

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

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OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

EVERETT SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2004-SE-0069

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

A hearing was held before Administrative Law Judge (ALJ) Janice E. Shave at Everett, Washington, on June 22, 2004. The parent of the student whose education is at issue in this proceeding (hereinafter Parent and Student) did not appear. The (hereinafter the School District) was represented by James Dionne, attorney at law. Also appearing on behalf of the School District was _____, Director of Special Services.

School District Exhibits D-101 through D-105 were admitted, there being no objection. _____ the Student's special education teacher, and _____ (hereinafter _____ its administrator, testified.

Following review of the pleadings, the offered and admitted exhibits, and testimony and argument, the following Order is hereby entered:

STATEMENT OF THE CASE

On May 25, 2004, the School District filed an appeal with the Office of Superintendent of Public Instruction (OSPI), requesting a hearing to demonstrate the appropriateness of its proposed placement of the Student at _____

A prehearing conference was scheduled to be held June 2, 2004, and the hearing was scheduled to be held June 23, 2004. A prehearing conference was held June 2, 2004, and a Prehearing Order was issued June 3, 2004, re-scheduling the hearing to be held June 18, 22 and 23.

A readiness prehearing conference was scheduled to be held June 10, 2004. Both parties appeared at that readiness prehearing conference, and a Prehearing Order was issued June 10, 2004. The issues for the hearing were identified within the June 10, 2004 Prehearing Order as follows:

Whether the placement proposed by the School District on or about May 6, 2004, for the Student at the _____ school, a self-contained behavior program operated by the Educational Service District (ESD) is an appropriate location, and specifically, whether the proposed placement provides an appropriate level of safety at the outdoor play area and provides an appropriate seclusion room.

The Parent does not object to the proposed program content at the _____ school; he only objects to the physical setting, the facility itself. Therefore, testimony at the hearing will be limited to the appropriateness of the facility as a location to deliver the IEP.

The June 10, 2004 Prehearing Order was not objected to by either party.

A prehearing conference was scheduled by telephone late in the afternoon of Friday, June 18, 2004, to address the status of the case. The matter proceeded to hearing as scheduled June 22, 2004.

The Student has been the subject of several special education due process hearing requests prior to the instant case. In a decision issued March 19, 2004, under Special Education Cause Number 2004-SE-0011, the Student was found to be a resident of the School District effective February 9, 2004. That Order was not appealed by either party.

The factual basis for the March 19, 2004 administrative order was that the Parent had arranged for the Student to live a few days per week with the Parent's sister (Student's paternal aunt) within the boundaries of the School District, a few days per week with the Parent's brother (Student's paternal uncle) and two days a week with the Parent, who lived within the Mukilteo School District (hereinafter Mukilteo), not the School District.

During the first and second prehearing conferences held in the present matter, the Parent stated his intent to move out of Mukilteo's school boundaries during the summer of 2004, and relocate inside the School District boundaries. However, at the time of the June 18, 2004, prehearing conference, the Parent stated under oath that he intended to remain a resident of Mukilteo, withdraw the Student from the School District, and enroll the Student in _____ As of the morning of June 22, 2004, the day of this due process hearing, no evidence was presented that the Parent had actually enrolled the Student in _____. Therefore, the matter proceeded to hearing.

FINDINGS OF FACT

1. As of the Spring of 2004, the Student resided within the School District boundaries. The Parent continued to reside within Mukilteo, not the School District. The Student was educated pursuant to an Individualized Education Program (IEP) at the School District's _____ Elementary School (hereinafter _____).

2. On five occasions during the 2003-2004 school year, the Student ran away from _____. The first two occasions occurred within the first month of school. On or about September 5, 2003 (the third day of school), the Student arrived at school agitated, with escalated behavior. His special education bus was met by two paraeducators, and the Student's behavior was de-escalated by them before he was allowed to disembark from the special education school bus. While the Student was walking into _____, and holding the hand of one of his paraeducators, the Student bolted and ran off school property. He ran down the front driveway and onto the neighboring street, which is _____ Street. That street is a four lane highway with a speed limit of 45 m.p.h.

3. The second time the Student ran away from school was September 22, 2003. The Student had been placed at Fairfax Hospital, a residential psychiatric facility, the prior Friday. The Monday following his hospitalization, the Parent returned the

Student directly to [redacted] from Fairfax. The Student behaved acceptably during the morning then escalated in the afternoon. He spent time in [redacted] "safe room." He bolted on the way to the special education school bus at the end of the school day, was caught by the principal, and taken to the principal's office.

4. The third episode occurred in October 2003, on a day when the [redacted] hot lunch program ran out of fish, which was the main course. The Student's class ate lunch in their own classroom, not in the lunchroom and not with the general education students. They routinely walked to the lunchroom to pick up their lunches and then returned to their classroom. On that day, the Student went out of control in the lunchroom and bolted. He ran onto the school playfield, and climbed a fence to an enclosed pond, still on school property.

5. The fourth episode occurred October 31, 2003, when the Student was transitioning back to his classroom. He teased his paraeducator, threatening or joking to run away, then did run away. He stayed in close proximity to the school building and did not leave school property.

6. The fifth and final episode occurred on or about May 29, 2004, toward the end of the school day, after the Student had experienced a good day. He had just earned free time for good behavior, and was about to receive his reward, when he threw away his good behavior folder, walked out the door, and ran away from the building. He ran off the school grounds, again onto [redacted], where he stayed on the sidewalk on that busy street.

7. It is the experience of the Student's special education teacher, [redacted], that the Student experiences difficulty with transitions at school. Each of the transitions increased the Student's agitation, and his opportunity to run away.

8. At [redacted], the Student experienced several transitions each day, from the bus to his classroom, from his classroom to the lunch room and back, to recess

one or two times a day, and his special classes, including library, computer lab and music. [redacted] consists of multiple buildings closely located on the elementary school campus. The Student was required to transition several times each day because of the physical layout of [redacted].

9. According to [redacted] [redacted] has 700 or more students. It is a large, noisy, but well-managed elementary school. The Student experienced some difficulty with increased behavior problems when he was in contact with general education students, such as at recess, in hallways, and in the lunch room. Because the Student had such difficulty interacting safely and calmly with general education students during recess, the Student's special education class recess time was changed. The Student's class switched so they take recess alone, not along with general education students.

10. Staff at [redacted] and the Parent met as an IEP team on at least four occasions during April, May and June 2004, to discuss the appropriate placement for the Student. The School District proposed, at first informally, to place the Student at [redacted]. The first two IEP Team meetings were held April 22 and 28, 2004, at [redacted]. [redacted] has been located since January, 2004, on the [redacted], Washington, [redacted] School District's campus. The specifics of [redacted] were discussed with the Parent and the Uncle at all four IEP meetings in April and May.

11. On May 24, 2004, the Parent notified the School District he was rejecting the proposed placement in [redacted]. On May 26, 2004, the School District issued a Notice of Action to the Parent, formally proposing to change the Student's placement from [redacted] to [redacted]. Exhibit D-104.

12. On June 7, 2004, the School District issued a second Notice of Action, again notifying the Parent it proposed changing the Student's educational placement and also the Student's IEP. The School District also proposed a reevaluation. Exhibit D-105.

13. At the request of the School District, the Student was evaluated by a psychiatrist, Douglas Dicharry, M.D., whose report was issued on or about May 26, 2004. Dr. Dicharry's evaluation report was not included in the exhibits. However, the uncontroverted testimony by the two witnesses at the hearing was that Dr. Dicharry recommended placement of the Student at [redacted].

14. Also on June 7, 2004, the IEP team completed an IEP Revision to the May 6, 2004, IEP. Exhibit D-103. The Father participated in the June 7, 2004 IEP team meeting about the revision and his input was included in the wording of the revision.

15. [redacted] was the Student's special education teacher during the 2003-2004 school year. That was her first year as a certificated special education teacher. Prior to the 2003-2004 school year, [redacted] was an occupational therapist (OT) working exclusively with preschool and elementary school disabled students who were receiving their education through an IEP.

16. It is [redacted] opinion that [redacted] is an appropriate program and location for the Student, and is actually a better program and placement for the Student than [redacted]. This is because there are fewer students at [redacted] (approximately 34 students), fewer distractions, fewer transitions, significantly more structured environment, and because she feels the seclusion room at [redacted] is better.

17. In contrast, the seclusion room at [redacted] is a small room constructed within the special education classroom. It is not sound proof. It has a window back into the classroom, which is obscured so that light passes through, but one cannot see through the glass. It also has a window in the door for observation. A significant problem with [redacted] seclusion room is that the Student is able to hear what goes on in the classroom and the classroom is able to hear what goes on in the

seclusion room. This decreases the sense of seclusion inside the seclusion room, and allows too much stimuli to enter the room.

18. _____ has two seclusion rooms, each approximately 8 feet by 8 feet, located within an outer room. The outer room is not used as a classroom. The seclusion rooms are padded, with soft but durable vinyl on the floor and walls. There is a window in the door and a person is present in the outer room to monitor a student in the seclusion room at all times. There is fluorescent lighting in the ceiling of the seclusion rooms. It is quiet in the seclusion rooms, since they are sound proofed, and since there is no activity in the outer room where the monitor sits.

19. The Student has a history of both urinating and defecating in the _____ seclusion room, according to the Parent during prehearing conferences. _____ seclusion rooms are required to be cleaned and disinfected to _____ School District's standards.

20. The Student will be considered a sixth grader during the 2004-2005 school year, based on his age. That is ordinarily considered a secondary school (junior high or middle school and high school) age. Secondary students at _____ do not take recess. Instead, they have physical education (P.E.) class during the school day. P.E. class occurs either in the new gymnasium located approximately 100 yards away from _____ building, across a fenced parking lot, or in a nearby sports field. In order to reach the field, the students continue walking past the gymnasium along _____ School District's property on a school district dead-end road, to an outdoor field owned and maintained by the _____ School District. At no time do students walk on a street.

21. _____ is located on a quieter, smaller road with two lanes and a speed limit of 25 m.p.h. as compared with _____ on _____ with four lanes, and a speed limit 45 m.p.h.

22. _____ requires students to walk in a line with an adult (teacher or instructional aide (IA)) at the beginning and the end of the line, and also adults are stationed alongside the line of students. The ratio of students to adults at _____ is a maximum of eight students to one certificated, special education teacher and two IAs. When students are new to _____ they are required to have an adult walk alongside them at all times. Only after a student has been in _____ and has earned some additional privileges through the level behavior system is a student allowed to walk without an adult directly at the student's side.

23. _____ has an adult beside each elementary student when outside the school building. Secondary students are not required to have an adult by their side or at all times, unless they are new to the program, or have behaved poorly and have received behavior consequences. Although the Student would be considered a secondary student at _____ during the 2004-2005 school year, he would have an adult next to him at all times, as if he were an elementary student. This is because of his history of running, and also because his cognitive functioning level is that of an elementary school student, not a secondary student.

24. _____ is the site director of _____. He has been a certificated special education teacher working with emotionally/behaviorally disabled students in public and private schools in excess of 20 years. He has worked both as a special education teacher, and as a program manager/administrator. He has been the program director of _____ or several years and is familiar with its current physical location as well as with the program. He has also participated in four IEP meetings regarding the Student, and has visited _____.

25. It is _____ opinion that _____ is an appropriate program for the Student, and is a better program and physical location for the Student because of the much smaller number of students (a maximum of approximately 34 or 35), the

significant degree of structure in the program and the environment at _____ the consistently high ratio of adults to students, the lower number of transitions through the day for the Student at _____ and the sound proofing and ample size of the seclusion rooms. Further, before a student is placed in the seclusion room at _____, the student must progress through several different layers of consequences.

26. Based upon the uncontroverted testimony of the Student's special education teacher, _____ and _____ Director, _____ is found to be an appropriate physical location for the delivery of the Student's educational program.

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 United States Code (USC) Section 1401 *et seq.* (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) 300 *et seq.* and Chapter 392-172 of the Washington Administrative Code (WAC).

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act (EHA)) 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.

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

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

4. In the instant case, no procedural violations are alleged. The only issues for consideration are substantive. They are, whether the physical location of Discovery is appropriate, and specifically, whether the seclusion room and the play area are appropriate for the Student.

5. The second prong of the *Rowley* test to determine whether a school district has provided a free appropriate public education (FAPE) is whether the IEP developed through the Act's procedures was reasonably calculated to enable a student to receive educational benefit. *Rowley*, 103 S. Ct. at 3051. The standard is met if a school district provides personalized instruction with sufficient supportive services to permit a student to benefit from the instruction. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time of the development of the IEP. The

relevant question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

6. IEPs must be designed to meet the special education student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum (the same curriculum as for nondisabled students) and to meet each of the student's other educational needs that result from the student's disability. The goal is to allow each special education student to advance appropriately toward attaining that student's annual goals. WAC 392-172-160.

7. The IEP offered to the Student at the [redacted] location is reasonably calculated to enable the Student to receive educational benefit. The location offers the Student a reasonably safe seclusion room. Although the Parent alleged during the prehearing conferences that the Student had a history of being locked in a closet as a young child, prior to being adopted by the Parent, no evidence of this past history for the child was offered at the hearing, and no evidence was offered that the seclusion rooms, larger than a closet at 8 feet by 8 feet, lit from within with fluorescent lighting and monitored at all times by an adult in the outer room, were inappropriate or would trigger any traumatic memories for the Student.

8. Further, the indoor gymnasium and outdoor play areas used by Discovery will be appropriate, when used in conjunction with the adult-to-student ratio and extra care of assigning a staff person to walk by the Student's side.

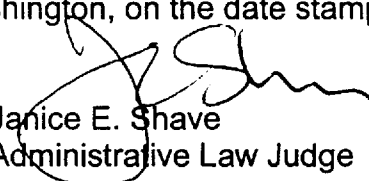
9. [redacted] seclusion room, play and P.E. areas will be safer and better designed for the Student than those at [redacted]. There is no guarantee that the Student will not run away from [redacted]. But the nearby street is less busy, and should therefore be safer. Further, the Student will have a much more difficult time running far while in [redacted] and being so closely monitored, than he did at [redacted] with its multiple transitions from building to building, indoors to outdoors for recess.

10. Because the Parent did not challenge the appropriateness of the proposed Discovery placement on any other basis, no other bases will be addressed.

ORDER

The change of location proposed by the School District from _____ to the Snohomish _____ Program is an appropriate change. The Student's IEP shall reflect placement for the 2004-2005 school year at the Snohomish _____ Program.

Entered in Seattle, Washington, on the date stamped above.


Janice E. Shave
Administrative Law Judge

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.

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