

ART WANG
Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
*One Union Square Suite 1500
600 University Street
Seattle WA 98101-1129*

July 16, 1999

Parents
[REDACTED]

William A. Coats
Vandeberg, Johnson & Gandara
PO Box 1315
Tacoma, WA 98401-1315

In re: [REDACTED] School District - Special Education Cause No. 99-65

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order the file will be closed and returned to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Melinda Brown, OSPI Legal Secretary, at (360) 753-2298.

Sincerely,

Robert P. Kingsley
Administrative Law Judge

c: Ben Gravely, OSPI
Chief ALJ Wang, OAH
Mary Radcliffe, OAH/OSPI Coordinator

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Superintendent of Public Instruction
Legal Services



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF:

[REDACTED] SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 99-65

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge Robert P. Kingsley in Olympia, Washington, on July 1, 1999. The interested parents appeared on their own behalf. [REDACTED] School District (District) was represented by William Coats, Attorney at Law. The administrative law judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

The parents filed a request for due process hearing with the Office of the Superintendent of Public Instruction on June 1, 1999. A prehearing conference was set for June 9, 1999, and continued at the request of the parties to June 14, 1999. The conference occurred on schedule and a prehearing order was entered on June 14, 1999. The hearing was initially set for June 21, 1999, and continued at the request of the parties to July 1, 1999.

The parents first requested that the hearing occur near their residence in [REDACTED] Washington. They subsequently requested a hearing location closer to the school to facilitate the appearance of witnesses. The parties agreed to the final location in Olympia, Washington.

ISSUES

The issues which were the subject of the due process hearing are:

- a. Whether the District administered aversive therapy to the student in violation of applicable state and federal regulations; and
- b. Whether this matter should be dismissed where the student has left the District and is currently receiving residential services in [REDACTED]

DISCUSSION

The Findings of Fact in this case reflect a resolution of disputed testimony on certain factual issues. The parents presented testimony from the student that he was placed into quiet rooms that smelled of urine. On one occasion, there was urine on the floor. When he complained, staff told him that the smell was part of the consequence of being placed in a quiet room. The mother testified to having observed a quiet room in which the student was isolated and to identifying a strong odor of urine. Staff testified that they never told the student that the smell in the quiet room was part of the consequence of isolation. They also testified that students do occasionally urinate on the floor when confined, that there may be an odor of urine, but the staff clean the rooms when urine is discovered, and do not place students in a quiet room when there is urine on the floor.

In resolving these conflicts, the demeanor and motivation of the witnesses was considered, as well as the logical persuasiveness of the parties' positions. The administrative law judge finds that the parent's testimony and other evidence is more logically persuasive than the District's and has formed the basis of the Findings of Fact regarding the odor of urine in the quiet rooms. The administrative law judge finds that the testimony of the hospital staff is more logically persuasive regarding the testimony of urine on the floor while the student was in the room, and statements made by staff about the consequences of isolation in a quiet room.

FINDINGS OF FACT

1. The student was a resident at the Child Study and Treatment Center (CSTC) located in Lakewood, Washington, for the 1998/99 academic year. The parents reside in ██████████ Washington. CSTC is the only state operated psychiatric hospital for children in Washington State. It is designed and staffed for the treatment of children from six to seventeen years of age who can not be served in less restrictive settings within the community. CSTC's mission statement provides that medical and psychological services, including assessment and treatment, shall be provided in a safe and nurturing environment that promotes positive processes of growth, development, and attachment.
2. CSTC is located within the geographic boundaries of the District. The District provides educational services for eligible residents in facilities on the CSTC campus. District staff are joined by a staff member of CSTC who acts as a liaison between the two programs. The student attended ██████████ in these facilities. There are four classrooms and an average enrollment of thirty-two students.

3. The student was evaluated upon his entry to CSTC. The MDT included a nurse employed by CSTC. The Summary Analysis and an individual education program (IEP) for the student were completed on August 10, 1998. The student qualified for services on the basis of a Serious Behavioral Disability (SBD). The Summary Analysis noted diagnoses for reactive attachment disorder, disinhibited type; post traumatic stress disorder; oppositional defiant disorder; and sexual predation. According to a behavioral evaluation, he exhibited significant delays in the areas of interpersonal relations/skills, with inappropriate behavior, unhappiness/depression, and physical symptoms/fears.
4. The student's IEP placed him in a specialized self-contained classroom for twenty seven and one-half hours per week. It provided for goals and objectives in reading, math, written language, and behavioral performance. It also included a behavioral management plan (BMP) to conform to WAC 392-172-392 through -398.
5. One of the BMP consequences for inappropriate behavior was removal from the classroom to a quiet room. The BMP identified the circumstances when removal would occur, the manner in which the student was to be escorted, the circumstances and technique for physically transporting him, and documentation. It did not identify the maximum length of isolation or indicate the staff authorized to administer it. Isolation was authorized where classroom disruption lasted longer than five minutes, where the student did not accept routine consequences for minor infractions, became aggressive, or eloped. The date, time, duration, and reason for each isolation was to be documented and maintained in school records. The BMP also required monthly review by the multidisciplinary team (MDT).
6. The parents noted their objection to the use of isolation in a quiet room, but signed the IEP and elected not to seek a due process hearing to resolve their dispute.
7. Isolation in a quiet room was also a consequence of inappropriate behavior outside of school hours. CSTC guidelines do not require constant visual monitoring of an individual isolated in a locked room. Visual monitoring is required, at a minimum, every fifteen minutes. Consistent with those guidelines, CSTC staff occasionally cover door windows to the quiet room with a piece of paper to prevent the occupant from watching staff in the hall and trying to insult or otherwise engage them.
8. Between June 1, 1998, and June 3, 1999, the student was removed to a quiet room during school hours on 32 occasions. These removals were precipitated by the student's sustained disruptive behavior, frequently involving physical aggression against staff, classroom property, and other students. The time in isolation ranged from approximately ten to thirty-five minutes. According to CSTC policy, an incident report and observation log was supposed to be filed for each occasion. These records were to be maintained with the student's medical files. Although the building principal reviewed reports filed by CSTC, the school did not maintain records of the student's

9. The parents met with the special education teacher and discussed their concern about the student being placed in quiet rooms. Upon their arrival at one of the residential units, immediately prior to the meeting, they heard a child screaming in the quiet room. No one was standing next to the door and a piece of paper covered the door window. The special education teacher assured them that the student's isolations would be administered differently and he would be constantly monitored during any school imposed isolation.

10. The student's treatment varied from the representations of the special education teacher. The student was not constantly in view of a responsible adult while confined in a locked quiet room. He was frequently monitored by CSTC staff in rooms located in other buildings on the campus. CSTC staff followed their own guidelines in monitoring the student. One of these rooms was located in a residential unit for older students. Occasionally, prior occupants of the quiet rooms urinated on the floor, and the smell lingered while the student was in the room. These rooms also featured graffiti on the walls typical of older students including foul language. The student found the language disturbing. The parents first discovered these facts when the student told them of one of the isolations and they arrived at the campus shortly after the incident. They were shown the room. The parents identified a strong odor of urine in the room.

11. The student's placement is managed by the Department of Social and Health Services, Division of Child and Family Services(DCFS). After the parents filed their request for due process hearing, DCFS placed the student at a residential treatment facility in Portland, Oregon. Educational services are provided by the local school district pursuant to the student's current IEP. The school is in the process of reviewing the IEP.

12. The student is expected to remain at his current placement for six months. The parents would like the placement to continue after the six months, but expect that he will be placed back in Washington State in a foster home. There are no known plans to place the student back at CSTC. There is a possibility that he would return to CSTC if foster placements were unsuccessful and the student still needed the residential services that can be provided by the Center. Foster placements have proved unsuccessful in the past.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-171 WAC (or Chapter 392-172 WAC for cases arising after November 11, 1995).

2. The IDEA (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In Hendrick Hudson District Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.
103 S. Ct. at 3051.

A "free appropriate public education" (FAPE) consists of both the procedural and substantive requirements of the IDEA. The Rowley court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

3. The District bears the burden of proving compliance with the procedural requirements of the IDEA. *Clyde K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994). Generally, only procedural flaws which result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process, will result in a denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985).

Mootness and Prospective Relief

4. The District has argued that the parents' request for relief should be dismissed as moot where the student is no longer enrolled in any District school and where his family resides in Vancouver, Washington, well outside of its geographic boundaries. The parents maintain that the issues are not moot, but are capable of repetition should the student be eventually returned to CSTC. The administrative law judge concludes that the District's motion should be granted as to prospective relief.

5. Generally, a controversy becomes moot when the underlying issue is resolved while the proceedings are pending and a judicial decision would have only an advisory effect. See *Williams v. Alioto*, 549 F.2d 136, 142 (9th Cir. 1977). An exception to the rule exists for disputes capable of repetition, yet evading review. In such a case, the plaintiff bears the burden of showing that there is a reasonable probability of reoccurrence under circumstances that would frustrate review. See *Honig v. Doe*, 484 U.S. 304, 318, 108 S.Ct. 592, 601, 98 L.Ed 2d 686, 703(1988). The Supreme Court has recognized two criteria to justify the exception: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

6. In this case, the student has been removed from CSTC. If the administrative law judge were to find in favor of the parents, there would be no prospective relief that could be ordered in their favor. The District cannot be ordered to comply with a specific standard as to future isolations where the student is not attending the school. The findings of the administrative law judge would be advisory only.

7. The parents have not established a reasonable expectation that the student will return to the District. There are no current plans for his return to CSTC and the parents do not reside in District. The parents' theory for his return is too attenuated to qualify as a reasonable expectation.

8. Finally, the issues complained of are not so brief in duration that they would evade review if the student were returned to CSTC. They can be addressed in the IEP process and reviewed by request for due process hearing. The summary nature of a due process proceeding will ensure timely review of the dispute. The administrative law judge concludes that the issues in this case are moot as to the request for prospective relief.

Compensatory Education

9. The parents have requested that the administrative law judge exercise discretion in fashioning appropriate relief. The parents' request therefore invokes the authority of the administrative law judge to order compensatory education. Compensatory

education is an award of educational services or reimbursement that may be ordered where a student has been denied FAPE. Compensatory education is a remedy to compensate a student for a violation of statutory rights while he or she was entitled to those rights, and is an appropriate relief in the context of the IDEA because such an order "merely requires [the defendants] to belatedly pay expenses that [they] should have paid all along." *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991); *Miener v. State of Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (citing *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985)). Equitable considerations are relevant in fashioning relief. *School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. at 374 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. See *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d at 1485-6. The IDEA imposes no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994).

10. Compensatory education may be ordered after graduation or the age at which a child is no longer entitled to special education services. See *Brantley v. Ind. Sch. Dist. No. 625*, 26 IDELR 839 (D.C. MN 1997); *Puffer v. Reynolds*, 761 F.Supp. 838 (D.C. MA, 1998); *Conemaugh Township Sch. Dist.*, 23 IDELR 1233 (SEA PA 1996); *Board of Educ. of the Wappingers Cent. Sch. Dist.*, 27 IDELR 517 (SEA NY 1997); *In re Child with Disabilities*, 20 IDELR 222 (SEA CT 1993); *Harris v. District of Columbia*, 19 IDELR 105 (D.C.D.C. 1992); *Murphy v. Timberland Regional Sch. Dist.*, 19 IDELR 846 (D.C. N.H. 1993); *Melvin v. Town of Bolton Sch. Dist.*, 20 IDELR 1189 (D.C. VT 1993); *J.B. Killingly Bd. Of Educ.*, 27 IDELR 324 (D.C. CT 1997); *In re Child with Disabilities*, 21 IDELR 624 (SEA CT 1994). According to this reasoning, it may therefore be available if the student is no longer a resident of the district.

11. The record in this case establishes that the District failed to administer aversive therapy according to the IEP and applicable regulations. A record of the date, time, duration, and reason for each isolation was not maintained in the student's school records. The BMP was designed to comply with WAC 392-172-392 through -398. According to those regulations, a student may be confined in a quiet room only if the door is unlocked or, if locked, the student is constantly within view of a responsible adult. WAC 392-172-394(2)(e). Additionally, the regulations prohibit exposure to noxious substances. WAC 392-172-392(8). In this case the student was not visually monitored at all times he was in a locked room, and he was isolated in a room smelling of urine.

12. The BMP failed to comply with WAC 392-172-396(5), (7), in that it did not identify the maximum duration of any isolation, and did not identify the person or persons authorized to impose the isolation.

12. The BMP failed to comply with WAC 392-172-396(5), (7), in that it did not identify the maximum duration of any isolation, and did not identify the person or persons authorized to impose the isolation.

13. The District claims that it bears no responsibility for the isolations, asserting that they are administered by CSTC staff after the student has been removed from the classroom according to the teacher's authority under RCW 28A.600.020(2). The District's position is unsustainable. The authority of a teacher to exclude a student from a class does not relieve the District of responsibility for the student until the end of the school day, unless he was suspended or expelled. The student's IEP provides for twenty seven and one-half hours of special education and related services per week. Isolation in a quiet room was provided in the student's BMP and is a component of the IEP. The record does not reflect suspension of the student on each occasion he was placed in a quiet room. In fact, the isolations were, for the most part, brief in duration, and the student was apparently returned to the classroom after his isolation was completed. The evidence therefore establishes that the District maintained a continuum of care for the student during the school day which included aversive therapy in the form of isolation in a quiet room. Its cooperation with CSTC, and reliance on CSTC staff and facilities, does not derogate from its responsibility to comply with the student's IEP and the applicable regulations.

14. These violations do not establish a basis for ordering compensatory education. While the District deviated from the standards for monitoring isolation, the evidence reflects that the student's removal from class and placement in a quiet room accorded with the terms of the BMP. The parents deliberately declined to seek review of the IEP as drafted and signed, and cannot complain now that the District followed its terms. This fact must also be considered in determining an award of compensatory education related to imperfect design of the BMP.

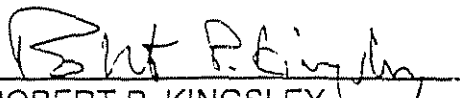
15. The parents have not presented evidence of a loss of educational opportunity which can be addressed by compensatory services. There is no evidence that the student has been denied substantive educational services, and the evidence does not establish that he has fallen behind in progress towards IEP goals and objectives as a result of the violations of conditions of isolation. Given these circumstances, the administrative law judge denies the parents' request for compensatory services.

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ORDER

It is ordered that the parent's request for prospective relief is dismissed. The request for compensatory education is denied.

Dated at Seattle, Washington this 16th day of July, 1999.


ROBERT P. KINGSLEY
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a petition for reconsideration filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (i) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The Petition for Judicial Review of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 7/16/99, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parents

William A. Coats
Vandenberg, Johnson & Gandara
PO Box 1315
Tacoma, WA 98401-1315