

Ch: Administrative
Judge



STATE OF WASHINGTON
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August 17, 2000

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Superintendent of Public Instruction
Legal Services

PARENTS:



Dr. Valerie Lynch, Director
Special Education
Highline School District
15675 Ambaum Blvd. SW
Box 66100
Burien, WA 98166

David Hokit, Attorney
Curran Mendoza
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Kent, WA 98035

In re: Highline School District - Special Education Cause No. 00-79

Dear Parties:

I am enclosing 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 (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact the Legal Services office at OSPI at (360) 753-2298.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrea Conklin".

Andrea Conklin
Administrative Law Judge

cc: 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:

HIGHLINE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 00-79

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

ANDREA CONKLIN, Administrative Law Judge (ALJ), held a hearing on July 14, 2000. The Highline School District (hereinafter School District) was represented by its attorney, David T. Hokit. The Parents appeared *pro se* and in person. Exhibits D-1 through D-8 and P-1 through P-9 were admitted.

STATEMENT OF CASE

On June 8, 2000, the Parents requested a due-process hearing to address the question of placement for the Student for the 2000-2001 school year. A hearing was held on July 14, 2000. The parties were given until August 4, 2000, to submit proposed Findings of Fact and Conclusions of Law (Proposed Findings) and a closing brief. The parties agreed to extend the 45-day due date by an additional three weeks to allow the parties to submit their Proposed Findings and the closing arguments. Therefore, this decision was due on August 18, 2000.

After the hearing, the Parents requested additional time to submit the Proposed Findings and a closing brief. The Parents' request was granted and the record closed on August 11, 2000. However, the decision is still due on August 18, 2000. Christy Thompson Ibrahim of the Law Office of Larry A. Jones appeared for the Parents for the sole purpose of submitting a closing brief.

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ISSUES

1. Should the Student advance to the [REDACTED] grade for the 2000-2001 school year or should the Student repeat the [REDACTED] grade and remain at [REDACTED] School [REDACTED]?
2. If the Student advances to the [REDACTED] grade, should the Student be placed at [REDACTED] School [REDACTED] or at [REDACTED] School [REDACTED]?

FINDINGS OF FACT

Background.

1. The Student is [REDACTED] years old and has [REDACTED]. She lives with her family within the boundaries of the School District. The Student had been served in special education under the [REDACTED] category. Exhibit D 1.1 The Student had attended [REDACTED] School [REDACTED] for [REDACTED].
2. Th School District reevaluated the Student when she turned [REDACTED] years old. Exhibit D 1.1 It was determined at the time that she would continue to receive services under the [REDACTED] category. Exhibit D1-1. The School District recommended that the Student be in a self-contained Developmentally Delayed classroom at [REDACTED]. Exhibit D 1.1 At the Parents' request the Student was placed at her home school, [REDACTED], in an inclusion model with Special Education Services. Exhibit D 1.1 The Student has been attending [REDACTED] since the [REDACTED] grade and has moved from grade to grade with her regular education peers. At the time of the hearing, she had completed the [REDACTED] grade.
3. The Student has a sister who is a [REDACTED] younger and who also attends [REDACTED]. The Student has an older brother. In addition, in the 1999-2000 school year, the Student's father was ill which caused the family strife.

Evaluation.

4. In January of 1999, the School District conducted a three-year evaluation of the Student. See Exhibit D 1. The evaluation was performed six months early, at the Parents' request. Based on the tests administered, the Student generally performed in the first percentile. Therefore, 99 out of 100 students of the same age performed better than the Student. Based on the testing, the Student is severely deficient in all areas, including reading, math and written languages. See Exhibit D 1, page 6.

5. The Student's adaptive behavior scale indicates the Student's skills at a two-years, seven-month-old level in communication skills, two years, six-months-old level in socialization skills, and four-years, three-year month-old level in daily living skills. Exhibit D 1.

6. The Parents did not completely agree with the evaluation performed by the School District. Therefore, the Parents requested that Dr. David Breiger, a Psychologist with Children's Hospital, perform an evaluation of the Student. Dr. Breiger's results were presented to the Parents on April 17, 2000. See Exhibit P-1. The Parents are not requesting that the School District pay for the evaluation performed by Dr. Breiger.

7. Dr. Breiger administered the Stanford Binet Intelligence Scale: 4th Edition, Leiter International Performance Scale, and Peabody Picture Vocabulary Test (Revised). On the Stanford Binet Intelligence Scale, the Student's overall score placed her in the first percentile for children her age. See Exhibit P 1, page 3. The Student's other Stanford Binet area scores were identical and placed her in the one percentile. The Student's age-equivalent scores were in the three to four-year-old range. See Exhibit D 1. See Exhibit P-1.

8. The Peabody Picture Vocabulary Test (Revised) showed the Student's overall intelligence and measured receptive vocabulary knowledge. The Student was

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asked to point to one to four pictures to identify the words spoken by the examiner. On the test, the Student scored below the one Percentile range. The Student's age equivalent was in the three to four-year-old range. See Exhibit P-1.

9. On the Leiter International Performance Scale, the Student indicated her answers by sorting blocks into different stalls based on similar-situated patterns. On the Leiter test, the Student's mental age equivalent was four years, ten-months old. This represented a strength for the child. See Exhibit P-1.

[REDACTED]

10. Since the [REDACTED] grade the Student has been receiving services through the Resource Room at [REDACTED] and then attending regular-education classes while being pulled out for certain services. For the [REDACTED] grade, the Student had a para-professional who worked with her approximately 6½ hours a day.

11. As a child with [REDACTED], the Student has communication difficulties. In the [REDACTED] grade, the Student receives speech and language services from pathologist, Kerstin Sams. Ms. Sams removed the Student for 60 minutes every week from the regular-education classroom and provided one-on-one services for the Student in her office.

12. The Student had a "communications pocket-book" which was designed to improve her communications with others. The book contained pictures regarding items such as family members and her address. The Student worked on articulating those items verbally so that others could understand her as well as having the pocket-book with her so she could use it for communication purposes.

13. One of the Student's IEP goals was to improve her functional communication. See Exhibit D 2, page 15. There were several communication goals for the Student, including being able to identify all of the steps in an emergency process, being able to spontaneously initiate activity choices, using appropriate syllables and articulation, improving intelligibility, speaking consistently and identifying items with her

communication pocket-book, as well as using the phrase "can I ____." See Exhibits D 15 and D 16. Although the Student improved in each one of the areas, she never completely met the IEP goals for communication.

14. A problem with the Student is that she is not generalizing her education. Generalizing means using the items the Student was learning in her education outside the special education classroom. She was not using these skills in her everyday life. In particular with the speech pathology, the Student was having difficulty taking that information and using it outside of the classroom.

Retention v. Advancing.

15. The Parents have a concern that the Student will have a problem transitioning from the [REDACTED] to [REDACTED]. The Parents are also concerned that the Student will not be safe at [REDACTED]. The Student has not grasped the concept of "good touch and bad touch."

16. In [REDACTED] at [REDACTED], the Student wandered off and was missing for two hours. The Parents are concerned that the Student will wander off again. If the Student goes to the neighborhood school of [REDACTED] or [REDACTED] the Student is well known throughout the community and by the staff and students at [REDACTED] and others would find her quickly.

17. The Student's younger sister will be in the [REDACTED] grade. The Student often plays with other [REDACTED] graders who will be [REDACTED] graders and is well known by all throughout the entire school. The Student has not been to [REDACTED] or [REDACTED] and has not met the teachers, nor has she met the other students.

18. The Student's resource-room teacher, Ms. [REDACTED], and her para-professional will not be returning to [REDACTED]. The principal has left [REDACTED]. Finally, the Student's regular education peers graduated from the [REDACTED] grade and will be attending [REDACTED].

19. The Parents presented a statement from Dr. Mark Greenfield, dated April 5, 2000, whose opinion is that the Student be retained at [REDACTED]. However, Dr. Greenfield did not visit [REDACTED] or [REDACTED], nor speak with any of the educators at [REDACTED].

20. In November of 1999, the Parents asked Dr. Breiger, the Psychologist from Children's Hospital, to address whether the Student should transition to [REDACTED] or be [REDACTED].

21. In January of 2000, the Mother began attempting to schedule meetings at [REDACTED] and [REDACTED] and visit the schools. At the end of April 2000, the Mother expressed to the staff at [REDACTED] that she was having difficulty contacting the special-education teachers.

22. In the beginning of May 2000, the Mother finally spoke with the teacher at [REDACTED] and arranged for a meeting. The Mother spoke with Ms. [REDACTED], but did not observe the classroom. The Student did not observe the classroom at [REDACTED].

23. The Parent was unable to take the Student for transitioning because she wanted to meet the teacher first, which was difficult. In addition, the Student's father was ill and the Mother had to take care of the Father, which made it difficult to carry out the transitioning plan.

24. [REDACTED] has two self-contained classrooms which service 13 to 14 students. The students are between [REDACTED] and [REDACTED] years of age. There are a total of two special-education teachers and two to three para-professionals for both classrooms. The students at [REDACTED] have functional or academic limitations, but not behavioral disorders.

25. The Student will receive her academic education in a self-contained classroom at [REDACTED]. This would allow the Student to use picture boards and other items to improve her speech throughout the day. The Student, if the IEP team agrees,

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could attend mainstream classes for art, music, and other general-education electives. The Student will receive all her academic courses in the self-contained classroom and be mainstreamed for lunch and passing through the hallways.

26. The program at [REDACTED] focuses on life skills, functional skills, and potential vocational skills. At [REDACTED] the students have a once-a-week outing on the bus to perform a community activity. The community activity is designed to allow the students to use the skills learned in the classroom out in the community. For example, the students have the opportunity to make change, read a bus schedule, buy groceries, and determine what is the best price for a particular product.

27. At [REDACTED] the Student would have a 20 to 25-minute bus ride one way. The Student will be met at the bus stop by a para-professional and will be taken to her classroom. The Student will be supervised at all times while she is at [REDACTED]. During lunch period and while she passes in the hall the Student would always be supervised.

28. Dr. Breiger, the Parents' expert, described a program which, in his opinion, would be best for the Student. Dr. Breiger believes that the Student would be best placed at a school that could allow her to learn life skills, vocational skills, and other functional skills. Dr. Breiger's description was similar to the program at [REDACTED]

29. The Parents live very near [REDACTED]. The Student has played at [REDACTED] playground. [REDACTED] is the Student's neighborhood school. If the Student attends [REDACTED], the Parents can walk her to school every day. The Student is well known in her neighborhood and her neighbors could watch out for the Student.

30. The program at [REDACTED] is for severely behaviorally disturbed children. There are two special education classrooms at [REDACTED]. There would be 13 to 14 severely behaviorally disturbed students in each class at [REDACTED]

31. The Parents' psychologist, Dr. Breiger, expressed concern about the Student attending a school with students who have behavioral problems. As the Student

has not yet grasped the "good touch and bad touch" concept, students with behavioral problems could take advantage of the Student.

32. Dr. Breiger was not familiar with either [REDACTED] or [REDACTED] and could not form an opinion as to which school would be best for the child. Dr. Breiger was also not familiar with the education the Student was receiving at [REDACTED] and could not render an opinion as to whether [REDACTED] was appropriate.

33. The Parents and the School District met in several Individualized Education Program (IEP) meetings between January and June of 2000 to discuss the program and placement for the Student for the 2000-2001 school year. The IEP team considered the Parents' request to have the Student retained at [REDACTED]. The IEP team also considered two schools that were available to the Student, [REDACTED] and [REDACTED].

34. It is the opinion of Ms. Sams, the Student's Speech and Pathologist, that the Student should advance to the [REDACTED] grade and be in a self-contained classroom in which she could be using the communications she is learning in a generalized all-day manner. At [REDACTED] the Student is pulled out and then returned to the regular-education classroom. The Student was not allowed to use the skills she was learning in her one-on-one situation with the regular education because others did not have the communication board, and she was not allowed to speak as much.

35. It is the Student's [REDACTED] grade resource room teacher, [REDACTED] opinion that the Student should advance to the [REDACTED] grade and be placed in a self-contained classroom. Ms. [REDACTED] has a concern that the Student is not generalizing her knowledge from what she was learning in school into her everyday life.

36. In addition, Ms. [REDACTED] believes the Student is not receiving educational benefit by mainstreaming with a one-on-one aide to assist her. The Student was attending the general-education classroom at [REDACTED] and then the

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curriculum was being modified with a one-on-one aide to teach the Student. However, in the [REDACTED] grade, children are learning world history and reading to themselves. The Student does not have the cognitive ability to learn these items. She is still learning her letters and how to spell her name.

37. All the parties acknowledge that the Student received social benefit from participating in a mainstream with students of her same age at [REDACTED]. However, the Student was receiving little or no academic benefit from mainstreaming.

38. It is [REDACTED] belief that to repeat the [REDACTED] grade would not provide the Student with as much social benefit and would not provide the Student with academic benefit. It is Ms. [REDACTED] opinion that the Student would benefit academically from advancing to the [REDACTED] grade, with her peers, in a self-contained classroom where she could have more instruction in a way that would be easier for her. Communication boards could be used for all her classes as opposed to just during the speech pathology period.

39. On June 8, 2000, the School District informed the Parents that they would not be granting the Parents' request that the Student remain at [REDACTED]. See Exhibit P 6. The IEP team decided, after considering the Parents' request for retention, that the Student will be placed in a self-contained learning center at [REDACTED]. See Exhibit P-7.

40. On June 8, 2000, the Parents requested a due-process hearing to address the question of placement for the Student for the 2000-2001 school year.

CONCLUSIONS OF LAW

Jurisdiction.

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

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(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.

2. A School District has the duty of proving compliance with the IDEA at the administrative hearing, including the appropriateness of its evaluation (34 Code of Federal Regulations (CFR) § 300.503(B)) and its proposed placement for the child. *Clyde K v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Circuit, 1994).

3. The IDEA assures all disabled children a "free, appropriate education." 20 United States Code (USC) § 1400(c) and § 1412(1). It provides federal money to assist states in educating disabled children and conditions such funding upon the states' compliance with extensive goals and procedures. *B.S.*, 82 F.3d at 1500. See also *Rowley*, 458 U.S. at 179, 102 S.Ct. at 3037.

An 'appropriate' public education does not mean the absolute best or 'potentially maximizing' education for the individual child. . . . The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child.

B.S. 82, F.3d at 1500, quoting from *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Circuit, 1994). "[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services. . . ." *B.S.* 82, F.3d at 1500; *Rowley*, 458 U.S. at 201, 102 S.Ct. at 3048.

4. There are both a procedural and a substantive test to evaluate compliance with the IDEA. The Court must inquire:

First, has the district complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Seattle School District v. B.S., 82 F.3d, 1493, 1498-1499 (9th Circuit, 1996). See also, *Board of Education v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).

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Procedural violations.

5. There are no alleged procedural violations and none noted in this matter.

Substantive violations.

6. The IEP in place is reasonably calculated to enable the Student to receive educational benefits. *Id.* The Student, although not meeting her IEP goals, was progressing. Therefore, she is receiving education benefit and there have been no substantive violations of the IDEA for the 1999-2000 school year.

Retention in [REDACTED] Grade.

7. There is no case, regulation or statute granting the ALJ authority to review a School District's decision to advance a special education student if the School District has complied with the procedural requirements and substantive requirements of the IDEA. The only similar case that could be located is *Houston Independent School District*, 30 IDELR 566 (1999).¹ In *Houston*, the Parent argued several violations of the IDEA, including improperly retaining the student in the second grade. The court stated, in a footnote, "The retention issue is not within my jurisdiction as granted under the IDEA."

Therefore, the ALJ does not have jurisdiction to review the decision of the IEP team to advance the Student to the [REDACTED] grade if there are no substantive or procedural violations of the IDEA. Contrary to the argument of the Parents, the ALJ does not have the general jurisdiction to review all decisions made by school districts. The ALJ cannot substitute her judgement for that of the educators and the IEP team if the procedural and substantive provisions of the IDEA have been met.

¹ This is a different case than the one cited by the School District, *Brenda c. v. Houston Independent School District*, which was attached to the School District's brief.

Appropriate School.

8. The Parents request that the Student attend [REDACTED] her neighborhood school, as opposed to [REDACTED] as recommended by the School District. The Student will have to take a bus ride of from 20 and 25 minutes, one way, to attend [REDACTED].

9. The Federal regulations, at 34 CFR §300.553, provide:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that--

- (a) The placement decision--
 - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
 - (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.550-300.554;
- (b) The child's placement--
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

10. The State regulations, at WAC 392-172-180(2), provide:

- (2) The selection of the appropriate placement for each special education student shall be based upon:
 - (a) The student's individualized education program;
 - (b) The least restrictive environment requirements of WAC 392-172-172;
 - (c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and

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(d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

(3) Unless the IEP of a special education student requires some other arrangement, the student shall be educated in the school that he or she would attend if nondisabled. The placement shall be as close as possible to the student's home, unless the parents otherwise agree.

(4) The decision on the educational placement shall be made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options.

(5) A special education student is not removed from education in age-appropriate general classrooms solely because of needed modifications in the general curriculum.

11. [REDACTED] does not have a self-contained classroom which provides the same programs for the Student as at [REDACTED]. In fact, [REDACTED] has only two classrooms with children with severe behavioral disorders.

12. The Student should not be placed with children with behavioral disorders. Testimony of Dr. Breiger. The Student does not have the ability at this time to distinguish between good touch and bad touch and to ensure her safety. Therefore, considering the potential harmful effect on the Student, [REDACTED] is not the appropriate program for the Student.

13. Although placing a student at her neighborhood school can provide certain benefits, a student's neighborhood school is not determinative of the least restrictive environment. In this case, the Parent has pointed out the benefit to [REDACTED] as the Student's neighborhood [REDACTED] school. However, the School District and the Parents' expert, Dr. Breiger, have amply demonstrated that the program at [REDACTED] is not appropriate and could actually harm the Student. The half hour bus ride to [REDACTED] is not optimum but is not too onerous, especially in light of the self-contained program offered. The evidence clearly establishes that the [REDACTED] self-contained program provides a staffing ratio capable of overseeing the Student's safety, which will then allow

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the Student to participate in a meaningful educational program that will allow her to generalize her learning beyond the one to one teaching environment. Accordingly, the School District's proposed placement of the Student at [REDACTED] for the 2000-2001 school year is appropriate.

ORDER

IT IS HEREBY ORDERED that

1. The Parent's request to retain the Student at the [REDACTED] grade at [REDACTED] [REDACTED] is hereby denied.
2. The Student shall advance to the [REDACTED] grade at [REDACTED] [REDACTED] for the 2000-2001 school year.

Dated at Seattle, Washington this 17 Day of August 2000



ANDREA CONKLIN
Administrative Law Judge
Office of Administrative Hearings

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the individuals named below by depositing a copy of the same in the United States Mail, postage prepaid, on the 17 day of August, 2000.

PARENTS:

[REDACTED]
Dr. Valerie Lynch, Director
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Highline School District
15675 Ambaum Blvd. SW
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David Hokit, Attorney
Curran Mendoza
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cc: Mary Radcliffe, SPI Coordinator, Seattle OAH-ES
Legal Services, OSPI

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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 USC 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.