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

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OCT 18 2000

Office of Administrative Hearing
Spokane

IN THE MATTER OF:

PASCO SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 00-32

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

A hearing in the above-entitled matter was held before Administrative Law Judge Wynne O'Brien Persons in Richland, Washington on September 19, 2000. The hearing date had been set during a pre-hearing conference in this matter on June 9, 2000 as a date mutually acceptable to the Parent (hereafter, "Father") and the Pasco School District ("District"). On August 29, 2000 the Father advised the Administrative Law Judge that he was withdrawing his request for due process hearing and indicated he was unable to appear in person or participate by telephone in the hearing as scheduled. An order dismissing the Father's request for due process hearing was issued on September 21, 2000.

The Father requested a continuance of the hearing by letter received by the Office of Administrative Hearings on September 15, 2000. This continuance request was denied by this Administrative Law Judge in an order dated September 18, 2000.

The Father failed to appear at the hearing.

The District was represented at hearing by Christopher L. Hirst, attorney at law. The witnesses who testified on behalf of the District were: Jana Hubbs, Director of Special

Education for the District; Stephan Sulzbacher, Ph.D., expert witness, Childrens' Hospital and Medical Center; Terry Atwood, Principal of [REDACTED] School; Sherri Williams, former counselor at [REDACTED] School; Vickie Marquardt, special education teacher; Kristine Mueri, special education teacher; Nanette Terrill, Special Programs Counselor at [REDACTED] Stacey Carlson, teacher, [REDACTED] School; Deena Stallings, teacher, [REDACTED] School; and Lorenzo Alvarado, Assistant Principal, [REDACTED] School.

STATEMENT OF THE CASE

The hearing was conducted concerning the District's request for due process hearing on the following issues: (1) whether the Father was given a reasonable opportunity to participate in the development of the Student's initial IEP in February, 1998; (2) whether the District is required to obtain the Father's consent to subsequent IEPs or amendments as long as the parent was or is given a reasonable opportunity to participate in their development; (3) whether the Father was given a reasonable opportunity to participate in development of the Student's current IEP dated February 10, 2000; (4) whether the District is expressly authorized to continue to provide opportunities to the Father to participate on the same basis as it has in the past in the development of or amendments to future IEPs; (5) whether the District has an obligation to provide equal information and equal opportunity for discourse with the Father as it does with the Mother, since the Student resides with the Mother while attending school; and (6) whether the District has an obligation to provide IEP meetings in the future concerning the Student in a "neutral location" or to conduct IEP meetings in any manner different from the manner in which the District has conducted IEP meetings concerning the Student in the past.

FINDINGS OF FACT

1. The Student is [REDACTED] years old (date of birth [REDACTED]) and resides within the District. He was first evaluated for eligibility for special education services under the Individuals with Disabilities Education Act ("IDEA") by the District with parental consent in October and November 1997. The District's evaluation team found the Student eligible for special education services under IDEA as a health impaired student due to his diagnosis by Dr. Sierra of [REDACTED] and his need for special education assistance in the area of written language. The District's evaluation team recommended that the Student be placed in its behavior management program half time to manage behavior problems which were also negatively impacting his educational progress. Exhibits 102 and 117.

2. The District drafted an Individualized Education Program (IEP) dated November 25, 1997. Exhibit 106. The IEP proposed that the Student be placed half time in a regular classroom and half time in the behavior management classroom. The Mother agreed to implementation of the November, 1997 IEP. The Father indicated that the behavioral program seemed satisfactory but he did not consent to the implementation of the November, 1997 IEP. The IEP was never initiated by the District. See also Exhibits 103, 104, and 105.

3. The District urged the Father to consent to placement of the Student in special education services in December, 1997 and January, 1998. Exhibits 107 and 112. The District promptly responded to the Father's requests for information and documents, to the extent the documents were within the possession and control of the District and did not involve third-party records which the District was not authorized to provide to the Father. Exhibit 117.

4. Jana Hubbs, Director of Special Education for the District, notified the Father by

letter dated January 7, 1998 of a proposed IEP meeting date for January 27, 1998. Exhibit 112. This meeting was rescheduled to February 11, 1998 and Ms. Hubbs sent to the Father notice of the rescheduled meeting on January 26, 1998. Exhibit 116. The notice of the IEP meeting was accompanied by a notice of procedural safeguards, which notice had been provided to the District by the Office of the Superintendent of Public Instruction (OSPI) for use in this way. The Father had previously received, and had acknowledged receipt, of these procedural safeguards. Exhibit 113.

5. The Father wrote several letters prior to the IEP meeting scheduled for February 11, 1998, in which he expressed his refusal to consent to placement of the Student in special education services, expressed disagreement with the District's evaluation of the Student and requested an independent educational evaluation at District expense ("IEE"). Exhibits 108, 110, 113, 114, 115 and 118.

6. The Father formally asked the District in a letter dated January 24, 1998 to provide an IEE of the Student, and requested that the District provide him with information about where an IEE could be obtained. Exhibit 110. Ms. Hubbs provided the Father with a list of potential evaluators, both from the Tri-Cities area and from other areas. The Father conducted a telephone interview with Dr. Stephen Sulzbacher of Children's Hospital and the University of Washington in Seattle and advised Ms. Hubbs that Dr. Sulzbacher was an acceptable choice for performing the IEE.

7. The Father attended the February 11, 1998 IEP meeting. The Student's initial IEP was developed at this meeting. Exhibit 121. The District provided additional records on the Student to the Father at the meeting. Exhibit 120. District staff presented the draft IEP that had been mailed to the Father by Ms. Hubbs on January 7, 1998 and again on January 28, 1998. Exhibits 112 and 117. Neither parent expressed disagreement or concerns about the summary of present levels of performance or the goals and objectives

in the draft IEP. The Mother consented to initiation of special education services in accordance with the February 11, 1998 IEP (Initial IEP), but the Father neither consented nor refused to consent to initiation of services under the IEP. Exhibit 121.

8. The District obtained the necessary consents from the Father and the Mother for Dr. Sulzbacher to perform the requested IEE at the IEP meeting of February 11, 1998. Exhibit 122.

9. The Father indicated at the IEP meeting of February 11, 1998 that he would make his decision on whether he would or would not consent to initiation of services in accordance with the Initial IEP by February 13, 1998. On February 12, 1998 the Father, via his attorney/brother Ronald DeFelice, requested that the time for a decision on the Father's approval of the Initial IEP be extended to February 17, 1998. The District agreed to the extension, while indicating that an IEP meeting would occur on February 13 as previously scheduled. Exhibits 123, 124 and 125.

10. The Father did not participate in the February 13, 1998 IEP meeting. The Father was given the opportunity to participate by telephone but declined to do so. The District determined at the February 13, 1998 meeting that it would initiate services for the Student in accordance with the Initial IEP with or without the Father's consent based upon the consent obtained from the Mother and safety and educational issues arising out of further delays.

11. The Father wrote to Ms. Hubbs on February 17, 1998, indicating his consent to initiation of the Initial IEP subject to several conditions. Exhibit 127. These conditions were unacceptable to the District.

12. Ms. Hubbs wrote to the Father on February 18, 1998 that the District would commence special education services on that date in accordance with the Initial IEP. Exhibit 128. The IEP services did commence on February 19, 1998 despite the Father's

disagreement. Exhibit 129.

13. Ms. Hubbs wrote to the Father on February 27, 1998 to confirm the initiation of services for the Student and again sent him a copy of the procedural rights notice which had been provided by the OSPI for such use by the District. Exhibit 130.

14. Ms. Hubbs wrote to the Father on March 16, 1998 responding to several additional questions he had asked, explaining to him that she was coordinating the effort with Dr. Sulzbacher in performing the IEE and indicating how the results would be considered once received. Exhibit 131.

15. A copy of Dr. Sulzbacher's IEE report dated March 31, 1998 was mailed by the District to the Father on March 16, 1998. Exhibit 133. Dr. Sulzbacher's March 31, 1998 report determined that the Student was better categorized as eligible for special education services as [REDACTED] and expressing the opinion that the District was appropriately serving the Student's needs in its behavior management classroom. Exhibit 133.

16. Ms. Hubbs notified the Father of a meeting on April 29, 1998 by notice dated April 16, 1998. Exhibit 132. The meeting was to consider the results of the IEE report. This meeting was rescheduled for May 14, 1998 at the Father's request so that he could participate by conference phone. Exhibit 134.

17. The Father participated in the May 14, 1998 meeting. The results of Dr. Sulzbacher's IEE were discussed at the meeting and its implications were incorporated into an addendum to the District's evaluation of the Student. The IEP determined to continue placement of the Student in the behavior management program as recommended by Dr. Sulzbacher. Exhibit 135.

18. When the Father initially agreed to have Dr. Sulzbacher conduct the IEE, he insisted as part of his agreement that Dr. Sulzbacher be authorized by the District to conduct a

more extensive evaluation than is typical in an IEE, in that he wanted Dr. Sulzbacher to search for a cause for the Student's difficulties and more fully examine family history than is usual in these circumstances. Dr. Sulzbacher obtained approval from Ms. Hubbs to conduct this expanded scope of evaluation, which increased the cost to the District of the evaluation. Exhibit 138. The Father objected to inclusion of some information in Dr. Sulzbacher's March 31, 1998 initial IEE report and requested that the information be removed. Dr. Sulzbacher agreed to remove several sentences from his report and issued a revised report dated November 16, 1998. The Father requested further revisions to the IEE report. Dr. Sulzbacher refused to further change his report from the final version dated November 16, 1998. Exhibit 139.

19. In an exchange of correspondence in November and December 1998, the Father requested clarification and the District clarified the basis upon which it had placed the Student in special education services without his consent. Those reasons were the consent of the Mother and safety and educational issues as those issues related to the ability of the Mother to act on her own in accordance with the Parenting Plan between the Mother and Father. Exhibits 137 and 140.

20. The Student made significant progress toward his academic and behavioral objectives under the Initial IEP. His behavior management classroom teacher, Vickie Marquardt, credibly testified that his behavioral problems became less frequent and less severe as a result of the services provided in accordance with the Initial IEP, and his academic performance showed significant improvement. Exhibits 136, 144 and 145.

21. Ms. Marquardt called the Father on February 3, 1999 to advise him that the Student's Initial IEP was due for annual review and an IEP conference needed to be scheduled. The Father refused to agree to any particular date or time for an IEP conference. Ms. Marquardt explained that the proposed IEP would focus on transitioning

the Student back into a regular classroom by June 15, 1999. Ms. Marquardt then scheduled the IEP conference for February 23, 1999 as a date that was acceptable to the Mother and other participants of the IEP team and sent the Father notification dated February 3, 1999 of that IEP meeting. Exhibit 141. Ms. Marquardt also offered to the Father in their telephone conversation of February 3, 1999 to allow him to participate in the IEP conference by telephone.

22. Ms. Hubbs faxed to the Father on February 22, 1999 a copy of the draft IEP which Ms. Marquardt had explained to him in their telephone conversation of February 3, 1999. Exhibit 142. The Mother and the Student attended the February 23, 1999 IEP conference. The Father did not attend. A new IEP was developed for the Student at the February 23, 1999 meeting, to which both the Mother and the Student agreed (February 1999 IEP). Exhibit 143.

23. The Student continued to make substantial progress toward his academic and behavioral objectives in accordance with the February 1999 IEP. Exhibits 144 and 145.

24. The Student was to be transitioned from [REDACTED] school to [REDACTED] school during the [REDACTED] school year. The Student would be attending the District's [REDACTED] School. The District held a meeting on August 31, 1999 to discuss how his February 1999 IEP would be implemented at [REDACTED] School. The Father attended this meeting along with his brother, Ronald DeFelice, and his sister, Susan Dolan. The Mother also attended this meeting, as did the Student's [REDACTED] teachers and vice principal, and Ms. Marquardt and Ms. Hubbs. The agenda for this meeting was to discuss transition for the Student into [REDACTED] school. The Father attempted to insist upon discussing his past disagreements with the District in placing the Student in special education services, which disagreements were the subject of a then currently pending special education hearing request under Cause No. 99-72 with the Office of Administrative

Hearings on behalf of the Superintendent of Public Instruction (Cause No. 99-72). The Father left the meeting when Ms. Hubbs would not allow the Father to discuss issues that were not part of the reason for the meeting. The remaining participants agreed after the Father's departure that the Student would attend regular education classrooms at [REDACTED] and receive behavior management support from [REDACTED] special education behavior counselor, Nanette Terrill. Exhibits 146 and 147.

25. The Student was experiencing significant behavioral issues by mid-October 1999 which were interfering with his academic performance. The District scheduled and held an IEP meeting on October 12, 1999 to discuss adjustments to the Student's program to address these behavioral issues. Ms. Terrill contacted the Father by phone several days prior to the meeting and obtained a phone number for him through which he could participate in this meeting. Ms. Terrill and Lorenzo Alvarado, Assistant Principal at [REDACTED] each tried to contact the Father at the time of the meeting by calling the number the Father had provided. The Father was not available at that number. The Father called at the end of the meeting. Ms. Terrill advised him when he did call at the end of the meeting that the attendees at the meeting, including the Mother, had determined that the Student would receive increased behavioral support services from her. Exhibit 149.

26. The District staff participated in several follow-up meetings with the Mother after the October 12, 1999 meeting in attempts to find a method and level of involvement by Ms. Terrill in managing the Student's behavior that would work. A solution was found during a meeting on November 5, 1999. Exhibit 151. The Student thereafter made significant progress both academically and behaviorally for the balance of the time covered by his February 1999 IEP. Exhibits 153 and 154.

27. The Student's IEP came due for annual review in February 2000. Kristine Mueri, special education teacher at [REDACTED] and Ms. Terrill contacted the Father on

February 3, 2000 concerning a proposed IEP meeting for February 10, 2000. Ms. Terrill sent the Father a copy of the proposed, draft IEP and Ms. Mueri sent to the Father on February 4, 2000 notification of the February 10, 2000 IEP meeting. Exhibit 150. The Father and the Mother both personally attended the IEP meeting as scheduled on February 10, 2000. The Father wanted the Student removed entirely from special education services. All other members of the IEP team, including the Mother, agreed that he would remain in special education services at least through the first quarter of the [REDACTED] school year. The IEP team concluded that the Student would face another significant transition in [REDACTED] from having two to three teachers to having five to seven teachers, and that his behavior continued to need monitoring. Exhibits 152 and 153. A new IEP dated February 10, 2000 was developed at this meeting which continues the Student in special education services ("February 2000 IEP"). The Mother agreed with this IEP and the Father did not.

28. The Student has continued to make substantial progress toward his academic and behavioral goals and objectives in accordance with his February 2000 IEP. Exhibit 153.

29. Dr. Sulzbacher returned to the District in the spring of 2000 to observe the Student in his current program and talk to his teachers about his progress. He did so at the request of the District in order to help him prepare as a witness in this matter. Dr. Sulzbacher expressed the opinion that the District's programs had allowed the Student to make very appropriate progress between the time of his initial evaluation in March 1998 and his visit in Spring 2000.

30. Summary judgement orders were issued by Administrative Law Judge Mary Radcliffe in Cause No. 99-72. Judge Radcliffe determined that the District was not obligated to have obtained the Father's consent to initiation of the Student's Initial IEP, so long as the District provided the Father with an opportunity to participate in development

of that Initial IEP. Exhibits 156 and 157. When Judge Radcliffe granted the Father's motion to withdraw his hearing request in Cause No. 99-72 and entered an order of dismissal on March 15, 2000, she expressly determined that "the entry of this dismissal order bring finality to the matters at issue including the summary judgment orders entered on this matter on July 14, 1999 and February 15, 2000." No appeal was taken by either party from Judge Radcliffe's Order of Dismissal of Cause No. 99-72. Exhibit 158.

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 District bears the burden of proving compliance with the substantive and procedural requirements of the IDEA. Clyde K. V. Puyallup School District, 35 F. 2d 1396 (9th Cir. 1994). 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 compliance with extensive goals and procedures.

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the EHA [Education for All Handicapped Children Act, now IDEA] 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' [FAPE] as defined by the Act.

Rowley, 103 S. Ct. at 3141, 3142.

3. The substantive test of Rowley does not require the absolutely best or 'potential-maximizing' education for the individual child. FAPE is provided if the child derives more than minimal or trivial progress in a placement, considering the child's unique characteristics. Florence County Sch. Dist. Four v. Carter, 950 F.2d 156, 160 (4th Cir. 1991), *affd.* 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993).

4. The District has met its burden of proving compliance with all material procedural requirements of the IDEA in this case, including that it has provided the Father with reasonable opportunities to participate in the development of the Student's initial IEP and each IEP or amendment thereafter. See WAC 392-172-105, WAC 392-172-15700 and Blackmon v. Springfield R-XII School District, 31 IDELR 132 at p.7 (8th Cir. 1999).

5. The District is not obligated to have obtained the consent of the Father in initially placing the Student in special education services, as determined by Administrative Law Judge Radcliffe in Cause No. 99-72. ALJ Radcliffe's rulings in this regard are now final and binding on the parties because no appeal was taken from her dismissal order of Cause No. 99-72 and through operation of the doctrines of *res judicata* and/or collateral estoppel. City of Des Moines v. Property Identified as \$81,231, 87 Wn. App. 689, 700-01 (1997); Reninger v. Department of Corrections, 134 Wn.2d 437, 449-50 (1998); Lee v. Ferryman,

88 Wn. App. 613, 622 (1997).

6. The District has provided FAPE to the Student in accordance with his IEPs dated February 11, 1998, February 23, 1999 and February 10, 2000.

7. The District has requested a decision in that, if the District had provided the parent with reasonable opportunities to participate in development of each of the Student's previous IEPs, the District can continue to provide the Father with similar opportunities to participate in subsequent IEPs or amendments thereto. There has been no authority cited to support such a futuristic ruling. Circumstances as they occur in the future are subject to the same review as had occurred in the past and are the subject of this decision. See WAC 388-172-105 and WAC 388-172-15700.

8. The District is not required to provide equal information or equal opportunity for discourse between the Student's Mother and Father concerning matters that do not constitute a significant change in the Student's IEP program or placement. WAC 392-172-105(3).

9. The District is not required to conduct the Student's IEP meetings in a neutral location. WAC 392-172-15700. The District is required, however, to schedule the meetings "at a mutually agreed upon place and time." *Id.* at (1)(b).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that:

1. The District provided the Father with reasonable opportunities to participate in development of the Student's initial IEP dated February 11, 1998 and each IEP thereafter.

2. The District is not required to obtain the Father's consent to subsequent IEPs or


changes thereto, so long as it continues to provide the Father with a reasonable opportunity to participate in development or amendments to such subsequent IEPs.

3. No ruling is made as to how the District may continue to provide the Father with reasonable opportunities to participate in subsequent IEPs and amendments. Such a decision must be left to circumstances as they arise in the future.

4. The District is not required to provide equal information or equal opportunity for discourse between the Student's Mother and Father concerning matters that do not constitute a significant change in the Student's IEP program or placement.

5. The District is not required to conduct IEP meetings concerning the Student in a neutral location. The District is required, however, to schedule the meetings at a mutually agreed upon place and time.

DATED at Spokane, Washington this 18th day of October, 2000.



Wynne O'Brien Persons
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. § 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 thirty-day time limit for filing a petition for judicial review commences with the date of the mailing of this

decision.

CERTIFICATE OF SERVICE

Parents



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