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Chief Administrative  
Law Judge

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS

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March 1, 2000

Parents  


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Superintendent of Public Instruction  
Legal Services

Dr. Largo Wales, Director  
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Auburn School District  
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Seattle, WA 98104

In re: Auburn School District - Special Education Cause No. 99-121

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 (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact the Legal Services office at OSPI at (360) 753-2298.

Sincerely,

William F. Lemke  
Administrative Law Judge

c Legal Services, OSPI  
Deputy Chief ALJ, Jan Grant  
Mary Radcliffe, OAH/OSPI Coordinator



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

IN THE MATTER OF

Auburn School District

SPECIAL EDUCATION  
CAUSE NO. 99-121

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge William Lemke in Auburn, Washington January 27 and 28, 2000 and in Seattle, Washington on February 4, 2000. The Parents and Student were represented by Kathleen Royer, attorney at law. The Auburn School District ("District") was represented by Christopher Hirst, 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 due process hearing request with the Office of the Superintendent of Public Instruction on November 22, 1999. The Parents' request for hearing asked for the following remedies: (1) a finding that the District cannot provide and is not providing the Student with a free appropriate public education; (2) a finding that [REDACTED] is an appropriate educational placement for the Student; (3) an order requiring the District to reimburse the Parents for expenses incurred in making a residential placement of the Student at [REDACTED]; and (4) an order requiring the District to pay the costs of placement of the Student at [REDACTED]

FINDINGS OF FACT

1. The Student is [REDACTED] years old and resides within the District. He was born to a mother who apparently [REDACTED] and [REDACTED] and for the first years of his life lived in a [REDACTED]. He was placed in [REDACTED] with his [REDACTED] in [REDACTED] and [REDACTED] by them in [REDACTED]. He exhibited excessive [REDACTED] behaviors during his [REDACTED] and [REDACTED] and has been in [REDACTED] for both [REDACTED] as well as [REDACTED] and [REDACTED] from [REDACTED] through the present with various therapists. See Exhibits 21 and 216.

2. The Student attended school in the Tacoma School District through [REDACTED] grade, the [REDACTED] school year. His last program at the Tacoma School District was a program

for [REDACTED] students. The Student made appropriate progress in Tacoma's [REDACTED] program. Testimony of the Student's Mother.

3. The Student moved to the Auburn School District for his [REDACTED] grade year, the [REDACTED] school year. He was placed at the District's [REDACTED] School in a resource room. Exhibit 204. During the [REDACTED] school year, the Student moved to the District's [REDACTED] School and was served in a resource room with regular class main streaming. Exhibit 212. The Student experienced [REDACTED] of unacceptable behavior and several suspensions from school during these years because of his behavior. See Exhibits 1, 2, 4, 6 and 9.

4. In [REDACTED] the Parents withheld the Student from school during September while the Parents and the District worked on developing a new Individualized Education Program ("IEP") for the Student. During September 1999 the District provided tutorial services to the Student through District teachers. Testimony of the Student's Father and Largo Wales. The parties agreed on an IEP on October 6, 1999 for the Student to attend [REDACTED] School, with the majority of his day in a more restrictive, self-contained special education classroom for students with a variety of disabilities plus main streaming to art and computer classes, as earned through appropriate behavior. See Exhibit 210. The Student continued to experience [REDACTED] of unacceptable behavior and suspensions from school as a result of his behavior during [REDACTED]. See Exhibits 13 and 16.

5. By letter dated November 15, 1999 the Parents provided the District with a ten-day notification of their intent to unilaterally place the Student at [REDACTED] and requested that this placement be at public expense. Exhibit 214.

6. The District responded by letter dated November 24, 1999 by indicating its intent in accordance with 34 CFR §300.403 and WAC 392-172-231 to reevaluate the Student through the use of the services of clinical psychologist Dr. Stephen Sulzbacher of Children's Hospital and Medical Center in Seattle, Washington ("Children's"). Exhibit 202. Additionally the District agreed that the then current information on the Student demonstrated a need for residential programming and committed to work cooperatively with the Parents and Dr. Sulzbacher to identify appropriate residential options for the Student as well as an appropriate interim placement.

7. The parties subsequently mutually agreed to the Student's interim placement at District expense in [REDACTED]. Testimony of Largo Wales. The Student commenced attendance at the [REDACTED] on December 15, 1999. Testimony of the Student's Mother. The placement has been continued until completion of the due process hearing by agreement of the parties and pursuant to a stay put order issued by this Administrative Law Judge.

8. After Dr. Sulzbacher completed his evaluation work and issued his evaluation report (Exhibit 217) the District and the Parents jointly submitted a preliminary application for [REDACTED] placement of the Student (Exhibit 216). This application sought placement of the Student in a residential facility funded through public money available through the [REDACTED] which is separate and apart from school funding. Testimony of Largo Wales.

9. The application attached and/or described the extensive history and evaluation work on the Student, including input from Timothy Kahn and Associates concerning [REDACTED] counseling with the Student, evaluations dated July 9, 1999 by psychiatrist Dr. H. Bartlett Vincent, Jr. (Exhibit 20); an Independent Educational Evaluation report dated October 1999 by clinical psychologist Dr. Richard W. Borton (Exhibit 21); the evaluation report dated December 6, 1999 by Dr. Sulzbacher (Exhibit 217); a psychological report and summary analysis of evaluation data dated December 3, 1999 prepared by the District (Exhibit 201) and other pertinent records and reports concerning the Student.

10. The Student's [REDACTED] application was initially reviewed by a regional committee, which recommended approval for a [REDACTED]-funded program, [REDACTED] in [REDACTED] Washington ([REDACTED]). Testimony of Largo Wales.

11. The Parents withdrew the Student's [REDACTED] application by letter dated December 21, 1999 (Exhibit 17).

12. Dr. Sulzbacher and Dr. Kelly Schloredt, the clinical psychologist at Children's assigned responsibility for the Student's program in [REDACTED] indicated that the Student has been successful in [REDACTED] and that his behaviors have been manageable, although at times inappropriate.

13. On January 20, 2000 the District formally offered alternative programs for the Student. Testimony of Largo Wales and Exhibit 219. The District offered to provide residential programming and placement of the Student at [REDACTED] or [REDACTED] in [REDACTED] Washington ([REDACTED]) through the [REDACTED] process. Alternatively, The District offered to place the Student in Tacoma School District's [REDACTED] for transition to one of Tacoma's adolescent [REDACTED] centers.

14. The District in making these formal, alternative program offerings considered the most recent information from [REDACTED] and the information in the [REDACTED] application including all of the necessary information about the Student, as indicated above in finding number 7. Implicit in the District's offered alternative programs was the realization that the District did not have a program or suitable facility to meet all of the Student's needs within the District.

15. The Student's multi disciplinary team determined on December 3, 1999 that the Student is eligible for special education services under two disabling conditions of seriously behaviorally disabled in accordance with WAC 392-172-118 and health impaired in accordance with WAC 392-172-124. This determination changed his eligibility category from his earlier category of [REDACTED] to [REDACTED] in accordance with WAC 392-172-136.

16. The team also determined that the Student has an inability to learn which cannot be explained by [REDACTED] or [REDACTED] factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behaviors or feelings under normal conditions; a general or pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personnel or school problems. The Student also has a serious behavioral disability which is distinguished from common disciplinary problems by the severity and duration of his [REDACTED] behaviors. He is seriously behaviorally disabled and also health impaired, with a diagnosis of [REDACTED]. See Exhibit 201.

17. Based upon the evaluations of the Student most recently performed by Drs. Vincent, Borton and Sulzbacher, the Student has [REDACTED] a [REDACTED] and a [REDACTED]. Doctors Vincent and Borton and Carol Almero of Timothy Kahn and Associates indicate that the Student has [REDACTED] and other [REDACTED] that create a risk to others if he is not treated in a residential placement as part of his educational programming and placement.

18. Based upon the testimony of several witnesses, including Dr. Borton and District school psychologists Andrea McHenry and Denise O'Conner, the Student is resistive to standardized testing, and the results obtained in such standardized testing regarding the Student's advancement in his educational programs are problematic. The standardized, academic test results obtained by the District in testing in February 1998 (Exhibit 203) and by Dr. Borton on November 1999 (Exhibit 21), and as illustrated in Exhibit 218, show a slight decline in the standard academic scores for the Student in the areas of basic reading and mathematics reasoning. Based upon the testimony provided by the Student's teachers, the District has made appropriate attempts to educate the Student within the District and for the majority of time District staff has been able to control the Student's behavior.

19. A preponderance of evidence, including the testimony of Carol Almero, Dr. Vincent, Dr. Borton and Dr. Sulzbacher, establishes that due to the Student's learning, behavioral and health problems, he needs a controlled environment at school and at home in order to receive meaningful educational benefit from his instruction. Programmatic and staffing

continuity are critical for the Student if he is ever to learn to develop and maintain relationships. Such continuity should afford him the opportunity to learn how to resolve frustrations more effectively. He needs to recognize that his manipulative and impersonal style is unproductive, unhelpful and destructive. Well trained therapeutic staff will have the capacity to separate issues of behavioral management. Relationship issues will require psychiatric involvement and careful environmental school and residential management, with appropriate involvement of the Parents in treating his [REDACTED]. The residential environment must also provide appropriate treatment and/or counseling for his [REDACTED] and related issues.

20. The Student has problems with peer relationships and in a regular public school environment non disabled peers are more free to behave in a manner that is not helpful to the Student. In a controlled environment this issue should not be a problem and the risk of the Student being a safety risk to himself and others will be reduced. Thus, the evidence establishes that the Student can only receive meaningful educational benefit at this time through a residential placement.

21. Although several witnesses testified concerning the Student's need for residential placement, only Dr. Stephen Sulzbacher testified about which residential facilities could provide appropriate educational programming and related services for the Student. Dr. Sulzbacher has extensive experience in performing educational evaluations of students in general and students with needs similar to the Student's in particular, as well as extensive experience in providing consultation and treatment services for students with needs similar to the Student's on behalf of school districts, parents and the United States Department of Education. Dr. Sulzbacher is very familiar with the program at [REDACTED] and is somewhat familiar with the program at [REDACTED]. Dr. Sulzbacher provided credible and convincing testimony that either [REDACTED] or [REDACTED] can appropriately meet all of the Student's educational programming needs, including all of the needs identified in the joint [REDACTED] application and the reports of Dr. Vincent, Dr. Borton, Dr. Sulzbacher and Ms. Almero.

22. Dr. Sulzbacher provided credible and convincing testimony that the Student's least restrictive educational placement is either at [REDACTED] or [REDACTED] because of the physical proximity of these facilities to the Student's home. This physical proximity to the home will facilitate the Parents' involvement with joint counseling including the parents and the Student to treat the Student's [REDACTED], as well as the Student's later transition back into his residential community.

23. Placement of the Student at [REDACTED] or the [REDACTED] also allows for the probability of payment of the Student's placement through public funding which is separate and apart from public school funding.

24. The evidence presented at the hearing, particularly the testimony of Dr. Sulzbacher, establishes that placement of the Student at ██████████ cannot appropriately meet his educational needs because of the distance of that facility from the Student's home and the resulting restrictions on parental involvement in the Student's counseling and treatment program, particularly treatment of his ██████████ and providing transition for the Student from his residential program back into his residential community.

#### 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 in 20 U.S.C. §1401 *et seq.*, the Individuals With Disabilities Education Act ("IDEA"); Chapter 28A.55 RCW; Chapter 34.05 RCW; Chapter 34.12 RCW; and the regulations promulgated thereunder, including 34 CFR Part 300 and Chapter 392-172 WAC.

2. The IDEA (formerly known as 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 v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established a test to evaluate a state's compliance with IDEA as follows:

"First, has the state complied with the procedure set forth in the Act? And second is the individualized education 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.

At "free appropriate public education" ("FAPE") consists of both the procedural and substantive requirements of the IDEA.

3. 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 3041-2.

4. The substantive test of *Rowley* does not require the absolutely best or "potential-maximizing" education for an individual child. However, the benefit must be real and measurable. A FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County School District 4 v. Carter*, 950 F.2d 156, 160 (4<sup>th</sup> Cir. 1991), affirmed, 510 U.S. 7, 115 S. Ct. 361 (1993).

5. 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 (9<sup>th</sup> Cir. 1994). Generally, only procedural flaws which result in the loss of educational opportunity, or seriously infringe the parent's opportunity to participate in the IEP formulation process, will result in a denial of FAPE as material procedural flaws. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992); *Rowland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990), cert. denied, 11 S. Ct. 1122 (1991).

6. The District has met its burden of proving compliance with all material procedural requirements of the IDEA in this case, including the requirement to consider all relevant evaluation and other data concerning the Student's needs.

7. WAC 392-172-226 and 34 CFR §300.302 provide that a public or private residential educational program can be appropriate if it is necessary to provide special education and related services to a special education student. The standard to be applied in determining whether these regulations entitle the Student to residential placement at District expense is whether the Student is "incapable of deriving educational benefit unless placed in a residential program." *Poolaw v. Bishop*, 67 F.3d 830, 833 (9<sup>th</sup> Cir. 1995); *Ash v. Lake Oswego School District*, 980 F.2d 585, 588 (9<sup>th</sup> Cir. 1992).

8. The Student meets the above tests for entitlement to residential placement at District expense.

9. The District has the burden of proving that it formally offered the Student a program/placement which is likely to provide educational benefit to the Student. *Clyde K.*

*v. Puyallup School District*, 35 F.3d 1396, 1398 (9<sup>th</sup> Cir. 1994); *Seattle School District v. B.S.*, 82 F.3d 1493, 1500-01 (9<sup>th</sup> Cir. 1996).

10. The residential program/placements offered by the District at [REDACTED] and [REDACTED] (Exhibit 219) are likely to provide meaningful educational benefit and necessary related services to the Student.

11. The District's formally offered residential program/placements have non-school district, public funding available and in place for them. The Administrative Law Judge is entitled to consider the cost which would be avoided by the District in approving as appropriate these placements. *Department of Education, State of Hawaii v. Catherine D.*, 727 F.2d 809, 813 (9<sup>th</sup> Cir. 1984); *Sacramento City Unified School District v. Rachael H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994).

12. It is appropriate for the Parents to be required to cooperate with the District in resubmitting the [REDACTED] application in order to access this funding.

13. The residential program/placements formally offered by the District constitute the Student's least restrictive environment in accordance with 34 CFR §300.550-556 because of their proximity to the Student's home and to the community to which the Student will likely return after residential programming.

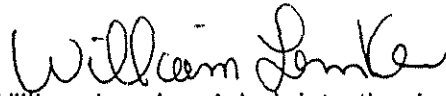
14. The Parents' request for placement of the Student at [REDACTED] at District expense must be denied because the evidence establishes that [REDACTED] cannot appropriately meet the Student's needs due to the distance of that facility from the Student's home and the resulting restrictions on parental involvement in the Student's counseling and treatment programs and subsequent transition of the Student from such program into his residential community. See *Seattle School District v. B.S.*, 82 F.3d 1493, 1501 (9<sup>th</sup> Cir. 1995).

## ORDER

IT IS HEREBY ORDERED:

1. The Student is entitled to residential placement at District expense.
2. The residential programs formally offered by the District at [REDACTED] and [REDACTED] are appropriate programs/placements for the Student.
3. [REDACTED] is not an appropriate program/placement for the Student.
4. The Parents shall cooperate with the District in resubmitting and seeking approval of the [REDACTED] application in support of placement of the Student at the [REDACTED] or [REDACTED].

Dated at Seattle, Washington on this 1<sup>st</sup> day of March, 2000.



William Lemke, 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 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 USC 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.

### CERTIFICATE OF SERVICE

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 March 1, 2000 by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parents

[REDACTED]

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