

ART WANG
Chief Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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MAY 24 2000

Superintendent of Public Instruction
Legal Services

May 22, 2000

Parent



Gigi DeVault
Director of Special Education
Clover Park School District
10903 Gravelly Lake Dr. SW
Lakewood, WA 98499-1341

In re: Clover Park School District - Special Education Cause No. 00-44

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. Thank you for your willingness to allow me to extend the time for issuance of my written decision. 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 Office at (360) 753-2298.

Sincerely,

Robert P. Kingsley
Administrative Law Judge

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



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

IN THE MATTER OF:

CLOVER PARK SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 00-44

**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 April 27, 2000. The interested parent appeared on her own behalf. Clover Park School District (District) was represented by Gigi DeVault, Director of Special Education. 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 District filed a request for due process hearing with the Office of the Superintendent of Public Instruction (OSPI) on April 7, 2000. The parties were served with a copy of a Notice of Hearing setting this matter for April 27, 2000. A prehearing conference was convened on April 18, 2000, at which the parties agreed on the issues, a date for exchange of documents and witness lists, and location of the hearing. The deadline for decision according to WAC 392-172-356 is May 22, 2000.

ISSUE

The issue which is the subject of the hearing is identification of the appropriate placement and educational program for the student.

FINDINGS OF FACT

1. The student is [REDACTED] years old and resides in the district with his mother and [REDACTED] siblings. He was first determined eligible for special education under the funding category eligibility criteria for [REDACTED] in 1992.

2. The 1992 Multi disciplinary Team (MDT) reported a history of defiant, belligerent, classroom behavior originating in [REDACTED]. The student's [REDACTED] grade teacher observed that he was friendly only when he was doing what he wanted to do. He would not accept direction, and responses to adult attempts to control his behavior had included physical conflict, kicking, biting, and running away. He had engaged in fights with other students. The psychologist reported that the student could be highly defiant until threatened by parent contact, at which point he would become warm, pleasant, friendly, and happy. The parent indicates that the student was deeply impacted by domestic violence in the home until she separated from her spouse in [REDACTED].

3. The student was most recently evaluated on May 14, 1998. At that time, the MDT concluded that he continued to meet eligibility criteria for [REDACTED] and recommended a highly structured learning environment in the form of 1 1/3 hours per day in a resource room. Academic achievement tests revealed a severe performance discrepancy in the areas of math and written expression. The MDT observed that the student had experienced significant difficulty complying with school rules, reasonable adult requests, and controlling aggressive, defiant, and delinquent behavior toward staff and peers. It identified several interventions that had been employed: routine school disciplinary procedures, police intervention for assaultive behavior at school, preferential seating, praise, ignoring, encouraging positive role modeling, and extra privileges. Individualized Education Program (IEP) provisions included goals and objectives toward maintaining appropriate class and school behavior and achieving passing grades in math. The student had not been able to meet behavior goals.

4. The student attended [REDACTED] grade at [REDACTED] School. Despite numerous in school and out of school suspensions, the student earned membership in the [REDACTED] and a Certificate of Achievement for his academic work during the 19[REDACTED] school year.

5. The student's behavior caused numerous confrontations and disciplinary interventions during the [REDACTED] school year. On September 16, [REDACTED] the student received three days of in school suspension for excessive rough-housing with classmates. On September 17, he was placed on out of school suspension for profane and vulgar language directed at a member of the staff during an angry outburst. A similar incident resulted in a three day out of school suspension on September 23.

6. On September 28, the student, his mother, and two administrators conferred and proposed specific alternative behavioral accommodations for the student. These included wait time, time out, walking outside, and reporting to the guidance office to calm down. On the same day, the student was referred to the office after an angry profane outburst directed at the [REDACTED].

7. The student was asked to identify a list of alternative behaviors that he would use to avoid further discipline. He identified six strategies: talking with the teacher after class, asking the teacher to be allowed to talk to the counselor, asking to be allowed to walk around the track, asking to go to the office, trying to take it without a problem, and not getting in any more trouble.

8. On [REDACTED] the student's math teacher referred the student to the office for disruptive behavior in class, including profane language. The student was assigned after-school detention for two days.

9. While in detention, the student was sent to the office. He used profanity in the office. The student subsequently received three days of out of school suspension for the incident.

10. An MDT meeting was conducted on October 23, 1998. The meeting resulted in one of the administrators beginning a referral process to [REDACTED] for counseling services. One of the administrators also arranged for a meeting between the student and a District counselor for anger management services. The student met once with the counselor and refused to return.

11. On [REDACTED] the student was placed on out of school suspension for fighting with another student.

12. On [REDACTED], one of the student's teachers directed him to stop drawing in class, put his materials away, and attend to class work. The student threatened the teacher. The teacher referred the student to the office.

13. The same teacher referred the student to the office on November 17 after he gave the student a detention notice and the student responded by kicking desks and slamming the classroom door.

14. On November 20, the principal directed the student to return to class from the nurse's office. The student threatened the principal, used profanity, and subsequently left the campus. The principal told the mother to keep the student at home for the following day.

15. On November 24, 19[REDACTED] the student was placed on emergency expulsion after becoming involved in a fight with another student which resulted in the teacher being pushed into her classroom door. The administrators considered the fact that the student had not followed through with earlier recommendations for anger management counseling. The administrators provided the parent with information and a phone number for [REDACTED].

16. An MDT meeting was scheduled for December 4, 1998. The meeting was attended by a counselor, several of the student's teachers, the school psychologist, and the principal. The MDT concluded that the student's behavior was related to his handicap. It recommended a return to school according to a [REDACTED] [REDACTED] and [REDACTED], and a [REDACTED]. The principal devised an Aversive Therapy Plan and Contract for the student. The parent did not agree to the plan. The student returned to school on December 16, 1998.

17. IEP meetings were conducted on January 5 and 15, 1999. The meetings were attended by the principal, a special education teacher, a District representative, the parent, and her PAVE advocate. An IEP, agreed upon by all parties, was sent home with the parent at the end of the second meeting. The IEP continued the thirty minute anger management counseling once per week, and provided for fifteen minute daily skills training. It included goals and objectives in math, anger management, and written language. The student's placement continued to be in the general education program with services offered in class and counseling in a separate room. The IEP team members agreed that the student's difficulties centered on his response to unstructured time, such as between classes. It also agreed that he would be eligible for sports although he might otherwise be barred for failure to maintain minimum grades.

18. On January 7, 1999, the student was stopped in the hall by a security guard and told to leave the school grounds. The student argued that he did not have to leave. Both parties escalated the argument and the guard inappropriately threatened to physically subdue the student. The guard was subsequently dismissed.

19. On January 25, 1999, the student defied a direction from his physical education teacher, and used profanity at him. He went to the office to use the telephone and, when told he couldn't, stormed out of the office slamming the door.

20. On February 4, 1999, OSPI issued a final decision regarding a citizen's complaint filed by the parent on December 16, 1998. The complaint alleged that the student had been excluded from his placement for more than ten days during the school year in violation of the IDEA. The District had agreed that the student had been suspended for more than ten days, and proposed, in part, the equivalent of ten days of individual tutoring, provided in two hour blocks, directed at academic and behavioral goals.

21. On February 22, 1999, the student was suspended again for one day. On February 24, 1999, an IEP meeting was conducted regarding the incident. The group determined that the student's conduct was related to his disability. It conducted a functional behavior assessment and on the following day completed a behavior intervention worksheet. It also discussed arrangements for completing the tutoring

required by OSPI. The parent indicated that compensatory tutoring would involve too great a time commitment for the student. The team agreed that the student's grades would be based on completed work rather than uncompleted make up work, and arrangements were made for a review of the student's first semester grades according to these guidelines.

22. The student did not consistently attend the daily social skills tutoring. He failed to appear on thirty three out of fifty three scheduled sessions.

23. During February and March, 1999 the student was able to manage many of his outbursts using the strategies he had identified earlier. However, the student's response to authority deteriorated after the confrontation with the security guard and he became less respectful of staff authority. On May 10, 1999, he became involved in a confrontation involving a teacher that led to his arrest and prosecution for assault. He was sentenced to thirty days confinement and, due to his confinement, stopped attending [REDACTED] School. He continued to receive educational services while in confinement.

24. Despite his confinement, the District convened an IEP meeting in May, 1999 and included representatives from [REDACTED] School. The purpose of the meeting was to plan for the student's transition to the new school.

25. The student began attending [REDACTED] School in September, 1999, and began having disciplinary problems within a short time. School discipline is coordinated by an administrative assistant. She is a certificated teacher training for certification in administration. On September 8, 1999, the student left class without permission. The teacher referred him to the administrative assistant. She counseled him regarding the disciplinary expectations of the school and assigned him three days of detention. While in detention, he was told to stop talking, to which he responded by leaving the room. He again met with the administrative assistant. She decided that he would complete the detention during lunch hour with her.

26. On September 14, 1999 he swore at his JROTC instructor. The instructor disciplined him in class. He was referred to the office on the following day for swearing at a teacher and leaving the classroom. On September 16, he was referred by another teacher for inappropriate behavior and swearing. The teacher also requested a staff meeting before he was returned to her class. The administrative assistant contacted the student and he acknowledged the behavior. The administrative assistant decided to impose a two day suspension and called the student's mother. The student became extremely upset over the suspension and indicated his preference for out of school suspension. The mother agreed and the student was placed on out of school

suspension. Before leaving the office, he picked up a chair and threw it across the room.

27. The mother decided to provide home based instruction to the student. The mother is not a certificated teacher and is not being supervised by a certificated teacher. Initially, the student continued attending [REDACTED] class and JROTC. On November 1, 1999, the parent decided to withdraw the student from the school and he has not received any services since then.

28. The administrative assistant noticed that the student tended to perform well in smaller classes where he could receive individual attention from the teacher. His disciplinary problems tended to originate from the larger, more unstructured classes. He appeared to thrive in the highly structured JROTC class.

29. [REDACTED] School delivers special education and related services on a variety of levels. For some students, the special education teacher designs instruction to be delivered primarily by the general education teacher and a paraprofessional supervised by the special education teacher. Depending on the needs of the student, more intense services are provided in resource rooms featuring an academic focus in English, math, or social studies. Study skills may be taught in a similar fashion as a resource room service. These classrooms operate as an adjunct to the general education classroom. Additionally, the school operates a self-contained classroom for individuals with more severe behavioral or academic needs which features a high degree of structure and a single teacher. There are approximately ten students to one teacher. Most of these students attend elective classes in the general education program.

30. The District maintains a [REDACTED] school for students who do not adapt well in the general [REDACTED] school curriculum. [REDACTED] its students tend to be teen parents or students who work. The program rewards self-reliance and an ability to work with little supervision.

31. The mother referred the student for intelligence and personality testing to [REDACTED] during the summer of 1999. The report was issued on September 20, 1999. Intelligence testing revealed that the student was functioning in the average range for children. A nineteen point spread between his verbal IQ and performance IQ indicated that his visual-motor discrimination skills were better developed than his auditory-vocal processing skills. The evaluator noted that the student did not appear to understand the social needs of his environment, tries to understand his world and impose meaning that he considers to be in agreement with his internal feelings and behaves accordingly even though it is in conflict with reality. The evaluator recommended social skills education, and the use of short and simple directions to assist with attention and concentration difficulties.

32. A complaint was made to the Department of Education Office of Civil Rights (OCR) which included, in part, allegations related to the student's history of discipline. The District and OCR entered into an Agreement to Resolve the complaint according to which the District agreed to determine whether an appropriate program is being offered to the student, and to determine whether the student would benefit from additional educational services to compensate for any time during the [REDACTED] school year when he may not have received educational services appropriate to his disability related needs. OCR directed the District to promptly provide the compensatory services agreed upon under the citizen's complaint to the student and to report on the progress by February 29, 2000. The District has requested an extension on its reporting while it attempted to resolve the issue of placement by mediation and a due process hearing. OCR has since agreed to extend the deadline for reporting to May 31, 2000.

33. On February 4, 2000, the District sent notice to the parent that it anticipated convening an IEP meeting on February 17, 2000. It notified the parent that the meeting would address the student's placement. On February 10, 2000, the Director of Special Education supplemented the notice with a letter identifying two proposed placement options: [REDACTED]

34. The parent's input was also sought by phone calls. On February 15, 2000, the parent responded in a faxed letter that she could not be available for a meeting on five days notice. She also informed the District that she would not be available for a meeting in February due to her schedule. In response to the proposal of the [REDACTED] she suggested [REDACTED] as her preferred placement for the student.

35. The IEP meeting was convened without the parent. The remaining members of the IEP team agreed that the student's placement should be in a self-contained program with a behavior focus. A specific school was not identified. The team noted that the student had a history of not participating and walking out of programs and classrooms. The only identified goal was that the student attend school regularly. The short term objectives were that the student would enroll in school within thirty days and would have reasonable attendance within the placement. Transition services were deferred until the student had been enrolled. The IEP referred to a behavior support plan attached to the IEP, which was to be modified upon enrollment.

36. The special education director contends that the student needs a more highly structured program than can be provided at [REDACTED] School. It is her opinion that the student's respect for school authority has eroded during the past year partially as a result of conflict between the District and the parent. The student's progress toward behavior management has been hampered by his rejection of tutoring and counseling, and the parent's support of those decisions. A successful program for the student would include a high degree of parent involvement in monitoring work towards both

academic and behavioral goals. Although not identified in the February 17 IEP, she recommends the District's [REDACTED]

37. The [REDACTED] program is directed at students returning to school from expulsions for weapons or dangerous behavior. The students' activities are closely monitored. Security measures include regular urinalysis and weapons searches.

38. The student has received educational services at juvenile detention on two occasions. He has responded positively to the close levels of supervision and resisted a promotion to a setting with more freedom. The student has visited the [REDACTED] program and compares it to the educational program operated by the [REDACTED]. There were approximately nineteen students to one teacher. The teacher used progressive levels of privileges to address behavioral and disciplinary issues. There were two rooms available for "time-out."

39. The parent has referred the student to [REDACTED] for counseling. One of her goals for the student would be to complete the school year with home based instruction, and involve him in a counseling program before seeking a transition back to a self contained placement at [REDACTED] School for the next school year.

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. 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).

Placement - Home Based Instruction

4. The parent has elected to provide home based instruction for the student. Home schooling is authorized as an approved alternative to mandatory school attendance under RCW 28A.225.010. To qualify, the instruction must be provided by a parent supervised by a certificated person; by a parent who has earned forty-five college level quarter credit hours (or its equivalent in semester hours), or has completed a course in home-based instruction at a postsecondary institution or a vocational-technical institute; or by a parent deemed sufficiently qualified to provide home-based instruction by the

superintendent of the local school district in which the student resides. RCW 28A.225.010(4). Supervision by a certificated person means planning of objectives, one contact hour per week with the parent and child, and evaluation of the student's progress. Home-based instruction is recognized as an alternative placement for special education. WAC 392-172-045 and -174.

5. 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.

6. As currently provided, the student's home based instruction is not an appropriate placement. The parent removed the student from [REDACTED] School without requesting or convening an IEP meeting to reconsider the student's placement. The placement is not supported by the student's evaluations or his IEP. Furthermore, the evidence does not establish that the home based instruction is being provided according to the guidelines set forth in RCW 28A.225.010. There is no evidence of the parent's qualifications or of supervision by a certificated person. Finally, the evidence does not establish supervision of the student's activities while the parent is engaged in her work.

Placement at [REDACTED]

7. The [REDACTED] program rewards self-reliance and an ability to work with little supervision. The student's history and evaluations do not support it as an appropriate placement.

Self-Contained Placement

8. The student's history and evaluations suggest that he needs a highly structured environment with a limited number of instructors. The student's discipline problems have tended to arise in large, relatively unstructured classes where individual attention was limited. The student's evaluation by [REDACTED] recommended short and simple directions, repeated if necessary, and a focus on learning more effective ways of dealing with his feelings. The 1998 evaluation recommended counseling services and a highly structured learning environment. The

Findings of Fact, Conclusions of Law and Order

student's history of attendance in a general education setting has been unsuccessful, with disciplinary problems becoming more aggravated as the student's response to authority figures has deteriorated. The student has not successfully participated in tutoring aimed at his behavioral needs. The evidence establishes that the student's needs cannot be satisfactorily met in the general education environment, even with the use of specialized instruction in a resource room.

The IEP and Placement Decision

9. The District has exerted reasonable efforts to include the parent in formulation of a current IEP and in the placement decision. It is responsible for notifying the parent of an IEP meeting early enough to ensure that the parent will have an opportunity to attend and shall schedule the meeting at a mutually agreed upon place and time. WAC 392-172-15700(1). They provided notice of the meeting thirteen days in advance. The parent's response that she would not be available for a meeting during the month of February did not provide a reasonable alternative. The District provided alternative methods for the parent's participation in the form of telephone calls to the parent.

10. The IEP designed by the District on February 17 is admittedly incomplete, but provides an appropriate proposed placement. This conclusion is based on the plan as executed on February 17, 2000, which proposes a self-contained program with behavior focus. It does not specify the program or school. The testimony of the District's witnesses reflects a recommendation of the District's [REDACTED] program. While the [REDACTED] program provides a highly structured program, there is insufficient evidence to determine whether its structure is appropriate to the student's needs at this time. The student's behavioral needs relate to anger management and control of explosive outbursts. The [REDACTED] program, featuring urinalysis and pat down searches for weapons, appears directed at a more criminally oriented individual than the student. The appropriateness of this particular placement, as opposed to an alternative self-contained program at [REDACTED] School, needs to be more fully explored at future IEP meetings. Simultaneously, the IEP team needs to consider the parent's referral for mental health counseling and its potential effect on the placement decision.

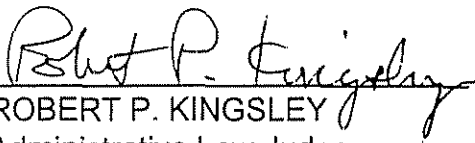
11. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

IT IS HEREBY ORDERED:

1. The District's proposed placement of a self-contained program with behavioral focus is an appropriate placement for the student. A specific program needs to be identified in future IEP meetings according to the foregoing Findings of Fact and Conclusions of Law.
2. The parties shall participate in additional IEP meetings to identify the specific school or program for the student's placement, to identify specific goals and objectives, and to review the behavior support plan.

Dated at Seattle, Washington this 21st day of May, 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.

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 5/2/00, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parent



Gigi DeVault
Director of Special Education
Clover Park School District
10903 Gravelly Lake Dr. SW
Lakewood, WA 98499-1341