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OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

NOV 12 1999

Superintendent of Public Instruction
Legal Services

IN THE MATTER OF:

Spokane School District

SPECIAL EDUCATION
CAUSE NO. 99-93

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge John M. Gaffney, in Spokane, Washington, on November 8 and November 9, 1999. Appellants, parents of the Student (Parents), were present at the hearing. Also present on behalf of the Parents was John Minkler. The Spokane School District (District) was present through Michael Ainsworth, Special Education Coordinator. Witnesses included Joanie Suttle, Low Incident Intervention Specialist, Tom Gresch, Vice Principal of [REDACTED], Jill Nowak, Special Education Teacher [REDACTED] and Lynn Kuennen, School District Area Coordinator. The District was represented by Gregory Stevens, Attorney at Law.

STATEMENT OF THE CASE

Appellants originally requested a due-process hearing on February 8, 1999. Several prehearing conferences were held. Judge Wynne O'Brien was in charge of the case at that time. Judge O'Brien held hearings on August 3, August 4 and August 31, 1999. Judge O'Brien issued a decision on September 7, 1999, which held: The Individualized Education Program (IEP) proposed by the District for the 1999/2000 academic school year is appropriate for the student. The student shall initially attend the [REDACTED] for the first half of each school day. The student shall then attend the [REDACTED] for the remainder of the school day.

On September 17, 1999, the Parents requested another due-process hearing alleging that the District had failed to comply with the Student's 1999/2000 IEP. Judge O'Brien was reassigned to the case. The Parents' request to remove Judge O'Brien from the case was granted. Judge John M. Gaffney was then assigned to the case. Prehearing conferences were held on October 20 and October 21, 1999. A Prehearing Order was issued by Judge Gaffney on October 22, 1999. As a result of the Prehearing Order and new matters addressed at the hearing of September 8 and September 9, 1999, the issues to be decided by this decision relating to the Student's 1999/2000 IEP are as

Findings of Fact, Conclusions of Law, and Order

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follows: (1) The means of transportation for the Student between home, the school, and back home again; (2) The number of hours per day that the Student is at the [REDACTED] [REDACTED] (3) Transportation for the Student to attend a meeting from (a) 3 p.m. to 4 p.m. each Tuesday at Lutheran Social Services and (b) 3 p.m. to 4 p.m. each Wednesday at Spokane Mental Health, (4) Whether or not the Criminal Trespass Order issued September 15, 1999, under RCW 9A.52 against the Student will remain in effect; (5) Whether or not the Criminal Trespass Order issued September 15, 1999, under RCW 9A.52 against the father of the Student shall remain in effect; (6) Whether the Student should be allowed to attend extracurricular activities such as dances and games and, if so, how such a plan should be implemented; (7) The precise location or locations where the Student is allowed to eat breakfast and lunch at [REDACTED] [REDACTED] and, (8) Whether the procedure used by the District to accompany the Student to the restroom should be continued.

The Administrative Law Judge is unaware of any appeal from Judge O'Brien's decision of September 7, 1999, holding that the District's proposed IEP for the Student for the 1999/2000 school year is appropriate. The purpose of this hearing was not to create a new IEP but merely to fine-tune the proposed 1999/2000 IEP which has been held to be valid.

FINDINGS OF FACT

I.

The Student at issue (Student) is a [REDACTED] [REDACTED] student. The Student was born [REDACTED] [REDACTED] resides with his parents within the Spokane School District (District). The Student has attended school within the District since [REDACTED]. The Student last attended school in the District as a [REDACTED] during the 1998/99 school year at [REDACTED]. His attendance ended in October 1998, at which time the Student was suspended for inappropriate sexual behavior and placed in private tutoring several hours each day at [REDACTED]. These tutoring sessions began on [REDACTED]. The Student attended these tutoring sessions through the remainder of the 1998/99 school year.

II

The Student's 1999/2000 IEP was made a part of the record and is used as the blueprint by which the Student's needs are addressed. That document also addresses the goals for the Student and the means by which to reach those goals. That document is meant to be somewhat of a fluid document that allows for changes as needed during the school year. For example, on the issue of transportation, the document does list as a goal that the Student will use public transportation. The document does not state specifically

that the Student should ride a Spokane Transit Authority (STA) bus one day per week or two days per week because that is simply viewed as too rigid. The Parents at one point stressed in the hearing that educators had stated they would be willing to modify the IEP during the year. Unfortunately, that has been virtually impossible for the educators as they have been in litigation over the IEP for almost a year. The matter is further complicated by the fact that the Student has not attended regular school sessions since October 1998. The District attempted to place the Student at two different high schools after the Student was removed from [REDACTED] but the parties could not reach an agreement. Due to difficulties between the District and the Parent, the Student has attended classes only sporadically during September and October of 1999. A truancy matter is currently pending at Spokane Superior Court. This Administrative Law Judge has stated numerous times during the prehearing and the hearing that he has absolutely no jurisdiction over the truancy matter. The matter is left to the province of Spokane Superior Court.

III.

Judge O'Brien's decision discussed very clearly that the Student should be at the [REDACTED] each morning and [REDACTED] in the afternoons. The [REDACTED] is the special education vocational site for the District. The developmentally impaired (DI) program at [REDACTED] integrates classroom work with community exposure, such as the Student coordinating bus schedules and other related activities. The DI program is heavily supervised, generally with eight to ten students to every three to four adults. At [REDACTED] in the DI program the Student is engaged in activities such as filling out job applications and working on bus schedules.

IV.

During a prehearing conference, it was agreed that, until Judge Gaffney's decision of November 10, 1999, the Student's school day would start at 7:45 a.m. at [REDACTED] for breakfast. The Student would then start the DI program at [REDACTED] from 8 a.m. until approximately 8:45 a.m. each morning. From approximately 8:45 a.m. until 9 a.m. each morning the Student is transferred from [REDACTED] to the [REDACTED]. The Student then attends the [REDACTED] from 9 a.m. until 11 a.m. The Student is then transferred back to [REDACTED] for the remainder of the day. The Student has lunch at [REDACTED] and continues in the DI program until 2 p.m. each day.

V.

The IEP in question specifically dictated that the Student be involved in 360 minutes (six hours) of special education per day. It also provided that transportation would be by means of Laidlaw, the school bus system, as needed.

VI.

School ends for each special education student at [REDACTED] at 2 p.m. Regular education students often attend school until 2:30 p.m. Monday through Friday. Other regular education students are on modified programs where they might work in the afternoon and only attend classes in the morning. All of the witnesses from the District uniformly testified that breakfast and lunch are an important part of the Student's socialization and communication skills. For this particular Student, socialization and communication skills learned at meals are crucial elements in the Student's growth. The District maintains that they were providing six hours and fifteen minutes of special education for the Student per day from 7:45 a.m. until 2 p.m. each day. The District felt that they were actually providing fifteen more minutes than necessary and mandated by the 360-minute stipulation of the IEP.

VII.

The Parents argued that lunch should not count towards the six hours and that the Student should remain in school until 2:30 p.m. Monday through Friday, leaving at the same time as the majority of the regular education students. As indicated in Judge O'Brien's decision of September 7, 1999, the Student does not attend any regular education classes.

VIII.

The District was very concerned that if the Student was allowed to take the city bus to [REDACTED] each morning rather than the school bus that the Student would not arrive at a uniform time, would not go in through the same door each morning, and that the school would not know the Student's exact whereabouts. The school felt it did not have the personnel to have a responsible adult situated at each door waiting for the Student to show up each morning. While on the school grounds, the Student is virtually always with an instructional aide or in a small group under the direction of a teacher. The District firmly believed that busing involved issues of safety and supervision. The hearing record contains significant information about the Student's inappropriate behavior that led to his expulsion from [REDACTED]. There is no need to list that behavior in this decision. The District does, however, have reasons for trepidation on safety issues with this Student.

IX.

The Student has taken the city bus successfully in the past. The Student felt that he was made fun of by his fellow students because he had to take the school bus to school each morning and ride that same school bus home each evening. The school bus

gets the Student home at approximately 2:45 p.m. each day. If the Student takes the city bus, he would leave the school at 2 p.m. and catch the 2:15 p.m. bus from the bus plaza that goes to the Student's home. The Student would arrive home at the earliest at about 2:30 p.m. each day. The Student rides the STA bus on weekends.

X.

Jill Nowak is one of the Student's special education teachers at [REDACTED]. Ms. Nowak teaches a self-contained class in a DI program. Along with the others, Ms. Nowak felt that lunch and breakfast were an integral part of each students' schooling, and of great need for this particular Student. Ms. Nowak noted that taking the city bus was a goal for the Student. Ms. Nowak felt strongly that as of the date of the hearing, the Student was not yet ready to take the city bus completely on his own, five days per week. Ms. Nowak is proud of the work that the Student has done. Ms. Nowak has gone out with the Student in the community on approximately four occasions. Although Ms. Nowak did not volunteer her own plan, when pressed on the matter, Ms. Nowak suggested that she complete ten community outings with the Student and that the Student should then be allowed to take the city bus rather than the school bus to and from home one day per week. If the Student is capable of arriving at school on time and going directly to the designated door in the mornings and in the evenings leaves the school grounds immediately and then takes the city bus home, the frequency would be increased until the Student was taking the city bus to and from school each day. All parties agreed it was acceptable for the Student to ride from [REDACTED] to the [REDACTED] in the mornings on the school bus and to return later in the mornings to [REDACTED] from the [REDACTED] by means of the school bus. The only disagreement was on how the Student should get to school each day and return home each evening.

XI.

The Student does attend an appointment at Lutheran Social Services each Tuesday from 3 to 4 p.m. and attends a session at Spokane Mental Health from 3 to 4 p.m. each Wednesday. The Student then walks from those appointments to the Spokane bus plaza where he takes the city bus home. The District agreed during the hearing to transport the Student by school bus each Tuesday to Lutheran Social Services and each Wednesday to Spokane Mental Health. The District is only responsible for getting the Student to those appointments by 3 p.m. It is perfectly acceptable for the District to take the Student immediately at 2 p.m. Tuesdays and Wednesdays from the school to the appropriate appointment. If the Student arrives for his appointments 55 minutes early, that is not the school's concern.

XII.

The District agreed that as part of the Student's socialization skills it would be worthwhile for the Student to attend school dances and school games. The Student very much wants to be part of the crowd and wishes to attend dances and games. Dances are held at the [REDACTED] within school hours. The District suggested that it would be easier to monitor the Student's conduct at a dance at the [REDACTED] and then transition into allowing the Student to attend a dance in the evenings at [REDACTED] if a teacher agreed to chaperone and keep tabs on the Student. The District cannot compel a teacher to attend an [REDACTED] dance.

XIII.

Although the District wishes to give the Student more independence, the school seemed to be very worried that the Student would act inappropriately towards other students, particularly female students, if the Student was not watched extremely closely. In regard to school games, Ms. Nowak suggested that the Student be allowed to attend games without supervision until such time that his conduct did not warrant that privilege. Games are held at various locations throughout the Spokane area including Joe Albi Stadium and numerous other schools such as Central Valley High School.

XIV.

Prior to the Prehearing Order of October 22, 1998, the school expected the Student to start each day at the [REDACTED] at 9 a.m. The Student was routinely reporting to [REDACTED] at about 7:45 a.m. each morning. The Student's father was also showing up at [REDACTED] on a very regular basis. One of the educators, Joanie Suttle, indicated that she had spent more time with the Student and his family than with any other student or family in her 25 years as an educator. In general, parents are required to make appointments to speak to administrators or educators. Parents are not simply allowed to walk into a school unannounced and make demands on behalf of their children. Tom Gresch, Vice President at [REDACTED] is responsible for 1,550 students. If he spends one hour talking to the father of the Student, it means the needs of many students go unattended during that time. Because of the growing frustration, the District issued a Criminal Trespass Order against the father of the Student on September 15, 1999, prohibiting the father from being on [REDACTED] property or [REDACTED] school property, as well as all Spokane School District 81 property. Because [REDACTED] is being torn down and rebuilt, classes are being held at the [REDACTED] building. Under the provisions of the Criminal Trespass Order, even if the Student's father scheduled a legitimate meeting at school property, he would be in violation of the Criminal Trespass Warning issued to him September 15, 1999. At the hearing, Judge Gaffney stated that he did not have jurisdiction over that matter. The District, however, was asked by the Judge to issue a

more lenient warning towards the father of the Student. The District agreed to suspend the Criminal Trespass Warning of September 15, 1999, and issue a more lenient warning that would allow the father of the Student to be on school property five minutes before a scheduled meeting, the period of the meeting, and for an additional five minutes after the meeting ended.

XV.

A Criminal Trespass Warning was also issued against the Student on September 15, 1999. One portion of the warning stated that the Student was prohibited from being on [REDACTED] property. Another portion of the document stated that the Student could not arrive at school until 11:30 a.m. During the hearing, the District agreed to completely revoke the Criminal Trespass Warning against the Student.

XVI.

As indicated earlier, the Student does eat breakfast and lunch at [REDACTED]. Breakfast is usually a very quick meal of approximately 15 minutes in which the Student eats a muffin or other item that can be held in his hand. Approximately 30 students eat breakfast at the school facility. The lunch period is thirty-five minutes each day. The Student indicated that he was forced to eat breakfast and lunch alone in a hallway. Ms. Nowak testified, and the undersigned finds as fact, that the Student eats breakfast on the run and lunch in the hallway with approximately 200 other students. There is no cafeteria. The student can go outside to eat. The Student is also allowed to leave the grounds and eat off premises if he has money and makes a prior arrangement with the school to have an aide accompany Student and others off the premises to a restaurant.

XVII.

The Student is virtually always with an instructional aide. When the Student wishes to use the restroom an aide insures that the restroom is empty. The Student then enters the restroom alone and the aide goes back to the classroom. The restroom can be seen from the classroom and either the teacher or aide can see when the Student exits the restroom.

CONCLUSIONS OF LAW

I.

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).

II.

The District bears the burden of proving compliance with the substantive and procedural requirements of the IDEA. Clyde K. V. Puyallup School District, 35 F. 2d 1396 (9th Cir. 1994). The 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 compliance with goals and procedures.

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the Supreme Court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the EHA [Education for All Handicapped Children Act, now IDEA] 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' [FAPE] as defined by the Act.

Rowley, 103 S. Ct. At 3141, 3142.

III.

The substantive test of Rowley does not require the absolutely best or 'potential-maximizing' education for the individual child. FAPE is provided if the child derives more than minimal or trivial progress in a placement, considering the child's unique characteristics. Florence County Sch. Dist. Four v. Carter, 950 F.2d 156, 160 (4th Cir. 1991), *affd.* 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed 2d 284 (1993).

IV.

An individualized education program (IEP) shall be developed for each special education student at the beginning of each school year. WAC 392-172-158. The IEP shall be developed on the basis of the student's evaluation and input of the parent's. WAC392-172-160(1). The IEP shall include the following:

(a) A statement of the student's present levels of educational performance;

(b) A statement of specific annual goals. . . . ;

(c) A statement of the specific special education and related services to be provided to the student based upon the **individualized needs of the student**, as determined through the evaluation process, and the extent to which the student will be able to participate in the general educational program, including physical education ;

(d) The individualized education program developed for a special education student shall also include a statement of the needed transition services as defined in WAC 392-172-060 including goals and objectives, based on a functional vocational evaluation and anticipated post-school outcome(s) **beginning no later than age sixteen and annually thereafter**. . . .

WAC 392-172-160(1); Emphasis added.

V.

As stated in the Statement of the Case, the purpose of this hearing is to simply fine-tune the Student's 1999/2000. The issue of the appropriateness of that IEP has already been litigated. Ideally, the IEP would be a fluid document in which the Parents and the District could make some minor needed changes during the school year. Unfortunately, because of the history of litigation between the parties, the District has been prevented from making changes, even those that could assist the Student.

VI.

The first issue to be decided concerns the Student's transportation to and from school each day. The undersigned concurs strongly with the goal of the IEP that the Student take public transportation to and from school. The question then is how to implement such a program. The undersigned wishes to stress that the District can set

reasonable guidelines and require that the Student follow those guidelines. The undersigned finds that the District has the Student's best interests in mind and is doing a commendable job in meeting the Student's needs and following the proposed IEP. The undersigned does, however, feel the need to keep the District moving towards greater independence for the Student. Ms. Nowak was a very credible witness and her ideas were sound. Because of problems between the District and the Parents during the previous school year and the first two months of the current school year, the Student is behind in his schooling and the goals of the IEP, including transportation. Ms. Nowak and the other educators are all extremely busy. It could be a significant period of time before Ms. Nowak is able to go out with the Student on ten different outings. Bearing all this in mind, the Student's transition to riding the STA will commence during the week of November 29 through December 3, 1999. The Student will be allowed to ride the city bus to and from school on either Tuesday or Wednesday of that week. The exact day will be selected by the District. The District shall set forth in writing to the Student and to the Parents by November 23, 1999, the precise day of the week that the Student will be allowed to take the city bus to and from school. That writing shall also include the time that the Student is to arrive at school and the exact door to be used by the Student. That procedure will be followed for two weeks. After the first two weeks, if the Student successfully takes the bus, arrives and leaves when he should, and arrives and leaves from the door designated by the District, the transportation by city bus will be increased to two days per week. That would start the week of December 13 through December 19, 1999. The District would then set forth in writing the two days that the Student is allowed to ride the city bus to and from school. Christmas vacation would be factored into the equation. After two weeks of successfully riding the city bus two days per week, it would be increased to three days per week for a two-week period. This would continue onward until the Student is riding the city bus to and from school five days per week.

VII.

This plan will only proceed as outlined if the Student meets the strict guidelines set by the District to ride the city bus. The decision as to whether or not the Student is meeting the requirements dictated by the District is to be determined by the District. The District can establish what person or persons make that decision. The study team that meets every few weeks to discuss the progress of the Student could certainly be used for that purpose. If during that first week that the Student takes the city bus, or any time thereafter, the District decides that the Student is either arriving at the wrong time, arriving at the wrong door, or not leaving the school premises within a very reasonable time, the privilege of the Student to ride the city bus is removed and the Student will be back to taking the school bus to and from school each day. There would then be a two-week period of the Student riding the school bus and after that the whole process would start over once again. That would mean that after that two-week waiting period the Student would be allowed to take the city bus one day per week for two weeks and continue as

outlined earlier. It should be understood by the Student and the Parents that the default position will be that the Student ride the school bus to and from school each day, and that the Student must show responsibility in this matter and that the independence to ride the city bus can be revoked unilaterally by the District if the Student does not comply.

VIII.

In regard to the hours per day that the Student is deemed attending school, the undersigned sides with the District in this matter. The Student currently is in school from 7:45 a.m. until 2 p.m. each day, a total of 6 hours 15 minutes. Meal times are considered to be an integral part of the Student's education. The school is meeting the mandates of the IEP in this regard. School ends for all special education students at 2 p.m. each day. The same is true for the Student in question.

IX.

The District agreed during the Hearing to provide the Student transportation to the Tuesday and Wednesday meetings each week. The District is responsible for that transportation even on days when the Student takes the STA to school on a Tuesday or Wednesday. It is then the responsibility of the Student and the Parents to arrange transportation from the appointments back home for the Student.

X.

In regard to the Criminal Trespass Order against the Student, the school did agree to revoke that Criminal Trespass Warning.

XI.

The District also agreed to revoke the existing Criminal Trespass Warning against the father of the Student. The District agreed to reissue a less restrictive document that permits the father of the Student to be on school property for scheduled meetings during the period of the meeting as well as five minutes before the meeting and five minutes after the meeting. The father of the Student must call the District to set an appointment.

XII.

Concerning extracurricular activities, the Student should be allowed to attend dances at the Libby Center immediately. This would mean the very next dance held at the Libby Center. The theory on the extracurricular activities are similar to the theory on busing. It is important for the Student to become more involved and more independent. That independence is not granted automatically and completely. Once again, the

decision as to whether the Student is acting appropriately at dances is up to the District. If the District does not feel that the Student is acting appropriately at a dance at the [REDACTED] that privilege could be revoked. The undersigned cannot envision every possible problem that might occur at a dance and therefore cannot set forth what the boundaries are and what will happen trying to foresee every possible scenario. If the Student chooses to attend two dances at the [REDACTED] and acts appropriately at those two dances, the District shall then make its best efforts to allow the Student to attend a dance at [REDACTED]. There were some inherent problems in terms of logistics because educators cannot be required to attend after-school activities such as dances at [REDACTED]. For that reason, the undersigned will not mandate that one of the educators of the Student be ordered to attend such a dance as a chaperone. The undersigned, however, would request (not order) that one of the educators cognizant of the Student's needs agree to watch the Student at an [REDACTED] dance. If the Student acts appropriately, the Student will be allowed to continue attending dances at [REDACTED]. Like the busing resolution, if the school feels the Student is acting inappropriately, the school may revoke the privilege to attend [REDACTED] dances as well as the dances at the [REDACTED].

XIII.

The District is allowed to continue the procedure to have an aide accompany the Student to the restroom door. The Student will then use the restroom alone.

XIV.

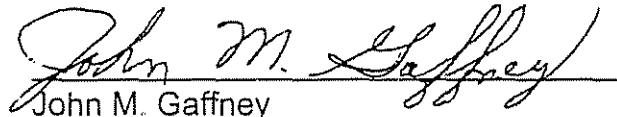
The Student eats his breakfast on the run in the second floor hallway. The Student eats lunch in the second floor hallway with approximately 200 students. There is no cafeteria. The Student can go outside to eat lunch attended by an aide. With proper notice the Student can eat off campus when accompanied by an aide.

ORDER

- 1) The Student will begin taking the STA the week of November 29, 1999, as outlined in Conclusion numbers VI and VII.
- 2) The school day will remain 7:45 a.m. until 2:00 p.m. Monday through Friday of each week. Meals are considered a part of the school day.
- 3) The District will provide transportation for the Student each Tuesday and Wednesday for the Student's 3:00 p.m. meeting each of those days.

- 4) The criminal trespass order entered against the Student September 15, 1999 is revoked.
- 5) The criminal trespass order entered September 15, 1999, against the father of the Student is revoked and a more lenient order will be issued as outlined in Conclusion number XI.
- 6) The Student will begin attending extracurricular activities as outlined in Conclusion number XII.
- 7) The second floor hallway is a proper place for the Student to eat his breakfast and lunch. The Student can also eat outside or leave the campus with prior approval and when accompanied by an aide.
- 8) The District need not change the procedure of accompanying the Student to the restroom. An aide will not enter the restroom with the Student.

Dated and mailed on the 10th day of November, 1999.




John M. Gaffney
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

PURSUANT TO 20 USC 1415(e) (INDIVIDUALS WITH DISABILITIES EDUCATION ACT) AND CHAPTER 34.05 RCW, THIS MATTER MAY BE FURTHER APPEALED TO A COURT OF LAW. THE 30-DAY TIME LIMIT FOR FILING A PETITION FOR JUDICIAL REVIEW COMMENCES ON December 10, 1999, THE MAILING DATE OF THE ORIGINAL DECISION.

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties and their representatives on November 10, 1999, by depositing a copy in the United States mail, postage prepaid, addressed to the following:

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