

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

IN THE MATTER OF

BAINBRIDGE ISLAND SCHOOL  
DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2002-SE-0107

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

A hearing in the above-entitled matter was convened before Administrative Law Judge Robert P. Kingsley in Winslow, Washington, on September 26, and October 8, 9, 2002. The interested parents appeared on their own behalf and were represented by Randal Brown, Attorney at Law. Bainbridge Island School District (District) was represented by William Coats, 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**

The parent filed a request for due process hearing with the Office of the Superintendent of Public Instruction (OSPI) on August 14, 2002. The parties were served with a copy of a Notice of Hearing setting this matter for hearing. A prehearing conference was convened on August 21, 2002. The parties agreed to: (1) extension of the deadline for decision to thirty days after the close of the record; (2) a hearing location at the District administrative offices; (3) a date for exchange of documents and witness lists; (3) hearing dates of September 4, 26, October 8, 9, 2002. The hearing was commenced on September 26 after the parties determined that three days would suffice for the hearing. The proceedings were reported by Roger Flygare, court reporter.

After adjournment on October 9, the record remained open for submission of additional exhibits and post hearing memoranda. With counsel for the parties present, the administrative law judge viewed the facilities for the District's program in the \_\_\_\_\_ and the Glen Eden Institute. The parties filed their documents and memoranda on November 27, 2002. The parties subsequently agreed to an extension of the deadline for decision to January 9, 2003, at the request of the administrative law judge.

## ISSUES

The issues for hearing, defined in the parent's request for hearing and at the prehearing conference, are

- a. Whether the District failed to provide a free and appropriate public education (FAPE) for the 2001-02 school year in its placement and services;
- b. Whether the student is entitled to compensatory education; and
- c. Whether the District should be ordered to pay for a private placement at the Glen Eden Institute for the 2002-03 school year.

## FINDINGS OF FACT

1. The student is 11 years old and began attending elementary school in the District in kindergarten. He resides with his parents within the District's geographic boundaries.
2. Before kindergarten, the student received special education and related instruction in pre-school programs in Bremerton, within the District, and on Mercer Island. He was initially identified as a focus of concern after his parents noticed severe language delays in his developmental milestones. He received speech/language (SL) therapy as a two year old at Holly Ridge Center in Bremerton. In 1994, he was evaluated and identified as eligible for special education under the funding category of developmentally delayed. He attended Bainbridge Island Developmental Preschool from ages three to four and one-half.
3. While enrolled in the District's preschool program, the student's physical therapist noticed balance and coordination deficits and recommended an evaluation by a sensory integration therapist. The student was referred to Dr. Stephen Glass, a pediatric neurologist, for examination. Dr. Glass has provided treatment and consultation since that time to the present.
4. The parents enrolled the student for six months at a private pre-school program on Mercer Island during the 1994/95 school year. They withdrew him after noticing that he was exhibiting inappropriate behaviors learned from other children in the program. He was re-enrolled in the District program and also received daycare services at a facility employed by the District for integrating disabled and non-disabled peers.
5. Based on a recommendation from the District, the student was enrolled in an afternoon kindergarten session during the 1997/98 school year where he would receive the services of a paraprofessional. The District reevaluated him and determined that he continued to

be eligible for services under the category of Developmentally Delayed. According to an Individualized Education Program (IEP) agreed upon on November 25, 1997, the student was placed in a general education setting with support from a paraprofessional. Goals and objectives were established in the areas of classroom independence, gross motor skill development, and oral language processing.

6. The student entered first grade in the fall of 1998 and continued his placement in a general education setting with support from a paraprofessional for four hours in the morning. The IEP was reviewed and agreed upon on November 25, 1998. The IEP included goals and objectives in writing, social skills, and oral language. In addition to a paraprofessional aide, services included SL therapy and occupational therapy (OT). The statement of present levels of performance noted that the student's academic skills were widely scattered. In reading, he could decode easily but exhibited poor comprehension of what he read. He was limited in letter/sound correspondence interfering with his ability to spell or write. The student's listening skills were weak causing him to struggle with oral instructions in math lessons despite an excellent ability with math concepts and counting. Socially, the student was eager to make friends but had difficulty interacting with peers. He used a very loud voice in class, apparently unaware that it interrupted others. At recess, his independent behavior with other children emphasized name calling, chasing, and yelling. In class, he showed poor attention to a common topic of discussion and was unable to physically maintain himself in his seat.

7. The District reevaluated the student in January, 1999, since he was no longer eligible for special education services as developmentally delayed. The evaluation team included the school psychologist, the special education teachers, a general education teacher, school counselor, nurse, a SL therapist, the student's paraprofessional aide, and the OT therapist. The parents declined an invitation to attend the evaluation conference.

8. Assessment reports were completed by the school psychologist and Dr. Glass. The evaluation incorporated earlier assessments by Dr. Glass, the SL therapist, and the OT therapist. The team determined that a diagnosis of diffuse encephalopathy and sensorimotor concerns impacting the student's academic and social abilities qualified him for eligibility under the category of health impaired. The team also determined that his current placement and services remained appropriate to his needs.

9. The student's IEP was amended in June, 1999, to plan for the student's transition to second grade. Resource room services were increased to accommodate an anticipated need for small group instruction in writing, reading comprehension, and social skills. The IEP was amended again in September, 1999, to provide for small group instruction in math.

10. The IEP was reviewed in November, 1999. Goals and objectives were established for reading, writing, math, and OT. He continued to receive instruction in the general

education setting with the assistance of an aide and specialized instruction in the resource room. He also received instruction with computer keyboard programs to assist him with some of his writing tasks.

11. The parents privately arranged for the student to receive neurofeedback services for several months during second grade. The parents were dissatisfied with the progress and discontinued the services.

12. Progress notes from the 1999/00 school year show that the student met his reading goals by June. He made little progress in math and some progress in writing and occupational therapy.

13. The student entered third grade in the fall of 2000. During the November, 2000, IEP review, the professional team members reported greater success for the student in the general classroom. He was able to complete his work with a reward of quiet reading time. Oral presentations to the class as a group were difficult for him. The student's teacher provided a rocking chair for him so that he could move without disturbing the class. He was allowed to move to a doorway during assemblies if he felt over stimulated. Transitions between classes were difficult where he was uncomfortable in the hallway with large numbers of students. The teacher allowed him to leave for his lunch first to avoid the crowded hallways. The team also reported that the student's reading skills were above grade level revealing good comprehension. Math skills were near grade level. His weakest area was written language.

14. The parents arranged for private services from the HANDLE Institute in Seattle, Washington. Services were provided to assist with integration of brain functions. The therapists provided the student a series of exercises. The parents subsequently observed some improvement in his coordination.

15. The parents grew frustrated with the student's progress as the third grade year progress. They noted that he became extremely resistant to homework and that he was developing behavioral strategies such as complaining of a stomachache to avoid unpleasant tasks. In June, 2001, the parents requested that the District administer cognitive testing to assess the student's potential and learning strengths. The test was postponed to September, 2001, in anticipation of a reevaluation.

16. The student received Extended School Year (ESY) services from the District after the 1998-99 and 1999-00 school years. The parents explored an alternative placement after the 2000-01 school year. They enrolled him for six weeks at the Glen Eden Institute in Poulsbo, Washington. They believed that the placement was successful, observing that the student appeared more relaxed, less anxious, and more open to instruction.

17. The student entered fourth grade during the fall of 2001. Fourth grade presented challenges to the student since the classes were larger with greater expectations. The student continued to receive support from an aide in the general education classroom. The parents retained counsel to assist them and informed the District of concerns regarding the student's placement. The District began the reevaluation process and authorized a psychoeducational assessment of the student by Stephen Sulzbacher, Ph.D. Dr. Sulzbacher observed the student in the general education class as part of his assessment. The student loudly objected to requests from his aide to work on a math assignment, but eventually complied. He made statements about having "disturbing thoughts" and the aide reported that he had mentioned harming other students. During the observation, the student acted out a scene from a movie by raising a pencil above his teacher's back in a stabbing motion and bringing it down onto her back. The blow was painful to the teacher but did not penetrate the skin. Dr. Sulzbacher concurred with Dr. Glass' diagnosis of static encephalopathy, but also reported a diagnostic impression that the student might be developing a psychiatric mood disorder such as Bipolar I disorder.

18. The student was emergency expelled effective November 1, 2001, as a result of the pencil incident. The IEP team met on November 14, 2001, and determined that the conduct was a manifestation of his disability. Dr. Clayton Mork, Director of Instructional Support Services, became directly involved in identifying an appropriate placement for the student. Dr. Mork has a Ph.D. in education and was a school principal for several years before assuming his current duties. He reviewed the student's file, paying particular attention to the reports from Dr. Glass, who had most recently examined the student on July 2, 2001. He decided to propose a program with two phases. The first phase was scheduled to begin immediately and end at the winter break. The second phase was to be scheduled for the second semester.

19. Dr. Mork sought an experienced teacher to provide a one on one teaching environment for the student. The goal for phase I was to observe the student and identify an appropriate setting for him. \_\_\_\_\_ a teacher familiar with the student, was chosen.

20. Dr. Mork consulted with a special education teacher for severely disabled students, a school psychologist, and a behavior intervention specialist. He outlined a plan on November 29, 2001. He proposed a four hour school day in an environment with the following characteristics:

- a. Low key to maintain sense of control;
- b. Exercise self-discipline when dealing with one other student;
- c. Allow self-imposed de-escalation and relaxation and voluntary, non-punitive time out;

- d. Provide established routines with self-directed engagement in high interest activities
- e. Learning to be tailored to interests;
- f. Provide breaks for walks, regular visits to the public library, regular lunch time outings in the community;
- g. Provide for a paraprofessional aide;
- h. Allow destination walks for ice cream;
- i. Possibly use games as vehicles for embedded therapy scripting;
- j. Anticipate fifteen minute attention span and allow for self-directed coping strategies (reading Harry Potter books);
- k. Provide horseback riding as therapy.

21. The goals of the proposal were to implement the goals and objectives of the IEP, help the student monitor his anxiety levels and make appropriate choices, assist him with social skill development, obtain a baseline for measuring future progress, and to provide the student with authentic, integrated learning experiences consistent with his current levels of attention and ability

22. Dr. Mork identified an office space in the \_\_\_\_\_ for the student's instruction. The \_\_\_\_\_ is a separate school building used to house special programs including the Renaissance program for behaviorally disabled students, the home school support program, and the Odyssey multiage program. The student began the placement on November 29, 2001. The parents agreed with the decision not to return the student to his general education setting because the disciplinary action seriously upset him and he was embarrassed to return to class in the same building.

23. The program proposal was presented to the parents at a meeting on Friday, November 30, 2001. The parents were willing to cooperate with the District in implementing its proposal. The parties agreed to continue with the reevaluation process in anticipation of formulating phase II of the program.

24. Between November 26 and December 20, 2001, Mr. \_\_\_\_\_ capitalized on the student's interest in the story of the lost city of Atlantis and designed the office space using Atlantis as the theme. Furnishings for the room included a computer for the student to use. Mr. \_\_\_\_\_ developed a consistent schedule involving appropriate behavior, social cues, and an occasional project. He noted that the student employed many avoidance techniques for tasks including complaints of a stomachache, headache, or simply a rude

denial. Mr. \_\_\_\_\_ reported satisfaction in working through these obstacles and noted that consistency in instructor was beneficial to the process.

25. The parents met with District staff and participated in formulation of an IEP at a review meeting on December 20, 2001. They acknowledged in writing that they had been advised of their procedural rights. The IEP incorporated the placement of the Phase I proposal and elements of an appropriate program. It included goals and objectives in the areas of written language, math, reading, occupational therapy directed at fine motor skills (writing using computer), communication, attention, participation in school routines and activities, and social interaction. A Positive Behavioral Intervention Plan was appended identifying appropriate behavioral strategies to be used with the student. Services included one on one instruction and consultation by the SL and OT therapists.

26. Dr. Glass examined the student on January 3, 2002. After reviewing the student's history since his last examination, Dr. Glass commented:

Within the school setting, (the student) will best benefit from a high degree of a structure, consistency and predictability in a positively based program. (The student) will benefit from a smaller classroom placement, more one-on-one support and, always, input that indicates what is wanted rather than what is not wanted, using words, not emotions and staying nonreactive. . . . At this point, it is clear that the school environment does need to attend to issues of anxiety, behavioral state regulation, mood and social interaction, but this can occur concurrent with ongoing academic expectations.

These elements were included as appropriate modifications in the IEP.

27. Dr. Glass also recommended ongoing OT emphasizing sensory integration, SL support, reduced expectations for writing with alternatives to handwriting emphasized, and close monitoring of mood and self-esteem.

28. The District completed its reevaluation of the student on January 14, 2002. The evaluation team included Dr. Mork, a school psychologist, the special education teacher, counselor, the principal from the student's most recent placement, the SL and OT therapists, both parents, and the District coordinator for alternative programs. Assessment reports were completed by Dr. Glass, the school psychologist, and the SL and OT therapists. Academic testing was administered and analyzed. The evaluation report was agreed to by the members of the evaluation team and included information from earlier evaluations by Dr. Glass and Dr. Sulzbacher. The team determined that the student continued to be eligible for special education services under the category of health impaired. It recommended services and IEP goals in the areas of: using words to express feelings and ideas appropriately, participation in school activities and routines with

success; increasing ability to interact effectively with peers and adults at school; increasing attention to task to age appropriate level; social communication; using strategies for social problem solving; written language/keyboarding; written language mechanics; math skills; and reading comprehension of material outside of his interests. The team also recommended continued SL and OT services.

29. Mr. \_\_\_\_\_ was replaced by \_\_\_\_\_, a special education teacher employed specifically for the student's program. Ms. \_\_\_\_\_ assumed the student's instruction on December 21, 2001. She has a Masters degree in art and counseling and is licensed to teach in Washington state with endorsements in reading, special education, psychology, and art. She noticed initial difficulty communicating with the student. He was preoccupied with Atlantis, exhibited limited eye contact with others, and was not able to engage in conversational give and take. He seemed ashamed about his expulsion.

30. Ms. \_\_\_\_\_ employed a visual schedule board and a "feeling chart" to assist the student in activity transitions and monitoring his emotions. As the program progressed she set the structure according to her judgment of the student's capability. The student engaged in activities proposed for phase I. They frequently took long walks as a break. She introduced soothing music, deep breathing techniques, and walking exercises to enhance left/right brain coordination. He enjoyed jokes and Ms. \_\_\_\_\_ used this interest to engage in conversation with the school secretary, other staff, and students he met in the hallway. With practice he became more attentive to his audience.

31. Ms. \_\_\_\_\_ received consultative services from Sharon Murphy, an OT experienced in assisting autistic children. She devised writing and keyboarding strategies that increased his ability to write effectively using the computer keyboard.

32. Ms. \_\_\_\_\_ recorded in detail the student's daily performance with respect to his schedule, emotional/behavioral state, and progress towards goals and objectives. The reports identified the activity and time of day, rated progress according to defined criteria, and supplemented the rating with narrative comments. This information was provided to the parents on a daily basis. Ms. \_\_\_\_\_ also communicated with the parents by telephone.

33. Connie Castellano, an OT paraprofessional, began working with the student in February for thirty minutes each day. She initially assisted him with handwriting, improving legibility, so that he could transfer it to the computer. She also interacted with the student outside of the classroom, noting improvement in his demeanor as the year progressed.

34. The student was also assisted by \_\_\_\_\_, a special education support specialist. She had previously worked with the student as an aide. She began working with him under Ms. \_\_\_\_\_ supervision in February and continued to April, 2002.

35. Based on Dr. Sulzbacher's concern regarding a possible mood disorder, the student was evaluated by Dr. Michael Golden, a board certified child psychiatrist. He diagnosed Pervasive Developmental Delay Not Otherwise Specified (PDD/NOS), a disorder within the autism spectrum. He did not identify a mood disorder but expressed concern that the student may be developing hallucinations which he has not fully disclosed. He recommended academic placement in a small class with other children functioning as normally as he is able to tolerate emphasizing social interaction and empathy throughout his entire curriculum. He also recommended emphasis on appropriate and social use of language. Dr. Glass disagrees that the student meets the criteria for PDD/NOS. There was no other evidence of hallucinations.

36. By the end of the school year the student exhibited marked improvement in his social skills and a decrease in his anxiety. He made progress towards his goals and objectives, meeting all objectives in attention to task, and some of the objectives in participation, communication, reading, and writing. In arriving at this finding the administrative law judge has considered conflicting testimony from the parents and their witnesses criticizing the District's services and educational strategies. This evidence consisted of expert and eyewitness testimony that the setting provided too much stimulation, that the educational methodology emphasized compliance instead of self-regulation, and that he showed little academic progress. The parents received the favorable reports from staff but testified that they did not see progress from his behavior at home. They observed that he acted rude and obnoxious after a day at school, and interpreted the conduct as a response to anxiety. They received copies of his work and observed that he had performed more in third grade. A report he wrote regarding a Harry Potter book was a fraction of what he had discussed at home. They believed that the District's program reflected micro management of the student's time without being receptive to cues from the student. They also observed a change from a happy demeanor to depression and loneliness. The administrative law judge finds that the testimony and evidence from the student's teachers and therapists is credible and that the student's performance in the school setting improved despite the parents' observations of his conduct at home.

37. On June 17, 2002, Dr. Mork presented a written proposal to the parents for a program for the following school year. He noted the student's progress towards the IEP goals and the strategies consisting of visual schedules, predictable and clear routine structures, high interest projects and activities, incentives, data collection, and regular communication with the parents. He proposed a change in the placement to a classroom equipped to serve a limited number of students with sensory integration and autism spectrum disorders. Despite the change in placement, the program would continue the emphasis on one on one or small group instruction and would include attention to sensory integration issues.

38. Dr. Mork proposed to expand the District's Renaissance program for behaviorally disabled students to encompass the anticipated services for neurologically impaired

students. While both programs would be housed in the \_\_\_\_\_, neurologically impaired students would not be in the same classrooms with behaviorally disabled students. Dr. Mork arranged for staff training in autism spectrum disorders at the University of Washington over the summer. Dr. Mork anticipated staffing the program with a special education teacher experienced with autism spectrum disorders and a mental health specialist, with services as needed from a SL therapist, OT, and school psychologist. Instruction would be offered one-on-one or in a small group. The building offers social access to normally developing peers where programs are offered to students receiving home based instruction and participating in the Odyssey program for gifted students.

39. The District staff met with the parents to discuss the proposal for the 2002-03 services. The staff offered Extended School Year services. The parents reported their disagreement with the District's assessment of his progress. They declined the ESY offer and decided to re-enroll the student at the Glen Eden Institute. The parents did not respond to the District's proposal for the 2002-03 school year

40. The Glen Eden Institute is approved as a Private School and Non-Public Agency by Washington State. It follows a program begun in British Columbia, Canada, in 1984. The student attended the program during the summer, 2002, and his enrollment has continued during the 2002-03 school year

41. The program is designed as an alternative for complex youth who have not been successful in the regular classroom. The program founder is Dr. Frederick V. Brennan. Dr. Brennan has earned a Ph.D. in developmental psychology and has experience as a school psychologist. He initially developed the program in response to students with complex disorders who had experienced long histories of failure in the public school system.

42. The Poulsbo facility is managed by Dr. Ronald Seifert. Dr. Seifert has earned a Ph.D. in physiological psychology and has extensive experience in biofeedback principles and techniques. He does not have significant experience in special education. The facility is located in a small suite of offices. There are four rooms; Dr. Seifert's office, two rooms available for classroom work, and a lunch area. Dr. Seifert is available on an ongoing basis for consultation with students. The office is equipped with a biofeedback instrument. The rooms are connected by a short hallway and small common area. One of the rooms contains computer equipment for students. Although available, computer use is minimized to foster socialization. Students have access to the internet by going to the Poulsbo public library located nearby.

43. Students attend the program from 9:00 AM to 3:30 PM, Monday through Thursday, and 9:00 AM to 1:00 PM on Friday. They will be assigned to a staff member either one on one, or in a small group of one to five students.

44. The first stage of the program is to provide a setting in which a student's behavior in an academic setting can be observed and monitored. The staff member will offer academic instruction using a grade appropriate curriculum. Performance expectations are minimized. Behavioral responses such as motor movement, internal arousal, verbal engagement, affect, methods of thinking, are recorded from moment to moment according to codes developed for the program. The data is then graphed and charted for analysis. The codes reflect the student's metamotivational state (empathy, negativity), level of arousal (anxiety or sensory stimulation), task difficulty and mastery, expression, and non-social behavior. Stimulating factors are slowly reduced and subsequently reintroduced in a controlled approach. Staff seek to identify moments of self-regulation with the goal of teaching the student how to consistently replicate the state.

45. The program emphasizes self-regulation over implementation of IEPs. Students generally require one to three years to learn self regulation techniques. The initial period of observation commonly requires one year. SL and OT services are available by independent contract. The program also has contracts for physical education programs.

46. The student has been attending the program since July, 2002. Dr. Brennan reports that he is in the early stages of self-regulation. His primary problem is accommodating transition, or change. Reports in September indicated that the student was still very intense but was beginning to exhibit some variability in his state by modulating vocal volume, leaving highly defended positions, listening to others, and deciding and expressing what he wants to do. He is not receiving OT, or SL at this time, and no IEP is being implemented. SL is considered a component of the basic instructional approach.

47. The basic tuition for the program is \$4,500 per month plus fees for optional activities. There are four male students, including the student, ages 16 to 11. The student works with two teachers. One is certified to teach history/social studies. The other teacher is certified to teach special education.

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-171 WAC (or Chapter 392-172 WAC for cases arising after November 11, 1995).

2. The IDEA (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

103 S. Ct. at 3051

A "free appropriate public education" (FAPE) consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

3. In an administrative hearing, the District bears the burden of proving compliance with the procedural requirements of the IDEA. *Clyde K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994). Generally, only procedural flaws which result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process, will result in a denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir 1985).

#### *FAPE During 2001-2002 School Year*

4. The student has presented the District with complex educational challenges due to diverse impacts of a static encephalopathy diagnosed by his pediatric neurologist. These impacts have interfered with his physical strength and coordination, his fine motor abilities, his ability to attend to oral instruction, his ability to integrate sensory input from his environment, and his ability to regulate himself in social settings. Despite these impacts, the student benefits from good intellectual capabilities and an aptitude for reading in areas of interest to him.

5. The District's evaluations throughout the years have included input from experts knowledgeable of the student's condition. He has been assessed in each of the areas of suspected disability and services have been provided according to agreed upon IEPs.

6. The student entered fourth grade receiving special education services agreed upon in a current IEP. He had been most recently evaluated in January, 1999. A change of placement was agreed upon by the parties after the student assaulted his teacher. The subsequent program implemented by the District reflected strategies and recommendations from the student's pediatric neurologist. The District completed its reevaluation of the student in January, 2002. The evaluation team included experts in each of the areas of suspected disability and the parents. The evaluation report incorporated recent assessment information from the student's pediatric neurologist, the psychoeducational assessment of Dr. Sulzbacher, and assessment data from the OT and SL experts. It was subsequently supplemented by a psychiatric evaluation regarding issues raised in the psychoeducational evaluation. The parents were included in development of a new IEP. Although the parents did not acknowledge in writing their agreement to the IEP, they were aware of their procedural rights to challenge the plan and chose not to pursue that option. They have not shown that their right to participate in the formulation of the IEP was infringed. Under these circumstances, the administrative law judge concludes that the District has not committed prejudicial procedural error in its evaluation and educational planning for the student during the 2001-02 school year.

7. During the 2001-02 school year, the District responded to the student's needs by establishing an environment suitable to the student's needs for consistency and limited sensory input. It committed to one on one instruction using positive behavioral strategies to address the student's negative responses. The length of the school day was limited to four hours in consideration of the restrictive nature of the one on one instruction. It provided opportunities for practicing and developing social skills. It included instruction towards the goals and objectives of the IEP. It also included consultation and direct services for SL and OT development. The characteristics of the program were consistent with the recommendations of the student's pediatric neurologist. Given the nature of the

student's neurological impairment, the setting met the requirements of placement in the least restrictive environment. See 34 C.F.R. §300.550; WAC 392-172-172.

8. The quality of the student's academic output was clearly affected by the emphasis on social and sensory integration issues. However, this emphasis was appropriate to the student's needs. "Appropriate public education" does not mean the absolutely best or "potential maximizing" education for a child. *Gregory K. v. Longview School District*, 811 F.2d 1307, 1314 (9<sup>th</sup> Cir. 1987). The administrative law judge concludes that the District's program was reasonably calculated to provide meaningful educational benefit and that the student received FAPE for the 2001-02 school year.

#### *Private Placement for 2002-03 School Year*

9. The parents are requesting reimbursement for the student's placement at the Glen Eden Institute during the 2002-03 school year. They are clearly entitled to seek the education they feel is most appropriate for their child. As argued by both parties, however, parents may be reimbursed for costs incurred in placing a child in private special education only when a school district has failed to offer a child a FAPE and where the private placement is appropriate. 34 C.F.R. §300.403, WAC 392-172-231. See also *Burlington School Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 369 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1485-6 (9<sup>th</sup> Cir. 1992). Reimbursement may be ordered even though the private institution does not satisfy the state education standards. *Florence County Sch. Dist. Four v. Carter*, id. at 114 S.Ct. 361, 365. See also *Union School District v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994). The right to reimbursement may be reduced or denied upon a judicial finding of unreasonableness with respect to actions taken by the parents. 34 C.F.R. §300.403; WAC 392-172-231(2)(d).

10. The student's program was formulated in an IEP executed on December 20, 2001. At the end of the 2001-02 school year, the District notified the parents of its intent to continue the student's current program in a different setting. It anticipated expanding its Renaissance program to provide services to children with neurological impairments. Despite the change in placement, the program would continue the emphasis on one on one or small group instruction and would include attention to sensory integration issues. The parents did not respond to the proposal and subsequently notified the District that they were declining an offer of ESY services. There was no further discussion regarding placement at Glen Eden Institute.

11. The administrative law judge concludes that the parents have failed to establish a foundation for reimbursement of a private placement. Counsel for the parents first argues that the District failed to formalize an offer of services and, pursuant to *Union School District v. Smith*, id., has failed to offer FAPE. This argument is misplaced. In the *Union*

*School* case, the District presented evidence of a prospective program that would have offered FAPE to the student. The student had never been placed in this program. The Ninth Circuit Court of Appeals concluded that the District's failure to formally propose the program precluded its consideration although the parents had indicated they would not have considered such a placement. See *id.*, 15 F.3d at 1526. As previously discussed, the District implemented an IEP in December, 2001, that offered FAPE to the student. The IEP was still effective for commencement of the 2002-03 school year. While the District proposed modifications to the program, the provisions of the previously agreed upon IEP would have governed in case of a dispute and administrative hearing over proposed modifications. See WAC 392-172-364. There is no evidence that the District was not prepared to reassemble the previous placement and staffing if the parents had enrolled the student for the 2002-03 school year. These circumstances distinguish this case from the *Union School* case.

12. The District's program without modifications offered FAPE to the student if he had enrolled in the fall of 2002. The proposed modifications were reasonably calculated to preserve the benefits of the original plan and combine them with access to group instruction. The administrative law judge has considered the appropriateness of the Glen Eden program. While it presents a plausible therapeutic model for teaching the student self-regulation, the evidence does not establish that it is structured to offer meaningful educational progress toward the student's academic goals. The administrators acknowledge that self-regulation may require up to three years to accomplish. The program is not guided by an IEP or similar counterpart. Performance expectations are minimized and there is no evidence of academic progress during the student's enrollment. The student's history shows that he has been able to make some academic progress even while struggling with an overstimulating environment. Since the evidence does not show that the Glen Eden placement would be reasonably calculated to provide progress toward his academic goals, it is not an appropriate alternative placement for this student.

#### *Compensatory Education*


13. Compensatory education is an award of educational services or reimbursement that may be ordered where a student has been denied FAPE. Since the administrative law judge has concluded that the District has provided FAPE to the student, there is no basis for compensatory education.

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

ORDER

IT IS HEREBY ORDERED that: The District provided the student FAPE for the 2001-02 school year. It has offered FAPE for the 2002-03 school year. The parents' request for compensatory education and reimbursement for a private placement is denied.

Dated at Seattle, Washington this <sup>9<sup>th</sup></sup> day of January, 2003

  
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.