PORT GAMBLE S'KLALLAM TRIBE vs. NORTH KITSAP SCHOOL DISTRICT

Docket No. 95-67-O

Appearances:

Russell W. Busch, Esq., Evergreen Legal Services, of Seattle, Washington, for Port Gamble S'Klallam Tribe.

Clifford D. Foster, Jr., Esq., Vandeberg Johnson & Gandara, of Tacoma, Washington, for North Kitsap School District.

Before: Judge Richard F. O'Hair

## FINDINGS OF FACT AND RECOMMENDATIONS

In accordance with the Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 8004 (to be codified at 20 U.S.C. § 7704)See footnote 1[1] and 34 C.F.R. Part 223, Subpart D, the Hearing Examiner hereby submits his Interim Findings of Fact and Recommendations concerning appropriate remedial action to the Assistant Secretary for Elementary and Secondary Education.

## PRELIMINARY STATEMENT

This proceeding originated with a complaint dated March 31, 1995, filed by the Port Gamble S'Klallam Tribe (Tribe) against the North Kitsap School District, Washington (District). This complaint alleges that the District violated special impact aid provisions found in Pub. L. No. 103-382, § 8004. That statute provides that a local educational agency (LEA) that receives federal impact aid because it educates Indian children who reside on or have a specified affiliation with tax exempt federal property, such as Indian reservations, must establish and implement certain policies and procedures. Specifically, these policies and procedures must ensure that: (1) Indian children educated by the LEA participate on an equal basis in the school program with all other children, (2) the local Indian tribes and parents of the Indian children are afforded an opportunity to present their views on the programs and activities as well as the needs of their children, (3) parents and Indian tribes are consulted and involved in the planning and development of educational programs, (4) relevant applications, evaluations, and program plans are adequately disseminated to the tribes and parents of Indian children, and (5) parents and Indian tribes are afforded an opportunity to present their views to the LEA regarding its general educational program. Pub. L. No. 103-382, § 8004(a); 34 C.F.R. Part 223, Subpart B.

In this case, the Tribe's complaint alleges that the District has:

1. failed to establish and follow specific "policies and procedures," required by Pub. L. No. 103-382, § 8004(a), and 34 C.F.R. §§ 223.10 & 11, to ensure that--

a. Indian children participate in programs and activities on an equal basis;

b. the Tribe is provided a meaningful opportunity to present its views on the District's programs and activities, including an opportunity to make recommendations on the needs of its children and how the District may help such children realize the benefits of such programs and activities;

c. the Tribe is consulted and involved in planning and developing the District's programs and activities;

d. relevant applications, evaluations, and program plans are disseminated to the Tribe; and

e. the Tribe is given a meaningful opportunity to present its views to the District regarding the District's general educational program.

2. failed to adhere to the Policies and Procedures it has adopted, in that the Intertribal Parent Education Committee has not been adequately informed or involved concerning the requirements of Pub. L. No. 103-382, § 8004 and 34 C.F.R. Part 223.

3. failed to adopt specific procedures for (1) assessing the meaningfulness of Indian input; and (2) modifying its policies and procedures, if necessary, based on that input, as required by 34 C.F.R. § 223.11(e).

In its reply to these charges, the District denied most of these allegations. In addition to asserting that the consultations and meetings requested in the Tribe's request for relief are provided for in the most current Board Policy and Procedure, the District also contended that the Tribe's allegations of discrimination are not properly raised in this forum.

On April 12, 1995, the Assistant Secretary for Elementary and Secondary Education received and accepted the Complaint and granted the Request for a Hearing pursuant to the appropriate regulations. Thereafter, the undersigned was appointed as Hearing Examiner. 34 C.F.R. § 223.24 and § 223.33. After concluding pre-hearing matters, a hearing was scheduled for and convened on May 10-11, 1995. At the hearing, counsel for the Tribe requested the opportunity to submit a post-hearing brief. It was agreed that the Tribe would submit a post- hearing brief by June 2,

1995, that the District would submit its post-hearing brief by June 9, 1995, and that the Tribe would have the option of submitting a reply brief by June 16, 1995.

These briefs were timely filed.

## FINDINGS OF FACT

At the hearing and in its post-hearing briefs, the Tribe argued that (1) under the District's current Indian Policies and Procedures (IPP), the Tribe is not involved in the District's processes to the degree required by law, (2) even if the amended IPP does meet the legal requirements, the District's actual practices do not adequately include the Tribe, and (3) the tribunal should retain a supervisory position to ensure that the District complies with its legal requirements.

The District replies that (1) its current IPP complies with the statutory requirements, (2) the District has provided the Tribe, in practice, the opportunity for comment, consultation, and information to allow meaningful participation in the development of District educational programs as section 8004(a) requires, and (3) the District's non-compliance before 1993 with certain procedural requirements of the former section 874 not only has been cured, but also did not cause the Tribe any harm warranting exercise of continuing supervisory jurisdiction by the Department of Education.

### I.

Public Law No. 103-382, § 8004(a) states as follows:

> (a) IN GENERAL.--A local educational agency that claims children residing on Indian lands for the purpose of receiving funds under section 8003 shall establish policies and procedures to ensure that--
>
> (1) such children participate in programs and activities supported by such funds on an equal basis with all other children;
>
> (2) parents of such children and Indian tribes are afforded an opportunity to present their views on such programs and activities, including an opportunity to make recommendations on the needs of those children and how the local educational agency may help such children realize the benefits of such programs and activities;
>
> (3) parents and Indian tribes are consulted and involved in planning and developing such programs and activities;
>
> (4) relevant applications, evaluations, and program plans are disseminated to the parents and Indian tribes; and
>
> (5) parents and Indian tribes are afforded an opportunity to present their views to such agency regarding such agency's general educational program.

In response to the previous version of this legislation, the District adopted an IPP. I will address the issue as to whether the District's current IPP, adopted on March 23, 1995, satisfies each of these statutory requirements.

Equal participation

At the hearing, counsel for the Tribe stated that jurisdiction over the Tribe's allegations as to the lack of equal participation by Indian children in District programs had been transferred to the Office of Civil Rights. Therefore, no further discussion of this requirement is necessary here.

Opportunity for parental comments and recommendations

The Tribe argues that the opportunities for parents and Indian tribes to present their views on the District's programs are limited because the District's IPP authorizes the District to provide only minimal information. The Tribe contends that section 3.A. of the IPP, found at Attachment A to these Findings and Recommendations, does not provide for a complete exchange of information describing Impact Aid-funded programs and activities or the District's general program, and that the Tribe is forced to react only to whatever materials the District chooses to make available. In response, the District argues that section 3.A. (1)-(4) requires the District to make available to the Tribe a wide range of material, with which it contends that it complies, and that the statute does not require the District to prepare custom reports for the Tribe on demand.

The language of section 3.A. specifically references Impact Aid funds and imposes upon the District the requirement to provide to the Tribe, and to any other person on written demand, information regarding the participation of Indian children in District programs supported by Impact Aid funds. Although sections (1) through (4) identify a wide range of materials that the District must provide to such interested parties, they are prefaced with the statement that "(T)his information shall include, but not be limited to the following," thus providing for the submission of materials other than those specifically listed. I agree with the District that Section 8004(a) requires the dissemination only of relevant applications, evaluations, and program plans and does not entitle an Indian tribe to specialized reports on demand. I find that the District's current IPP requires the District to provide substantial information to the Tribe and to other interested parties and is in compliance with the statutory requirement that it ensure that relevant applications, evaluations, and program plans are disseminated to the parents and Indian tribes.

The Tribe also claims that the current procedures directly constrain the Tribe's ability to express views and make recommendations. Specifically, the Tribe objects to the use of the word "may" in section 3.C. of the IPP, arguing that this places the process for joint meetings between the District and the Tribe entirely at the discretion of the superintendent, who "may" appoint representatives to participate in joint meetings "as he or she deems necessary." The District contends that the first sentence of section 3.C. goes beyond the minimum requirements of § 8004(a) in that it adds discretionary authority for the District to conduct specialized studies and prepare reports in response to specific tribal requests. At the hearing, both Gerald Brock, the District's assistant superintendent for financial services and operations, and Robert Ellsperman, the District's superintendent, testified that the references to "joint meetings" in the second sentence of section 3.C. were not referring to the "joint meetings" discussed in the first sentence of section 3.C. Mr. Ellsperman testified that this section has two parts, in which the first part provides for potential meetings or reviews that may occur, whereas the second part provides for systematic dialogue wherein if the Tribe requests meetings, they shall occur.

I find these explanations by the District, as well as the language of section 3.C. in general, to be troubling. The language of section 3.C. is inherently contradictory. The first sentence clearly

gives the superintendent discretion as to whether he or she appoints District representatives to participate in "joint meetings" with representatives of the Tribe. The second sentence begins with the phrase, "(I)f requested by a Tribe, such joint meetings shall occur not less than three times a year...." (emphasis added). This language implies that the District does not have the discretion as to whether the joint meetings referenced in the second sentence will occur, because they "shall occur" if requested by a tribe. Nonetheless, the use of the word "such" implies that the mandatory joint meetings discussed in the second sentence are the same as the discretionary joint meetings discussed in the first sentence.

At the hearing, Mr. Ellsperman testified that he would entertain breaking section 3.C. into two parts in order to avoid the appearance that the superintendent has discretion in providing the joint meetings discussed in the second sentence of section 3.C. In its brief, the District requests that the tribunal's conclusions reiterate the mandatory duty that section 3.C. imposes upon the District to meet, consult, and provide opportunities for joint or separate recommendations from the Tribe and District officials regarding the District's educational program. I agree. For the purposes of this proceeding, I hold that the joint meetings discussed in the second sentence of section 3.C. are mandatory upon the District and that if the District fails to hold them upon request of the Tribe, the District shall be in violation of § 8004(a). Furthermore, I recommend that the District amend its IPP in this manner as soon as practicable.

Mr. Ellsperman also noted that section 5 contains an open-ended invitation to the Tribe. That section states that, "(T)he above procedures are not intended to be the exclusive means for Indian Tribes, parents, or other interested persons to provide comments and recommendations on these matters." The section states that comments or suggestions are welcome at any time and can be made in writing to District officials, at public comments sessions at board meetings, or by other means. For these reasons, I cannot agree with the Tribe's assertions that the current procedures directly constrain the Tribe's ability to express views and make recommendations and that the Tribe is unable to effectively make recommendations at the special school board meeting discussed in section 4.C. because of insufficient information. I find that the current IPP complies with the requirements of § 8004(a)(2) and (5).

Consultation of parents and Indian tribes

The Tribe asserts that section 3.B. provides inadequate assurances that the Tribe will be consulted and involved in planning and developing programs and activities through District committees and task forces because these groups must include "citizen and parent members" and must "undertake planning, evaluation, or policy development tasks concerning educational programs." In response, the District contends that the second sentence of section 3.C. goes beyond section 3.B. because it provides for joint meetings between representatives of the Tribe and the District at least 3 times per year.

While the language providing parents and Indian tribes the opportunity to participate in District committees and task forces, "when such groups include citizen and parent members," may be merely an attempt to include Indian tribes and parents in committees when other parents are represented, I agree with the Tribe that this language is potentially limiting and urge the District to delete it. As the Tribe correctly notes, "the tribe has an interest in the child which is

distinct from but on a parity with the interest of the parents." *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 52 (1989), quoting with approval *In re Adoption of Holloway,* 732 P.2d 962, 969-70 (Sup. Ct. of Utah, 1986). Thus, it is not enough for the District simply to provide Indian parents the opportunity to participate on such District committees and task forces only in their role as parents. The District must consult with the Tribe directly.

As for the language requiring such participation on committees or task forces that "undertake planning, evaluation, or policy development tasks concerning educational programs," I find this to be an innocuous attempt to broadly include all committees or task forces related to educational programs. The language is descriptive, rather than limiting, and therefore I do not find it to infringe upon the rights of the Tribe.

Other parts of the District's IPP impose additional duties upon the District to consult parents and Indian tribes and involve them in planning and developing programs and activities. As discussed above, I held that the second sentence of section 3.C. confers a mandatory duty upon the District to hold joint meetings with the Tribe. These meetings are to be held in October, in February, and at the board meeting in the spring. As the District notes, this schedule is essentially similar to the schedule requested by the Tribe in the complaint that initiated these proceedings. In light of this, and because both section 5 and the first sentence of section 3.C. provide for additional joint meetings and consultations, I find that the District's IPP satisfies the requirements of § 8004(a)(3).

Dissemination of relevant applications, evaluations, and program plans

Although the Tribe does not directly challenge the compliance of the District's IPP with § 8004(a)(4), which relates to the dissemination of relevant applications, evaluations, and program plans, the Tribe indirectly challenges the District's dissemination of information because of a perceived lack of opportunity for parental comments and recommendations. § 8004(a)(2). Therefore, the discussion above under that section, wherein I found that the District's current IPP requires the District to provide substantial information to the Tribe and to other interested parties and is in compliance with § 8004(a)(4), is equally applicable here.

Opportunity for parents and Indian tribes to present views regarding general educational program

Again, the discussion above relating to the Tribe's complaint that the District fails to adequately provide opportunity for parental comments and recommendations is equally applicable here.

**II.**

Both in its briefs and in much of the testimony that it elicited at the hearing, the Tribe repeatedly contends that the District was in non-compliance with the requirements of Public Law 81-874 ("the 874 requirements") prior to 1993, with the corollary, implicit assumption that the District will not comply with its current IPP either. While arguing that it has satisfied most of the legal requirements for a number of years and that there has been an ongoing recent history of substantial involvement, the District conceded that it did not comply with the 874 requirements

prior to 1993. The District contends that since 1993, it not only has attempted to develop policies and procedures that meet the facial statutory requirements, but also has changed its procedures to satisfy the Tribe. According to the District, both sides have failed to communicate as effectively as they should. The District claims that the central issue is whether it has engaged in a good faith effort to satisfy the legal requirements, and the District states that it has done so because it has satisfied the intent of the regulations by attempting to establish a meaningful dialogue.

While I share the Tribe's concern over the District's past non-compliance, for the purposes of this proceeding, it is irrelevant whether the District was in compliance prior to 1993, except to the extent that such non-compliance has continued or has created an ongoing harm. The issue before me is whether the District's current actual practices are in compliance with the statutory and regulatory requirements. For the reasons discussed below, I find that they are.

The evidence as to whether the District's past non-compliance has created an ongoing harm is inconclusive at best. At the hearing, the Tribal witnesses testified as to the relatively poor performance of Indian children in the District's programs compared to non-Indian children. Witnesses also testified, however, that education was not the Tribe's top priority prior to 1993, but was only its fifth or sixth priority. Additionally, it is important to note that the statute requires only that the District establish policies and procedures to ensure that Indian children participate on an equal basis. It does not guarantee equal results. If the District has established and followed policies and procedures that comport with the statute, but the affected children do not perform as well as other children for whatever reason, the District cannot be held to be in violation of the statute solely on that basis.

As to whether the District's current actual practices are in compliance with the legal requirements, despite the Tribe's complaints both in its briefs and at the hearing that the District has not been responsive to the Tribe's wishes, several of the Tribe's witnesses at the hearing acknowledged that the District has responded to the Tribe's concerns over the past year and a half. For example, Ted George, a member of the Tribe with an extensive background in the field of education, acknowledged that changes to the IPP have occurred because of the Tribe's input. Other witnesses also acknowledged that members of the Tribe have been members of committees that interviewed job applicants for various positions with the District, including the position of school principal. Witnesses also testified to numerous ongoing discussions and interactions between the District and the Tribe. The overall picture painted at the hearing was not one of a recalcitrant school district that refused to work with the Tribe, but rather one of ongoing discussions and negotiations that may have suffered from miscommunications at times. Although the District may not have adopted all of the Tribe's suggestions for its current IPP, this is not required under the statute or the regulations.

The Tribe also alleges that the District has used the Indian Parent Education Committee (PEC) as an intermediary or “buffer” between the Tribe and the District, rather than interacting directly with a tribal representative. While the District's 1993 IPP provided for the PEC, that committee is required by other statutes. In response to the Tribe's concerns on this matter as expressed through various discussions between the parties, the IPP adopted in 1993 also specifically provided for the use of a joint P.L. 81-874 committee to address issues related to the District's funding under this statute. The Tribe subsequently indicated that it wanted to work directly with

the District, rather than through a committee. In accordance with the Tribe's wishes, the joint P.L. 81-874 committee was removed from the IPP adopted on March 23, 1995, which provides for consultation directly with Indian Tribes. Overall, the evidence does not demonstrate that the District is using the PEC as a "buffer" between itself and the Tribe.

The Tribe also alleges that a draft of the 1995 IPP was delivered to them too late for effective tribal review. In its November 29, 1994, letter to the Tribe, the District states that because P.L. 81-874 had been replaced by P.L. 103-382, the District's IPP should be reviewed for compliance. Although some of the communications from the District to the Tribe requested responses within a relatively short time frame, both the letters themselves and the testimony of witnesses at the hearing reveal that the District believed that after receipt of its blank impact aid application form from the Department, the District had only 30 days to submit its completed application, including its amended IPP. Under these circumstances, the District's request for quick responses appears reasonable, and the Tribe appears to have been informed and involved in the process of amending the District's procedures.

In sum, I find that the District's current actual practices are in compliance with both its IPP and the statutory and regulatory requirements. Nonetheless, despite the overall pattern of compliance with § 8004, one area of concern is the fact that no representatives of the Tribe were included on the District's most recent Strategic Planning Committee. In its reply brief, the District describes this as an "oversight" that it "sincerely regrets." The District is strongly advised to prevent such oversights in the future.

**III.**

I believe that the complaint procedures provided for in § 8004 contemplate a situation involving extreme non-compliance by an LEA, fraudulent or otherwise, which demands immediate intervention by the Department. I do not find such an extreme scenario in this instance, but rather the development of not uncommon idealistic, and sometimes unrealistic, expectations of adversaries, one of whom has just discovered new responsibilities and the other has discovered new rights. With time and perseverance, the views of both parties will moderate toward the center and they will reach an accommodation.

Although frequently mentioned by the Tribe, I give little weight to the admitted minimal compliance by the District with the procedures required by § 8004, and its predecessor, prior to 1993. During that era, both the District and the Tribe were ignorant of the legislative requirements, and little can be accomplished by dwelling on that situation. However, with the District's discovery of their non-compliance, followed by concerted efforts to adopt and implement an appropriate IPP, I believe we must overlook the past and concentrate on current attempts at compliance. From this vantage, I see a genuine desire by the District to meet the requirements of § 8004, as exemplified by the several refinements of the District's IPP and its application of these guidelines to its daily activities. Both parties are sincere in their concerns for enhancing opportunities for Indian education and I commend both for the increased dialogue between them. I was somewhat disappointed, however, that this dialogue appeared to cease with the submission of the current complaint to the Assistant Secretary, because I see a continuation of that dialogue process as the course with the most beneficial possibilities for both parties. With

regard to the conduct of each party, I think each can modify its present operations to take account of the obligation for each to more fully appreciate the other party's needs and abilities.

To this end, the District must be more aware of the Indian presence and encourage more input from the Tribe. This should include inviting a tribal presence in every committee and task force created by the District, thus leaving it to the discretion of the Tribe as to whether it believes it would be beneficial to have a representative participate in such a committee or task force. Furthermore, the District should ensure that the Tribe is on every mailing/telephone list and is contacted as much in advance as possible when District committee meetings are to be conducted. Once again, the Tribe can decide which of those meetings a representative should attend. Additionally, when the District is preparing revisions of the IPP, Impact Aid applications or other relevant documents and Tribal input is expected to be sought, sending a draft of the proposed document to the Tribe as far in advance as possible is another method by which the Tribe and the District can garner the most thoughtful input and consideration of the proposal. The mechanism to accomplish these recommendations is in existence; it only need be conscientiously exercised.

The representatives of the Tribe are to be commended for their earnest desire and unselfish devotion to securing the best education possible for their students. Here, too, there is room for improvement. I believe they now acknowledge that the District does not have to provide them with an Impact Aid funds accountability and recognize that these funds are deposited in the District's general operating fund account to be spent as the District thinks best. However, with respect to their requests for miscellaneous data, reports, and other such District information, the Tribe appears to have the attitude that any such requests should be acted upon immediately by the District and that anything short of that amounts to a repudiation of the request. This reaction is not realistic, particularly when the District does not have the requested data readily available or in the format the Tribe is requesting. This information exchange process will only be improved when the Tribe becomes better educated on what reports the District can provide with minimal effort and the District is informed of the true needs/desires of the Tribe. To enhance this process, representatives of the two should meet to discuss what information is desired, what information is now available, and what information programs can be modified to meet the needs. The Tribe also needs to be sensitive to the additional workload these information requests place on the District. Often these requests are new, additional requirements for the District and for which current employees may not be trained or which exceed the present scope of their duties. These problems, if they exist, must be identified and brought to the attention of the Superintendent; the vehicle for this relay of information is already included in the IPP. Overall, the Tribe should be both patient and persistent in its attempt to provide input, as well as receive information, about the general education of the children of its members.

**IV.**

The Tribe requests that this tribunal retain a supervisory position to ensure that the District complies with its legal requirements. The District opposes ongoing supervisory authority for the judge. Inasmuch as I have found that both the District's current IPP and its actual practices are in compliance with the statutory and regulatory requirements, I find it unnecessary and inappropriate for this tribunal to retain further jurisdiction over this matter. If, however, the District fails to carry out the duties required under the law and its IPP or to make the changes

recommended in this decision, the Tribe is entitled to bring another Indian Complaint against the District, at which time the history of the District's non-compliance and the recommendations in this case would be appropriate factors for that tribunal to consider in rendering its opinion.

CONCLUSION AND RECOMMENDATIONS

Based upon the foregoing discussion, I recommend that the Assistant Secretary for Elementary and Secondary Education find that 1) the District's current IPP is in compliance with the applicable legal requirements, 2) the District's current actual practices are in compliance with both its IPP and the applicable legal requirements, and 3) the Department of Education should not retain supervisory jurisdiction over this matter.

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Judge Richard F. O'Hair

Issued: July 14, 1995
Washington, D.C.

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S E R V I C E

A copy of the attached document was sent to the following:

Assistant Secretary Thomas W. Payzant
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A copy of the attached document was sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED** to the following:

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Footnote: 1 [1]*These provisions formerly were contained at 20 U.S.C. §§ 240(b)(3)(C) and 1221e-3(a)(1).*