

JOHN WANG
Chief Administrative
Law Judge



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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August 20, 1999

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RECEIVED

AUG 24 1999

Superintendent of Public Instruction
Legal Services

In re: Seattle School District - Special Education Cause No. 99-34

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(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order the file will be closed and returned to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Melinda Brown, OSPI Legal Secretary, at (360) 753-2298.

Sincerely,

Robert P. Kingsley
Administrative Law Judge

c: Ben Gravely, OSPI
Deputy Chief ALJ Jan Grant, OAH
Mary Radcliffe, OAH/OSPI Coordinator



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

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 99-34

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge Robert P. Kingsley in Seattle, Washington, on July 14, 15, and 16, 1999. The parents were represented by Charlotte Cassady, Attorney at Law. Seattle School District (District) was represented by Brenda Little, Deputy General Counsel. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE AND DISCUSSION

The parents filed a request for due process hearing on March 26, 1999. They raised objections to removal of the student from his current program at Children's Hospital, and alleged failure of the District to formulate an Individualized Education Program (IEP) comporting with the Individuals With Disabilities Education Act (IDEA). An interlocutory order was entered on April 2, 1999, identifying the Partial Hospitalization Program (PHP) operated by Children's Hospital as the student's placement during the pendency of these proceedings. A due process hearing was initially set for April 20, 1999. The hearing was continued three times to its current date. The parties agreed that the deadline for decision should be extended to thirty days after the close of the record. The record was closed on July 23, 1999, after the parties submitted post-hearing memoranda and proposed findings of fact and conclusions of law.

Four issues were initially identified for hearing. One of these issues was resolved where the student completed the school year at the PHP. The remaining issues have been identified below.

The parents also indicated at prehearing conference that they anticipated raising a request for compensatory services involving expenses for private placement to be provided during the summer of 1999, for thirty six weeks during the [REDACTED] school

year, and also over a four year period. The parents acknowledged that the issues raised by this request could be considered separately from the issues identified in the request currently on file. The administrative law judge ruled that the scope of this request exceeded the issues raised on March 26, 1999, and would not be considered at this hearing. The parents may pursue these issues with an independent request for due process hearing.

The parents sought an order directing the District to design and implement a program for students diagnosed with [REDACTED] Disorder, [REDACTED], or other non-disruptive conditions. At hearing, the administrative law judge ruled that this request would exceed the scope of a due process hearing. The decision to develop a program involves *policy considerations independent of the appropriate education for a single student*. These considerations include monetary and building resources, program design and evaluation, personnel, and demographics. The authority of a hearing officer under the IDEA is limited to questions concerning a single student's educational planning. The decision to design and implement a program must be determined in another forum.

By prehearing motion, the District sought to dismiss this action on the grounds that no justiciable controversy existed where the District agrees that a new placement needs to be identified for the student. The District also asserted that the parents had not proposed a placement other than the PHP, that the parents had not alleged that the District had failed to provide a free and appropriate public education (FAPE) in the student's previous placement, or that they requested implementation of a program developed by their educational consultant independent of the IEP process. The motion was denied where significant factual issues were unresolved, and where, as will be discussed below, the administrative law judge determined that a hearing officer has the authority to order implementation of a specific program under the appropriate circumstances.

ISSUES

The issues for hearing were:

1. Whether the student has been denied FAPE in the development and implementation of an IEP; and
2. Whether an IEP, or elements of an IEP, designed by the parents, should be approved by order of the administrative law judge and implemented by the District; and
3. Whether the administrative law judge should order attorneys' fees to the parents if they prevail.

FINDINGS OF FACT

1. The student was born on [REDACTED] and is a resident of the Seattle School District. He has been diagnosed with [REDACTED] Disorder, and qualifies for special education under the eligibility criteria for health impairment. [REDACTED] Disorder is an autism spectrum disorder, marked by sustained, and often severe, impairment in social interaction as well as restricted and repetitive patterns of interests.

2. Prior to evaluation for special education, the student received educational accommodations pursuant to §504 of the federal Rehabilitation Act. The accommodations included: 1.) administering medicine at school, 2.) daily progress reports, 3.) teachers had [REDACTED] repeat assignments back verbally, 4.) school changed [REDACTED] home room to that of history teacher, 5.) assistance with organization skills, 6.) daily check-in with science teacher during home room to validate completion, understanding of assignments, provide further organization skills, 7.) cuing by teacher in order to get his attention before presentation of new materials, 8.) test taking separately with extended time as necessary, and 9.) training in use of Alpha Smart for written work. He was referred for evaluation by the parents due to their concerns about long-standing learning delays.

3. The student's evaluation was completed on January 6, 1998, while the student was attending [REDACTED] School. The student was enrolled in a combination of general education, Spectrum (a program for advanced students), and resource room classes. While the Summary Analysis identified eligibility for services under health impaired, it did not reflect a diagnosis of [REDACTED] Disorder. The medical evaluation available to the team indicated that the student had longstanding problems with distractibility, disorganization, motor hyperactivity, and poor impulse control. The physician noted that [REDACTED] medication and counseling had not been effective in addressing the problems.

4. An independent psychoeducational evaluation was performed by Steven Sulzbacher, Ph.D. on March 24, 1998. Dr. Sulzbacher noted that the student had been diagnosed with [REDACTED] Disorder by Dr. Alan Unis pursuant to an examination concurrent with Dr. Sulzbacher's evaluation. Dr. Sulzbacher supplemented the District's evaluation with several recommendations. First, he recommended a regimen of medication, currently being developed by Dr. Unis, to address the student's perseverative thoughts, impulsivity, and inability to focus on difficult tasks like written expression. Second, he suggested identifying an appropriately flexible placement for the [REDACTED] school year. He suggested placement at Summit K - 12, [REDACTED] School, or [REDACTED] School. Dr. Sulzbacher was favorably impressed with the flexibility of the student's current curriculum. Finally, he recommended immediate and future focus on written language expression and social skills with peers and teachers. He suggested an individual tutor to help organize an anticipated written project, and speech/language pathology services in the area of speech pragmatics. He also recommended that the student maintain a daily journal to foster writing habits.

5. The student was next evaluated by Molly Kenny, a speech/language pathologist employed by [REDACTED]. Ms. Kenny observed the student and administered selected subtests from the Woodcock-Johnson Psycho-Educational Battery-Revised(WJ-R); The Adolescent Word Test (WORD); and The Test of Auditory Perceptual Skills (TAPS). She identified visual processing, attention, social use of language and written language as areas of concern.

6. The student's first IEP was completed on May 4, 1998. Members of the IEP team included the parents; their attorney; Dan Lefebvre, Asst. Director of Special Education; Jane Lambert, Administrative designee; Janis Toth, general education teacher; and Don Hanson, special education teacher. The IEP identified [REDACTED] as the student's placement. The educational services consisted of tutoring to the end of the school year; medications to be administered by the school nurse, with contact to the mother if medications were missed; one resource room period per day; substitute teachers to be provided a hand-out sheet identifying the student and describing his educational needs; coordination of assignment sheets between home and school; and extra supervision during class transitions and other unstructured times. Modifications were recognized for grading, and goals and objectives were identified in written expression and study skills. The IEP team approved extended school year (ESY) services out of concern for a loss of written expression skills during the summer.

7. The IEP was amended on June 15, 1998, to reflect a change in the student's placement for the [REDACTED] school year. The amendment identified [REDACTED] with resource room support as the student's placement. A general education teacher from [REDACTED] was not present for the meeting. The IEP team anticipated a need for a meeting after the student's general education teacher had an opportunity to become acquainted with him. It provided for a transition IEP meeting to be convened by the [REDACTED] staff before the end of September, 1998.

8. When the student began school in the fall of 1998, the parents prepared a package containing the student's medication for one month. The mother is a school nurse, and the package reflected the District's requirements for prescription medication to be administered at school. During the month of September, the nurse periodically contacted the mother to express difficulty in administering the medication over the student's objections.

9. The student initially expressed excitement about his experience at [REDACTED]. However, the parents were not receiving daily assignment sheets and could not determine if the student was keeping up with his work. The [REDACTED] staff failed to convene a transition IEP meeting in September, 1998, and the parents sent an e-mail to the student's special education teacher on October 1, 1998 requesting that the meeting be held.

10. An informal meeting subsequently occurred on October 7, 1998, with the parents, the school psychologist, and some of the student's teachers. The school teachers discussed the student's failure to hand in assignments and adjust to class.

The psychologist returned the remainder of the student's medication that had been prepared by the mother one month earlier. The pills were no longer organized, and the mother estimated that the student had missed approximately one-half of his prescribed medication.

11. The group discussed the fact that the student's assignment sheets were not being used at [REDACTED]. The parents emphasized that these assignment sheets had been useful to [REDACTED] at [REDACTED] because he had little self-reflective ability. The group discussed the need to use the assignment sheets.

12. The student was suspended approximately one week after the meeting for refusing to identify himself to a substitute teacher. The teacher approached the student and made a joke. The student does not understand jokes, was frightened, and would not provide his name when asked to do so by the substitute. The substitute teacher had not received a copy of the information sheet required by the IEP. The student was suspended for two days. The suspension frightened him, and the parent thought that the student was experiencing a "breakdown." The student told his mother that the other children were angry with him after the suspension. The vice principal responsible for the disciplinary decision was not aware that the student was receiving special education. The District did not convene an IEP meeting to determine whether the student's conduct was a manifestation of his disability, or to develop an assessment plan to address the student's behavior.

13. On November 2, 1998, the student's parents mailed a letter to Dr. Robert Howman, Director of Special Education for the District, requesting an IEP meeting no later than November 25, 1998. In the letter, the parents complained that medications were not being administered; short term goals and objectives were not addressed in October 1998 as per the IEP; the student's [REDACTED] symptoms had compromised his overall behavior during the time at [REDACTED] he was receiving low to failing test scores; and he had been suspended for failing to identify himself to a substitute teacher who had not been advised of the student's special needs. By letter dated November 4, 1999, Dr. Howman advised the parents to contact the special education teacher to request an IEP meeting. The parents complied with this instruction by requesting an IEP meeting again from the student's special education teacher. The teacher responded by stating that no meeting was needed.

14. The District convened the first IEP meeting at [REDACTED] on December 15, 1998. It did not provide formal written notice to the parents of the date of the meeting, the attendees, or the agenda. The parents had retained educational consultant Jeannette Cohen to assist them in the student's educational planning. She attended the meeting at their request.

15. The meeting was also attended by the student, the student's general education and special education teachers, his basketball coach, the principal of [REDACTED] Seattle School District psychologist Jane Eberle, and Supervisor of High Incidence Special

Education Programs Lucille Madden. The parent expressed reservations about confronting the student with performance evaluations in a group setting. The principal insisted that he attend the meeting. The group discussed the student's emotional state and academic performance, with each [REDACTED] participant making comments. The basketball coach terminated the student from the program with all attendees present. The student was emotionally devastated by the comment, having considered the coach one of his favorite teachers. The group excused the student from the remainder of the meeting.

16. Each of the teachers indicated either that the student was failing or that he could not be graded because no assignments had been completed. The teachers described the student's disruption of the class and stated it was difficult to pay attention to the other children because of the time devoted to his behavior. The school nurse apologized that the student had missed medications earlier in the year and indicated that he was currently being medicated properly. She also stated that there was an obvious effect on his behavior. The teachers indicated they saw no glimpses of the intelligence that had resulted in the student's previous participation in the Spectrum program at [REDACTED]. The student's behaviors were described as "bizarre." Principal Cathy Hayes expressed concern that the student might be suicidal. The parents' educational consultant suggested that the student be hospitalized for an extensive evaluation.

17. The IEP team kept notes of the meeting, each participant initialing his/her agreement. The team did not formulate an IEP or amendment to the existing IEP. The parents believed a consensus had been reached that Summit was not an appropriate placement for the student and that hospitalization for evaluation purposes was appropriate. The IEP team did not address other placement options although Ms. Madden added such a reference to the meeting notes because she thought it was "missing."

18. The student remained home for three days until beginning of the winter break. The parents questioned the District about the student's placement after break, and were told that no other placement than Summit had been identified. When the student returned to [REDACTED], his schedule was almost free of academics. [REDACTED] principal Cathy Hayes asked the student's parents to send his Walkman to school. The student spent much of his time after Christmas listening to music or reading books in the library. The student was less anxious during this period.

19. On January 12, 1999, a second IEP meeting occurred. The parents received no written notice of the meeting and no notice of the attendees. The parents believed the agenda for the meeting to be discussion of an appropriate hospitalization program for the student. They had requested someone be present with budgetary authority to authorize payment for hospitalization. However, at the beginning of the meeting, the parents were handed a copy of a proposed IEP assigning the student to [REDACTED]. The mother asked Dr. Robert Howman whether he was present at the meeting in order to authorize budget decisions. Dr. Howman and Dr. Eberle then left the meeting

momentarily. When they returned, Dr. Howman announced that a comprehensive evaluation of the student was appropriate and suggested an appointment be made with Dr. Sulzbacher of Children's Hospital in order to obtain his recommendation as to evaluation. At the meeting, the student's father called Children's Hospital on his cell phone and set up an appointment. The proposed IEP was rejected as inappropriate. The decisions of the meeting were not formalized in an IEP or IEP amendment.

20. A meeting at Children's Hospital occurred on January 19, 1999. It was attended by Dr. Kelly Schloredt and Dr. Sulzbacher of Children's Hospital, Dr. Eberle of the District and the student's parents. This meeting was not characterized as an IEP meeting. Dr. Eberle was apparently authorized to commit the District to the evaluation. She described the student's current status, and Dr. Sulzbacher suggested a minimum four to six week stay in the Hospital's Partial Hospitalization Program (PHP). He explained the program, including provisions for a smooth transition back to school after its completion. Dr. Eberle apparently approved, but did not authorize payment at the meeting

21. The District approved payment for a four week evaluation on February 8, 1999, and the student was immediately admitted. The approval was quickly changed to six weeks. The decision was not formalized in an IEP meeting or IEP amendment.

22. Dr. Kelly Schloredt testified regarding the program's activities. Dr. Schloredt obtained a Ph.D. in clinical psychology from the University of Utah. She spent eight years in graduate study and two years completing a post-graduate fellowship at the University of Washington. Dr. Schloredt's role at PHP includes offering suggestions to staff about how to handle issues with the children, meeting with children individually and in groups, and observing children in various settings within the program.

23. The Partial Hospitalization Program (PHP) is a transitional psychiatric day treatment program for children and adolescents between the ages of five and eighteen. Staff includes a coordinator, teacher, clinical psychologist, and a psychiatrist. Children are admitted for comprehensive evaluation, a process which includes diagnostic clarification, behavioral observation and stabilization, medication evaluation, and educational observation, planning, and transition. The period of stay is generally from two to twelve weeks.

24. Children arrive at the program at approximately 8:30 A.M. and leave at approximately 3:30 P.M. They meet with the PHP coordinator who discusses the children's time at home the night before and sets out the goals for the day. The children spend half of their day in therapeutic groups and the other half of the day in school. School takes place on the inpatient psychiatry unit. Goal setting, group therapy, and schoolwork are tailored to the child's specific needs. At 3:00 P.M., the children meet again to close the day, reflect on goals set for the day, and plan for the evening at home with family.

25. When children have completed the program, the PHP staff prepare them for transition back to their school system. The procedure followed by staff involves

activities over a seven to eight day period. Initially, the staff contact the child's teachers and discuss the child's situation with them. Then, the staff prepare the student mentally by discussing the anticipated program with the child. Finally, the child and staff visit the placement, spending one-half of the day at the school, the second half at PHP, for a period of four to five days.

26. The student has attended the program from his admission until the end of the school year. PHP staff had completed their testing, stabilization, and evaluation of the student by April 27, 1999. The PHP staff has completed a treatment summary of the student including analysis of his diagnosis, behavioral observation and stabilization, medication evaluation, and educational observation, planning, and transition. Regarding behavior, the summary identified significant antecedents to difficult behaviors and strategies for managing the behavior. Antecedents included unfamiliar work, new situations or places, too much stimulation, and delayed gratification. Strategies included structured routines and predictable schedules, periods of time-out, stating expectations without entertaining arguments, and working for incentives.

27. The PHP staff tapered off the student's medication and introduced different prescriptions to target low frustration tolerance. Educationally, the staff noted that the student showed extraordinary interest in math, science, and art. He showed an intense dislike for reading and written expression. The staff made the following recommendations for the student's educational planning: a classroom setting that is routinized and predictable, small, not chaotic or highly stimulating, with a low student/teacher ratio; one to one help, or a classroom aide; specific assistance and structure in completing reading and writing assignments; use of the student's strengths to remediate weaknesses, (i.e., using a computer to complete writing assignments, or reading and writing assignments focused on scientific topics); and use of incentives with an immediate reward.

28. The parents became concerned about the student's placement after termination of the PHP program. The District did not communicate with the PHP staff or the parents regarding a placement for the student until a meeting conducted on March 10, 1999. The student's anticipated discharge date was March 19, 1999. The District indicated that it had not determine a proposed placement. PHP staff advocated for an additional two weeks of service to stabilize behavior, monitor medication changes, complete testing, and work with the student on social skills and self regulation. The District contacted PHP staff on March 15, 1999 with approval for two additional weeks of service. The PHP staff informed the parent of the extension.

29. The District contacted PHP staff on March 23, 1999, suggesting placement at [REDACTED]. However, no specifics about the program were mentioned. PHP staff expressed their concern over the proposed discharge date of April 2, 1999, and lack of time to accomplish an appropriate transition where the student's program had not been further developed. PHP staff were invited to observe the program at [REDACTED] and [REDACTED] School. The District attempted to schedule a meeting with the parents and PHP staff on March 23, 1999. A meeting was

scheduled for March 31, 1999. The District emphasized that it would no longer fund the student's placement after April 2, 1999.

30. The student's placement was stabilized after the parents filed a request for due process hearing. On April 2, 1999, the administrative law judge determined that PHP would remain the student's placement pending hearing, unless the parties agreed otherwise.

31. PHP staff have observed the programs at [REDACTED] and [REDACTED] School to find an appropriate placement for the student in the District's programs. While both programs have positive features, they are inappropriate for the student. [REDACTED] features large classes and difficult transitions. The student's social skill deficits would interfere with his ability to fit in at [REDACTED].

32. The parents' educational consultant, Jeannette Cohen, has been a certificated special education teacher in the State of California for twenty years. She is experienced in drafting and implementing IEPs and in the delivery of educational services to students with autism spectrum disorders. Ms. Cohen has analyzed the student's evaluations and the PHP records, has observed the student in class at PHP, and has conferred with the student's teacher and Dr. Unis. Ms. Cohen drafted an IEP proposal (April 20 proposal) featuring a behavior management plan (BMP), accommodations, a proposed placement, a plan for attending regular education classes, and detailed goals and objectives matching the deficits identified by the PHP staff. She recommended placement in a self-contained program for individuals with [REDACTED] Disorder, or with other disorders not involving disruptive behavior or acting out; opportunities for participation in regular education programs where appropriate; and assistance from a one-on-one trained aide.

33. The next IEP meeting occurred on April 20, 1999. The parents provided a copy of the April 20 proposal to the District. The District also presented a proposal. The parties conferred and agreed on a statement of the student's present levels of performance that incorporated portions of each proposal.

34. An IEP meeting was scheduled for April 30, 1999. However, the District left a voice mail message for the parents on the afternoon of April 29 canceling the meeting. The District explained that Lucille Madden could not attend because of a death in the family. Both of the parents had arranged to take off work for the meeting. They had directed their educational consultant and their attorney to attend.

35. A meeting between the parents and District, characterized as a settlement negotiation conference, was scheduled for June 2, 1999. The parents reserved the day on their calendar for several weeks and instructed their educational consultant and attorney to do the same. On May 28, 1999, counsel for the District confirmed by letter the June 2 date and an exact time for the meeting, identifying it as an IEP meeting. The letter also identified participants. Lucille Madden was not among them. The letter indicated that Dr. Schloredt of Children's Hospital would possibly be there. The parents had advised the District in a letter dated April 16, 1999, that they expected Dr. Schloredt

to be present at the IEP meeting. At the parents' insistence, the District arranged for Dr. Schloredt to be available on speaker phone. However, on the morning of June 2, the parents were informed by District counsel that the meeting might not occur. They, their attorney, and their educational consultant waited for word from the District as to whether they should proceed forthwith to the meeting place. The proposed time of the meeting was changed several times. At 2:55 p.m., the parents were advised the meeting had been canceled.

36. Shortly after June 2, an IEP meeting was scheduled for June 11, 1999. The mother rescheduled days off in anticipation. The parents instructed their attorney and their educational consultant to reserve time to attend. The parents received no written notice of the meeting and no notice of attendees. The District canceled the meeting on June 10, 1999.

37. The District does not operate a self-contained program at the high school level for students with [REDACTED] Disorder. It operates a program for elementary students, and anticipates developing a program for junior high school students. In its current program, academic programs are individually designed for each child. The children participate in selected regular education classes if capable of doing so with pre-planning similar to that set out in the April 20 proposal. A speech and language pathologist assists the students in groups and individually. She devotes approximately 90 minutes per week to each child. The student-teacher ratio is very low. In one program there is one teacher and two full-time aides for seven children. In the other program there is one teacher and three full-time aides for nine children. When a child attends a regular education class, an aide accompanies him or her.

38. The current programs use scripting and scheduling techniques. "Scripting" is a technique for direct teaching of certain social conventions. It involves verbally rehearsing an event or interaction with the student.

39. The parents have explored a placement in the self-contained program at [REDACTED] School. In a meeting initially identified as a settlement conference, the parents met with Hal Johnston, the special education teacher, and considered placement in the class with a full-time aide specially trained to work with a student with [REDACTED] Disorder. Mr. Johnston reviewed the April 20 proposal. He indicated that another student in the program had [REDACTED] Disorder and received similar services. It was his opinion that the placement would be feasible and that the April 20 proposal could be implemented.

40. Where a self-contained program for students with [REDACTED] Disorder is not available, Ms. Cohen has recommended the following provisions for an IEP:

Placement in a [REDACTED] school resource room model with all classes in the Special Education Department, with the exception of planned regular education classes discussed below. [REDACTED] is preferred because it has already been discussed between the parties and because of the excellent reputation of its special education program.

A full time aide specifically assigned to the student. The aide's scheduled breaks and lunch period should coordinate with the student's schedule in the resource room so that the aide is available to assist the student between periods and at lunch. The aide's qualifications should include a master's level degree in psychology or education and a specialty in autism. They should also include ability to script the student.

The student's aide shall be responsible for implementing a home/school communication system. This will include: (a) helping the student organize his backpack when he arrives and before he leaves school; (b) keeping track of his homework assignments, checking that these assignments are included in the backpack when he leaves at the end of the day, and that they are returned in the morning; (c) providing a means for the student's parents to know his assignments such as a "homework check sheet"; and (4) making sure a "communication notebook" for comments by the aide to the parents and the parents to the aide is kept in the student's backpack.

The student's aide should be instructed in the importance of segmenting classroom assignments into smaller tasks so that the student is able to sense accomplishment and does not become overwhelmed in completing assignments.

An autism specialist should be available for the first month to consult with the student's teachers, the aide, and the student for one hour a day, five days a week, for a total of twenty hours. After the first month, the [REDACTED] specialist should be available to consult for one and one half hours every week.

The student should participate in a social skills group or friendship group on a weekly basis. It is believed this can be coordinated with the [REDACTED] school counseling department. Similar therapy groups have been organized for children of divorced parents, substance abuse problems, and for children new to the schools.

The student should be evaluated for speech/language pathology services to address problems with language pragmatics. Specific problems to be addressed are the student's difficulty in understanding subject matter changes in conversations, and difficulty engaging in reciprocal conversations with an understanding of the meaning of words that are spoken. The amount of service minutes to be provided should be determined after the evaluation and pursuant to IEP meeting. The student will also be evaluated for assistive technology, with goals and objectives included in his IEP as needed at the conclusion of the evaluation.

An FM system is a transmitting device worn by the teacher communicating with a small receiver placed in the student's ear. It is particularly useful in overcoming distractibility when a teacher is instructing a class. It may be turned off when the teacher is giving specific instruction to another student. An FM System should be considered for use with the student in mainstream classes.

The student should have nursing support to administer and monitor medications as prescribed by his physician.

If the commute to school is less than an hour, the student should be provided with a Metro pass. If it is more than an hour, the student should be transported by school bus, and if he is denied transportation on the school bus, he should be provided with alternative special education transportation. Where placement is a [REDACTED] the student can commute by Metro.

A BMP should be included in an IEP. The plan should match the student's needs and reflect the findings of Children's Hospital staff and the Parents' input. The student lacks insight to participate in drafting the BMP.

The student should participate in regular education classes as set out in the April 20 proposal at page 5 under "Mainstream Plan." Due to his historic difficulty in adjusting to a regular education environment, his participation should be limited to a selected general education classroom or a number of general education classrooms with the support of an aide, significant pre-planning, and only when he exhibits an ability to participate in these classes. The student should be given modified assignments in mainstream classes. For example, if a writing assignment is five pages for the class, the student's assignment may be three pages.

The student should not be excluded from special school events or classroom outings sponsored by a general education class he is attending. He should participate with appropriate support. In the past, the student has not been allowed to attend school functions. In at least one case, he was given a video of a party he was not allowed to attend. Attending such functions allows the student to practice his scripting and social skills.

41. Ms. Cohen's program was reviewed by Dr. Alan Unis. Dr. Unis is a psychiatrist and an acknowledged expert in the area of [REDACTED] disorders, a class of disorders which includes [REDACTED] disorder.

42. Dr. Unis' first contact with the student occurred in March of 1998, at which time he diagnosed [REDACTED] disorder. He also saw the student at PHP and has since consulted with PHP staff and the parents regarding the student's medication and treatment. When Dr. Unis first saw the student, he exhibited a sense of defeat and was mildly stressed. These feelings became more severe in the fall of the same year. The increase in the student's stress level manifested in escalating compulsive behaviors. When Dr. Unis saw the student at PHP, he observed that medication had not apparently controlled the student's behavior. The student appeared depressed and demoralized.

43. Dr. Unis considers the PHP too intensive after staff have completed evaluation and stabilization of a particular student. Dr. Unis has reviewed the Interim Report of the PHP staff. He concurs in the recommendations for the student's educational planning.

Dr. Unis has also reviewed the April 20 proposal, and the above alternative recommendations for a program where the District does not operate a self-contained program for students with [REDACTED] Disorder. He concurs with these recommendations. He specifically supports a highly trained aide assigned to the student on a one-to-one basis. A full time aide can assist the special education teacher, who would not have the time, training, or energy to help the student with social issues. The aide should be the central component to the program. Because the student has difficulty accepting the [REDACTED] diagnosis, and does not wish to be perceived as disabled, the aide will need expertise and finesse so that the student may appear normal to his peer group. A full-time aide is necessary also because of the unpredictability of the student's negative behaviors. He characterizes Ms. Cohen's recommendations as a necessarily intensive program which may be scaled back as the student succeeds.

44. The student has been involved in a summer work program coordinated by PHP staff at the end of the school year. He has been extremely successful in the program and has shown great interest and reliability in his work. The parents report that the student's current behavior is well controlled.

45. The District has made no effort to convene an IEP meeting since the cancellation of the June 11 meeting. The parents feel considerable frustration over the student's educational planning during the last two years. They are concerned that they will not be able to participate meaningfully in the student's [REDACTED] planning if meetings are postponed until commencement of the school year. They are concerned about the effects of delay where the student's placement has not been identified.

CONCLUSIONS OF LAW

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

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

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the

Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.
103 S. Ct. at 3051.

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

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

3. The District bears the burden of proving compliance with the procedural requirements of the IDEA. *Clyde K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994). Generally, only procedural flaws that result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process, will result in a denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985). The evidence in this case establishes that the District failed to provide FAPE for the 1998/99 school year.

Failure to Implement IEP

4. First, the District failed to deliver instruction and services comporting with the student's IEP executed in May, 1998. The IEP included several significant provisions that were ignored. The school nurse failed to properly administer the student's medication and failed to advise the parents when the student did not receive his medication. Consistent administration of medication was essential to medical treatment of the student's disability. The parents and teachers observed significant changes in the student's behavior during the fall semester of 1998. Without consistent administration of medication, the student's physician lacked information to properly

determine the role of the medication in these changes. The student's evaluation recognized that his behaviors affected his educational performance.

5. The student's teachers disregarded the requirement of daily assignment logs. These deviations from the IEP had a significant negative effect. The daily assignment logs were necessary to address the student's weaknesses in executive functioning. The student failed to properly monitor completion of assignments. Without the sheets, the parents were not properly informed of the problem and unable to modify the student's behavior. The seriousness of the student's academic deficiencies were apparent by October, 1998. Despite a meeting reinforcing the need for these sheets, the student's teachers remained inconsistent in their use for the remainder of the semester.

6. The student's teachers failed to incorporate the parents' information sheet into their sub packets. The student was suspended as a result of his behavior with a substitute teacher who had not received the information sheet. The suspension had an extremely demoralizing effect on him.

Disciplinary Exclusion

7. The student was suspended without regard for the procedural requirements of a behavioral assessment plan or a manifestation determination. See 20 U.S.C. §1415(k)(1)(B); (k)(4)(A). These matters are to be addressed by the IEP team within ten days of the action. The parents have argued that the District's initial IEP was inadequate where it did not contain a BMP. Regardless of the adequacy of the initial IEP, a functional behavioral assessment and BMP was clearly appropriate after the student's suspension.

Failure to Revise IEP And Convene IEP Meetings

8. The District failed to convene required IEP meetings. The original IEP team recognized that the student's placement in [REDACTED] would constitute a change in circumstance warranting review of the IEP by the IEP team. The District failed to convene the meeting and disregarded the parents' subsequent requests for a meeting.

9. The District has an obligation to revise the IEP as appropriate to address: (1) any lack of expected progress toward the annual goals and in the general curriculum; (2) the results of any reevaluation; information about the child provided to, or by, the parents; (3) the student's anticipated needs; or (4) other matters. 20 U.S.C. §1414(d)(4)(A). The student's difficulty with the curriculum and the placement was apparent by October 1, 1998. As discussed above, the student's suspension warranted an IEP team meeting. The parents expressed their concern about the student's behavior and performance on several occasions, including a letter to the District's Director of Special Education. The District did not make any attempt to convene an IEP meeting between October 7, 1998, and December 15, 1998. The District's failure to convene timely IEP meetings under these circumstances directly interfered with the parents' ability to participate in the student's educational planning.

10. The change of placement to the PHP for evaluation was not preceded by revision of the IEP. As argued by the parents, the placement was authorized by Dr. Howman outside of the IEP process. There was no consensus regarding the student's length of stay or transition to a more permanent setting. The parents sought these provisions and the District's failure to convene meetings and resolve these issues interfered with their ability to participate in the student's educational planning.

11. The District also failed to convene timely IEP meetings after the student was placed in the PHP. Transition was an essential element of the program involving seven to eight school days. However, the District scheduled meetings too close to anticipated discharge dates to accommodate the transition protocol. The scheduling of these meetings was inadequate considering the student's anticipated needs.

12. Finally, the District failed to timely convene IEP meetings after the parents had filed a request for due process hearing. Several meetings were scheduled and canceled, and all efforts for planning discontinued after the school year ended. The effect of these actions has been to postpone complex educational planning until immediately before the commencement of the school year. The parents have credibly argued that postponement of the educational planning will likely deny the student services needed at the commencement of the school year.

Failure to Provide Notice

13. The District has an obligation to notify parents of each IEP meeting. See WAC 392-172-302. The District must notify the parents of the purpose, time, location of the meeting, and the persons attending. WAC 392-172-156(3). The District did not provide written notice of any of the meetings during the [REDACTED] school year. On at least one occasion, the parents were surprised by the agenda and unable to properly respond. This was particularly true during the December 15, 1998, meeting and its demoralizing effect on the student. The evidence establishes that the District's failure to provide notice interfered with the parents' ability to participate meaningfully in the student's educational planning. Lack of notice therefore resulted in a failure to provide FAPE.

Least Restrictive Environment

14. The District has an obligation to deliver services in the least restrictive environment, i.e., in the general educational environment with students who are not disabled to the maximum extent appropriate to his or her needs. Removal from the general education environment cannot occur unless it is demonstrated by the District that the nature or severity of the student's disability is such that his or her education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. WAC 392-172-172. The evidence shows that the student remained in the PHP after the staff had completed its goals of stabilization and evaluation. The student was ready for placement in a less restrictive environment involving some access to regular education classes, with appropriate supports and services. While the restrictive environment of the PHP was necessary for a certain period of time to stabilize the student and evaluate his needs, continuance of that environment after

those goals had been achieved denied him opportunities for exposure to regular education settings. The District has not sustained its burden of proving that continued participation in the PHP was necessary after April 27, 1999. The April 20 proposal offered opportunities for participation in the general education program with supportive accommodations and services. The District failed to provide FAPE where it had not convened the necessary IEP meetings and identified an appropriate placement after April 27, 1999.

Remedy

15. The parents argue that an appropriate remedy in this matter is an order directing implementation of the educational program identified as appropriate by Ms. Cohen, Dr. Schloredt, and Dr. Unis. The District challenges the authority of the administrative law judge to enter such an order, arguing that it would usurp the role of the IEP team in determining an appropriate educational plan. The administrative law judge concludes that the parents' requested relief is appropriate in this case.

16. WAC 392-172-350 authorizes a hearing at the request of a parent to determine the appropriateness of the District's refusal of the parent's request to initiate or change the delivery of educational services or provision of special education and related services. The Ninth Circuit has recognized the authority of a district court to fashion appropriate relief where a student has been denied FAPE. Basically, 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 School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994).

17. The parents have shown that the April 20 proposal, modified by Ms. Cohen's proposal for placement at [REDACTED] is an appropriate plan for the student. Ms. Cohen's proposal incorporates the required elements of an IEP. The proposed services are consistent with the student's needs identified in his evaluations. The placement offers opportunities for participation in the general education program with limitations appropriate to the student's disability. The goals and objectives defined in the April 20 proposal are appropriately tailored to the student's unique needs. The BMP is based on the functional behavioral analysis performed in the PHP.

18. Significantly, Ms. Cohen's proposal has been reviewed by a District special education teacher and other professionals acquainted with the student and his disability. These professionals agree that the proposal is appropriate and feasible. While designed outside of the structure of an IEP meeting, the proposal reflects a collaborative and knowledgeable foundation.

19. An order directing implementation of this proposal is relief designed to ensure that the student is educated within the meaning of the IDEA. The IDEA requires an IEP to be in effect at the beginning of the school year. 20 U.S.C. §1414(d)(2)(A); WAC 392-172-158. The evidence shows that, without an appropriate order, this requirement would likely not be met. An order directing implementation of the parents' proposal will address this concern.

20. It is anticipated that the District may seek to renegotiate aspects of the proposal. The parents have acknowledged a need for further discussion after the student has begun school. A placement determined in the course of a due process hearing becomes the last agreed upon placement in the event of further review or additional due process proceedings. See *Clovis Unified School Dist. v. California Office of Adminis. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). Here, one of the functions of an order directing implementation of the proposal will be to establish a baseline for services while the parties continue to participate in the IEP process.

21. The parents' proposal should be adopted with one modification. The proposal mandates a master's level education for the aide. The administrative law judge concludes that this requirement will not provide sufficient flexibility in the hiring decision. The District should seriously consider the recommended education in its selection process. To ensure appropriate qualifications, the final selection of the aide shall be approved by Dr. Unis, or another expert identified by the parents if Dr. Unis is not available.

Request For Attorney's Fees and Costs

22. The administrative law judge concludes that the parents' request for attorney fees and costs should be denied. This tribunal lacks jurisdiction to consider these matters. An award of attorney fees and costs under the IDEA is appropriately pursued in superior or federal district court. 20 U.S.C. §1415(i)(2).

ORDER

IT IS HEREBY ORDERED:

1. The District has failed to provide FAPE during the [REDACTED] school year.
2. The District shall immediately implement the April 20 proposal with the following additions or modifications:

The student shall be placed at [REDACTED] in the special education resource room with all classes taught by the Special Education Department, with the exception of planned mainstream classes discussed below.

A full time aide shall be employed and specifically assigned to the student. The aide's scheduled breaks and lunch period should coordinate with the student's schedule in the resource room so that the aide is available to assist the student between periods and at lunch. The aide's qualifications should include a master's level degree in psychology or education and a specialty in [REDACTED]. They shall also include ability to script the student. Selection of the aide shall be contingent upon the approval of Dr. Alan Unis, or, if unavailable, other expert designated by the parents.

The student's aide shall be responsible for implementing a home/school communication system. This will include: (a) helping the student organize his backpack when he arrives and before he leaves school; (b) keeping track of his homework assignments, checking that these assignments are included in the backpack when he leaves at the end of the day, and that they are returned in the morning; (c) providing a means for the student's parents to know his assignments such as a "homework check sheet"; and (4) making sure a "communication notebook" for comments by the aide to the parents and the parents to the aide is kept in the student's backpack.

The student's aide will be instructed in the importance of segmenting classroom assignments into smaller tasks so that the student is able to sense accomplishment and does not become overwhelmed in completing assignments.

An [REDACTED] specialist shall be available for the first month to consult with the student's teachers, the aide, and the student for one hour a day, five days a week, for a total of twenty hours. After the first month, the autism specialist shall be available to consult for one and one half hours every week.

The student shall participate in a social skills group or friendship group on a weekly basis. It is believed this can be coordinated with the [REDACTED] school counseling department. Similar therapy groups have been organized for children of divorced parents, substance abuse problems, and for children new to the schools.

The student shall be evaluated for speech/language pathology services to address problems with language pragmatics. Specific problems to be addressed are the student's difficulty in understanding subject matter changes in conversations, and difficulty engaging in reciprocal conversations with an understanding of the meaning of words that are spoken. The amount of service minutes to be provided shall be determined after the evaluation and pursuant to IEP meeting. The student will also be evaluated for assistive technology, with goals and objectives included in his IEP as needed at the conclusion of the evaluation.

An FM system is a transmitting device worn by the teacher communicating with a small receiver placed in the student's ear. It is particularly useful in overcoming distractibility when a teacher is instructing a class. It may be turned off when the teacher is giving specific instruction to a student. An FM System shall be considered for use with the student in mainstream classes.

The student will have nursing support to administer and monitor medications as prescribed by his physician.

If the commute to school is less than an hour, the student shall be provided with a Metro pass. If it is more than an hour, the student shall be transported by school bus, and if he is denied transportation on the school bus, he shall be

provided with alternative special education transportation. Where placement is at [REDACTED] the student can commute by Metro.

A behavior management plan shall be included in an IEP. The plan shall match the student's needs and reflect the findings of Children's Hospital staff and the Parents' input. The student lacks insight to participate in drafting the BMP.

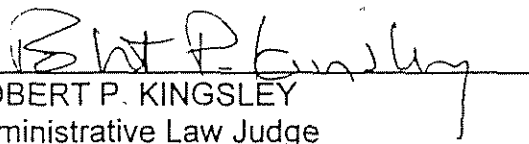
The student shall participate in regular education classes as set out in the April 20 proposal at page 5 under "Mainstream Plan." Due to his historic difficulty in adjusting to a regular education environment, his participation shall be limited to a selected general education classroom or a number of general education classrooms with the support of an aide, significant pre-planning, and only when he exhibits an ability to participate in these classes. The student shall be given modified assignments in mainstream classes. For example, if a writing assignment is five pages for the class, The student's assignment may be three pages.

The student shall not be excluded from special school events or classroom outings sponsored by a general education class he is attending. He shall participate with appropriate support. In the past, the student has not been allowed to attend school functions. In at least one case, he was given a video of a party he was not allowed to attend. Attending such functions allows the student to practice his scripting and social skills.

3. The District shall convene appropriate IEP meetings to review and, if necessary, revise the student's educational plan within one month of the beginning of the school year. The District shall provide written notice as required by the applicable statutes and regulations. The District shall not deviate from the above provisions without order of the administrative law judge unless accomplished pursuant to an appropriately executed IEP.

4. The parents' request for attorney's fees and costs is denied. The parents may commence an appropriate action in superior or federal district court.

Dated at Seattle, Washington this 20th day of August, 1999.


ROBERT P. KINGSLEY
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a petition for reconsideration filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (i) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The Petition for Judicial Review of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

CERTIFICATE OF SERVICE

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 8/26/99, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

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