic and physical support needs are met. The aide must be prepared to learn to understand the student and to facilitate efforts to help him reach the maximum possible level of self-sufficiency.

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<sup>15</sup> Transcript, Vol. II Page 31.

<sup>16</sup> Transcript, Vol. I Page 30.

<sup>17</sup> Transcript, Vol. II Page 127.

<sup>18</sup> Transcript, Vol. I. Page 65.

<sup>19</sup> Transcript, Vol. II Page 18.

<sup>20</sup> Transcript, Vol. II Page 33.

<sup>21</sup> Transcript, Vol. II Page 35.

15. We find that, when it is necessary to change the aide for a student with the complex needs of the student in this case, an orderly process to select a qualified person is needed, as is a reasonable period of in-service transitional training and acclimation. This student's needs are so great and so particular that generic training for an aide will not suffice. There must be particular training to meet the needs of this particular student. This conclusion is bolstered by the difficulty the school district had to initially find an aide for this student when began regular public school instruction.<sup>22</sup> At one point a variance to a collective bargaining agreement was sought and obtained to facilitate obtaining the services of an appropriate aide.<sup>23</sup>
16. We find that the aide currently assigned to this student is now properly performing the duties of the position at issue and has the proper qualifications, including the appropriate Department of Education credential, for the position she now holds. We reach this conclusion based upon the testimony of the certified staff that testified in this matter.<sup>24</sup> In reaching this conclusion we have considered the forceful testimony of the mother of this student, who we qualified as an expert witness, and who observed the efforts of the aide to work with this student at the start of the school year. The student's mother testified that in her judgment the new aide lacked the physical strength and the necessary training to take appropriate care of this student. We think that there is a learning curve here which the new aide had to pass through before she reached full proficiency. In the end we credit the testimony of the certified staff that this new aide received appropriate training in her duties and that she is successfully carrying out these duties.<sup>25</sup>

## **Discussion**

We conclude that the new aide in this case is qualified to perform the duties of the position she is now holding. It must be conceded, however, that the transition to this new aide left something to be desired. The way matters worked in this case was that a collective bargaining agreement appeared to have the effect of bumping an employee into a personnel care position of great responsibility without any antecedent formal inquiry as to whether or not the person exercising bumping rights was qualified for the position. This appearance would cause any parent concern. In saying this we do not mean to suggest that the school district would not have acted if it had concluded that the person was not qualified for the position. However, some formal review process, known to the parents, should have taken place to screen the candidate before the person was assigned to this very responsible position.

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<sup>22</sup> Transcript, Vol. I Page 47 and 64...

<sup>23</sup> Transcript, Vol. I Page 64.

<sup>24</sup> Transcript. Vol. II Pages 78 through 104 (physical therapist), Transcript, Vol. IV, pages 3 through 10 (occupational therapist), Transcript Vol. IV, pages 10 through 15 (speech language pathologist), Transcript Vol. IV, pages 16 through 56 (special education classroom teacher), Transcript Vol. IV, pages 56 through 68 (special education classroom teacher).

<sup>25</sup> Transcript Vol. II Page 111.

This situation was made more difficult by the fact that the first candidate took almost immediate sick leave, leaving another candidate to assume the position. Such quick transitions are bound to cause concern. This is particularly the case when the aide the student had was giving excellent and caring service that clearly met the student's educational needs. No parent would see any need to change the prevailing situation.

None of the parties raised or argued issues about the validity of the terms of a collective bargaining agreement that requires a bumping process in cases of this nature involving personnel care aides for students with very unique needs. It would therefore not be appropriate for us, *sua sponte*, to raise such issues. Still, we conclude that if a new aide is required for this child, the school district must specifically and explicitly find that the person being assigned as an aide is qualified for the position. While it would have been preferable to have the student's excellent prior aide remain in her assignment, part of student's education is to learn how to adjust to transitions. In our judgment the student's new aide is functioning with good, and we expect increasing success in meeting the educational needs of this student.

Finally, we decline to issue a ruling defining the "skills and abilities" needed for this aide position since we believe that such an issue is most properly determined through the applicable special education due process procedures now underway.

**Conclusion**

The application for interim relief must be denied.

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Forrest L. Avila, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

January 12, 2009  
Date