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 OFFICE OF ADMINISTRATIVE HEARINGS
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 Superintendent of Public Instruction
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December 29, 2000

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In re: **Clover Park School District - Special Education Cause No. 00-104**

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 OSPI Legal Services at (360) 753-2298.

Sincerely,

Robert P. Kingsley
 Administrative Law Judge

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

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

IN THE MATTER OF:

CLOVER PARK SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 00-104

**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 Lakewood, Washington, on November 15, 2000. The interested parent was represented by Randal Brown, attorney at law. Clover Park School District (District) was represented by William A. 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 with the Office of the Superintendent of Public Instruction (OSPI) on September 11, 2000. The parties were served with a copy of a Notice of Hearing setting this matter for October 3, 2000. Prehearing conferences were convened on September 19, 2000, October 5, 2000, and October 24, 2000, and the hearing continued from its original date.

The deadline for decision was extended to thirty days after the close of the record, according to WAC 392-172-356. The record was kept open after the hearing for submission of post-hearing memoranda. The record closed on December 1, 2000.

ISSUE

The issue for hearing, defined at the prehearing conference, is whether the District's proposed placement for the student is inappropriate due to the distance from the student's residence, and considering his medical condition.

FINDINGS OF FACT

1. The student is [REDACTED] years old and resides in the district with his mother. He is multiply disabled as a result of an adverse reaction to a [REDACTED] received when he was under [REDACTED] years old.
2. The student qualifies for special education and related services under the eligibility category for other health impaired, WAC 392-172-124. His medical diagnosis includes [REDACTED] with [REDACTED] [REDACTED] [REDACTED], and [REDACTED]. He is approximately [REDACTED] inches tall and [REDACTED] pounds in weight.
3. The student's ongoing medical needs consist of frequent, difficult to control [REDACTED] [REDACTED] with [REDACTED] and recurrent [REDACTED]. He is currently fed through a permanent [REDACTED]. As a result of [REDACTED] he requires frequent suctioning of saliva from his airway and occasional administration of oxygen. The suction and an oxygen bottle are maintained on his [REDACTED]. His [REDACTED] [REDACTED] is not medically controlled and his primary physician anticipates a gradual decline in brain function from damage caused by the [REDACTED]. The student requires constant attention from trained personnel because of the unpredictability of the [REDACTED] and frequent airway obstructions. Aspiration related illness has substantially interfered with his school attendance.
4. The student attends both a self-contained and general education program located at [REDACTED] School. He has attended school at [REDACTED] since he was [REDACTED] years old. The school is approximately a [REDACTED] bus ride from the residence of the student's grandparents. The student's mother works as a [REDACTED], and transports the student to the grandparents at approximately 6:30 A.M. Her residence is approximately three miles away. He attends school from 10:30 A.M. to 2:30 P.M., Monday through Friday. The grandparents provide before and after school care for the student while the mother works.
5. The student's current placement was agreed upon after a mediation conducted immediately before the 1999/2000 school year. The staff members of the Individualized Education Program (IEP) team had recommended that the student's placement be changed from [REDACTED] to [REDACTED] with transition occurring during the [REDACTED] school year. The parent disputed the proposed change. The mediation agreement provided for addition of the life skills class, and a commitment to regular data collection on the student's progress towards goals and objectives across all educational settings. It also provided for quarterly IEP meetings to: (1) evaluate the student's progress in the general education class, in the life skill class, and in his therapies; (2) evaluate

location, time, and provider in the provision of related services; and (3) discuss the appropriateness of a transition to middle school.

6. The student spends one-half of his day in the general education setting, and the other one-half of the school day in a life skills program. He does not benefit academically from general education, but enjoys interaction with students in the general education class. He has enjoyed students reading and talking to him.

7. The student is beginning to show signs of maturation consistent with his age.

8. The student's cognitive ability is at an infantile level. Goals and objectives have been centered on developing consistent responses to simple visual/aural stimuli or maintaining an upright, controlled, posture. The student's progress was recorded during the 1999/2000 school year. His progress has been inconsistent, with some occasional points of success. The parent considers the lack of progress consistent with the severity of the student's disabilities. She anticipates no improvement. The director of special education believes that improvement can occur in a controlled setting with staff who are skilled at recognizing the student's level of alertness and who can capitalize on his peak moments.

9. The student was most recently evaluated May 3, 2000. The evaluation reflected a continued need for special education and related services consisting of speech and language therapy (SLP), occupational therapy (OT), physical therapy (PT), and an emergency medical plan. He requires one-on-one assistance from an aide. His current aide is trained as an emergency medical technician.

10. As the 1999/2000 school year progressed, the professional staff on the IEP team continued their recommendation that the student move to a middle school. At an IEP meeting convened on May 4, 2000, the staff proposed an IEP for the following school year featuring a placement at [REDACTED] for five four hour days. The student's instruction would occur in a specialized, self-contained class with opportunities for inclusion in the general education program. The specific school was not identified because the District had not specified where a full-time nurse would be located.

11. Two schools were considered: [REDACTED] and [REDACTED]. The staff selected [REDACTED] as the appropriate placement after it was determined that a full-time nurse would located there.

12. [REDACTED] is close to [REDACTED] and is preferred by the parent as an alternative to continuing the current placement. Commuting time from the grandparents' residence would remain the same as the current placement. The school nurse works only three days per week. The school is fully enrolled and space for expansion is limited. Special education services are delivered primarily in general education classrooms by one and one-half special

education teachers. Individualized services may be delivered in an empty class or conference room. There is one self-contained classroom with approximately thirty students taught by a special education teacher and three aides. The room is located in a portable building. The special education teacher is not trained specifically in education of severely disabled students. There are currently no medically fragile students receiving services. Most of the students receiving services are learning disabled. The room is not appropriate for a student with severe physical limitations and medical needs. There is no room for delivering occupational or physical therapy. Health services are delivered in a small two room office, one of the rooms housing the nursing office and a small cot, and the other room housing two additional cots. The rooms are used frequently during the winter season by students who have developed a fever and are waiting for parents to take them home.

13. The staff members of the IEP team support a placement at [REDACTED]. Commuting time, including loading and unloading, from the grandparents' residence is estimated to be approximately thirty minutes. The school is a two minute drive from the interstate highway and emergency services are readily available. Special education services are delivered to approximately eighty students in the general education program. There is a self-contained life skills program designed for severely disabled students. It is staffed by a special education teacher, two aides, with two additional aides available for one-on-one instruction. There are eleven students currently in the program. The teacher has had experience with a broad range of disabilities, including severely disabled students. The life skills classroom provides an appropriately controlled environment for practicing elementary responses to simple stimuli. A nurse is available on a full-time basis. OT/PT services are available as needed, with one day per week currently scheduled. These services are delivered in the life skills classroom. There are also two side rooms available which are equipped with a full bathroom, table, and specialized lift.

14. The [REDACTED] environment offers different opportunities for socialization than the [REDACTED] environment. Socialization in [REDACTED] occurs throughout the day. Socialization in [REDACTED] occurs between classes, in the lunchroom, in gym, and during after-school activities and electives. Depending on their abilities, life skills students at [REDACTED] can interact with general education students during any of these activities. Because of the nature of the life skills environment, and the services of a one-on-one aide, the student's program can be flexible enough for him to participate in activities as opportunities arise.

15. The District proposes to provide specialized transportation to and from [REDACTED]. He would be accompanied by an aide, trained as a Licensed Practical Nurse, who could respond to the student's medical needs. The driver would also be trained and be equipped with a cell phone in case an emergency response is necessary. The aide would be responsible for using the time in transit as an opportunity for specialized instruction.

16. The District is committed to a philosophy of normalization for disabled students to the maximum extent possible. An element of this commitment is an age appropriate placement for all students. The District's philosophy reflects a concern that maintaining a static placement for severely disabled students leads to devaluation of their program.

17. The student's treating physicians believe that the District's proposal involves risk to the student's health and little gain. The goal of the student's primary physician is to provide palliative care. She believes the student should be maintained in the current placement as long as possible since it has been workable for the parent. The physician believes that an aide who is not familiar with the student may not be able to identify when emergency services are appropriate. The student is currently transported by car to doctor and therapy appointments in the Seattle area four times per month. The parent provides the transportation with assistance from one other person.

CONCLUSIONS OF LAW

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

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

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

103 S. Ct. at 3051.

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

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

3. In an administrative hearing, 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).

4. The evidence does not show that the parent's opportunity to participate in the IEP formulation process has been infringed. The District's proposals have been preceded by notice and developed in IEP meetings. The parent has influenced the proposals with her input as well as that of the student's physicians. The parties have agreed upon many of the elements of the student's education. They do not dispute that the student is entitled to special education and related services despite the fact that, due to the severity of his disabilities, he may never manifestly benefit from them. See *Timothy W. v. Rochester, New Hampshire, School District*, 875 F.2d 954 (4th Cir. 1991). The student has been properly identified for eligibility and the parties have agreed on goals and objective, and appropriate related services in the form of one-on-one assistance, OT, PT, and transportation. The only subject of disagreement has been the student's placement.

5. In Washington, a student's placement is determined according to WAC 392-172-180. According to that section, it shall be determined at the annual IEP meeting and shall be based upon: (1) the IEP; (2) the least restrictive environment requirement; (3) the placement option that provides a reasonably high probability of assisting the student to attain his annual goals; and (4) consideration of any potential harmful effect on the student or on the quality of services he needs. The least restrictive environment requirement

means that a student shall be in the general education environment to the maximum extent appropriate and removal from that environment shall occur only if the nature or severity of the disability is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. WAC 392-172-172 and -180. Additionally, a student's placement shall be as close to his home as possible. 34 C.F.R. §300.552(b)(3).

6. The Ninth Circuit has developed a four factor test for determining the extent to which the IDEA authorizes a school district to remove a special education student from the general education environment. These factors are: (1) the educational benefits of full-time placement in the regular education classroom; (2) the nonacademic benefits of such a placement; (3) the effect the disabled student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. *Sacramento City Unified School District v. Rachel H.*, 14 F.3d. 1398, 1402 (9th Cir.) cert. den. 114 S.Ct. 2679, 129 L.Ed.2d 813 (1994).

7. The District's IEP placement proposal satisfies its obligations under the IDEA and is reasonably calculated to provide educational benefit to the student. The evidence shows that the student's current placement does not provide significant educational benefit. His progress towards goals and objectives is minimal and he is not socializing with normally developing peers. The benefit of the current placement is its proximity to the student's family.

8. There are significant non-academic benefits from the student's contact with general education students. However, his specialized instruction is not compatible with a general education environment and there would be a negative effect on the teacher and other students if the student was not removed for at least part of his day. Cost is not determinative since the District is prepared to serve the student in a building that also serves a general education population. A placement providing a separate, controlled environment for practicing elementary responses to simple stimuli, coupled with opportunities to socially interact with general education students approximately the student's age, is consistent with the IDEA and the Ninth Circuit's analysis.

9. The facilities and staff at Woodbrook are clearly superior at meeting the student's needs than those at [REDACTED] and the commuting distance is not excessive. The parent is legitimately concerned for the student's health but has not established that his health needs cannot be met according to the District's proposal. The proposal includes an aide trained to respond to the student's medical needs, access to emergency services, and specialized transportation. The student has historically been transported from his home to the grandparents on a daily basis. He has also been transported to Seattle for medical appointments and therapy. Additional measures to minimize an adverse effect on the student would be a gradual transition to the new schedule with feedback on the travel time

and the student's responses being considered by the IEP team. The placement may be reconsidered if time in transportation is greater than anticipated, and the student's ability to participate in his program deteriorates as a result of additional stress in transportation.

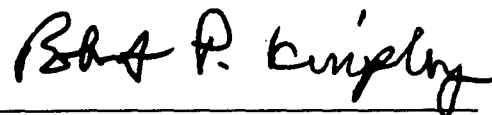
10. The District's philosophy of normalization through age appropriate placement is consistent with the goals of the IDEA and should be respected as a policy decision within its expertise and discretion. The student is showing signs of maturation and there is no reason that he should not benefit from exposure to his peers. The student's physician favors a program featuring palliative measures. The District is under no obligation to abide the physician's care philosophy so long as the student's health needs are being met.

11. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

IT IS HEREBY ORDERED that the District's proposed placement at [REDACTED] is an appropriate proposal for the student. The District shall provide specialized transportation for the student including an aide trained as a Licensed Practical Nurse who is qualified to respond to the student's seizures, airway obstructions, and oxygen needs. The driver shall also be trained in appropriate emergency response measures, and shall be equipped with a cell phone. The IEP team shall design a transition plan according to which the proposed transportation measures may be tested. The IEP team shall also consider and identify socialization opportunities to provide benefits equivalent to the student's current program. The IEP team shall review the placement if the student does not respond successfully to the increased transportation demands.

Dated at Seattle, Washington this 29th day of December, 2000.



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.

CERTIFICATION OF MAILING

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 12/19/00, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

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