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February 2, 1995

Richard McCartan
Assistant Attorney General
P.O. Box 40124
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Re: Green Hill School Policy #4

Dear Richard:

I received the new policy you sent last week governing the use of physical restraint and restraint devices at GHS that you suggest implements Judge Bryan's order filed December 6, 1995, concerning pepper spray. However, you did not send the JRA bulletin relating to pepper spray use that authorizes the institution's policy. Was JRA Bulletin #2 rewritten after Judge Bryan's order? What about Institutions Standards 5.02, 14.20-14.25 referred to in the authorizing section of GHS #4: Are those JRA standards and were they modified in any way after the Judge's ruling? I would appreciate it if you would send me the Bulletin and Standards so I can review them as well.

My co-counsel and I have reviewed the new GHS policy and find only two changes from the October policy that was the subject of our preliminary injunction motion. The first appears on page 3 (sections a. and b. were changed concerning when aerosol restraint may be used) and the second is on page 4 (section 4 on that page is a new section relating to leg brace programs). Please let me know if there are additional changes in the policy which we missed. For the reasons set forth below, we believe that GHS Policy # 4 is still unconstitutional. In general, it does not make clear that pepper spray should not be used by staff except in narrowly defined circumstances as outlined by Judge Bryan. The policy is difficult for lawyers, let alone line staff, to understand and is internally inconsistent.

More specifically, the new policy, as did the October one, permits the use of pepper spray by staff in non-emergency situations. By definition, a non-emergency circumstance is not one where there exists a threat of harm that is greater than the harm caused by the use of pepper spray or to a substantial amount of valuable property. In defining a non-emergency situation, the policy states "there is time to summon additional staff to resolve the problem..." (p. 2). The policy in one part allows use of pepper spray in such a situation (p. 7-8). However, another part of the policy seemingly limits the use of pepper spray to emergency situations. These two seemingly inconsistent parts of the

policy are not reconcilable. Moreover, Judge Bryan's order explicitly prohibits the use of pepper spray unless "absolutely necessary". Use of this painful substance can hardly be absolutely necessary if there are other less painful means to address a juvenile's behavior as would be true in a non-emergency situation.

Secondly, while the policy changes somewhat the criteria governing when aerosol may be used (section a. and b. on page 3) it does not restrict use to ONLY those situations when the criteria listed in the policy have been met. To be consistent with Judge Bryan's ruling, the policy should at least indicate that aerosol may not be used at all except is certain narrowly defined circumstances. In other words, the policy should say something like "Aerosol may ONLY be used when:", instead of "Aerosol may be used when:", as it does on p. 3. But more importantly, we believe the criteria as they have been redrafted are not sufficient to insure compliance with Judge Bryan's order. For example, the criteria do not, as Judge Bryan ordered, require staff to factor in the danger of harm that pepper spray presents to youth in assessing whether there exists a sufficient danger of harm to warrant the use of pepper spray to incapacitate a dangerous youth. And, under our reading of the policy, the criteria still permits staff to spray youth for not following a staff directive so long as staff believe that they will get injured if they attempt to physically force the youth to comply with staff. Thus, for example, a juvenile banging on his door could be sprayed under the new policy provided staff believe they risk bodily injury by using physical force to enforce a directive to stop banging, even though there may be another method of addressing the problem, e.g., moving the juvenile to a different location, that does not present the same balance of risk of harms. We do not think that this is consistent with Judge Bryan's ruling.

Concerning the new section that authorizes staff to place youth on a leg restraint "program", we do not believe that it provides sufficient safeguards to prevent unwarranted and prolonged restraint proscribed by Youngberg. What criteria exist for release from leg restraint? What constitutes "destructive" behavior? Could a suicidal youth be restrained in this manner? Can a juvenile be placed in a leg brace as punishment for unruly behavior staff perceive to be "destructive"? It seems to us that the policy simply is too broad and does not provide sufficient safeguards against impermissible restraint.

In light of our concerns about the new policy, and in order for us to obtain timely information about the use of pepper spray, we would like to receive notice of every incident involving the use of pepper spray within five days of the event as well as a copy of the videotape of the incident and all relevant documentation. We would appreciate it if you would agree to provide us with this information in this time frame without requiring us to get a special order to permit such expedited disclosure under the

discovery rules.

Prior to any reenactment of the GHS pepper spray policy, if any, we would be happy to review revisions made in light of our comments. We were disappointed that we were not given the opportunity to give you our comments about the policy you sent last week. Although this case is set for trial next November, and we are all moving ahead with discovery with that in mind, we believe that it is the most efficient and productive use of time and resources for both sides to work together to resolve the legal disputes in this case as much as possible. Using the pepper spray example, if we are not satisfied that the policy is constitutional on its face we will, no doubt, be back in front of Judge Bryan seeking clarification of his injunction. Thus, in the interest of avoiding costly litigation, we again invite your clients to discuss this issue with us as well as the others raised in the lawsuit in an effort to resolve at least some of plaintiffs' claims in an agreed order.

Thank you for your time and consideration of our concerns.

Very truly yours,

Patricia J. Arthur
Project Director