

ART WANG
Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
One Union Square Suite 1500
600 University Street
Seattle WA 98101-1129

March 30, 2000

Parents


RECEIVED

APR 03 2000

Superintendent of Public Instruction
Legal Services

Law Offices of Joni R. Kerr
800 NE Tenney Rd., #110-123
Vancouver, WA 98685

RE: Kent School District, Special Education Cause No. 00-17

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order Regarding Motion For Summary Judgment 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 Legal Services, OSPI, at (360) 753-2298.

Sincerely,

Handwritten signature of Robert P. Kingsley in cursive.

Robert P. Kingsley
Administrative Law Judge

c: Legal Services, OSPI ✓
OAH, Headquarters
Mary Radcliffe, OAH/OSPI Coordinator



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

IN THE MATTER OF

KENT SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 00-17

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER REGARDING
MOTION FOR SUMMARY
JUDGMENT**

STATEMENT OF THE CASE

On February 14, 2000, Kent School District (District) filed a request for due process hearing seeking an order allowing the District to evaluate the student and to identify the student's placement pending completion of these proceedings. The parties were served with a Notice of Hearing, setting a hearing for 9:00 A.M. on March 8, 2000, and a Notice of Prehearing Conference, to be held on February 23, 2000. Both parties requested that the prehearing conference be postponed. After hearing the parties' comments, the administrative law judge issued an order continuing the prehearing conference to February 29, 2000, at 9:30 A.M.

The parents failed to appear at the prehearing conference on February 29, 2000. The prehearing conference was conducted in their absence. The District clarified its request, indicating that it sought an opportunity to observe the student in a classroom setting in order to prepare an Individualized Education Program (IEP). Based on the District's presentation, the administrative law judge issued a prehearing order striking the hearing, setting this matter for hearing on the District's anticipated motion for summary judgment, identifying the issue, and extending the deadline for decision. The deadline for decision as extended is April 6, 2000.

The District has moved for summary judgment to determine the following issues:

- a. Whether the District should be allowed to observe the student in a classroom setting for the purpose of preparing an individualized education program (IEP), and

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- b. Is the student's placement pending completion of these proceedings (stay put placement) the [REDACTED] program at [REDACTED] School.

A telephone hearing was held before Administrative Law Judge Robert Kingsley on March 15, 2000. The District was represented by Joni Kerr, attorney at law. Also appearing on behalf of the District was Marilyn Holm, Director of Special Education. The mother appeared on behalf of the parents.

The parents requested a second continuance to obtain the assistance of counsel. The administrative law judge considered the fact that a continuance had previously been granted at the parent's request, and the limited nature of the issues for decision. The motion for continuance was denied. After hearing argument from the parties, the administrative law judge determined that resolution of the stay put placement would require reference to the last two IEPs written on the student's behalf. The record was left open for production of those documents, and an opportunity for the parent to respond.

A stay put order was entered on March 23, 2000. The remaining issue shall be determined in these Findings of Fact, Conclusions of Law, and Order Regarding Motion For Summary Judgment.

Matters Considered

In addition to argument of the parties, the administrative law judge has considered the following documents and materials:

- i Request for Due Process Hearing dated February 10, 2000;
- ii Cover letter and School District's Motion For Summary Judgment and Memorandum in Support;
- iii Declaration of Renee Rivera In Support of School District's Motion For Summary Judgment;
- iv Chronology of Events by Renee Rivera;
- v Letter from Renee Rivera to parents dated November 17, 1999, regarding composition of the IEP team and proposed dates for meetings;
- vi Notice of Action dated 11/17/99;
- vii Letter from Renee Rivera to parents dated December 15, 1999, regarding proposed meeting schedule;
- viii Notice of Action dated 1/11/00;
- ix Letter from Renee Rivera to parents dated January 12, 2000, regarding IEP

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- materials from 1997 ESY and proposed meeting schedule;
- x Notice of Action dated 1/12/00;
 - xi Letter from mother dated 1/17/00;
 - xii Notice of Action dated 1/20/00;
 - xiii Letter from Renee Rivera to parents dated February 2, 2000, regarding schedule for meetings;
 - xiv Letter from Renee Rivera to parents dated February 4, 2000, regarding summary of events and scheduling efforts;
 - xv Declaration of Marilyn Holm, E.D., In Support of School District's Motion for Summary Judgment;
 - xvi Chronology of Events by Marilyn Holm;
 - xvii Letter from parents dated March 13, 2000;
 - xviii Letter from parents dated March 14, 2000;
 - xix Letter from Joni R. Kerr dated March 15, 2000;
 - xx IEP signed by parent and dated November 21, 1996;
 - xxi Referral for ESY Service dated April 28, 1997;
 - xxii 1997 ESY IEP Goals and Objectives;
 - xxiii IEP Amendment Form signed by parent and dated June 11, 1997;
 - xxiv Letter from Marilyn Holm to Parents dated October 17, 1997
 - xxv Letter from parents dated March 18, 2000;
 - xxvi Letter from mother to Marilyn Holm dated February 5, 2000;
 - xxvii Review of eligibility by Renee Rivera dated November 17, 1999;
 - xxviii List of IEP team members;
 - xxix Letter from parents dated March 24, 2000;
 - xxx Request to Attend IEP Meeting dated 3/16/00;
 - xxxi Notice of Action for IEP Meeting dated 3/16/00;
 - xxxii Notice of Action for Observation dated 3/16/00.

Findings of Fact

The record reflects the following material facts are undisputed:

1. The student was born on [REDACTED] and resides with his parents within the boundaries of the District. He was initially evaluated for special education and services in 1994, and reevaluated in 1997. The student first qualified for services under the eligibility category of [REDACTED]. The reevaluation reflected a May 7, 1997, health appraisal from [REDACTED] diagnosing [REDACTED]. The student was subsequently determined eligible under the category of [REDACTED].

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2. The student received services in the district through the [REDACTED] school year at [REDACTED] School. On November 21, 1996, the parties agreed to an IEP placing the student in a self-contained special education classroom and providing 600 minutes per week of special education and 30 minutes per week of speech/language therapy. Goals and objectives were identified in the area of self-help and adaptive behavior, motor skills, and receptive and expressive language.

3. On April 28, 1997, the student's teacher formally referred the student for Extended School Year (ESY) services.

4. On June 11, 1997, an amendment to the IEP was agreed to by the parties changing the levels of service to 15 minutes per week of speech/language therapy and 1065 minutes per week of special education classroom services. The IEP amendment also provided that the student's placement starting September 2, 1997, would be in the [REDACTED] at [REDACTED] School.

5. The student attended the ESY program at [REDACTED] School. The parents were pleased with his progress there. As agreed, he commenced the [REDACTED] school year at the [REDACTED] program at [REDACTED] School until September 19, 1997, at which time the parents removed him after a disagreement with the teacher. An IEP meeting was conducted on September 29, 1997, after which the student was placed in a similar [REDACTED] program at [REDACTED] School. This placement was not memorialized in writing. The student attended this program from October 7, 1997, to October 16, 1997, at which time the parents withdrew him. The student has not attended school since October 16, 1997. The parents have not notified the District of their intent to provide home based instruction pursuant to RCW 28A.200.

6. The parties participated in an unsuccessful mediation on November 18, 1997. The parents filed two requests for due process hearing: the first request was filed on February 17, 1998, under Special Education Cause No. 98-12, and the second request was filed on May 29, 1998, under Special Education Cause No. 98-76. The requests were dismissed on April 13, 1998, and September 3, 1998, respectively. Timothy E. Williams, attorney, appeared in the first proceeding, and requested a dismissal so that the parties could resolve the matter informally. Gary Huie, attorney, appeared in the second proceeding. The request for hearing was dismissed over the parents' objection. The Order of Dismissal noted that the parent had not provided the attorney with a release to review school records, and counsel was unable to identify an issue for hearing although the matter had been pending since June 29, 1998, for that purpose.

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7. The student reached the mandatory age for school attendance on [REDACTED]. On [REDACTED] the District mailed the parents a letter about the requirements of compulsory school attendance under Chapter 28A.225 RCW and enclosed an enrollment packet. The parents returned the completed forms in October, 1999.

8. The parties communicated regarding dates and times for an IEP meeting. The first meeting occurred on January 11, 2000. The District determined that it could not identify the student's present level of educational performance until it had an opportunity to observe the student in a classroom setting. Due to the nature of his disabilities, the student's skills cannot be measured by tests. A meaningful understanding of his current level of educational performance can only be determined by direct observation. At this meeting, the parents sought copies of the IEP used during the student's 1997 ESY program. It was their belief that the student had made meaningful progress under this plan.

9. On January 12, 2000, the school psychologist sent the parents a letter with copies of the 1997 ESY IEP goals enclosed. The letter noted that the parties had agreed to meet with the student for an observation on January 20, 2000, at 2:00 P.M., at [REDACTED]. The letter also notified the parents that an IEP meeting had been scheduled immediately after the observation.

10. On January 17, 2000, the mother sent a letter to the District indicating that the parents anticipated meeting with the IEP team members on January 20 to discuss the ESY program elements. The letter indicated that the parents would bring the student after this discussion. The parents indicated further that parts of the ESY IEP were still missing.

11. On January 20, 2000, the mother appeared without the student. The mother again sought copies of three pages of the 1997 ESY IEP that she maintained were missing. In a letter dated February 5, 2000, she reaffirmed the parents' position that the three allegedly missing pages of the 1997 ESY IEP would be necessary to completion of an IEP for the current year. She suggested that, if the pages could not be found, the 1997 ESY teachers be assembled to recreate the program. The parent indicated that the IEP team could meet with the student after the proposed meeting about the 1997 ESY IEP.

12. During the prehearing conference on March 15, 2000, the District identified any time during the school day between March 27 and March 31, 2000, for available times to observe the student in a classroom and conduct an IEP meeting. The parent indicated that the District should have an opportunity to observe the student but would not identify a date and time. In the absence of the parents' input, the District suggested 2:00 P.M. on March

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28, 2000, for the observation. The proposed length of the observation is one hour. The individuals who would be present are: Heather Scheer, a speech language pathologist; Cami Okubo, general education teacher; Sally Hughes, special education teacher; Nancy Hampson, occupational therapist; and Renee Rivera, school psychologist. The location of the observation is [REDACTED] School.

Conclusions of Law

Standard

1. The motion for summary judgment is directed to the authority of the administrative law judge to decide a matter where there is no dispute of material facts. See WAC 10.08.135; *ASARCO Inc. v. Air Quality Coalition*, 92 Wn. 2d 685, 696, 601 P.2d 501 (1979). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (citing *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974)). In determining the motion, the facts should be considered in the light most favorable to the nonmoving party. *Bowles v. Washington Dep't of Retirement Sys.*, 121 Wash.2d 52, 62, 847 P.2d 440 (1993).

Jurisdiction/the IDEA

2. 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 392-172 WAC.

3. 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

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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" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). 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.

4. The District is responsible for convening meetings at least annually to review and revise a student's IEP. WAC 392-172-156. A mandatory element of an IEP is the statement of the student's present levels of educational performance, including how the student's disability affects the student's involvement and progress in the general curriculum. WAC 392-172-160(a). In developing, reviewing, and revising the IEP, the IEP team shall consider the strengths of the student and the concerns of the parents for enhancing the education of the student, as well as the results of the most recent evaluation of the student. WAC 392-172-159.

5. The IEP team shall consist of the student's parents, at least one general education teacher if the student may be participating in the general education environment, one special education teacher, and a District representative who will supervise the provision of services. WAC 392-172-253.

6. The IEP process presumes current knowledge of the student's strengths and abilities. The student's abilities are initially measured in the evaluation process. The student's evaluation report shall be sufficient in scope to develop an IEP. WAC 392-

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172-10905. The initial IEP meeting occurs within 30 calendar days of the evaluation report. WAC 392-172-156. The annual review of an IEP presumes that the student has been engaged in the program and the IEP team is sufficiently knowledgeable of the student's progress to review the continued appropriateness of the plan.

7. In this instance, the student has not attended school for over two years. The IEP team members cannot perform their functions of assessing performance and proposing appropriate special education services without current information concerning the student. The District's request for a one hour observation is reasonable. The parents position that IEP meetings should occur before the student is observed interferes with the ability of all IEP team members to participate meaningfully in the development of an appropriate IEP. Therefore, the parents should be directed to unconditionally make the student available for classroom observation by the members of the IEP team prior to any further IEP meetings.

8. The record reveals that the parents seek the presence of the student's 1997 ESY teachers at IEP meetings. They also assert that the goals and objectives from the ESY IEP should be adopted in the current IEP review process. The administrative law judge concludes that these requests are not material to the question of whether a current observation should be ordered. These issues may be considered independently of the observation, and may be the subject of a separate due process proceeding.

Order

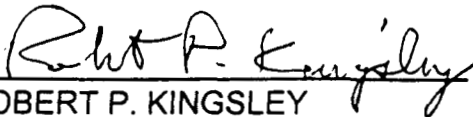
IT IS HEREBY ORDERED that the District members of the IEP team shall have an opportunity to observe the student for one hour in a classroom setting at [REDACTED] School. The session shall be attended by members of the IEP team, including one or both parents, a speech language pathologist, a general education teacher, a special education teacher, an occupational therapist, and the school psychologist. The purpose of the observation will be assessment of the student's communication skills, pre-academic readiness skills, socialization and play skills, and motor skills. The District shall notify the parents of three available dates and times for the observation during the school day. Within two days of the notice, the parents shall notify the District of their selection of one of the available dates. In the absence of a response, the first available date and time identified by the District shall be conclusive. The parents shall make the student available accordingly.

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SIGNED at Seattle, Washington on March 30, 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.

Certificate of Service

This certifies that a copy of the above Order was served upon the parties or their representatives on 3/30/00, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parents



Law Offices of Joni R. Kerr
800 NE Tenney Rd., #110-123
Vancouver, WA 98685

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