



ART WANG
Chief Administrative
Law Judge

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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March 22, 1999

Parent


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APR 06 1999

Rick Anthony, Superintendent
White Pass School District
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Randle, WA 98377

Superintendent of Public Instruction
Legal Service

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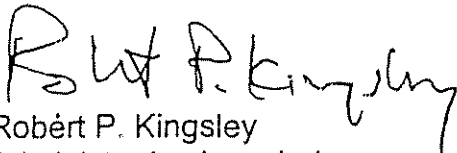
In re: White Pass School District - Special Education Cause No. 99-01

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



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

IN THE MATTER OF:

WHITE PASS SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 99-01

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 Randle, Washington, on March 10, 1999. The interested parent appeared on her own behalf. White Pass 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 parent filed a request for due process hearing on January 9, 1999. At the initial prehearing conference, a hearing was set for January 27, 28, 1999. The hearing was stricken at the request of the parties while they attempted to settle the matter. The parent subsequently indicated that the matter was not completely settled and another prehearing conference was held resulting in an order resetting the matter for hearing and extending the deadline for decision to March 22, 1999.

The parent acknowledged that issues related to the student's 1998/99 school year program and extended year program had been settled. The parent seeks an adjudication of allegations related to past violations of the IDEA and a determination of the student's placement for the 1999/2000 school year. The parent has supplemented her initial request for due process hearing with an itemization of the relief she requests. This relief consists of compensatory education in the form of: (1) additional services to be provided over a three year period; (2) additional time in the summer program over a two year period; (3) additional preparation time for the special education teacher; (4) additional time for parent/staff meetings; (5) a special education classroom to be available for the next six years; (6) an independent educational evaluation (IEE) at public expense; (7) parent training; (8) a district intervention plan for [REDACTED] and [REDACTED] children with a major disability; (9) compensation for the regular education teacher to attend educational planning meetings for the student.

The District has moved for dismissal of the proceedings on the grounds that the parent's agreement to the student's current placement, and agreement to all past placements, operates as a conclusive determination of the appropriateness of the student's educational planning. The administrative law judge deferred ruling on the District's motion until the close of the evidence.

ISSUES

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

- a. Whether the district has failed to provide a free and appropriate public education (FAPE) in past years;
- b. If so, whether the student should receive compensatory education;
- c. If so, whether the administrative law judge should consider issues related to the student's placement during the 1999/2000 school year.

FINDINGS OF FACT

1. The student is a [REDACTED] year old boy diagnosed with [REDACTED]. His family moved to Packwood, Washington, in August, 1996. He has received special education services from the district since his initial evaluation on September 26, 1996. The referral for evaluation occurred after the student had been evaluated by the [REDACTED] in April, 1996.

2. The student's evaluation was administered through the Lewis County Special Education Cooperative. A multidisciplinary team (MDT) was formed consisting of a school psychologist, special education teacher, occupational therapist, speech therapist, and the director of the Lewis County Special Education Cooperative. The MDT considered the evaluation materials from the Mary Bridge program, including the diagnostic report of Dr. Glenn Tripp. The report did not provide a definitive diagnosis for the student, but noted that the student's disabilities suggested hearing impairment with significant [REDACTED] or [REDACTED].

3. Evaluation activities were performed in the areas of cognitive ability, hearing, social/emotional development, adaptive/self-help behavior, language/articulation, and motor/perceptual skills. The psychologist, speech/language therapist, and occupational therapist each wrote evaluation reports. The summary analysis of evaluation data was incorporated into the evaluation report written by the school psychologist. The only summary signed by all members of the MDT was a one page checklist of findings related

to eligibility determination and program recommendations. The MDT determined the student eligible for services under the developmentally delayed funding category. It checked boxes recommending services in a preschool program in the areas of cognitive, communication, fine motor, gross motor, social/emotional, and adaptive skills. Extended school year (ESY) services were also recommended. A box was checked indicating the student was not in need of a special education program. The recommendations did not include a particularized discussion of service options or needs for specialized materials or equipment.

4. The MDT did not include anyone knowledgeable in the evaluation and treatment of [REDACTED]. The school psychologist had only limited prior experience with [REDACTED] children. She did not administer a rating scale specific to children with [REDACTED].

5. The District does not operate a [REDACTED] program at the student's neighborhood school, [REDACTED] School. Special education services are provided through placement at cooperating private facilities operated within the District. After the evaluation, the student was initially placed in the [REDACTED] program at [REDACTED] School pursuant to an IEP approved by the parent. Occupational therapy, speech/language therapy, and specialized instruction were provided on an itinerant basis by the respective therapists and special education teacher. A one-to-one aide was provided to assist the student with his needs. Goals and objectives were identified in the areas of cognitive development, self-help, social skills, speech/language development, and gross/fine/visual motor ability. The District agreed to provide transportation. However, the parent complained of twelve occasions when transportation was not provided as promised.

6. The student's services were supported by monthly meetings by a team (IEP team) consisting of the parent and the special education professionals. The student's placement was changed at the parent's request for the 1997/98 school year. Pursuant to an IEP signed by the parent on October 15, 1997, the student was placed in a cooperative [REDACTED] program operated at [REDACTED] School. A behavioral support plan, additional compensation for the [REDACTED] teacher to attend monthly team meetings, a tape recorder, and various toys, were added to the IEP. Total instructional time decreased from 720 minutes per week to 420 minutes per week in recognition of the student's sensitivity to overstimulation.

7. The IEP was amended twice during the 1997/98 school year at the parent's request. On December 4, 1997, it was amended to increase the aide's time from 1:00 - 3:10 to 12:30 - 3:30 for consulting and planning time. On June 4, 1998, the student's program was amended to gradually increase his specialized instructional time during a six week ESY program from 360 minutes to 540 minutes per week. The purpose of the change was to assist the student's preparation for [REDACTED].

8. The school psychologist evaluated the student's progress in the spring of 1998. She administered the same psychoeducational tests used in the initial evaluation. The

psychologist found that while the test results showed gains in individual areas, the discrepancy between chronological age and age equivalent scores was increasing. She identified a potential impact of sensory integration dysfunctions and considered the need for a psychological scale specific to children with [REDACTED]

9. By the end of the 1997/98 school year, the IEP team had identified certain behavioral problems requiring special attention. These problems included biting and running away. John Whitehead was an independent consultant contacted in the spring of 1998. He observed the student and recommended adding structure to the student's classroom.

10. The IEP team was joined by a new special education teacher in July, 1998, who had experience working with behavioral disabilities and [REDACTED] children. She concentrated on developing a systematic functional analysis of the student's behaviors and assisted in the development of an educational plan for the 1998/99 school year. She also facilitated the monthly IEP team meetings and provided minutes of each meeting.

11. The student's IEP for the 98/99 school year was signed by the parent on September 1, 1998. It provided for placement in the [REDACTED] program at [REDACTED] School with shortened instructional hours and individualized supplemental time to practice calming strategies for overstimulation. Goals were identified in adaptive behavior for toileting skills, in social skills for increasing attendance to activities, and in communication for increasing vocabulary. Special services of a full-time assistant were provided, and a behavior management plan was included employing a place for time-out, and pictures and familiar words for transition cues.

12. The IEP team agreed that a "time-out" area, or room, was necessary for development of calming strategies. The IEP team discussed extensively selection of an appropriate facility. The first choice was a separate area in the [REDACTED] room. However, this provided too much stimulation for the student, and a room located under the hall stairs was subsequently chosen. The team finally agreed that another room located in the cafeteria was more appropriate with certain modifications.

13. Since October, 1998, the parent has sought several accommodations consisting of: (1) a special education classroom to be located at [REDACTED] School; (2) Applied Behavioral Analysis (ABA) training and therapy for the student; and (3) weekly meetings with staff involved in the student's day to day instruction. Minutes of the IEP team meetings reveal that district staff encouraged the parent to address her concerns for a special education classroom to the district administration. Additional training has been made available for members of the staff in the form of workshops sponsored by the Lewis County Cooperative and the University of Washington.

14. On January 26, 1999, the IEP team met to resolve several issues raised by the parent. The team agreed to several resolutions. First, it agreed on an amendment to the

current IEP providing for an immediate increase in specialized instruction time for the student from 90 minutes per day to 120 minutes per day, two days per week. The parties agreed that the student's program should be expanded to 150 minutes per day, 5 days per week, in addition to the student's kindergarten schedule. However, this modification will require hiring additional staff. The amendment shall govern while the District hires the staff for the expanded program. The team also agreed: (1) to initiate planning for the 1999/00 school year, considering a blended program of [REDACTED] and [REDACTED] grade activities for the student to ease the transition process; (2) that the summer program should consist of three hours per day, four days per week, for a period of ten weeks, with curriculum issues to be postponed until May 1, and, (3) to retain [REDACTED], a Portland organization skilled in [REDACTED] program planning for [REDACTED] children, to evaluate the student's needs, assist the IEP team in the design of an appropriate program, and to train staff as needed.

15. The parent and the staff agree that the student has shown progress during the 1998/99 school year. However, the parent maintains that he would have shown greater gains if he had received a more intense program of [REDACTED] therapy. The student has not been formally reevaluated to determine continuing qualification for services under the funding category of developmentally delayed or eligibility under the [REDACTED] category.

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. 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).

Jurisdictional Challenge

4. The District's motion to dismiss should be denied. The District has provided no decisional authority in support of its argument. Jurisdiction over the parent's allegations is based on WAC 392-172-350(b) which authorizes a due process hearing at the request of a parent to challenge the District's refusal of a parent's request to initiate or change the delivery of educational services or the provision of special education and related services. The WAC does not limit jurisdiction to instances where a parent has not signed an IEP because it did not reflect the parent's proposals.

5. The District has argued that it is unfair to recognize a parent's challenge to educational planning after the parent has participated in IEP meetings and signed agreement to an IEP. The District is not as vulnerable as argued. 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.* A parent's delay in challenging educational planning may be grounds for denying relief under a theory of equitable estoppel. A party may be estopped from seeking relief where: (1) a party's

admission, statement or act is inconsistent with its later claim; (2) another party acts in reliance on the first party's act, statement or admission; and (3) there is an injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. See Robinson v. Seattle, 119 Wash.2d 34, 82, 830 P.2d 318, cert. denied, — U.S. —, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992).

6. The administrative law judge concludes that the parent's request for relief is not barred by equitable estoppel. The elements of estoppel have not been established. The student's evaluation is less than three years old. While the parent signed each of the IEPs and amendments, she clearly expressed continuing concerns over the student's educational planning, and was consistent in her demands for provision of a special educational class and additional training for staff. The District has not shown that it acted to its detriment in reliance on the parent's representations, or that consideration of the parent's claim at this time has caused it any distinct injury.

Request for IEE At Public Expense

7. The parent requests an IEE at public expense. 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 a full and individual evaluation of the student's educational needs, analysis of data by an MDT knowledgeable of the student and the suspected areas of disability, 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.

8. In this case, the District has not established that it has appropriately evaluated the student. The evidence shows that [REDACTED] was suspected as the appropriate diagnosis for the student in September, 1996. However, the MDT did not include a professional knowledgeable of [REDACTED] and its educational impacts, and the MDT did not conduct evaluation activities specific to [REDACTED]. See WAC 392-172-108(1),(2). The summary analysis of evaluation reports was contained in the psychologist's psychoeducational evaluation and was not signed by all members of the MDT. Program recommendations were limited to a checklist of general service areas with no particularized discussion of service options or needs for specialized materials or equipment. See WAC 392-172-152(1)(d)(iii). The MDT checked a box, apparently in error, indicating the student was not in need of a special education program.

9. While the District has not performed an appropriate evaluation, the evidence does not establish a need or foundation for an order granting an IEE at public expense. Parents are entitled 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. The parent has failed to follow this procedure and therefore cannot claim entitlement to an IEE at public expense according to the WAC.

10. The administrative law judge cannot conclude from the current record that the District's failure to conduct an appropriate evaluation has resulted in a loss of educational opportunity, or a serious infringement on the parents' opportunity to participate in the IEP formulation process. The inadequacy of the evaluation has been mitigated by the District's regular meetings with the parent and ongoing efforts to supplement the evaluation with consultations by experienced professionals. It has furthermore provided specialized staff training, at the request of the parent.

11. The District has shown an abiding willingness to listen to the parent and adopt her suggestions where deemed appropriate. It has most recently agreed to an evaluation and training by [REDACTED], an organization identified by the parent as experienced in [REDACTED] educational methods for autistic children. Since the student's current eligibility category is developmental delay, the District is also obliged to reevaluate him prior to the age of eligibility for [REDACTED] grade. See WAC 392-172-114(2)(d). This reevaluation will provide an opportunity to correct any inadequacy resulting from the initial inadequate evaluation that has not been addressed by the ongoing efforts of the IEP team. Based on these circumstances, the administrative law judge concludes that the appropriate remedy in this case is an order directing compliance with the agreements contained in Finding of Fact No. 14, and compliance with the requirements of WAC 392-172-114(2)(d).

Compensatory Education and Special Education Classroom

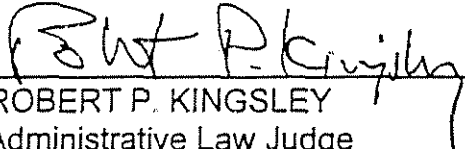
12. The administrative law judge concludes that the evidence is insufficient at this time to establish a need for the specific forms of compensatory education requested by the parent. There is no persuasive evidence that the additional hours of service are appropriate to the student's needs, or would address the effects of an inadequate evaluation. The student is currently being served in his neighborhood school, and the District has been able to meet his needs for a "time-out" room in that setting. It is premature to rule on the adequacy of the student's [REDACTED] grade placement without an appropriate evaluation.

13. Several of the parent's requests exceed the scope of a due process hearing and are unsupported by the evidence. These requests include a special education classroom at [REDACTED] School, to be available for the next six years, and a district intervention plan for [REDACTED] and [REDACTED] children with a major disability. These are matters of administrative policy and are unrelated to the appropriateness of services for this student.

ORDER

1. The District has failed to appropriately evaluate the student. It shall reevaluate the student as required by WAC 392-172-114(2)(d). Its evaluation shall comport with all applicable regulations including evaluation and analysis by an MDT consisting of professionals knowledgeable of the student and [REDACTED]
2. The District shall implement the modifications and consultations agreed to in Finding of Fact No. 14.
3. The parent's request for compensatory education is denied.

Dated at Seattle, Washington this ^{22nd}~~21st~~ 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 3/12/99, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parent



Rick Anthony, Superintendent
White Pass School District
PO Box 188
Randle, WA 98377

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