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Parents

[REDACTED]

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In re: **Puyallup and Franklin Pierce School Districts - Special Education Cause No. 2001-SE-0041**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order the file (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) 725-6133.

Sincerely,

Mary J. Radcliffe
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:

PUYALLUP AND FRANKLIN PIERCE
SCHOOL DISTRICTS

SPECIAL EDUCATION
CAUSE NO. 2001-SE-0041

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

A hearing in the above-entitled matter was held before Administrative Law Judge Mary L. Radcliffe in Tacoma, Washington, on June 11, 12 and 28, 2001. The interested parents, [REDACTED] and [REDACTED] ("Parents") appeared on their own behalf. The Puyallup School District ("PSD") and the Franklin Pierce School District ("FPSD") were represented by Joni Kerr, attorney at law. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

On April 23, 2001, the Parents filed a request for hearing with the Office of Superintendent of Public Instruction (OSPI). On April 24, 2001, the Office of Administrative Hearings (OAH) mailed a Notice of Prehearing Conference and a Notice of Hearing, with attachments, to the identified parties: the Parents and the Puyallup School District. On May 2, 2001, a prehearing conference was held and a Prehearing Order entered the same day. The prehearing conference was also continued to May 16, 2001. The hearing, originally scheduled for May 14, was continued to May 24 in order to resolve the PSD's motion to dismiss. The prehearing conference took place as scheduled on May 16 and a Prehearing Order was entered on May 17, 2001. The Prehearing Order denied the PSD's motion to dismiss, joined the Franklin Pierce School District, set another prehearing conference for May 21, 2001 and struck the hearing scheduled for May 24, 2001. The ALJ found good cause for continuance of the deadline for issuance of a written decision, pursuant to WAC 392-172-356. Also on May 17, 2001, OAH mailed a Notice of Prehearing Conference and a copy of the May 17, 2001 Prehearing Order to the Franklin Pierce School District.

On May 24, 2001, a third prehearing conference was held with the Parents, PSD, and FPSD. A hearing was scheduled for June 11 and 12, 2001. The 45 day deadline for written decision was continued to 30 days from the close of record. The parties agreed that closing argument would be submitted on the last day of hearing, which would render the last day of hearing the close of record.

Findings of Fact, Conclusions of Law and Order

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The matter proceeded to hearing as scheduled, but it did not conclude. A telephone conference was held on June 14, 2001. The parties agreed to reconvene the hearing on June 28, 2001. On June 14, 2001, an Order of Continuance was entered to that effect. The hearing concluded on June 28, 2001 and the record closed. The deadline for issuance of a written decision, pursuant to Order of Continuance and WAC 392-172-356, is Saturday, July 28, 2001. According to computation of time rules, WAC 10-08-080, the deadline moves forward to Monday, July 30, 2001.

At hearing, the following witnesses testified: Ann Jones Almlie, Susan Adkins, Peggy Haskey, Marc Wiese, Lori Jowers, David E. Cupp, Norm Bishop, Darrell Powell, Jill Skoda, Linda Mead, Bill Rasplica, and the Parents.

The following exhibits were admitted:

Joint FPSD and PSD exhibits:	FP101 through and including FP 151.
PSD Exhibits:	PSD 201 through and including PSD 205.
Parent Exhibits:	P301 through and including P337, P339, P341 through and including P346, P350, 351, 352, 353.

Exhibits not admitted: P330 and P354 (duplicates), P335, P347, 348, 349
Admissibility of P338, 340 was reserved.

Exhibits P338 and 340

Exhibit P338 is a redacted copy of a July 14, 2000, Final Decision by Doug Gill, Ed.D., Director of Special Education, for OSPI, regarding a Citizen Complaint. The complaint contains numerous families' concerns. It includes the Parents' concerns about the Student's participation in extra-curricular activities. The portion of the Final Decision which the Parents' assert is relevant begins at the bottom of page 31 and concludes at the bottom of page 32 (which are pages 32 and 33 of the exhibit). The document contains other handwritten notations implicating applicability to the Student but are not proffered by, or addressed by, the Parents.

Exhibit P340 is a letter by Dr. Gill acknowledging the receipt of the citizen complaint and a summary of the issues.

Ruling On Admissibility of P338 and P340: The Parents have alleged no concerns with the PSD's development or implementation of the Student's IEP at PHS. In fact, their request for hearing is solely to achieve the Student's right to remain in the PHS Life Skills Program for the [REDACTED] program under his current IEP. The Parents have inferred that the PSD retaliated against them in the [REDACTED] school re-assignment to [REDACTED]

because of the Citizen Complaint, and against them in the [REDACTED] re-assignment to [REDACTED] or FPSD because the Parents complained about a daily early release of the Life Skills students at PHS. To the extent that other evidence was admitted explaining the assessment and modifications necessary for the Student's participation in the cross-country track team, the proffered exhibits have some relevancy. Insofar, as it sheds light on the PSD's motivation for the proposed changes, the proffered exhibits are also relevant. P338, specifically page 32 and 33, and P340 are admitted for those two purposes.

MOTIONS TO DISMISS

At the close of the hearing, the PSD renewed its motion to dismiss itself as a party to this matter. After determination of the Findings of Fact, and Conclusions of Law, below, the ALJ concludes there is good cause to grants its motion.

FPSD, who agreed to participate in this matter, and did not file a motion to dismiss itself. However, it asserts that because the Parent did not want it to be a party to the hearing, it should be dismissed. After a determination of the Findings of Fact, and Conclusions of Law, below, the ALJ concludes that it is not appropriate to grant its request.

ISSUE

Whether the proposed change of location of the Student's program and placement from [REDACTED] to [REDACTED] or to the [REDACTED] developmental delay program in the Franklin Pierce School District, is a change of placement. If so, is it appropriate for the Student under the IDEA.

Third Prehearing Order, dated May 24, 2001.

FINDINGS OF FACT

1. The Student resides with his family within the boundaries of the FPSD. At the time of the hearing, he is [REDACTED] years old and completing his third year in the Life Skills Program, a program for students with severe developmental delays, at [REDACTED]. It is his seventh year within the PSD.

2. The Student is eligible for special education, and will remain eligible until he is [REDACTED] years old, based on his significant [REDACTED] disability. Having [REDACTED] the Student benefits from routine, and has difficulty with transitions. He is non-verbal and does not initiate the meeting of his own needs. He dislikes disruption in routine. However, the Student has done well at PSD and his challenges are not manifested as aggressive behavior problems. The Student is an eager and willing participant in school, and his behavior is consistently positive and cooperative. With reassurance and time, he

Findings of Fact, Conclusions of Law and Order

adjusts to changes in his routine. During the [REDACTED] school year, the Student successfully competitively participated on the PHS cross country track team.

3. The Student's annual review of his IEP takes place in October of each year. In October 2001, an IEP meeting was held and the Student's IEP updated. It is this IEP which the Parents assert can only be implemented at PHS and that PSD and FPSD assert can be implemented at PHS, [REDACTED] or FPSD Life Skills Program.

4. The Student has attended school in the PSD as a result of annual inter-district contracts between PSD and FPSD. Originally, this was because FPSD, the Student's resident district, did not have an appropriate special education program and placement for the Student. During these seven years, the PSD has developed and implemented the Student's annual IEPs and conducted reevaluations. FPSD was not involved in any aspect of the Student's educational planning with the exception that it has provided transportation.

5. The current inter-district contract term is from September 1, 2000 to August 31, 2001.

6. The contract provides reimbursement to the PSD in exchange for the acceptance of responsibility for the Student's educational services. It states, in relevant part:

9. The [PSD] will provide, and retain title to, all assets used in the program. The [PSD] will assume all general liabilities associated with the program. The [FPSD] will assume the liability to pay the [PSD] for each fractional or full-time equivalent student and also to assume any liability resulting from specific actions by the [FPSD].

11. The Franklin Pierce School District acknowledges that while this is for one school program year only, program development is continuous and long-range planning a requisite: that their entering into this agreement may carry implications for succeeding school year (sic). Therefore, Franklin Pierce School District agrees to announce their participation intentions for the succeeding school year no later than May 13, 2001. While such arrangement is not binding, such notification of intent is to be considered carefully and not thereafter modified except for good cause.

7. FPSD receives the federal and state special education funding for the Student and PSD receives the state basic education funding for the Student. At the end of the contract term, PSD bills FPSD for costs to serve the Student in excess of the basic funding allowance.

8. In preparation for the [REDACTED] school year, PSD sent notice to parents of students in the [REDACTED] Life Skills Program of the split of the program: One part was to continue at [REDACTED] and one was to begin at [REDACTED]. Students who did not live in the [REDACTED] attendance area were to move to [REDACTED] (An attendance area is an identified geographic area, within the district's boundaries, which surrounds the identified school.) This change included resident students and non-resident students alike, by virtue of the fact that a non-resident student does not reside in the district and therefore does not reside in the attendance area of [REDACTED]

9. By letter dated June 12, 2000, FPSD also informed the Parents that it had learned that [REDACTED] would be closed to non-attendance area residents and that FPSD was interested in the Student returning, as FPSD now believed it was capable of meeting the Student's educational program needs. The letter provided the name and telephone number of the teacher of the FPSD Life Skills Program, Darrell Powell. The Parents responded that the Student would be attending [REDACTED] at [REDACTED]. By letter dated July 5, 2000, the FPSD responded that the Parents should enroll the Student at FPSD.

10. In August 2000, in anticipation of the change to [REDACTED] PSD held an IEP meeting with [REDACTED] and [REDACTED] staff, and the Parents. The Parents contested the move to [REDACTED] and took issue with the vocational skills portion of the program, most notably the opportunities for off-campus job sites. The Parents excused themselves from the meeting and talked with Lori Jowers, the assistant director of special education, who also attended the meeting. The Parents told Ms. Jowers that they did not want the Student to attend [REDACTED] because of a previous conflict with the teacher of the [REDACTED] program, which caused them not to trust her.

11. That teacher will not be working in the Life Skills Program at [REDACTED] for the [REDACTED] school year.

12. During this August/September 2000 period, the Parent had two conversations with William Rasplica, FPSD's director of special education. Mr. Rasplica told the Parents of FPSD's desire to have the Student return to his resident district. On the Parents' part, they inquired whether the Student would be able to attend the local high school in FPSD because the Parents were not satisfied with PSD's change to [REDACTED]. Several days later they spoke again, and the Parents informed Mr. Rasplica of the PSD's agreement to continue to serve the Student at [REDACTED]. FPSD agreed to continue to contract with PSD for another year in order to accommodate the Parents' wishes.

13. Also during the summer of 2000, the Parents joined a Citizen Complaint filed with OSPI by some parents of special education students attending school in PSD. The

relevant issue here relates to PSD's involvement of special education students in extra-curricular activities and sports and the IEP requirements that pertain to such activities.

14. In August, 2000, PSD agreed to continue to serve the Student at [REDACTED]. PSD was of the view that [REDACTED] was an appropriate program but that it would take time to repair the relationship between the teacher and the Parents. It did not want to delay the Student's entry into the school year. It also wanted to obviate the Parents' assertion of retaliation for the Citizen Complaint. By August 11, 2000 letter to the Parents, PSD confirmed its agreement to serve the Student at [REDACTED] for another year. The letter also stated that PSD understood that FPSD intended a transition to FPSD for the [REDACTED] school year.

15. Apparently, as a result of the July 14, 2000 Final Decision of the Citizen Complaint, by Dr. Gill of OSPI, [REDACTED] staff conducted an assessment of the Student's ability to participate on the [REDACTED] cross country track team. The assessment addressed the Student's safety, running skill level, and needed accommodations. An evaluation summary was written on September 21, 2000.

16. The September 21, 2000 evaluation concludes that the Student demonstrated the physical ability to run with the cross-country team, and that to ensure his safety and well-being he would need accommodations. It recommended direct and close supervision for the period between the end of the class day and the beginning of practice (an hour) and constant adult supervision during running on or near the road. He also needs careful oversight due to his inability to monitor his own level of stress, and fatigue, and to report any injury. He needs reminders to use the bathroom and to drink water. Pairing with other students was successful. The Student was not able to start his participation at the outset of the season (August) because his placement was not settled, and then his assessment and implementation of the modifications took some time. However, once begun, the Student's participation was successful by all accounts. The Student's ability to outlast one running companion required the PSD to provide two such companions.

17. Part of the Student's [REDACTED] transition/vocational program is an off-campus job at Pacific Sports. He has developed excellent skills in mopping the gym floor. He may be able to continue with that placement if he changes schools but it would also be a good idea to try a new one. The Student has had other successful experiences with off-campus jobs.

18. A student in the PSD Life Skills Program has a variety of transition activities available, depending on his individual needs and abilities. Some students spend more time in off-campus transition activities than others. A PSD "transition house" located

off campus, which was part of the Life Skills Program, closed in January 2001. At the current time, all Life Skills students are based in the high school programs.

19. Vocational opportunities/training, and off-campus job sites depend on a student's abilities and needs and are tailored to the specific student. Job sites should change periodically to ensure that a student is well-rounded and tries various types of jobs for aptitude and skill development. Off-campus job sites and paying jobs are very important for an appropriate student, in part, because they serve to motivate a student and most closely mimic the actual activities the student may be called upon to do in a job environment.

20. A student in PSD, eligible for special education until age [REDACTED] does not become classified a "senior" until his last year of eligibility. The Student will again be a junior for the [REDACTED] school year. Therefore, there is no clear demarcation after four years of high school for a Life Skills Program student, as there is for a senior in a regular education class. Based on the idea of the "transition house," the Parents are of the view that the Student would be a senior in the [REDACTED] school year and would move to the transition house the year after. Therefore, they opined, the [REDACTED] school year would be a better time to make a transition from [REDACTED] to another school. If the Parents' view of the "transition house" program was true before the [REDACTED] school year, it is no longer true.

21. Given the Student's inability to advocate for himself, and/or report to his Parents about his daily events, it is necessary for the Parents to trust the Student's teacher. The Parents have absolute trust in the Student's two teachers at [REDACTED] Peggy Haskey and Marc Wiese. They attribute some of the Student's marked gains in the [REDACTED] school year to the excellent rapport he has developed with both teachers, especially, Mr. Wiese. The Student is slow to develop rapport and it takes a longer time to get to know the Student and his needs because he is non-verbal.

22. Mr. Wiese, who has worked closely with the Student at [REDACTED], predicts that the Student will not have problems moving from [REDACTED] to [REDACTED] or FPSD. He sees working with the Student as a bonus for any teacher.

23. The Parents received and read the February 2001 [REDACTED] newsletter which included a reminder to non-resident and non-attendance area "Choice" families to complete and submit a release from the resident district and an application for an inter-district transfer to the PSD for the [REDACTED] school year.

24. The Parent was unsure whether he was required to complete the non-resident transfer forms because the Student's name did not appear on the list provided with the notice. He consulted with Ms. Jowers, who was also unsure. Both agreed, wanting to

leave no stone unturned in the Parents' efforts to have the Student remain in the PSD, that the Parents should obtain the release from FPSD and submit it along with an application for non-resident transfer to the PSD. FPSD signed the release and the Parent submitted it with the application to PSD.

25. Although the Parents may pursue the inter-district transfer if they do not prevail in this matter, it has been their intention to have PSD and FPSD continue the inter-district contract for the ██████████ school year. PSD and FPSD understand the Parents' position. PSD and FPSD consider a renewal of inter-district agreement possible if PSD enrollment numbers allow for it.

26. As of January 25, 2001, ██████████ has been closed to non-residents and new students due to over-enrollment. PSD is awaiting enrollment data in August to make final decisions related to "Choice" applications and inter-district contracts. It is extremely unlikely that ██████████ will be open to non-residents due to PSD's policy and commitment to serve resident students' needs first.

27. The release signed by FPSD releases the Student for the ██████████ school year as an inter-district transfer student, not as a student served under an inter-district contract.

28. The FPSD is of the view that it is able to appropriately serve the Student in its ██████████ severe developmental delay program and does not need to contract with PSD. It remains flexible as to which district will serve the Student in the ██████████ school year as it tries to accommodate the Parents' wishes.

29. On March 13, 2001, the Parent met with PSD's superintendent, Dr. Gourley, assistant superintendent, Dr. Tony Apostle, and the director of special education, Ann Jones-Almlie. The participants discussed the Parents' suspicion that students in the Life Skills Program were being released fifteen minutes early each day due to the bus schedules, and thereby denied a full day of school services. They also discussed the fact that ██████████ was full and unable to serve the Student for the ██████████ school year and that FPSD had requested the Student return to the district. The Parent asserted the proposed change was a retaliatory act based on his complaint about the 15 minute early release. Moreover, the Parents disputed Dr. Gourley's statement that FPSD wanted the Student to return, by showing her the "Choice" release form signed by FPSD. It was agreed that a meeting would be set up with FPSD and that the PSD would look into the 15 minute early release/bus schedule concern.

30. The PSD followed up on the Parents' early release/ bus schedule concern. They learned that all buses are scheduled for the same time and if there is some variation that shortens the Life Skills students' day, it is made up on Wednesdays, when they

have an extra hour of services. PSD reported back to the Parents and considered the matter resolved. The Parent informed the PSD, during his testimony at hearing, that he did not consider the matter resolved and was pursuing the issue by other means. The Parent conceded that this may be the first the PSD had heard of it, which the PSD confirmed.

31. On April 6, 2001, a meeting with PSD, FPSD, and the Parents took place. The purpose of the meeting was to discuss the Student's placement for the ██████ school year. The Parents reiterated their desire that the Student continue at ██████. Ms. Jowers informed the Parents that ██████ was currently closed and that it was more likely the Student could attend ██████. She left open the possibility that when August's final enrollment numbers were evaluated, PSD may be able to accommodate the Parents' request. FPSD expressed its desire and willingness to serve the Student. A discussion of the FPSD ██████/life skills program took place.

32. The Parents did not share much information about the Student, but did explain that it was not a good time for the Student to make a transition because of his excellent progress with his teacher, Mr. Wiese. They did not share their position that the Student should not attend school in FPSD. As a result of the meeting, the FPSD believed the Parents would be scheduling an appointment with the teacher of its developmental delay program (Ms. Powell) to view it during the PSD spring break (FPSD was in session that week). The Parents believed that FPSD would contact them with more information in order to arrange the appointment with the teacher. No visit took place.

33. On April 23, 2001, the Parents filed a request for hearing to contest PSD's notice of its intent to change the location of the Student's program and placement for the ██████ school year and to seek an order requiring PSD to serve the Student at ██████

34. On or about May 23, 2001, the Mother left a message for Ms. Powell, wanting to schedule a visit. Ms. Powell returned the call, but the Mother's proposed date was not a good day to see the program. They were unable to schedule a convenient time for the Mother.

35. On May 24, 2001, FPSD sent the Parents an invitation to an IEP Meeting, scheduled for May 31, 2001. The Parents told the FPSD they would not be attending, as they felt it was not timely. The Parents felt their decision was supported by a comment made by the ALJ in a prehearing conference as to the timing between the request for hearing and the scheduling of the IEP meeting.

36. The FPSD is of the opinion that it can implement the Student's PSD IEP without holding an IEP meeting. The meeting was to facilitate and plan the transition and communicate the needs of the Student and the opportunities in the program.

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37. The FPSD and PSD Life Skills Programs are substantially similar, designed to meet the needs of severe developmentally delayed students. The FPSD program is adapted and modified to the individual student. The staffing of the program is different in that [REDACTED] has two teachers and FPSD has one teacher and ten para-educators.

38. The Student's current IEP provides for transition services, development of vocational skills, with later participation at the PSD "transition house," functional academics, community and recreational skills, meal preparation skills, communication skills, regular physical education class and otherwise placement in a self-contained developmental program. It provides for the opportunity to access all extracurricular and non-academic activities offered at [REDACTED] with specific accommodations and/or staff support as considered and identified for his greatest participation, safety and success. The IEP also provides for 300 minutes per week of speech and language services by the [REDACTED] SLP therapist. The Student's participation in the regular physical education class is separate and different than his participation on the cross country team, which is an extra-curricular activity.

39. The FPSD developmental delay program focuses on students with [REDACTED] although not all students in the program have [REDACTED]. The program combines life skills and vocational skills building. It also includes functional academics and housekeeping. Currently, it has 14 students. Each student spends varying amounts of time in a given day in the self-contained classroom, depending on his/her needs and skills and IEP. The program also provides speech and language services by a speech language pathologist as appropriate. Generally these services are provided in a group setting. The FPSD proposed draft IEP provides that 60 of the proposed 300 minutes would be provided by the SLP and the remaining minutes by a para-educator. This appears to be different than his current [REDACTED] IEP in which all 300 minutes are provided by the SLP.

40. The FPSD IEP team received the Student's [REDACTED] cross-country track assessment along with the other educational records/information from PSD.

41. As a result of the FPSD IEP meeting, which included [REDACTED] staff and administration, as well as a full complement of FPSD staff, including the head athletic coach, the team developed a draft IEP. This is a preliminary proposed IEP and will need further refinement, with the participation of the Parents, including confirmation of appropriate vocational settings, speech and language services, and extra-curricular participation in cross country opportunities and modifications necessary for his participation.

42. The Parents initially objected to the admission of the draft IEP as untimely but later requested it be considered. The IEP is not reviewed here for sufficiency or appropriateness under the IDEA as it is not the subject of the hearing. It is considered

insofar as it sheds light on the FPSD's ability to implement the Student's current [REDACTED] IEP.

43. [REDACTED] and FPSD's Life Skills Programs provide or can develop appropriate job site opportunities for the Student. PSD's program staff and parents communicate daily via a communication notebook. FPSD's program staff and parents communicate by the use of a daily goal sheet.

44. PSD and FPSD staff testified that when serving a student under an inter-district contract, the non-resident district is obligated to comply with the requirements of the IDEA. Staff stated that a resident district cannot assign away its IDEA obligations to a student by entering into an inter-district agreement for another district to serve the resident student. However, Mr. Rasplica opined that changes in educational placement are the responsibility of the serving district unless the resident district proposes the change.

45. The Parents' assertion that because FPSD did not have the cross country coach present at the May 31, 2001 IEP meeting that FPSD has not demonstrated it can implement the Student's IEP is not accurate. The athletic director/head coach did attend. He supervises the cross country coach. Based on the [REDACTED] assessment and accommodations /modifications information, he provided assurance to Ms. Powell that there would be no problem with the Student's participation on the cross country team at FPSD. The ALJ finds it reasonable to accept Ms. Powell's assertion which was corroborated by FPSD testimony that the cross country coach was reportedly eager to call the Student's family to begin setting up the program, but was advised to wait until the due process hearing was resolved. Based on this corroboration, the ALJ relies on FPSD's assertion that the Student will be able to participate on the cross country track team.

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 392-172 WAC.

2. Here, the ALJ does not have jurisdiction under the state "Choice" laws, Ch. 28A.225 RCW and Ch. 392-135 WAC and/or Ch. 392-137 WAC, as there is no request for hearing on that issue, and it is not ripe for adjudication. As such, the ALJ has no authority to render a decision related to non-resident district student transfers. See WAC 392-137-190. However, "Choice" law is relevant, in this matter, because it sheds

light on what meaning to attribute to the parties' actions in this matter. The ALJ's authority in this matter arises from the Parents' claim under the IDEA. See WAC 392-172-350.

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 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.

4. Here, the Parents make several somewhat fluid and flexible arguments. All of them seek to establish the same point: that PSD is responsible to serve the Student during the ██████ school year at ██████. At times, the Parents have alternatively asserted that PSD has the obligation to serve the Student at *either* ██████ or ██████. They also assert that even if FPSD is responsible for the Student, it should be compelled to contract with the PSD. The Parents rely on the long-standing history of service to the Student and his best interests. They also rely on the legal arguments that the proposed change to ██████ and/or FPSD is a change of placement, that a change of placement is not appropriate for the Student, and that both districts' failures to provide prior written notice of the proposed change should prevent either from being able to execute the change. Below, the ALJ addresses the relevant legal principles, district obligations and compliance with the IDEA.

Joinder of FPSD

5. The ALJ joined FPSD by Prehearing Order of May 17, 2001, served it a Notice of Prehearing Conference, and offered it an opportunity to be heard on the issue of its joinder. FPSD agreed to participate in this matter because it acknowledges responsibility for the Student under the IDEA. However, FPSD is of the view that it should be dismissed as a party because the Parents did not request its participation in their request for hearing and do not want FPSD to be responsible for the Student.

6. As the ALJ noted earlier, the Parents' legal arguments have a certain flexibility to them, so that they have argued on the one hand that only PSD has a responsibility to the Student, and on the other hand, that FPSD's failure to provide prior written notice requires both districts to continue the interdistrict agreement for the [REDACTED] school year.

7. Pursuant to Civil Rule 19(a), a court may join a person, if feasible, if needed for the just adjudication of a matter. A court may add parties necessary to complete determination of controversy. See *McKinnis v. Los Lugos Gold Mines*, 188 Wash 447, 62 P.2d 1092 (1936). A necessary party is one who has sufficient interest in the litigation so that the judgment cannot be determined without affecting that interest or leaving it unresolved. *Harvey v. Board of County Comm'rs*, 90 Wash. 2d 473, 584 P.2d 391 (1978). The rule provides that the court may join a party on her own order. This is supported by *In re Clerf*, 55 Wash. 465, 104 P. 622 (1909).

8. Here, pursuant to her duties under the Administrative Procedure Act, RCW 34.05 and implementing regulations, the ALJ finds that use of the Civil Rules for appropriate adjudication of this matter is appropriate; that joinder of the FPSD is feasible; and, in its absence complete relief cannot be accorded among those already parties and/or would leave issues unresolved. The ALJ concludes it is proper to join FPSD in order to resolve the dispute as raised by the Parents. FPSD's request to be dismissed is denied.

Change of Location or Change of Placement?

9. The Parents assert that the dictionary definition of "placement" should govern the answer to the question of whether the proposed change to [REDACTED] or FPSD's autism/developmental delay program is a change of placement. The Parents quote the definition as "to put in a particular spot." However, a change of placement is a term of art under the IDEA and a more apropos definition within special education law can be found.

10. Generally, a change in classroom or teachers is not necessarily a change in placement for purposes of the IDEA. This issue has not been addressed in the Ninth Circuit. In the Second Circuit, the court in *Concerned Parents v. New York City Bd. of Education*, 629 F.2d 751 (2d Cir. 1980) considered this issue where handicapped children were transferred among schools within the same district. Reversing a lower court decision, the court concluded that placement under the IDEA does not include a change in location, but refers to the general type of educational program in which the child is placed. The court considered three factors. First, notice and hearing requirements are limited to certain fundamental decisions regarding the existence and classification of a handicap and the most appropriate type of educational program for

assisting a child with such handicap. Second, the legislative history and the regulations implementing federal law, 45 C.F.R. §121:551, use the term "placement" to refer to the general educational programs. Finally, strong policy considerations support a narrow construction of the term. The court defined "educational placement" as:

[T]he general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary.

See also *In Re Child With Disabilities*, 21 IDELR 62, 684 (SEA Mich. 1994), where the hearing officer stated: "clearly, the choice of a placement, a building where a teacher is, is not a prerogative of the parent. Those responsibilities remain with the superintendent or his designee."

11. Where interpreting complex federal statutory programs, federal courts defer to administrative interpretations of such statutes. See *Honig v. Doe*, 484 U.S. 305, 325, 98 L. Ed. 2d 686, 108 S.Ct. 592 (1988). In *Letter to Fisher*, 21 IDELR 992, 993 (OSEP 1994), the Office of Special Education Programs responded to a question from the Tennessee Department of Education whether a change in schools would constitute a change in placement for purposes of the notice and hearing provisions of the IDEA. The change was occasioned by the closing of a school for violation of the least restrictive environment element of the IDEA. According to that letter, determination of whether a "change of placement" has occurred should be analyzed as follows:

Although not defined in either the Part B statute or regulations, a "change in educational placement" refers to a situation in which a student's education program is materially altered, and not an instance which involves only a change in the physical location of the program. The determination as to whether a new placement constitutes a "change in placement" must be made on a case-by-case basis and the effect of the change in location on the following factors must be considered: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with non-disabled children to the same extent; whether the child will have the same opportunities to participate in non-academic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.



12. In this case, [redacted] and [redacted] have identical programs with the exception of staff identity and geographic location. PSD established that the Student's IEP can be

implemented at either [REDACTED] or [REDACTED]. Applying OSEP's criteria in *Letter to Fisher*, the ALJ concludes that the PSD proposal to change the delivery of services to [REDACTED] does not require a change in the Student's IEP or the Student's program. His opportunities to be educated with non-disabled peers or to participate in non-academic and extracurricular services are unchanged. Both programs also fall on the same place on the continuum of alternative placements as defined by WAC 392-172-174.

13. The procedures for establishing educational placements requires a school district to consider, in part, any potential harmful effect on the student or on the quality of services which he needs. See WAC 392-172-180(2)(d). Here, as to the quality of services, the evidence does not establish a qualitative difference between the [REDACTED] and [REDACTED]. As to potential harm, the ALJ considers the fact that transitions are difficult for the Student, he is non-verbal, that it takes greater time to establish rapport and understanding, that his strong rapport with Mr. Wiese will be lost, and the Parents' need to trust the Student's teachers vital. The ALJ also considers that with appropriate support the Student has made successful transitions before, and will be able to make a transition to [REDACTED]. And, the Student's teachers, including Mr. Wiese, as well as the PSD administration, support the proposed change.

14. Based on the weight of the evidence, and the fact that the teacher at [REDACTED], with whom the Parents had a previous conflict, is no longer at [REDACTED] the ALJ concludes that although it may not be in the best interests of the Student, it is not inappropriate.

15. Based on the above-cited authority and an analysis of this situation, the ALJ concludes that it is within the PSD's discretion to change the location of the Student's services and that a change from [REDACTED] to [REDACTED] Life Skills Program is a change of location and not a change of placement. Accordingly, PSD has established that it may appropriately serve the Student at the Life Skills Program at either [REDACTED] or [REDACTED].

Franklin Pierce [REDACTED] Developmental Delay Program

16. As required under *Concerned Parent*, FPSD established that its [REDACTED] developmental delay program is the same type of program the Student attends at [REDACTED]. Applying the analysis of *Letter to Fisher*, the ALJ concludes that FPSD demonstrated that it can implement the Student's IEP, with the same degree of education with his non-disabled peers, and provide opportunities for extra-curricular activities, most specifically the cross country track team. The program is also at the same level on the continuum of alternative placements. The program provides similar opportunities for vocational and transitional services. The notable difference is that the school is in a different school district, albeit his resident district. The ALJ found no authority for the

proposition that a change in school districts was a change in placement.¹ As held in the ██████ placement, the ALJ concludes that the potential harm to the Student, or his unique needs, do not alter the nature of the proposed change. The ALJ concludes that FPSD, as the resident district, has the discretion to change the location of the Student's services to FPSD's autism/developmental delay program.

Is Prior Written Notice Required?

17. The Parents assert that PSD had an obligation to provide prior written notice of its intention to change the location of services from ██████ to ██████ or to FPSD. In the alternative, they assert that FPSD had the obligation to provide prior written notice and that the failure to provide timely prior written notice, requires FPSD to contract with PSD for the ██████ school year, and requires PSD to serve the Student.

18. **WAC 392-172-302 When prior written notice must be given.**

A school district or other public agency shall give prior written notice in accordance with WAC 392-172-306 to the parent(s) of a student (or to the adult student) a reasonable time before the school district or other public agency:

- (1) Proposes or refuses to initiate or change the identification, evaluation, educational placement of the student or provision of FAPE to the student.
- (2) If the notice required under this section relates to an action proposed by a district or other public agency that also requires parental consent under WAC 392-172-185 and 392-172-304, notice may be given at the same time parental consent is being requested.

19. In this case, the relevant portion of the regulation pertains to whether the proposed change is a change of educational placement. Having earlier in this decision reached the conclusion that the proposed change is a change of location of services and not a change of educational placement, the ALJ concludes that neither PSD nor FPSD district had an obligation to provide prior written notice to the Parents, pursuant to WAC 392-172-302.

¹ See *Concerned Parents & Citizens for Cont. Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.*, 629 F.2d 751 (2d Cir. 1980) which noted that the district's proposed change of location was within the same school district. This suggests that the outcome might have been different had that not been the case. However, the ALJ found no authority to support that view.

20. The effect of such an outcome may seem extreme where a student is being moved back to a resident district after a long period in the non-resident district. And, perhaps school districts would be well advised to err on the side of providing notice, since OSEP's *Letter to Fisher* indicates that the determination of change of location versus change of placement is reviewed on a case by case basis. However, the facts of this case demonstrate that even if the PSD and FPSD did not have a formal obligation to notify the Parents in writing, both districts did advise the Parents of the likelihood of the change as early as August 2000. Some of the later opportunities for discussion between the parties resulted from the coincident "Choice" process. This may be considered fortuitous given how much ground the parties have covered with time still remaining to prepare for the fall. The fact that both districts have not made a final decision reflects their desire to accommodate the Parents' wishes, consistent with their other responsibilities. Their flexibility does not alter the fact that the Parents were notified of a likely change of either the Student's school or district for the [REDACTED] school year.

21. Lastly, the ALJ notes that the Parents did not suffer any ill effect from a lack of formal written notice. The purpose of such notice is so that a parent can bring his/her persuasive power to bear on the decision-making process and to seek due process and stay put placement if unsuccessful. Here, the FPSD and PSD provided informal notice. As a result, the Parents persuaded both districts to extend the [REDACTED] location for the [REDACTED] school year. When not yet successful for the [REDACTED] school year, the Parents sought and received a timely hearing on the substantive issue underlying the proposed change (i.e., whether the proposed change is a change of placement or a change of location of services, and whether, if a change of placement, it is appropriate.)² Stay put did not become an issue because the Student remained at [REDACTED] through the end of the school year.

22. The ALJ notes that all procedural errors do not result in a denial of a free appropriate public education. Generally, procedural error will constitute a denial of a free appropriate public education (FAPE) only where it results in the loss of educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994, (1st

² It might be argued that lacking a final decision by both districts the Parents' claim is not ripe for hearing. However, given the need for planning and transitions for this Student, leaving review until fall could result in loss of educational opportunity to the Student. Given the districts' prognostications of the high likelihood of the proposed change, the ALJ concludes that review is timely.

Cir. 1990), cert. den., ___ U.S. ___, 111 S.Ct. 1122 (1991); *Hall by Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

23. Even if the PSD and FPSD were required to provide formal prior written notice, the lack of written notice did not result in the Student's loss of an educational opportunity or the parents' loss of a right to participate in the IEP process. Therefore, such an error would be a minor one. See *Weil v. Bd. of Elementary and Secondary Ed.*, 931 F.2d 1069 (5th Cir. 1991) in which the court found that even if prior written notice was required the effect was *de minimus*.

Is retaliation the cause of the proposed change?

24. The Parents have asserted that PSD's motivation in making the proposed change of location is one of retaliation: Retaliation against the Parents for their participation in the citizen complaint, and later for their suspicion that Life Skills students were not receiving a full day of services to which they are entitled. The evidence presented in this matter does not support such a conclusion. The citizen complaint, resolved prior to the [REDACTED] school year, did not effect PSD's decision to serve the Student for the [REDACTED] school year except to the Parents' benefit.

25. As to the Parents' early release allegation, the PSD only learned the matter was not resolved to the Parents satisfaction at the end of the due process hearing. Most importantly, the PSD's changes have district-wide effect, effecting residents and non-residents alike for general policy and demographic reasons, and are not solely applicable to the Student and his family. The ALJ concludes that the PSD and FPSD have established a basis for their proposed changes unrelated to other issues that may have been or be pending between them and the Parents.

26. This decision addresses the issue of retaliation only insofar as it could have affected the responsibilities, activities, judgment or credibility of the parties' actions in the ALJ's legal analysis under the IDEA. The ALJ does not have authority to address retaliation as its own claim or cause of action and does not do so.

Which District is Responsible Under the IDEA?

27. The IDEA provides funding to state and local agencies for the education of disabled students in exchange for those agencies' agreement to certain terms imposed by the IDEA. 20 U.S.C. Sec. 1411. Local educational agencies (school districts), in turn, are eligible for funding if they enact and enforce policies consistent with those enacted by the state. 20 U.S.C. Sec. 1413. A school district is responsible for compliance with the IDEA for a particular student based on its receipt of the IDEA funding for that student. 20 U.S.C. Sec. 1414(d)(2)(A) (requiring "each local

educational agency . . . [to] have in effect, for each child with a disability in its jurisdiction, an individualized education program"); 34 C.F.R. Sec. 300.342 (requiring districts to "have an IEP in effect for each child with a disability within its jurisdiction"); and, WAC 392-172-100 (requiring school districts to "conduct childfind activities for the purpose of locating, evaluating and identifying students with a suspected disability . . . who are residing within the boundaries of the district").

28. The duty to provide special education to a student rests with the school district in which the student resides. See RCW 28A.155.040(1). If the district of residence does not have available, within its borders, an appropriate educational program for a student, the resident school district may enter into agreements with other districts or agencies to provide the student a free, appropriate public education (FAPE). RCW 28A.155.040.

29. No authority was cited, and none is known, under the IDEA, that holds more than one district at a time accountable for the delivery of a FAPE to a student. An inter-district agreement may create, as it did here, the non-resident district's responsibility to comply with the IDEA during the period of the contract *as an agent of the resident district*. That responsibility includes the planning activities for the continuation of services into the next school year.

30. The ALJ notes that the PSD/FPSD inter-district contract contemplates "implications for the succeeding school year" if FPSD fails to provide adequate time to plan for the ██████████ school year. This provision appropriately acknowledges that to act otherwise could deny a special education student served under an inter-district agreement the same continuity of planning provided a special education student served within his resident district.³ That PSD and FPSD staff recognize the importance of complying with the IDEA, whether resident or non-resident district, is also reflected in their testimony.

31. However, that being said, no authority was cited and none is known, that transfers responsibility under the IDEA to the non-resident district during the period of the contract or requires the non-resident district to renew the contract. See WAC 392-172-020(2)(a) (interdistrict agreements shall be voluntary).⁴

³ There is no issue here as to insufficient time to plan for the ██████████ school year, as the parties were meeting as early as April 2001 to plan for transition.

⁴ Mr. Rasplica's view that a change of placement made by a non-resident district would be the non-resident's responsibility under the IDEA is not addressed further because of the ALJ's conclusion that the change by PSD is one of location and not placement.

32. As the responsibility for the delivery of a FAPE to the Student rests with the resident district, FPSD, and the PSD's compliance with the IDEA is pursuant to principles of agency under contract law, not the IDEA, the ALJ concludes that: (1) PSD's compliance with the IDEA establishes FPSD's compliance; (2) that PSD has no independent duty under the IDEA to the Student; (3) that PSD is dismissed as a party; and, (4) that the Parents' request to compel PSD to serve the Student for the [REDACTED] school year is denied.

Summary Conclusions

33. The Parents want what is best for the Student. It is evident that the Student is very fortunate and has benefitted greatly from his Parents' efforts on his behalf. If it were the ALJ's job to decide what is best for the Student, the outcome of this decision might be otherwise. However, the legal standard here is whether the [REDACTED] and/or the FPSD [REDACTED]/developmental delay programs are changes of location or changes in placement. As stated earlier, the ALJ concludes that the proposals are both changes in location. Accordingly, the PSD and FPSD are entitled to exercise their discretion to choose the location of the Student's services at which to implement the Student's current IEP.

34. If PSD decides to continue to serve the Student for the [REDACTED] school year, and FPSD agrees to enter into a contract, PSD may serve the Student at either [REDACTED] or [REDACTED]

35. If PSD elects to not renew the contract to serve the Student, FPSD may locate the Student's services in its [REDACTED]/developmental delay program, and implement his *current IEP*, the appropriateness of which is not at issue.

36. FPSD's proposal to create, update, and/or change the Student's current IEP is not reviewed here for its appropriateness. The IEP serves as a means by which to assess the FPSD's ability to implement the Student's current IEP. In the event of a dispute in the development of a new IEP, either party may seek a due process hearing as provided for in WAC 392-172-350.

ORDER

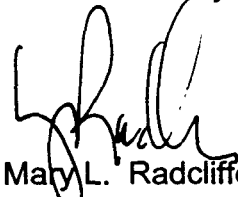
1. PSD's proposal to change the implementation of the Student's current IEP from [REDACTED] to [REDACTED] is a change of location of services and not a change of placement.

2. FPSD's proposal to implement the Student's current IEP from [REDACTED] to FPSD's [REDACTED] developmental delay program is a change in location of services and not a

change of placement. This conclusion is based on the demonstrated ability of FPSD to implement of the Student's *current* PSD IEP.

3. Neither PSD or FPSD had an obligation to provide the Parents with formal prior written notice pursuant to WAC 392-172-302 when it proposed to change the location of the Student's services.
4. Assuming, *in arguendo*, that PSD and/or FPSD either district had an obligation to provide the Parents formal written notice, the failure to do so was *de minimis*.
5. PSD's responsibility to comply with the IDEA, vis a vis the Student and his Parents, exists as an agent of the FPSD, until August 31, 2001, the expiration of the agreement. Its compliance with the IDEA in planning for the [REDACTED] school year demonstrates FPSD's compliance with the IDEA as to issues for hearing.
6. The responsibility for a delivery of a FAPE to the Student during the inter-district contract period of September 1, 2000 to August 31, 2001 remains with the Student's resident district, FPSD.
7. The PSD has complied with the IDEA obligations identified in the issues for hearing.
8. FPSD has demonstrated compliance with its IDEA obligations, as identified in the issues for hearing.
9. This decision does not review the appropriateness of FPSD's proposed IEP.
10. PSD's motion to dismiss itself is granted.
11. FPSD's request to be dismissed is denied.
12. The Parents' request to require FPSD and PSD to renew the inter-district agreement for the [REDACTED] school year is denied.

Dated at Seattle, Washington this 25th day of July, 2001.



Mary L. Radcliffe
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 Mailing

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 7/25/01, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

MCK

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