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Administrative
Law Judge



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STATE OF WASHINGTON

VANCOUVER OFFICE OF

OFFICE OF ADMINISTRATIVE HEARINGS

800 Franklin Street - First Floor • Vancouver, Washington 98660 • (360) 690-7189 • FAX (360) 696-6255

June 30, 2000

Parent (A)

[REDACTED]

Louis Byrd Jr., Attorney at Law
305 W Kennewick Avenue
Kennewick, Washington 99336

Lawrence B. Ransom, Attorney at Law
1201 3rd Avenue Suite 2900
Seattle, Washington 98101

In Re: Evergreen School District Special Education - Cause No. 99-101

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 feel free to contact Ben Gravely, OSPI Legal Secretary, at (360) 664-0056.

Sincerely,

Mark C. Ebbeson

Mark C. Ebbeson
Administrative Law Judge
Enclosure

cc: Ben Gravely, SPI Legal Unit
Jan Grant, Deputy Chief OAH
Mary Radcliffe, SPI ALJ - Seattle
Candace Baker, Director - Special Services - Evergreen School District

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

IN THE MATTER OF)

EVERGREEN SCHOOL DISTRICT)

) Special Education Cause NO. 99-101

) **FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

_____)
A hearing in the above-entitled matter was held before Administrative Law Judge, Mark C. Ebbeson in Vancouver, Washington, on December 1-2, 1999, April 12-13, 2000 and May 9, 2000. Appellant, the Parent of the child, and the child, Nina F., were present throughout most of the hearing and were represented by Louis B. Byrd, Jr., attorney at law. The Evergreen School District ("School District" or "District") was represented by Lawrence B. Ransom, attorney at law. The Administrative Law Judge having sworn the witnesses, heard testimony, considered the admitted exhibits and arguments of the parties, and hereby enters the following:

STATEMENT OF THE CASE

This case involves the appropriateness of the evaluation of the child. On June 2, 1999, the Evergreen School District completed an evaluation of the child, reaching the conclusion based on the evaluation that the child was not eligible for special education services. On September 20, 1999, the Parent indicated that she was in disagreement with the results of the evaluation and requested an independent educational evaluation at public expense. On October 5, 1999, pursuant to WAC 392-172-150 and WAC 392-172-350(1)(c), the Evergreen School District requested a hearing to establish the appropriateness of the School District's evaluation of the child and thus to challenge the Parent's request for an independent educational evaluation at public expense.

PROCEDURAL BACKGROUND

1. By letter dated October 5, 1999, the School District requested a due process hearing under WAC 392-172-150. The School District had requested a due process hearing because it had received, on September 20, 1999, a letter from the attorney for the Parent requesting an independent evaluation at public expense. Exhibit E25.

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2. A telephonic pre-hearing conference was held on October 22, 1999. At the pre-hearing conference, the issues for hearing were clarified. A pre-hearing order was issued on October 28, 1999, setting forth the following as the issue for hearing:

The District's denial of a request for an independent educational evaluation at public expense.

The pre-hearing order included a directive that if no objection to the pre-hearing order was filed within ten days after its mailing, "it shall control the subsequent course of the proceeding unless modified for good cause by subsequent Order." No objection to the pre-hearing order was filed within the specified ten day time period or at any other time during the course of these proceedings.

3. In the course of the hearing, the School District called the following as witnesses: Candace Baker, the School District's Director of Special Services; Cathy Jaworski, a counselor at Mountain View High School in the School District; Catherine Hollivoet, a certified audiologist who is employed by the Educational Service District No. 112; Michael Meloy, a special education teacher at Mountain View High School; and Gail Jones, a school psychologist employed by the Evergreen School District.

4. At the hearing, the Parent called the following witnesses: Ruth F., the Parent; Nina F., the child; Larry Fast, a school psychologist employed by the Evergreen School District; Kirk VanGelder, an Auto Technology Shop teacher at Mountain View High School; Michael Dillman, SAT Preparation/Careers teacher at Mountain View High School; Paul Beck, Language Arts teacher at Mountain View High School; Leslie Wilson, Chemistry teacher at Mountain View High School; Stan Summers, Chemistry teacher at Mountain View High School; Barbara McGuckin, Psychology teacher at Mountain View High School; Dr. Judith Belk, audiologist and speech/language pathologist; and Elizabeth Barton, tutor.

FINDINGS OF FACT

1. The student at issue (hereinafter "the child") was born [REDACTED]. She was over the age of [REDACTED] years throughout these proceedings. She resides at home with her mother, whose residence is within the boundaries of the Evergreen School District;

2. The child has attended schools located within the boundaries of the Evergreen School District for a number of years and was in the [REDACTED] grade during the course of the hearing, expecting to graduate from high school in June of 2000.

3. The child was initially evaluated by the Evergreen School District in the fall of 1994. That assessment "was based on concerns that [the Parent] had about a possible learning disability." Student's Exhibit B, page 1. The conclusion reached in the 1994 evaluation was that the child "does not qualify under any special educational handicapping

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classification." Student's Exhibit B, page 3.

4. The child has attended Mountain View High School in the Evergreen School District throughout her high school career. She was in the [REDACTED] grade during the 1996-97 school year, in the [REDACTED] grade during the 1997-98 school year, in the [REDACTED] grade during the 1998-99 school year and in the [REDACTED] grade during the 1999-2000 school year. She is expected [REDACTED] from Mountain View High School in June of 2000.

5. Throughout her entire high school career at Mountain View High School, the child has been provided with a plan of accommodation pursuant to Section 504, based upon a diagnosis of dyslexia, originally diagnosed in April of 1994. Exhibits E26, E27, E28 and E29.

6. On or about February 22, 1999, the child was referred by her mother for evaluation for special education eligibility. On the referral form, the Parent checked the boxes identifying problems in "math, reading, vision, writing and hearing." She identified the following as previous education interventions: "504 plan, class/teacher change, counselor or SAS, and other (student has private tutors)." The Parent described the results of these interventions in the following terms: "Teacher change, counselor and 504 plan has helped student, but having private tutors has been the most effective." Exhibit E1.

7. In response to the Parent's referral of her child for special evaluation, the School District assigned the referral to Gail M. Jones, school psychologist. Ms. Jones sent out a Notice of Referral for Special Education Services on February 24, 1999. Exhibit E2.

8. On the basis of the referral, the School District decided to conduct a second evaluation of the child. The District issued a "Notice of Decision of Evaluation for Special Education Services" on March 17, 1999. On the "Notice of Decision," the District wrote: "[The child] appears to have an appropriate 504 plan that is working, she's on track to graduate and is passing her classes with above average grades." Exhibit E3.

9. On or about March 28, 1999, the Parent wrote to Gail Jones indicating that she did not want any of the 1994 evaluation results to be reflected in the final conclusion of the child's 1999 assessment. The Parent also requested that certain tests be utilized in the evaluation. Exhibit E4. The School District responded to the Parent's request in this regard by identifying the tests that would be used to conduct the evaluation. Exhibit E7. The tests proposed by the District were standardized tests used to determine eligibility for Special Education, per State of Washington guidelines.

10. The Parent signed a "Consent for Evaluation for Special Education Services" form on March 29, 1999. The form indicates that the Parent consented to the conducting of an "Initial Evaluation." Exhibit E6. The evaluation was considered an "initial" evaluation, even though the child had previously been evaluated in 1994, because the child had never

been determined to be eligible for special education and related services.

11. The Parent, acting through her legal counsel, sent a letter to the Evergreen School District dated May 13, 1999 which included the sentence: "Please accept this correspondence as the Parent's formal request that her student be evaluated." Exhibit E15. As noted above, the Parent had requested an evaluation in February of 1999, had signed the consent for evaluation form on March 29, 1999, and the evaluation of the student was not only in progress but was almost completed at the time of the May 13, 1999 letter from the Parent's legal counsel.

12. In the spring of 1999, the Evergreen School District conducted an initial evaluation of the child which included the preparation of a special education teacher individual report summary, prepared by John McCausland, a teacher qualified to teach general education classes at the high school level who was serving as a special education coordinator, Exhibit E10; a series of Woodcock-Johnson tests of achievement, Exhibit E11, administered by Gail Jones, school psychologist; a speech/language assessment, prepared by Nada Eid-Nicola, a speech language pathologist (Exhibit E12); a hearing screening, also conducted by Nada Eid-Nicola (Exhibit E13); a school nurse summary of health findings, prepared by school nurse Debra Palmer, R.N. (Exhibit E14); a "School Psychologist Report," prepared by Gail Jones (Exhibit E16); a classroom observation prepared by Mike Meloy, a teacher who is qualified to teach general education classes at high school level and was not one of the child's regular classroom teachers (Exhibit E16, page ESD 009 and Exhibit E19); administration of the Wechsler Adult Intelligence Scale – revised (WAIS-III), administered by Larry Fast, school psychologist (Exhibit E16, page ESD 008; Exhibit E17, pages ESD 011-025, and pages 065 - 072); Achenbach Behavior Check Lists, filled out by the child, the Parent, the American Sign Language teacher (Ms. Giles), the theater teacher (Margit Moe), the pottery teacher (Mr. Osier), the SAT preparation class teacher (Mr. Dillman), and the U.S., history teacher (Ms. Muhich).

13. The evaluation team completed its evaluation in late May of 1999. The Parent was notified that the School District members of the team had concluded that the child was not eligible for special education services. Exhibit E22. The denial was based upon the evaluation results and was not predetermined by School District Staff.

14. The Parent was invited to attend a meeting to discuss the evaluation and the issue of the child's eligibility to receive special education services on June 2, 1999.

15. The team, including the Parent, met on June 2, 1999 to discuss and explain the conclusions of the evaluation, which are reflected in the "Summary Analysis of Evaluation Data." Exhibit E23.

16. The signature page for the Summary Analysis, Exhibit E23, includes a place for the Parent to sign as a member of the team. The signature page also includes a place

for each signer to indicate whether they certify "that the Summary Analysis reflects the conclusions of the MDT members." The Summary Analysis was signed by Gail M. Jones, Case Manager; Nada Eid-Nichola, speech/language pathologist; Michael Meloy, special education teacher, John McCausland, coordinator; Debi Palmer, school nurse; and the Parent. The Parent checked the certification indicating "yes." The signature page also indicates that "MDT members whose conclusions are not reflected by this report must attach a dissenting report." At the hearing, the Parent testified that she did not intend to be expressing her agreement with the conclusions of the other MDT members when she checked the column marked "yes" on the signature page. She also testified that she did not understand that she was a member of the team. She further testified that she did not understand that she had the opportunity to submit "a dissenting report" if she did not agree with the conclusions of the other members of the multi-disciplinary team. See Exhibit E23, page ESD 006.

17. The School District members of the evaluation team included a general education classroom teacher (John McCausland) and at least one individual qualified to conduct individual diagnostic examinations of children (Gail Jones).

18. The Evergreen School District has accepted the opinion of outside specialists that the child has dyslexia. On the basis of those opinions, the School District had previously determined that the child was eligible for a Section 504 Plan of Accommodation, which had been in place through the child's high school career.

19. In the course of her high school career, the child has expended considerable time and effort studying, working with her mother, working with her grandmother, and working with private tutors on her school work. She has also used technological aids such as computer programs and audio books to help her learn. The Parent has expended substantial funds for tutors and technological learning aids. The Parent believed that such outside efforts and services were necessary to address the child's learning disability.

20. In the course of its evaluation of the child in the spring of 1999, the School District members of the evaluation team were aware that the child had from time to time utilized the services of outside tutors. Some of the School District staff had attended meetings at which the child's tutors were present, but these meetings were part of the ongoing process of providing educational services to the child and accommodating the student's needs through the Section 504 Plan of Accommodation. The School District's staff did not specifically seek additional information from any of the child's tutors as part of the evaluation process itself. The School District did, however, have correspondence from one of the consultants who had been retained by the Parent to work with the child, Judith Belk, Ph.D. Dr. Belk had provided information to the School District in 1997 (Exhibit E31), and had reiterated that information in a letter sent to the School District at the time the Parent made her referral for evaluation in February of 1999 (Student's Exhibit Ex.E.). In her September 6, 1997 letter to the School District, Dr. Belk had stated: "Given my

present information about her, I would recommend that Nina continue to be served by a 504 Plan of Accommodations." Exhibit E31, page 2. Dr. Belk did not alter that recommendation when she communicated with the School District in February of 1999. Student's Exhibit E. The School District considered the information which had been received from Dr. Judith Belk in the course of the evaluation, even though School District staff did not seek any additional information from Dr. Belk beyond that which she had provided to the School District. Dr. Belk informed the School District in her letter of February 24, 1999 (Student's Exhibit E) that, "I have not worked with Nina since December 1996."

21. School District members of the evaluation team believed that it was not necessary for them to have any additional information about the child's tutorial and other outside services or aids in order to complete an appropriate evaluation of the child in the spring of 1999.

22. The only disabilities which were suspected at the time of the evaluation were specific learning disabilities related to processing of information (characterized by the Parent as dyslexia) and possible health impairment related to a history of ear infections when the child was very young. The School District conducted an evaluation which addressed all of these suspected disabilities.

23. In the course of conducting its evaluation, School District staff members participating in the evaluation conducted tests to determine the child's intellectual ability (IQ). The instruments used by the School District's staff were valid instruments commonly used for the purpose of assessing and quantifying intellectual ability. The testing was done in accordance with proper professional standards. The results of the evaluation of the child's intellectual ability in 1999 were entirely consistent with the evaluation which had been conducted in 1994 and with all other information related to the child's intellectual ability. The School District's staff believed that the results of the evaluation of the child's intellectual ability, as reflected in the School Psychologist Report (Exhibit E16) and the Summary Analysis (Exhibit E23), were accurate. No School District members questioned that the evaluation results accurately represented the student's intellectual functioning.

24. The results of the evaluation, as reflected in the Summary Analysis (Exhibit E23 and E24), which includes application of the test data to the "Severe Discrepancy Tables" issued by the Office of the Superintendent of Public Instruction of the State of Washington, indicate that there is not a severe discrepancy between the child's intellectual ability and her academic achievement.

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 Chapter 392-172 WAC.

2. The Office of Administrative Hearings has more specific jurisdiction to hear this matter pursuant to WAC 392-172-150(4)(b) and WAC 392-172-350, pursuant to the School District's request for hearing to challenge the Parent's request for an independent educational evaluation at public expense.

3. The School District made a timely request for hearing within fifteen calendar days following the School District's receipt of the Parent's request for an independent educational evaluation at public expense. WAC 392-172-150(4)(b).

4. WAC 392-172-150 provides that a Parent may request an independent educational evaluation at public expense if the Parent disagrees with the assessment conducted by the School District. However, if the School District establishes at a due process hearing that its evaluation of the student is appropriate, the School District is not required to pay for the independent evaluation. WAC 392-172-150(4)(c).

5. For the Evergreen School District's evaluation of a learning disabled child to be appropriate, it must meet the requirements of WAC 392-172-126, et. seq., which include requirements that tests be administered in a nondiscriminatory manner by trained personnel in conformance with test instructions, be validated for the specific purpose for which they are used, and to be tailored to assess specific areas of educational need. The student must be evaluated in all areas of suspected disability. No single procedure can be used as the sole criterion for determining eligibility. Psychological assessments must be conducted by credentialed school psychologist. The School District has met these requirements.

6. The School District's evaluation must include observations of the student's behavior in class by someone other than the child's regular teachers. WAC 392-172-130(3). Teacher report forms cannot substitute for first hand observation by a person other than the teacher. In this case, Michael Meloy conducted observations of the child in her classroom. Mr. Meloy is not one of the child's regular teachers, and he is qualified not only to teach special education but also to teach general education classes at the high school level.

7. Specific requirements related to the evaluation of a child to determine eligibility for special education in the specific learning disability category are contained at WAC 392-172-126, WAC 392-172-128, WAC 392-172-130 and WAC 392-172-132.

8. The discrepancy tables for determining severe discrepancy under WAC 392-172-130 and WAC 392-172-132 have been published by the Office of Superintendent of

Public Instruction of the State of Washington. A copy of those tables is included in Exhibit E34.

9. The School District's evaluation of the child indicates that, based on the OSPI discrepancy tables, there is not a severe discrepancy between the child's intellectual ability and her academic achievement.

10. The School District felt no obligation to apply "professional judgment" (as that term is used in WAC 392-172-132) in the course of its evaluation and the assessment using the discrepancy tables, because the evaluation results did not inaccurately represent the student's intellectual ability. For the team members to use "professional judgment" under WAC 392-172-132(2)(c), there must be two prior conditions: (1) "where the evaluation results do not appear to accurately represent the student's ability" . . . and (2) "where the discrepancy between the student's intellectual and academic achievement does not initially appear to be severe upon application of the discrepancy tables, WAC 192-172-130" . . . Both conditions must be met for the use of "professional judgment" for purposes of WAC 392-172-132(2)(c). In this case, the evaluation results do appear to accurately represent the student's ability. Therefore, the "professional judgment" provisions of WAC 392-172-132 (2)(c) are not applicable.

11. The Evergreen School District's evaluation of the child in this case was appropriate because, among other reasons, it met the following requirements:

- (a) The evaluation was conducted by qualified persons;
- (b) The testing and assessment materials and procedures utilized were not racially, culturally or sexually discriminatory;
- (c) The tests and other assessment materials used were provided and administered in the student's primary language or other mode of communication;
- (d) The tests and other assessment material used (Wechsler Adult Intelligence Scale – Third Edition; Woodcock-Johnson Revised Tests of Achievement; Achenbach Child Behavior Checklists; and SCAN-A audiometric tests) had been validated for the specific purpose for which they were used;
- (e) The tests and other assessment materials used were administered by trained personnel in conformance with test instructions and proper professional standards;
- (f) Individually administered tests of intellectual functioning were

administered by a credentialed school psychologist;

(g) The child was assessed in all areas related to her suspected disability;

(h) The assessment was conducted by persons knowledgeable of learning disabilities and health impairments related to hearing; and

(i) No single procedure or test served as the sole criterion for determining the child's eligibility or disabling condition.

12. The Parent has challenged the District's "severe discrepancy" evaluation under WAC 392-172-130 as violative of WAC 390-17-108(6) for the proposition that, "No single procedure or test shall be the sole criterion for determining a student's eligibility or disabling condition . . ." The "severe discrepancy" provisions require the use of two tests; The first determines "a total or full scale intellectual ability score . . . , and the second test or series of tests obtains "an academic achievement test score." This use of the two testing processes does not violate WAC 390-17-108(6).

13. The Parent also challenges the procedures occurring at the meeting on June 2, 1999 as her opportunity to file a dissent to the evaluation results was purportedly thwarted. However, the Parent has a history of regularly meeting with District staff on educational issues involving her child and actively voicing any disagreement with District actions. She had hired an attorney to help with these evaluation issues, and she would be reasonably expected to have been advised of her legal status and rights in this meeting by her attorney. Further, her signature on the Summary Analysis page was with the other team members and the signature page indicates, "MDT members whose conclusions are not reflected by this report must attach a dissenting report." No dissenting report was done by the Parent. Her not filing a dissent is also consistent with her checking the column "yes" on the signature page expressing her "certification" that the Summary Analysis reflects the conclusions of the MDT members. Under these combined circumstances, the Parent's claim of a denial of her right to dissent from the Summary Analysis results is not established. No denial of the Parent's rights of dissent occurred.

14. In summary, the child has learning difficulties that have been addressed through the 504 Plan of Accommodations. With such accommodations at school, her use of tutors and technological aids and primarily her own motivation and drive, the student has been successful in her high school education. Her disabilities were appropriately reviewed and evaluated by the School District in the spring of 1999. The Parent's subsequent request for an independent education evaluation at public expense must be denied given the appropriate evaluation of the child done by the School District.

ORDER


1. The School District has met the substantive and the procedural requirements of Chapter 392-172 WAC and Chapter 28A.155 RCW with respect to all issues before the undersigned.

2. The School District conducted an appropriate evaluation of the child in the spring of 1999.

3. The Parent's request for an independent educational evaluation at the public expense is DENIED, and the Parent is not entitled to reimbursement for any independent educational evaluations obtained by the Parent.

4. The Evergreen School District is the prevailing party in this hearing.

Dated at Vancouver, Washington this 30th day of June, 2000.


Mark C. Ebbeson
Administrative Law Judge

APPEAL RIGHTS

PURSUANT TO 20 U.S.C. Sec. 1415(e) (INDIVIDUALS WITH DISABILITIES EDUCATION ACT) AND CHAPTER 34.05 RCW, THIS MATTER MAY BE FURTHER APPEALED TO A COURT OF LAW. 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 this Order was mailed to the interested party or his/her representative at the address listed below on the 30th day of June, 2000, by depositing the same in the United States Mail, postage prepaid.

Mailed to the following:

Louis B. Byrd, Jr.
Byrd Legal Services
515 E. 39th Street
Vancouver, WA 98663

Lawrence B. Ranson
Karr Tuttle Campbell
1201 Third Ave, #2900
Seattle, WA 98101

Parent (A)

Candace Baker, Director
Special Services
Evergreen School District
PO Box 8910
Vancouver, WA 98668-8910

Ben Gravely, SPI Legal Unit
Mail Stop 7200

Jan Grant, Acting Chief OAH
Mail Stop 2488

Mary Radcliffe, SPI ALJ - Seattle
Mail Stop TS-07

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