


ART WANG
Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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March 12, 1999

Parent


Gale Forrest, Director of Special Education
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PO Box 430
Stanwood, WA 98292-0430

Chad V. Horner
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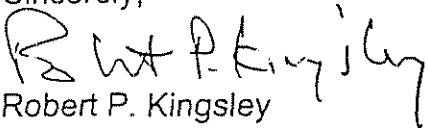
In re: Stanwood School District - Special Education Cause No. 99-12

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: Melinda Brown, 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:

STANWOOD SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 99-12

**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 Stanwood, Washington, on February 22, 1999. The interested parents appeared on their own behalf and were assisted by Jennifer Myers, PAVE advocate. Stanwood School District (District) was represented by Chad Horner, 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

On January 27, 1999, the District requested a due process hearing to show the appropriateness of its most recent evaluation of the student. The parent had previously requested an independent educational evaluation at public expense.

ISSUES

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

- a. Whether the parent is entitled to an independent educational evaluation (IEE) at public expense where the district allegedly failed to properly respond within fifteen days of the first request;
- b. Whether the District's 1997 evaluation is appropriate within the meaning of 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 392-172 WAC.

FINDINGS OF FACT

1. The student is a [REDACTED] with [REDACTED] who has attended school in the District since [REDACTED]. He was first evaluated for special education services in 1991, based on a referral from [REDACTED], a child development center.

2. The evaluation was completed on October 14, 1991. A multidisciplinary team (MDT) was formed consisting of the school principal, school psychologist, a communication disorders specialist, a special education teacher, an occupational therapist, and the special education director. Assessments were conducted in the areas of communication, gross and fine motor coordination, social and emotional behavior, and vision and hearing. Cognitive functioning was determined according to incomplete testing administered by the District and reliance on test data from [REDACTED] dated May, 1991. A summary analysis was prepared and signed by all members of the MDT. The student qualified for special education services resulting from developmental delays in communication, cognitive, fine/gross motor, and social/emotional development. The MDT recommended the student attend a [REDACTED] program and receive special education services in the areas of delay. It also recommended related services of a communication disorders specialist and occupational therapist. The MDT deferred consideration of extended school year programming to May, 1992.

3. The student was reevaluated on May 20, 1994. The MDT consisted of the special education director, the school principal, the school psychologist, the student's regular classroom teacher, the special education teacher, the communications disorder specialist; and the school nurse. An assessment for occupational therapy needs was conducted by an occupational therapist, but she did not sign the summary analysis as a member of the MDT. Assessments were also conducted in the areas of adaptive behavior, motor skills, classroom observation, speech and language, and vision and hearing. Cognitive ability was not reassessed. The MDT concluded that the student continued to qualify for special education. It revised the basis for qualification to [REDACTED] and recommended goals be identified in reading, math, written language, writing, social skills, speech, and occupational therapy. It did not recommend any related services. It concluded that the student's individual educational plan (IEP) needed to be changed for the following year to provide for placement in a resource room, regular education classroom, life skills room, or other appropriate setting.

4. The student's third evaluation occurred on May 20, 1997. The MDT included the school principal, the student's special education teacher, the school counselor, the student's occupational therapist, his classroom teacher, the special education director, the school psychologist, the school nurse the reading specialist and the student's speech-language pathologist. The MDT obtained a report from a psychiatrist, Dr. Thomas P. Newlyn, who had examined the student. He submitted a report confirming the diagnosis of [REDACTED], and also identifying [REDACTED] and [REDACTED] as other diagnoses. Assessments were

conducted for adaptive behavior, speech and language, motor skills, vision, and hearing. The adaptive behavior assessment consisted of two parts. One part was completed by the special education teacher regarding her observations. The second part reflected observations of the parent recorded by the school psychologist during an interview. The MDT indicated that it had not attempted cognitive testing. An assessment of the student's academic achievement was based on the special education teacher's observations of the student's progress in his curriculum. The evaluation also included a review of records and consultation with the student's teachers and parents.

5. The MDT found that the student continued to qualify for special education and services. It recommended that he be considered multiply disabled to reflect his needs and goal areas. The summary analysis and evaluation reports revealed three bases for eligibility; communications disorder, health impairment, and [REDACTED]. The MDT suggested life skills, occupational therapy, and speech/language therapy, with goals in math, reading, behavior, written expression, occupational therapy, and speech/language. The current IEP was considered appropriate while extended school year (ESY) services were not considered necessary.

6. The school psychologist supervised the evaluation. She is knowledgeable regarding the educational impacts of [REDACTED] and [REDACTED]. Each of the members of the MDT were certificated by the Office of the Superintendent of Public Instruction in the areas of their expertise.

7. Approximately one year after the 1997 evaluation, a second MDT including the school psychologist executed an addendum to the evaluation addressing the lack of cognitive testing. The addendum explained that cognitive testing had been attempted. However, the student would not cooperate with the process, even when the test was administered by people he trusted. The addendum explained that the MDT's initial conclusions and recommendations could be sustained on the basis of the behavioral assessment; the physician's diagnoses of [REDACTED] and [REDACTED]; teacher reports; academic performance; and parent information. The addendum included a suggestion that cognitive testing be considered at the beginning of the 1998/99 school year to assist in continuation of appropriate programming to meet the student's IEP goals and objectives.

8. Three IEPs have been negotiated since the 1997 evaluation. They are dated 10/27/97, 3/26/98, and 10/20/98. The IEPs feature special education services in the areas of reading, written language, math, behavior, communication, and fine motor. Services were provided in the form of one-to-one instruction, adult assistance for behavior, assistive technology, and speech/language and motor therapy. The IEPs provided for primary placement in the general education classroom and part-time placement in the special education classroom. An Aversive Therapy plan, including a functional analysis and behavior plan, was attached. Goals and objectives were identified in each of the areas needing services.

9. The parent first requested an IEE on November 15, 1998. Shortly after the request, the parents indicated that they would be withdrawing the student from school and pursuing services in another district. On November 20, 1998, the parents officially withdrew the student from school. The District indicated its willingness to continue services to the student if he remained enrolled, and offered to consider the request for an IEE at public expense when, and if, the parents chose to reenroll him.

10. On January 12, 1999, the parents filed a declaration of their intent to home school the student in the district. They renewed their request for IEE on the same day. Their request for IEE noted the recommendation for cognitive testing in the MDT addendum. On January 27, 1999, the District filed its request for due process hearing to establish the appropriateness of its evaluation.

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 Individuals with Disabilities Education Act (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. An accurate evaluation is fundamental to formulation of a disabled student's IEP. When performed correctly, an evaluation determines the eligibility category of the student and provides the data and analysis for decisions related to placement, annual goals and short-term objectives, and related services. Federal and state regulations establish numerous minimum standards to guide the evaluation process. These minimum standards include consent from the parent, analysis of data by an MDT, appropriate evaluation activities, and documentation in the form of a summary analysis and other evaluation reports. Eligibility categories may require additional assessment activities to meet the definitions or criteria for qualification. See generally WAC 392-172-102 through -148.
4. A student shall be reevaluated at least once every three years according to the procedures required of the initial evaluation. The purpose of the reevaluation is to determine if the student has been appropriately identified and if the student's program is appropriately designed to meet his needs. WAC 392-172-182, 186.
5. Parents have the right to an IEE at public expense where: (1) they notify the district that they disagree with the evaluation results obtained by the school district and request an IEE at public expense, and (2) either the district fails to respond to the parent's request in fifteen calendar days, or a hearing officer finds, after a hearing requested by the district, that the district's evaluation is inappropriate. WAC 392-172-150.
6. 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). In this case, the District bears the burden of showing that it has conducted an appropriate evaluation of the student. WAC 392-172-150(4)(b).
7. 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).

Request For Evaluation

8. The failure of a district to respond in a timely fashion to a request for independent evaluation may result in a parent automatically being granted the IEE. The remedy is not automatic. IDEA remedies are based on equitable principles and the conduct of both parties should be examined. See W.G. v. Board of Trustees of Target Range School District, id..

9. In this case, the parents withdrew the student from school in November before the District was required to respond to the request for IEE. The parents' stated that they were seeking a placement in adjoining districts. Their statements inferred that the student would no longer be the responsibility of the District. The District suspended consideration of the parent's request for IEE so long as the student was not enrolled. The parents did not communicate an expectation that the District should consider their request despite withdrawal from school. On January 12, 1999, when the parents identified the student as a home-schooled student within the district and renewed their request for an IEE, the District responded in a timely fashion with a request for due process hearing. Under these circumstances, the administrative law judge concludes that the District's failure to request a due process hearing after the parents' initial request for IEE in November, 1998, is not alone grounds for ordering an IEE at public expense.

Appropriateness of Evaluation

10. The District has met most of the minimal requirements for an appropriate evaluation. The student was first evaluated in 1991 and reevaluated in 1994 and 1997. The 1997 MDT included professionals knowledgeable of the student and his suspected areas of disability. WAC 392-172-108(2). The members have been properly credentialed and certificated. WAC 392-172-108(5). A physician's report was obtained to support eligibility for a health impaired student. WAC 392-172-124. The MDT findings have been documented in individual reports and a summary analysis. WAC 392-172-108(12), -152. The MDT's reports have included analysis of the pertinent data, recommendations for the IEP team, and discussion of conclusions based on professional judgment where assessment data was not available. See WAC 392-172-108(8), -152. The 1997 evaluation supports a conclusion that the student meets the criteria for multiple disabilities based on communication disorder, health impairment, and evidence of [REDACTED]. See WAC 392-172-120, -124, -134. The student's IEPs have reflected goals and objectives based on the information provided by the evaluations. See WAC 392-172-160. The IEPs also reflect that the formal evaluations have been supplemented by an aversive therapy plan including a functional behavioral assessment and behavior plan.

11. The District's evaluation is deficient in one significant area. The MDT professionals in all three evaluations have failed to administer standardized individual tests to assess the student's mental functioning. The eligibility criteria for [REDACTED] require a current

evaluation of intellectual functioning obtained from standardized individual test, administered by a qualified psychologist, and a current academic achievement evaluation measured by an individual academic achievement test. See WAC 392-172-134. A clear showing of [REDACTED] criteria is important where eligibility based on multiple disabilities requires an analysis of the combined impact of several separate disabilities. WAC 392-172-136.

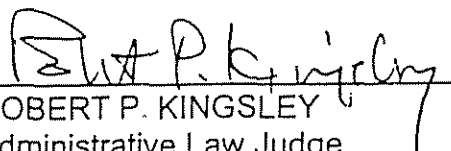
The 1991 evaluation relied on cognitive testing performed in the student's previous program. The 1994 MDT noted without discussion that intellectual assessment was not attempted. The 1997 MDT made the same comment and discussed their decision in a 1998 addendum, noting that the student would not cooperate in testing activities even after attempts were made to build his trust. The MDT recognized the need for cognitive testing, however, where it concluded that testing should be attempted at the beginning of the 1998-99 school year to assist in appropriate programming. The evidence does not indicate that this suggestion has been implemented.

The District's witnesses have testified that they used curriculum based assessments to evaluate the student in lieu of standardized tests. Professional judgment, based on other evidence of disability, may substitute for assessments where properly validated tests are unavailable. WAC 392-172-108(8). The District's testimony supports the view that curriculum based assessment may substitute for academic achievement tests. However, the administrative law judge concludes that the District's records support a need for cognitive testing, and that an IEE at public expense is appropriate for that limited purpose. See WAC 392-172-134(1)(a).

ORDER

The District's evaluation is inappropriate in that it lacks a current evaluation of intellectual functioning as defined in WAC 392-172-134(1)(a). The parent is entitled to an independent educational evaluation at public expense for the limited purpose of evaluating intellectual functioning. The evaluation shall conform to the criteria of WAC 392-172-150(3)(a) and (4)(d).

Dated at Seattle, Washington this 2nd day of March, 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 3/14/99, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parent

[REDACTED]

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