



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101
(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov

MAILED

JAN 16 2020

OAH - SEATTLE

January 16, 2020

Parent



Maureen Lyden, Director, Special Programs
East Valley School District
3830 N Sullivan Road Bldg. 1
Spokane Valley, WA 99216

Gregory L. Stevens, Attorney at Law
Stevens Clay PS
421 W. Riverside, Suite 1575
Spokane, WA 99201-0402

In re: East Valley School District
OSPI Cause No. 2019-SE-0030
OAH Docket No. 02-2019-OSPI-00703

Dear Parties:

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

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

Anne Senter
Administrative Law Judge

cc: Administrative Resource Services, OSPI

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

MAILED

JAN 16 2020

IN THE MATTER OF:

EAST VALLEY SCHOOL DISTRICT

OSPI CAUSE NO. 2019-SE-0030

OAH - SEATTLE

OAH DOCKET NO. 02-2019-OSPI-00703

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

تتضمن هذه الوثيقة معلومات مهمة بخصوص جلسة الاستماع الخاصة بك. إذا لم تحضر أو لم تقم باتخاذ إجراء آخر،
فيمكن أن تفقد حقوقاً مهمة. يرجى الاتصال على الرقم 1-800-845-8830 إذا كنت بحاجة للمساعدة على فهم هذه
الوثيقة.

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Spokane Valley, Washington, on November 12, 13, and 14, 2019. The final day of hearing, for purposes of the presentation of oral argument, was held by telephone on December 17, 2019. The Parent of the Student whose education is at issue¹ appeared and represented herself. The East Valley School District (District) was represented by Gregory Stevens, attorney at law. Maureen Lyden, District director of special programs, also appeared. An interpreter was present for the Parent.

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on February 19, 2019. The Complaint was assigned Cause No. 2019-SE-0030 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered February 21, 2019, which assigned the matter to ALJ Anne Senter. The District filed its Response to the Complaint on March 7, 2019.

The hearing was continued a number of times for varying reasons, including to allow the parties to participate in mediation, for the Parent to attempt to acquire an attorney to represent her or another individual to accompany and advise her, and to accommodate the District's schedule.

Due Date for Written Decision

As set forth in the Third Prehearing Order, the due date for a written decision in this matter was continued to 30 days after the close of the record at the District's request. As the record

¹In the interests of preserving the family's privacy, this decision does not name the parent or student. Instead, they are each identified as "Parent," "Mother," or "Student."

closed on the last day of hearing, December 17, 2019, the due date for a written decision is **January 16, 2020.**

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 - D25; and

Parent's Exhibits: P1 - P2, and P4 - P19.

Witnesses Heard (in order of appearance):

The Parent;
Tristan Fitzgerald,² District school psychologist;
Abigail McAllister, World Relief, cultural mentor/friend of Parent;
Suzanne Savall, District principal;
Jeff Kalles, Lilac City Behavioral Services;
Matt Thurman, District paraeducator;
Kevin Kirkpatrick, District school counselor;
Brenda Vandouris, District school psychologist;
Stephanie Watson, former District assistant principal;
Megan Johns; District special education teacher; and
Maureen Lyden;³ District director of special programs.

ISSUES

As set forth in the Sixth Prehearing Order, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) beginning February 20, 2017, by:
 - i. Failing to appropriately provide interpreters for the Parent at Individualized Education Program (IEP) meetings and other meetings for the Student;
 - ii. Failing to appropriately provide documents regarding the Student's education in the Parent's language;
 - iii. Punishing the Student in the fall of 2018 by requiring him to stay in a small room near the office for two or three days;

² The Parent sometimes referred to Mr. Fitzgerald, as "Mr. Vicks." See, e.g. Parent, Tr. 57. District documents sometimes refer to Mr. Fitzgerald as "Mr. Fitz." See, e.g., Exhibit P9.

³ The Parent sometimes referred to Ms. Lyden as "Ms. Lori." See, e.g., Savall, Tr. 261-62 (Parent's question).

- iv. Inappropriately suspending the Student for more than ten days in or around November 2018;
 - v. Requiring the Student to receive his education one-on-one after returning from his suspension;
 - vi. Failing to allow the Student to attend school full time after returning from his suspension;
 - vii. Teachers taunting the Student, using harsh words with him, and calling the police;
 - viii. Physically punishing the Student by pulling a paper away from him, hurting his arm;
- b. And, whether the Parent is entitled to her requested remedies:
- i. Full-time placement of the Student at a school outside the District that will consider his needs, including his cultural needs (Broadway, Center Valley, University, Smith, or Progress);
 - ii. "Punishment" for the District;
 - iii. Compensation for the Student to assist him in catching up to his grade level;
 - iv. And/or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. The Parent and Student are from Iraq and speak Arabic as their first language. The Parent also learned English in school and can write in English. Parent, Tr. 92-93. She wrote her due process hearing request in both Arabic and English, with her sister's assistance with the English. *Id.* at 92-93. She studied law in Iraq. *Id.* at 94. That program was conducted in Arabic. Parent testimony.

2. The Student suffered significant trauma growing up. The Student observed armed men attack the family's home in Iraq. Parent, Tr. 53. Additionally, the Student was physically abused by his father, who he later saw assassinated. *Id.* at 54. He was also struck by a teacher when attending school in Turkey. *Id.* The Student lived in multiple countries before coming to the United States and did not consistently receive an education. *Id.*

3. When the Student first entered the District, he attended Trentwood Elementary (Trentwood). Parent, Tr. 46. The District initiated a special education referral for the Student while he was attending Trentwood, but it was discontinued when the Parent withdrew him to be homeschooled in September 2017. Exhibit D18. The Parent withdrew the Student because she had concerns about his education there that are not relevant to this case. Parent, Tr. 45-46.

4. The Student returned to school in the District in January 2018, when he was in the fourth grade. Vandouris, Tr. 434. He attended Otis Orchard Elementary (Otis Orchard), a “trauma school,” with building-wide protocols for trauma interventions for all students and specially-trained staff. Savall, Tr. 211-12.

5. The Student started school at Otis Orchard on a half-time basis to get him acclimated to school since he had not been attending since September. Vandouris, Tr. 435. The Student was initially in general education classes with one-on-one support. Savall Testimony. Various staff members, including the principal, rotated into the classroom to work with him because of his challenging behaviors. *Id.*

6. The District initiated positive support plans for the Student in January, February, and April 2018. Exhibits D15, D16, D17. During the spring of 2018, the Student attended the BEST program at Sacred Heart Hospital. Vandouris, Tr. 439-40. The BEST program is a five-week program working on behavior regulation, which includes a psychological evaluation and a physician available to address medication needs. *Id.* at 458-59. For the first three weeks, Students participate in the program full time in place of school. *Id.* at 459. They begin transitioning back to their schools during the fourth and fifth weeks, and then return back to school full time after the end of the program. *Id.* The BEST program identified that the Student’s behavior was not yet stable when he left the program to return to Otis Orchard. Exhibit D13; Vandouris, Tr. 441.

7. The District conducted a special education evaluation, including a functional behavioral assessment (FBA), of the Student in May 2018 at the Parent’s request. Exhibits D14, D18. The evaluation resulted in a determination that the Student was eligible for special education and related services under the “health impairments” eligibility category. Exhibit D18. The Parent was provided with procedural safeguards in Arabic during this time period. Vandouris, Tr. 442.

8. An individualized education program (IEP), including a behavioral intervention plan (BIP), was developed in May 2018. Exhibit D19. The IEP placed the Student in the behavior intervention (BI) program, which was a class with one certificated staff and two paraeducators for approximately six to nine students. Savall, Tr. 210; Vandouris, Tr. 462; Johns, Tr. 507, 527. Students in the BI program work on academics in reading, writing, and math, and also work on social and behavior skills to adapt their behavior so they can later return to a general education setting. Johns, Tr. 507.

9. The Student began the 2018-2019 school year in the BI program. Parent, Tr. 49. The Student had a number of behavioral issues. The Parent perceived that some of the behaviors resulted because of the Student’s interactions with a male paraeducator who worked with him. Parent, Tr. 49-50. The Parent requested that he no longer work with the Student and a new paraeducator was assigned, at least in part to respect the Parent’s request. Savall testimony.

10. The District provided the Parent with a number of notices of disciplinary action for the Student prior to the discipline at issue in this case. The District provided notice that the Student was suspended for one day each on September 4 and 11, 2018, for separate incidents of physical aggression toward a staff member. Exhibits P1, P2. The District provided notice that the Student was emergency expelled on September 18, 2018, for exceptional misconduct. Exhibit P4. The notice states that the emergency expulsion would continue until rescinded or revised. *Id.* The

record contains no evidence of how many days, if any, the Student was out of school as a result of the emergency expulsion or when it was rescinded or revised. *Id.*

11. The Student's IEP and BIP were amended on September 20, 2018. Fitzgerald, Tr. 133. The Student's placement was full-time in the BI program. Johns, Tr. 527. The District again provided the Parent with the notice of procedural safeguards in both English and Arabic. Exhibit D25; Fitzgerald, Tr. 134.

12. The Student was suspended for one day on October 16, 2018, for conduct – violence without major injury – on October 16, 2018. Exhibit P5. Upon return to school, he was to serve two days of in-school suspension on October 17 and 18, 2018. *Id.* The behavior for which he was disciplined was pushing and hitting his paraeducator, kicking his teacher and another teacher, throwing chairs, and causing a safety concern to students and staff. *Id.*; Savall, Tr. 223.

13. The Student served his in-school suspension in the “reset room,” a small, unfurnished, carpeted room near the Otis Orchard office. Exhibit P16, photo 2; Savall, Tr. 224. The District used this room for a number of reasons, including allowing students to calm down, for work in a quiet setting, and for in-school suspensions. Savall Testimony. The Student was always supervised by an adult. Savall testimony.

14. The Parent understood that the Student served a third day of in-school suspension on October 19, 2018, because of his misbehavior on the first two days. Parent, Tr. 52. There is no documentation of a third day of in-school suspension and District witnesses denied there was a third day. Accordingly, no finding is made that the Student served a third day of in-school suspension.

15. The Parent believed the in-school suspension in a room was inappropriate for the Student because it brought back memories from his early childhood trauma. Parent, Tr. 53. The Student engaged in additional acts of misconduct during the two days of in-school suspension. On one of the in-school suspension days, the Student made a threat to Mr. Kirkpatrick to kill his new baby and wife and also made personally-upsetting comments to Principal Savall. Savall, Tr. 237-38. The Student had also asked to go to the restroom, but then run into the foyer and hit staff members and parents with a crossing guard sign and went outside and took down the American flag and wrapped it around himself. *Id.* at 239. During the in-school suspension, the Student also threatened to bring a knife to school and kill people.⁴ *Id.* at 243-44.

16. The Student was emergency expelled for violence without major injury, verbal threat, and disruptive conduct for the behavior on October 17 and 18, 2018. Exhibits D2, D4. The notice of emergency expulsion was dated October 23, 2018. Exhibit D2. The notice of disciplinary action provided to the Parent stated that the emergency expulsion would end or be converted to another form of corrective action within ten days from the date of the emergency expulsion. *Id.*

⁴ The District presented evidence that this conduct took place on October 23, 2018, the date of the notice of expulsion, not when the Student was serving his in-school suspension. However, the District's threat assessment documents, completed on October 22, 2018, describe the events leading to further discipline and identified them as taking place on October 17 and 18, 2018. Exhibit D4.

17. Regular education students would have been emergency expelled for these same behaviors. Watson, Tr. 472.

18. On November 1, 2018, the Student's emergency expulsion was converted to a long-term suspension. Exhibit D3. The notice stated that the suspension would last for 13 days but did not identify which days. *Id.*

19. The District attempted to schedule a manifestation meeting with the Parent. The Parent wanted members of the Student's WISE team, which provided wraparound services, to attend. Fitzgerald, Tr. 136. The manifestation meeting was held on November 7, 2018. Exhibit D21. The District acknowledged that this was one day late. Stevens, Tr. 599. The team determined that the Student's behavior was a manifestation of his disability because the conduct had a direct and substantial relationship to his disability. *Id.* Accordingly, the team determined the Student was able to return to school. *Id.*

20. The manifestation determination document stated that the "parent agreed on a half-day schedule until the IEP team could meet and formulate a more specific plan." Exhibit D21. Likewise, the prior written notice (PWN) following the meeting stated that the Student could immediately return to school and that the Parent "agreed to a half-day schedule until the IEP team can convene." Exhibit D22.

21. The evidence is conflicting as to whether the question of where the Student would be educated was also addressed at the manifestation determination meeting. Neither the manifestation determination review documentation nor the PWN addressed the Student returning to a setting other than the BI classroom. Exhibits D21, D22. The Parent believed the Student would return to his special education classroom and only learned later that the District was serving him in the office of the school counselor, Kevin Kirkpatrick. Parent Testimony. Suzanne Savall, the school principal, recalled that the decision about the circumstances under which the Student would return to school were discussed in a "re-entry meeting," not a manifestation determination meeting. Savall, Tr. 259-60. She did not recall whether the Parent was informed at that meeting that the Student would be instructed in Mr. Kirkpatrick's room rather than returning to his classroom. *Id.* at 260. After refreshing her recollection about the existence of the manifestation determination meeting, she did not recall whether there was discussion at that meeting either as to where the Student would receive his services when he returned. *Id.* at 313. Stephanie Watson, the assistant principal, did not recall whether the placement the Student would return to was discussed at the meeting. Watson, Tr. 496. Maureen Lyden, District director of special programs, recalled that only the discussion about the half day took place at the manifestation determination meeting and that the decision about where he would be educated took place later with the IEP team or a problem-solving meeting. Lyden, Tr. 542-43. She did not know whether the Parent was present when it was discussed. *Id.* at 543. Megan Johns, the Student's special education teacher, recalled that a decision was made at the manifestation determination meeting that the Student would be educated in Mr. Kirkpatrick's room. Johns, Tr. 527. She believed the Parent agreed because she did not vocalize a disagreement as she usually did when she disagreed with a District decision. *Id.* at 527. Likewise, Mr. Fitzgerald recalled that the decision was discussed at the manifestation determination meeting and that, although he did not recall the Parent affirmatively agreeing, he did not remember any meetings that ended in disagreement. Fitzgerald, Tr. 158-59; 169-70. It is found, based on the written documentation of the meeting, the Parent's denial that she knew at the meeting he would not return to the BI classroom and surprise and distress about that action when she learned about it later, the failure of many present to recall a

discussion about the provision of services, and the absence of any evidence that the Parent affirmatively agreed to an individualized-instruction placement, rather than return to the BI classroom, that the Parent did not agree to this placement at the manifestation determination meeting.

22. The Student's individual instruction was received in Mr. Kirkpatrick's office from a paraeducator, Natalie Damatio,⁵ under the instruction of a special education teacher, Megan Johns. Savall, Tr. 271; Johns, Tr. 515. Mr. Kirkpatrick was often in the room to assist. Johns, Tr. 515.

23. On November 16, 2018, the Parent provided written consent for an FBA. Exhibit D6. The consent document was provided in both English and Arabic. *Id.*

24. An IEP meeting was held on December 5, 2018. Exhibit D20, pp. 3, 4. The Parent and members of the Student's WISE team participated, and an interpreter was present. As a result of the meeting, the Student's IEP was amended to reflect a partial-day school placement and the delivery of the Student's instruction on an individualized basis except for participation in music, lunch, PE, and library. Exhibit D20. The Student was to be educated in an individual setting because "he benefits from a staff personnel of one on one to meet his academic, social, and behavioral needs." *Id.* at 4. The prior written notice (PWN) stated that the Student was demonstrating a higher level of success with partial days and the individualized school program than in previous full days in the behavior support setting. *Id.* at 1. The PWN stated that the FBA was underway and that it was expected this information would better inform the Student's programs and supports. *Id.* Both the PWN and IEP were provided to the Parent in Arabic. Exhibit D20.

25. Unlike at the manifestation determination meeting, the Parent knew by this time that the Student was being educated in Mr. Kirkpatrick's room. The Parent never testified that she objected to the placement at the IEP meeting or at other times, only that she asked how long he would need to be there, and all District witnesses who testified about the meeting understood that the Parent and the members of her WISE team were in agreement as they had not expressed otherwise during the meeting.

26. The individualized setting continued to be Mr. Kirkpatrick's class. The Student could attend general education classes, such as music and library, if he was following expectations. *Id.* at 516-17. The Student eventually began reintegrating into the BI class by having studies skills sessions in that room when other students were present. *Id.* at 517-18.

27. The District engaged Jeffrey Kalles, M.S., BCBA, to conduct an FBA of the Student, which concluded sometime before January 30, 2019, when he issued a report. Exhibit D23. Mr. Kalles opined that the Student should continue to be receive his instruction in Mr. Kirkpatrick's class while the FBA was underway. Kalles Testimony. As a result of the FBA, Mr. Kalles recommended that the Student's program be focused on minimizing triggers and any motivation he might have to engage in unsafe behavior. Kalles, Tr. 332. Two meetings were held with Mr. Kalles to learn about his recommendations with the Parent and an interpreter present.

⁵ Ms. Damatio was often referred to as "Ms. D" in the record. See, e.g., Exhibit P9.

28. The recommendations were extensive and called for an intensive investment as far as the time, people, materials, and space required. Lyden, Tr. 534. Despite that, the District was willing to follow Mr. Kalles's recommendations. The District began preparations to carry out the recommendations by posting a position for a staff person to work with the Student and ordered materials and started setting up a room for him with closer access to the special education classroom to aid in integration. Lyden, Tr. 534-35.

29. In the meantime, the Student was suspended again on January 23, 2019 for one half day, and on February 5, 2019, for two days. Exhibits P8, P19.

30. The incident on February 5, 2019, that led to a suspension for physical aggression took place in Mr. Kirkpatrick's room, where the Student was receiving his instruction. Exhibits P8, 9. Much of the evidence about what took place is contradictory. The description of the incident is described in the notice of suspension:

[The Student] hit another student upon arrival to school. He also grabbed and misused his supervisor's two-way radio. When his supervisor told him she was going to make copies of his math homework instead of sending the "book" home, he demanded to have the book. He physically backed her into the corner of the room with his body, put his arms around her from behind and tried to pry the book out of her hands. She repeatedly asked him to "stop" but he would not and continued to enclosing (sic) himself around her. Another staff member had to pull him off her.

Exhibit P8.

Ms. Damatio, the Student's paraeducator, was the "supervisor," and Mr. Fitzgerald was the staff member who intervened. The Parent believes, although she was not present, that Mr. Fitzgerald "physically punished" the Student and hurt his arm by pulling papers away from during this interaction. The Student had a bruise on his arm the next day and the Parent took him to see a doctor.

31. Mr. Kirkpatrick was in the room and observed the incident. Kirkpatrick, Tr. 402. He recalled that the Student and Ms. Damatio were engaged in a power struggle about a book. The Student had approached Ms. Damatio and had his arms posed around her in a "menacing" way. *Id.* at 406. He recalled that Mr. Fitzgerald redirected the Student, trying to deescalate him verbally, while standing by his own desk, and the Student went to Mr. Fitzgerald's desk and "got in his face" and tried to grab things from Mr. Fitzgerald as well. *Id.* at 403, 406. Mr. Kirkpatrick had moved to the doorway to give the Student a path to leave the room if he wished. *Id.* From that angle, it appeared that Mr. Fitzgerald was backed against his desk with nowhere to go and that Mr. Fitzgerald grasped the Student's forearm to guide it away when the Student was being aggressive. *Id.* at 404. Mr. Kirkpatrick did not recall Mr. Fitzgerald touching the Student while the Student was interacting with Ms. Damatio. *Id.* at 405.

32. Mr. Fitzgerald recalled that, when he was helping to remove the Student from Ms. Damatio, he grabbed the long bones of the Student's arm, midway between his elbow and wrist, consistent with "Right Response" training for physical interventions with students. Fitzgerald, Tr. 156. Mr.

Fitzgerald denied touching the Student when the Student was trying to grab something away from him later in the same interaction. *Id.* at 155-56.

33. It is not clear when Mr. Fitzgerald grasped the Student's arm, but he did do so at some point in the interaction to deescalate the Student's aggressive behavior. There is no evidence that the grasp was inappropriate under the circumstances or that Mr. Fitzgerald intended to punish or injure the Student.

34. A meeting was scheduled for February 28, 2019, to discuss the Student's program and behavior plan based on Mr. Kalles's report. Lyden, Tr. 536. Prior to the meeting, the District learned the Parent had filed the due process hearing request in this case. *Id.* at 537. Ms. Lyden called the Parent, with an interpreter on the line, to confirm she still wished to hold the meeting. *Id.* at 538. Ms. Lyden's understanding of this conversation was that the Parent no longer wished to hold the meeting. *Id.* The Parent understood that the District called to say it wished to postpone the meeting and that the Parent wished to postpone as well. Parent, Tr. 82. The Student stopped attending school around that time, and the Parent was no longer interested in rescheduling the meeting because she was not interested in returning the Student to a District school. Fitzgerald, Tr. 148; Parent testimony.

35. On March 22, 2019, the Parent submitted a declaration of intent to provide home-based instruction for the Student. Exhibit D24. He had not returned to school as of the time of the hearing, although the District has initiated meetings to try to return him to school. Savall, Tr. 324. The District welcomes the Student's return to school and is willing and able to carry out Mr. Kalles's recommendations. Savall, Tr. 322-23.

36. There is no evidence in the record, other than the Parent's allegations, that District staff taunted the Student, used harsh words with him, or called the police with respect to the Student. The vice principal did invite the Student to meet the school resource officer once, but it did not relate to any misconduct of the Student. Savall testimony; Watson testimony.

37. The District provided interpreters for the Parent, either in person or by phone, for many meetings. The Parent testified that there were multiple times when no interpreter appeared for a meeting, either because one had not been scheduled or had been scheduled but did not show up. Parent, Tr. 108. Ms. Savall acknowledged that she recalled one meeting when an interpreter had not been scheduled. Savall, Tr. 297. The record does not reflect whether these were special education meetings. When no interpreter appeared, the Student's WISE team members helped the Parent understand what was happening. Parent, Tr. 108.

38. Similarly, the District provided many documents to the Parent in her native language, including the notice of special education procedural safeguards, although the Arabic documents were not always provided right away because the District does not employ an Arabic translator. Exhibit D25. The District did not provide all special education documents in Arabic, though, including the 2018 evaluation report, IEP, and BIP. Vandouris, Tr. 460-62.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings (OAH) 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) §1400 *et seq.*, the 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) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parent is the party seeking relief in this case, she has the burden of proof.

The IDEA

3. The IDEA 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 *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, has 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.

Id. at 206-07 (footnotes omitted).

4. A "free appropriate public education" 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:

[A] "free appropriate public education" consists of educational instruction specially 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 on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" [FAPE] as defined by the Act.

Id. at 188-89. A district is not required to provide a “potential-maximizing” education” in order to provide FAPE, but only a “basic floor of opportunity” that provides “some educational benefit” to the Student. *Id.* at 200-01.

5. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Andrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can “make progress in the general education curriculum,” taking into account the progress of his non-disabled peers, and the child’s potential.

M.C. v. Antelope Valley Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017)(citation omitted).

Provision of Interpreters and Translation of Documents

6. Several specific requirements apply to school districts with respect to a parent’s understanding of and participation in the special education process. School districts must take whatever action is necessary to ensure that parents understand the proceedings of IEP team meetings, including arranging for an interpreter for parents whose native language is other than English. WAC 392-172A-03100(7). Additionally, when school districts must obtain a parent’s consent for an activity, the parent must be fully informed of all information relevant to the activity for which consent is sought in his or her native language. WAC 392-172A-01040(1)(a). School districts are also obligated to provide prior written notice and notification of procedural safeguards to parents in their native language unless it is clearly not feasible to do so. WAC 392-172A-05010(3)(a)(ii); 392-172A-05015(4)(a)(ii).

7. The District argues that, beyond these specific obligations, “there is no requirement in the IDEA or its accompanying regulations that all IEP documents must be translated,” citing *Letter to Boswell*, 49 IDELR 196 (OSEP, 2007). While *Letter to Boswell* includes this language, it goes on to say that providing documents in a parent’s written language is one way a school district can demonstrate that a parent has been fully informed of a student’s educational program. *Id.* Thus, that opinion does not stand for the proposition that a district need not ever translate special education documents other than procedural safeguards and prior written notices.

8. In this case, the Parent speaks, reads, and writes in English, and has significant education in her own language. Additionally, interpreters were available for most, if not all, special education meetings and the Parent was fortunate to have WISE team members at meetings to assist her, as well as her sister to help her with reading and writing. The Parent identified one document she was asked to sign without translation. That document, related to a threat assessment, was not a special education document. She did not identify any time when she failed to understand what

was taking place with respect to the Student's special education program because of her language needs. The Parent has not demonstrated, under these circumstances, that the District's failure to translate some special education documents denied the Parent her participation rights.

Discipline of Special Education Students

9. The IDEA sets forth specific procedural requirements for the discipline of a student eligible for special education. A school district may remove a special education student who violates a student conduct code from his current placement to another setting or suspension for *not more* than ten consecutive school days if those alternatives are applied to students without disabilities. WAC 392-172A-05145. Additional removals of not more than ten consecutive school days in the same school year for separate incidents of misconduct are also allowed so long as the removals do not constitute a pattern. WAC 392-172A-05145(392-172A-05155(1).

10. When a school district seeks to expel a student or suspend him from school for *more than* ten days for violation of a code of student conduct, a review must be conducted, within ten days of the decision, to determine whether the misconduct is a manifestation of the student's disability. WAC 392-172A-05146(1).

11. For purposes of this manifestation determination, conduct is a manifestation of a Student's disability if 1) the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability, or 2) the conduct in question was the direct result of the school district's failure to implement the IEP. *Id.*

12. If it is determined that the student's misconduct was a manifestation of his disability, the IEP team must either conduct an FBA, if one has not been previously conducted, and implement a BIP for the student or, if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior. WAC 392-172A-05147(1) and (2). The student must also be returned to the placement from which he was removed unless the parent and the school district agree to a change of placement or unless certain special circumstances not relevant here (related to weapons or drugs at school or causing serious bodily harm) exist. WAC 392-172A-05147(3).

Fall 2018 in-school suspension

13. Although the Parent believed the discipline was too harsh for the Student's conduct, she has not demonstrated that a general education student would not have been subject to a two-day in-school suspension for the same conduct. Additionally, because the in-school suspension was only two days and the Student had not previously been suspended ten days during the school year, the in-school suspension was not a change of the Student's placement that would trigger special education discipline requirements. The Parent believed that serving the student in a small room was inappropriate for the Student given his history of trauma, and she appears to believe that the in-school suspension caused his inappropriate behavior while he was there. She has not identified a violation of the IDEA related to serving the Student in this setting during his in-school suspension.

November 2018 suspension

Length of suspension

14. The Parent has not demonstrated that a general education student would not have been subject to an emergency expulsion converted to a long-term suspension for the same conduct. However, the District's failure to conduct a manifestation determination meeting within ten days was a procedural violation of the IDEA.

Placement after suspension

15. Because it was determined that the Student's misconduct was a manifestation of his disability, the District was obligated to return him "to the placement from which he was removed." WAC 392-172A-05147(3). The Ninth Circuit has stated that a change in educational placement "relates to whether the student is moved from one *type of program* – i.e., regular class – to another type – i.e., home instruction." *N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). (italics added). Part-time attendance in an individualized setting in an office was not the Student's IEP placement. The Student should have been returned to the BI classroom on a full-time basis unless the Parent agreed otherwise.

16. The Parent specifically agreed, at the manifestation determination meeting, to the Student's return to school on a part-time basis. Thus, the District did not violate the IDEA by failing to educate him full time upon his return to school.

17. The Parent did not, however, agree with educating the Student on an individualized basis in an office, rather than in the BI classroom with his peers, as she did not even understand that the subject was under discussion. Thus, that placement was not appropriate until the IEP team, including the Parent, agreed to it while the FBA was pending, on December 5, 2018. See *Peninsula Sch. Dist.*, 113 LRP 46801, n. 31 (SEA WA 2013).

18. The Parent has not demonstrated that the placement was inappropriate for the Student while the FBA was underway between December 5, 2018, and when the Student stopped attending school around February 22, 2019, before a new program was developed based on the FBA. The Parent's major complaints about the individualized instruction setting focused, not on the individualized instruction itself, but on the education being conducted in an office and the number of adults in the room throughout the day.

19. Nor has the Parent presented convincing evidence that the District is not capable of appropriately educating the Student. Her primary concerns appear to be that the Student be treated in a culturally-appropriate and trauma-informed manner. Otis Orchard is a trauma school, with educators specially-trained in those areas. And the District has invested considerable resources in the FBA conducted by Mr. Kalles and is willing and committed to carry out his recommendations specific to the Student's needs should the Student return to school.

20. In summary, the Parent has proven that the District violated the IDEA by failing to conduct a timely manifestation determination meeting and by failing to return the Student to his previous placement once it was determined that his behavior was a manifestation of his disability, but has not met her burden to prove any other violations with respect to the Student's discipline.

Allegations Related to Teacher Conduct Toward Student

21. The Parent hasn't proven any violation of the IDEA with respect to teacher conduct toward the Students. There is no record evidence of staff taunting the Student, using harsh words with him, or calling the police on him. Mr. Fitzgerald grasped the Student's forearm in an effort to deescalate his physically aggressive behavior but the Parent did not demonstrate that this was an IDEA violation.

Remedies

Compensatory education

22. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

23. The Parent requests compensatory education to assist the Student in catching up to grade level. The District shall provide compensatory education for the Student in reading, math, and writing, the academic subjects he would have received in the BI program. The District failed to appropriately place the Student for approximately one month (approximately 20 school days) from when it should have conducted a manifestation determination meeting to when it eventually amended the IEP and the Parent agreed to the placement pending the completion of the FBA. The District shall provide a total of 80 hours of one-on-one instruction in math, reading, and writing (20 school days x 4 hours per day = 80 hours). The instruction shall be provided by a certificated District special education teacher with the education, training, and experience to provide such instruction. The District shall provide whatever behavioral supports the IEP team determines are appropriate for the Student's academic instruction during the school day during this compensatory instruction as well. The compensatory education may be delivered at any time during the calendar year following the entry of this decision, at the duration and frequency determined appropriate by the Parent and the District. Once a schedule is set, the student shall, except in an emergency, give notice 24 hours in advance of a scheduled session. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award. The instruction shall take place at Otis Orchard unless the Parent and the District agree otherwise.

Other remedies

24. The Parent requests that the Student be placed full time at a school outside the District that will consider his needs, including his cultural needs. This remedy is denied for several reasons. First, as discussed above, the Parent has not demonstrated that the District cannot appropriately serve the Student. Second, the Parent has not identified any school with an appropriate program with the capacity to serve the Student. Finally, the ALJ does not have any authority to order a school district not a party to this case to take any action, and the Parent has not identified a school district willing to serve the Student. Nothing in this order prevents the

Parent from seeking to place the Student in a different school district if she finds a district able to serve him.

25. The Parent also requests "punishment" for the District. The ALJ does not have the authority to "punish" the District or District employees. For that reason, this remedy his denied as well.

ORDER

1. The District violated the IDEA and denied the Student FAPE by failing to timely conduct the manifestation determination meeting and by failing to return the Student to the placement from which he was removed after his conduct was determined to be a manifestation of his disability. The District did not otherwise deny the Student FAPE.
2. The District shall provide the Student with 80 hours of compensatory education services in reading, writing, and math to be delivered as set forth above. The Parent's remaining remedies are denied.

Signed at Seattle, Washington on January 16, 2020.



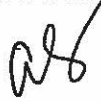
Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), 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 brought within ninety days after the ALJ has mailed the final decision to the parties. 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.

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.



Parent



Maureen Lyden, Director, Special Programs
East Valley School District
3830 N Sullivan Road Bldg. 1
Spokane Valley, WA 99216

Gregory L. Stevens, Attorney at Law
Stevens Clay PS
421 W. Riverside, Suite 1575
Spokane, WA 99201-0402

cc: Administrative Resource Services, OSPI