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

OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

KENT SCHOOL DISTRICT

CAUSE NO. 2007-SE-0090

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

A hearing in the above-entitled matter was convened before Administrative Law Judge (ALJ) Robert P. Kingsley in Kent, Washington, on November 1, 2007. The parents of the student whose education is at issue (hereinafter Parents and Student¹) appeared and were represented by Randal Brown, Attorney at Law. Kent School District (District) was represented by David Hokit, Attorney at Law. The ALJ, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

Procedural History

The Parents, by and through counsel, filed a Due Process Hearing Request (Complaint) on September 14, 2007. The matter was referred to the Office of Administrative Hearings (OAH) and a Scheduling Notice was issued on September 18, 2007. The parties appeared for a prehearing conference on October 11, 2007, at which time they agreed to convene for hearing at the District's administrative offices on the date set in the Scheduling Notice.

The hearing was reported by Jennifer McLeod, certified court reporter.

Pursuant to WAC 392-172A-05110 and/or 34 CFR §300.515, the deadline for decision is November 28, 2007. The deadline was calculated on the basis of a 30-day period for informal resolution, and 45 days for conclusion of the hearing process.

ISSUES

The issues which are the focus of the Complaint are:

¹ In the interest of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parents," "Mother," "Father," and/or "Student."

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Superintendent of Public Instruction
Administrative Resource Services

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-1129
(206) 464-7095 1-800-845-8830
FAX 587-5135

- a. Whether the District's individualized education program (IEP) June 20, 2007, proposal for the Student's 2007-08 school year is appropriate.
- b. Whether the District has offered an appropriate educational placement for the Student for the 2007-08 school year.
- c. Whether the Parents are entitled to reimbursement for costs of a private educational placement for the 2007-08 school year.
- d. Whether the ALJ has authority to interpret and resolve issues of compliance with a previously executed resolution agreement.
- e. Whether the District has satisfied its obligations under the Individuals with Disabilities Education Act (IDEA) pursuant to compliance with the terms of the resolution agreement.

FINDINGS OF FACT

1. The Student resides in the District with her Parents. She has attended [REDACTED] since the beginning of the 2006-07 school year.
2. The Student attended [REDACTED] Middle School during the 2005-06 school year. She had previously been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and was entitled to accommodations under a §504² plan.
3. Immediately prior to commencement of the 2006/07 school year, the Parents notified the District of their intent to enroll the Student at [REDACTED]. They advised the District of concerns over the Student's school performance and the District's alleged failure to implement the §504 plan. Their letter included a request for reimbursement of the costs of the private placement. The Parents met with the District to discuss their concerns. The District agreed to complete a special education evaluation.
4. The evaluation was completed on November 9, 2006. The evaluation team determined that the Student was eligible for special education under the eligibility category of health impaired. The team recommended specially designed instruction in the areas of reading comprehension and behavior. Regarding behavior, the team identified executive functioning strategies as the specific area requiring specially designed instruction.
5. An IEP meeting was convened on January 22, 2007. District staff had presented a completed proposal to the Parents for discussion purposes. After discussion at the

² Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, 29 USC § 794.

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meeting, a final form was prepared for signature by the parties. The Parents took it home for review. The Mother returned the signature page with a notation that she did not agree that the program and services met the Student's needs.

6. The Parents filed a request for due process hearing complaining that the District's IEP had failed to adequately address the Student's diagnosed ADHD, her anxiety disorder, and her reading and writing deficits. The Parents sought an order directing the District to develop an appropriate IEP, to pay for evaluation costs, to provide compensatory services, and further sought reimbursement for the Student's private placement at [REDACTED]

7. The parties entered into a Resolution Agreement on April 25, 2007. According to the Agreement, the District agreed to pay the Parents the sum of \$12,500.00. Both parties agreed to meet to develop an IEP for the Student returning her to the District for the 2007-08 school year, with input from [REDACTED]. The Student had the option of attending [REDACTED] or [REDACTED] High School (hereinafter [REDACTED] and [REDACTED]). The parties agreed to visit the schools before the start of the 2007-08 school year for the purpose of meeting with appropriate staff to facilitate transition to the chosen school. The District also agreed to evaluate the Student's social/emotional needs with input from [REDACTED] staff and the Student's medical providers.

8. [REDACTED] is employed by the District as a mental health specialist. She was asked to evaluate the Student's social and emotional needs. She met with the Student at [REDACTED]. The Student was accompanied by the [REDACTED] administrator, at the request of the Mother and the Student. She also met with the Student's homeroom teacher and her counselor. The counselor indicated that he occasionally saw the Student when she requested an appointment. He employed a common problem-solving approach according to which the Student would be asked to explain the problem, discuss her choices, and describe how she planned to solve the problem. The counselor recommended the availability of three adults for the Student's consultation needs, positive reinforcements for socially appropriate behavior, and a predictable routine at school. [REDACTED] has implemented similar recommendations for other students in the District.

9. [REDACTED] prepared an additional page to the IEP completed on January 22, 2007. It described an annual goal and two short-term objectives for problem-solving to address anxiety provoking situations.

10. The Parents met with the Special Education Director and [REDACTED] for visits to [REDACTED] and [REDACTED] High Schools. The visits occurred on June 20 and 21, 2007. The problem-solving page was provided to the Parents. The Parents emphasized that the Student would require access to adults she trusted.

11. [REDACTED] and [REDACTED] each serve approximately 2,500 students. As a result of a recent boundary modification, [REDACTED] became the Student's resident high school for the 2007-08 school year.

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12. The Parents were not pleased with the staff's reception at [REDACTED]. The administrator did not assure them that the Student's program and counseling needs would be met. The Special Education Director agreed that [REDACTED] would not be a good match for the Student's needs.

13. The Assistant Principal at [REDACTED] had been a special education teacher for 15 years before assuming her administrative duties. To prepare for the visit she reviewed a copy of the January 22, 2007, IEP with the page addressing problem-solving attached. The [REDACTED] student body is diverse and the staff includes members skilled in problem solving strategies for students with disabilities. For students who experience anxiety over transition between classes, accommodations include staggered entry to, and exit from, class. The staff also try to create links with trusted adults, usually a counselor, and ensure that teachers are aware of accommodations for students in the class. Each classroom has a red notebook reflecting the students and their accommodations.

14. [REDACTED] classes are also organized to create an intimate educational experience for ninth and tenth graders. Organized in 'pods', students in these grades are separated into three groups of students and teachers. The students attend three core classes in closely situated rooms. The Assistant Principal assured the Parents that [REDACTED] could meet the needs of the Student.

15. At [REDACTED] the Student had developed an interest in drama. The special education teacher at [REDACTED] was involved in the drama program. The Assistant Principal and the Parents believed that the mutual interest in drama might form a basis for a trusted relationship with the Student.

16. After the visit at [REDACTED] the parties next met on June 26, 2007. The meeting was attended by the Parents, their attorney, and the Special Education Director and the attorney for the District. The Parents indicated that neither [REDACTED] nor [REDACTED] would be acceptable and stated their intention to maintain the Student's enrollment at [REDACTED]. They expressed their concern about the size of the two schools. After the Parents expressed their objection to both schools, the Special Education Director asked if the Parents would consider a program transitioning the Student from [REDACTED] to [REDACTED]. She suggested that the Student might remain at [REDACTED] for the first half of the year while she attended one class at [REDACTED].

17. The parties did not meet again. Shortly after June 29, 2007, the Parents paid a deposit to [REDACTED] for the Student's enrollment for the 2007-08 school year.

18. Counsel for both parties continued to confer. On July 23, 2007, the Parents' attorney notified them that the District had offered to pay one-half of the Student's tuition and costs at [REDACTED]. The Parents did not accept the offer.

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19. On August 21, 2007, the Parents formally requested a copy of the District's meeting notes from seven meetings occurring between September 15, 2006, and June 26, 2007. They also requested an opportunity to inspect and review the Student's educational records. The Parents enrolled the Student at [REDACTED] for the 2007-08 school year and subsequently filed their Complaint on September 12, 2007.

[REDACTED]

20. [REDACTED] is licensed as a private school and is located in Mercer Island, Washington. During the 2007-08 school year, there are approximately 67 students enrolled in grades six through twelve. Approximately 90 percent of the students are mildly or severely disabled. Some of the students attend pursuant to a contract for services with the resident school district.

21. [REDACTED] staff includes ten teachers, four administrators, a librarian, and a part-time school counselor. Eight of the teachers are certified by the State of Washington and one is endorsed in special education.

22. Students are assigned to a homeroom on the basis of chronological age. They attend classes according to their ability.

23. The Student attended [REDACTED] without an IEP. The school received copies of the Student's educational and medical records. The Student's diagnosed neurological and learning disorders have been considered to ensure that the Student's educational and behavioral needs have been met.

24. The Student's performance improved while at [REDACTED]. Initially, she relied heavily on contacts with the school counselor to address her anxiety issues. Her reliance on the counselor decreased during the year.

Evidentiary Discussion

25. The Parents presented evidence that, during the June 26, 2007, meeting, the Special Education Director conceded the District did not have an appropriate placement for the Student. They indicate that they requested reimbursement for the Student's expenses at [REDACTED] as a result of this concession. The evidence consisted of testimony from both Parents and a family friend and adviser. The Special Education Director testified that she acknowledged that [REDACTED] was not a good match for the Parents but denied that she said that the District lacked an appropriate placement. She believed that [REDACTED] was appropriate for the Student's needs and anticipated that the Parents would announce their choice of the two schools at the June 26 meeting. She discussed a transition alternative after the Parents had rejected the placements and indicated their intent to continue the Student's enrollment at [REDACTED]. She suggested the alternative to possibly

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address the parents' feelings of broken trust arising from the Student's attendance at [REDACTED] Middle School. In resolving these conflicts, the demeanor and motivation of the witnesses was considered, as well as the logical persuasiveness of the parties' positions. I find that the District's testimony and evidence is more persuasive than the testimony and evidence presented by the Parents.

CONCLUSIONS OF LAW

1. The IDEA and its implementing regulations authorize federal funding 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. The IDEA is implemented by federal regulations and Chapter 392-172A WAC.
2. Pursuant to the IDEA, students with disabilities are entitled to a free appropriate public education (FAPE). FAPE consists of both the procedural and substantive requirements of the IDEA. The IDEA defines FAPE as instruction specifically designed to meet the unique needs of a student, supported by such services as are necessary to permit a student 'to benefit' from the instruction. 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 general education, and comport with a student's IEP. *Henrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 103 S. Ct. 3034, 3041 - 3042 (1982).
3. Violations of procedural requirements of the IDEA will result in a denial of FAPE only if the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 CFR §300.513.
4. The ALJ has jurisdiction to enter a decision in this matter pursuant to WAC 392-172A-05080 through WAC 392-172A-05105. Since the Parents initiated these proceedings, they bear the burden of proving a right to relief. See *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

The IEP Process

5. The Parents complain that the District failed to propose an IEP or appropriate placement for the Student's 2007-08 school year. The District argues that the IEP negotiated on January 22, 2007, with the problem-solving amendment proposed by [REDACTED] met its obligation to propose an appropriate IEP.
6. The evidence shows that the IEP process was not completed before the commencement of the 2007-08 school year. The process began after the November 9,

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2006, evaluation with an IEP meeting convened on January 22, 2007. After the meeting, the District presented a final version to the Parents for signature. The Parents rejected the program and services on January 31, 2007. After a request for due process hearing was filed, the parties entered into a Resolution Agreement committing to a placement at either [REDACTED] or [REDACTED] with an IEP meeting providing for the Student's return to the District for the 2007-08 school year.

7. The District complied with the terms of the Resolution Agreement by completing an evaluation of the Student's social/emotional needs and included consideration of the services provided by [REDACTED]. It proposed goals and objectives addressing the Student's anxiety disorder, and was prepared to deliver services substantially similar to those provided by [REDACTED]. It arranged for visits to [REDACTED] and [REDACTED].

8. The Parents rejected the placements and announced their intention to maintain the Student's enrollment at [REDACTED]. Their decision foreclosed further development of an IEP returning the Student to the District.

The District's Proposed Placement/Resolution Agreement

9. The parties agree that this matter does not involve a jurisdictional issue regarding enforcement of the terms of the Resolution Agreement. However, the Resolution Agreement is relevant to an evaluation of the District's compliance with the IDEA. The Resolution Agreement constituted a settlement of the Parents' initial complaint and request for hearing. The evidence shows that the District proposed a placement for the Student consistent with the terms of the Resolution Agreement. [REDACTED] would have provided an appropriate setting for the Student's educational services. [REDACTED] is the resident school for the Student's neighborhood. Using the pod system, it provides a small community setting within the large school environment. Regarding counseling, the evidence shows that the Student needs frequent access to a trusted adult with some assistance by a skilled counselor. Her reliance on the counselor has decreased. The administration at [REDACTED] has experience meeting these needs. Additionally, the special education teacher at [REDACTED] shared an interest in drama with the Student. The shared interest would provide a possible basis for a trusting relationship.

10. I conclude that the District met its obligations under the IDEA by complying with the terms of the Resolution Agreement and proposing an appropriate placement. The Parents have not established a denial of FAPE where they foreclosed further development of an IEP by rejecting the proposed placement.

The Parent's Right to Reimbursement

11. The right to reimbursement for a unilateral private placement has been recognized as an equitable remedy available for denials of FAPE. See *Burlington School Comm. v.*

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Massachusetts Dep't of Educ., 471 U.S. 359, 369 (1985). As a form of compensatory education, 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 (9th 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 (9th Cir. 1994).

12. The right to reimbursement has also been specifically addressed in the IDEA and its implementing regulations since it was reauthorized in 1997. See 20 USC §1412(a)(10)(C)(ii). As reflected in WAC 392-172A-04115, formerly WAC 392-172-231, the right is available to parents of a "student, who previously received special education and related services under the authority of a school district," where an ALJ has determined that a district failed to offer FAPE in a timely manner and has also found that the private placement is appropriate. It may be reduced or denied upon failure to provide appropriate notice of intent to enroll a student in a private placement at public expense, or upon a judicial finding of unreasonableness with respect to actions taken by the parents. WAC 392-172A-04115(4)(a) - (c).

13. The District has argued that the Parents should be denied reimbursement for their costs at [REDACTED] because the Student has never received special education and related services. The issue raised by the District has been most recently considered in a case decided by the Second Circuit of United States Courts of Appeal. In *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2d cir. 2006), the court considered an argument that the right previously recognized in the *Burlington* case had been limited by the language of the statute and implementing regulations. The court held that the language of the statute did not unambiguously restrict reimbursement where a court or ALJ found that it was "appropriate" relief pursuant to 20 USC §1415(i)(2)(C)(iii).

14. The court in *Frank G.* noted a contrary decision by the First Circuit in *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004). The *Amy N.* case involved dissimilar facts. The parents in that case removed their child from the public school system with no notice to the district. In *Frank G.*, as in this case, the parents and the district had engaged in extensive discussions regarding the student's special education needs before the student was privately placed.

15. I conclude that the discussion of the *Frank G.* case is more persuasive. Its reasoning was considered and affirmed by an equally divided United States Supreme Court in the case of *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1, 169 L. Ed. 2d 1 (2007). The restrictive language of 20 USC §1412(a)(10)(C)(ii) and its implementing regulations is not a threshold requirement for a right of reimbursement.

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16. I also conclude that the Parents are not entitled to reimbursement as a compensatory remedy. While [REDACTED] has successfully addressed the Student's educational needs, the evidence does not show that the Student was denied FAPE for the 2007-08 school year. Additionally, the Parents' conduct foreclosed completion of the IEP process. It would be inequitable to the District to order reimbursement under these circumstances.

Settlement Offers

17. In arriving at my decision in this matter, I have considered evidence that the District offered to partially reimburse the Parents after the June 26 meeting. This offer was communicated to the Parents after counsel for both parties had conferred, and it appears to have been made as a settlement offer. Offers to compromise a disputed claim are ordinarily not admissible in a trial of the underlying issues of liability. See ER 408. Settlement offers involve consideration of tactical considerations independent of liability and have little evidentiary value in evaluating the issues in this matter.

Arguments Considered

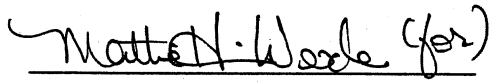
18. I have considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

IT IS HEREBY ORDERED that:

1. The Parents have not established a denial of FAPE. The District proposed an appropriate placement for the 2007-08 school year and has complied with its obligations under the IDEA;
2. The Parents' request for reimbursement of the costs of a private placement for the 2007-08 school year is denied;
3. The Parents' request for additional relief is denied.

Dated at Seattle, Washington this 28th day of November, 2007.


ROBERT P. KINGSLEY
Administrative Law Judge
Office of Administrative Hearings

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FAX 587-5135

APPEAL RIGHTS

RECONSIDERATION

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the administrative law judge has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the administrative law judge at his/her address and served on each party to the proceeding. A copy of the petition must be provided to OSPI, Administrative Resource Services. The filing of a petition for reconsideration is not required before filing a Petition for Review or bringing a civil action under the appeal provisions of the Individuals with Disabilities Education Act (IDEA).

PETITION FOR REVIEW

This matter may be further appealed to a court of law pursuant to RCW 34.05.542. A Petition for Judicial Review of this decision must be filed with the court and served on OSPI, Administrative Resources Services; the Office of the Attorney General; all parties of record; and this office within 30 days after service of the final order. If a petition for reconsideration is filed, this 30-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.

RIGHT TO BRING A CIVIL ACTION

Pursuant to 20 U.S.C. §1415(i)(2) of the IDEA, any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be filed in court within 90 days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this 90-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local, state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 11/14/07

Parents

[REDACTED]

[REDACTED] Director, Special Education
Kent School District
12033 SE 256th Street
Kent, WA 98030-6643

Randal Brown, Attorney at Law
25913 163rd Ave SE
Covington, WA 98042

David Hokit, Attorney at Law
Curran Law Firm
555 W Smith St / PO Box 140
Kent, WA 98035

cc: Administrative Resource Services, OSPI
Barb Cleveland, Executive Assistant, OAH
Janice E. Shave, ALJ, OAH/OSPI Caseload Coordinator

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