



JI-WA-0002-0030



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

670 Woodland Square Loop SE • PO Box 40124 • Olympia WA 98504-0124

February 7, 1995

EVERGREEN LEGAL SERVICES

FEB 9 1995

INSTITUTIONS PROJECT

Pat Arthur
 Evergreen Legal Services
 101 Yesler Way, Suite 301
 Seattle, WA 98104

Dear Pat:

This is in response to your February 2 letter. At this time, I will address the pepper spray issues. I will address the leg brace issue soon in another letter.

I believe the new pepper spray policy, as set forth in Green Hill Policy #4, completely comports with Judge Bryan's ruling, and is not confusing to Green Hill staff.

You should also know that the policy is being followed at all institutions, even though JRA Bulletin #2 has not yet been updated. What matters is the policy being followed, and not the format of the policy.

I cannot understand your concerns on permitting the use of pepper spray in "non-emergency situations." The provisions on when pepper spray may be used (pages 2-3) do not use the terms "emergency" or "non-emergency." Nor does Judge Bryan's order use those terms. Instead, those terms are used to describe the procedures to be followed before pepper spray is used (pages 7-8). I believe in every case Green Hill has been able to follow the "non-emergency" procedures prior to using pepper spray. To my knowledge, you are the only one confused about this issue.

The policy (page 2) states "aerosol may be used when" You think the policy should state "aerosol may be used only when" This is a nitpicky point. Adding the word "only" would not change the meaning of the sentence. Staff understands very well that the use is limited to the two situations.

Finally, I disagree with your assertion that the pepper spray provisions do not follow Judge Bryan's order. Specifically, you state:

Pat Arthur
Dated February 7, 1995
Page 2

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.

I surmise your objection is a restatement of Judge Bryan's fourth criteria that pepper spray:

may be used only if there is a threat of equal or greater harm to others or to a substantial amount of valuable property than the pain and danger of harm that the use of pepper spray presents.

JRA considered this criteria, and its policy now provides that aerosol may be used when a resident fails to follow a staff directive, and:

To force compliance, without the use of aerosol, likely would result in the resident attempting to assault staff in a manner that may cause specific bodily injury to the resident, staff, or others.

This policy represents JRA's determination that the harm threatened by an assault that may cause specific bodily injury is greater than the harm caused by pepper spray. Our rationale is that an assault can cause temporary or lasting serious physical injury, while the effects of pepper spray are temporary. This determination, in our opinion, is consistent with Judge Bryan's decision and with all case law on the subject.

You also object as follows:

(T)he criteria still permits staff to spray youth for not following a staff directive so long as staff believe they will be 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 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 balance of risk of harm.

The first sentence is absolutely correct, and certainly is consistent with Judge Bryan's ruling. Under your example, staff must first attempt to get the resident voluntarily to be quiet. If that fails, staff may decide it is necessary to move the resident. If staff then believes moving the resident will cause the resident to attempt to assault them, it may use pepper spray to prevent

Pat Arthur
Dated February 7, 1995
Page 3

bodily injury. Frankly, I do not understand your objection, or why you believe the policy is contrary to Judge Bryan's ruling.

In sum, we believe the pepper spray provisions conform to Judge Bryan's ruling, and so we decline to change them.

Sincerely,



RICHARD A. McCARTAN
Assistant Attorney General

RAM/mla