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Superintendent of Public Instruction
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December 11, 2001

PARENT



Bellevue School District
Sharon Howard
Linda Hawkins
P.O. Box 90010
Bellevue, Washington 98009

Christopher L. Hirst
701 Fifth Avenue, Suite 5000
Seattle, Washington 98104

RE: School District, Special Education Cause No. 2001-SE-0084, 2001-SE-0085

Dear Parties:

Enclosed please find a copy of the Findings of Fact, Conclusions of Law and Order entered in the above referenced matter.

If you have any questions, feel free to contact the undersigned at the above address or telephone number.

Sincerely,

Andrea Conklin
Administrative Law Judge

cc: Legal Services, OSPI
Mary Radcliffe, OAH ALJ Hearing Coordinator



DEC 11 2001

OFFICE OF
ADMINISTRATIVE HEARINGS

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

IN THE MATTER OF:

BELLEVUE SCHOOL DISTRICT

SPECIAL EDUCATION

CAUSE Nos. 2001-SE-0084

2001-SE-0085

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

Andrea Conklin, Administrative Law Judge (ALJ), held a hearing on November 16, 19, 20, and 21, 2001. The Parents appeared in person and *pro se*. The Bellevue School District ("District") was represented by Christopher L. Hirst, of the law firm of Preston, Gates and Ellis, LLP. Exhibits P-2.2 through 2.4, P-3 through 24, P-37 and P-38, P-41 through 42, P-44 through 54, P-57 through 123, and D-1 through 12, and 14 through 97 were admitted. The District called as witnesses Linda Hawkins, Dr. Carol Davis, Judy Jurden, Donelle Booth, Siri Berry and Dr. Ilene Schwartz. The Parents called as witnesses the Mother of the Students (Mother), Anita Fischer and Reena Prasad. The Students whose educations are at issue [REDACTED] and [REDACTED] did not participate in the hearing.

STATEMENT OF THE CASE

On July 20, 2001 the Parents filed two due process hearing requests, one for each Student, with the Office of the Superintendent of Public Instruction. At the time of filing the hearing requests, the Parents were represented by attorney Kathleen Royer. On August 9, 2001 a prehearing conference was held. During the prehearing conference, the Parents, through their counsel, stipulated that the November 2000

Individual Education Plans ("IEP") currently in place is appropriate for both the Students. On August 13, 2001 a Prehearing Order was entered outlining the issues for the hearing and the Parents' stipulation. No objection was filed to the August 13, 2001 Prehearing Order.

On September 5, 2001, Ms. Royer withdrew from representation of the Parents in this matter. A prehearing conference was conducted on September 10, 2001. The Parents' request for a continuance was granted because their counsel had withdrawn. The Prehearing Order dated September 13, 2001 again notes that the Parents stipulated that the November 2000 IEPs currently in place is appropriate for both the Students. No objection was filed to the September 13, 2001 Prehearing Order.

ISSUES

1. Did the District properly implement the ESY (extended school year) services provisions of the November 2000 IEP for both Students?
2. Are the Students entitled to compensatory education if the November 2000 IEPs have not been properly implemented?

FINDINGS OF FACT

1. [REDACTED] and [REDACTED] are [REDACTED] whose date of birth is [REDACTED]. The Students have been diagnosed with [REDACTED]. The Parents believe that the best program for their children is one in which the Students receive intense training during school hours and on the weekends. Therefore, the Parents, at their own expense, hire aides to provide training and other services to the Students on the weekends.

2. The District initially served the Students in its birth to three program at [REDACTED], beginning in [REDACTED]. D-1 and D-2. In September of 2000, the Students began at [REDACTED] School ([REDACTED] for [REDACTED]). Separate IEPs were in effect for both Students and are dated November 6, 2000. D-5 and D-6.

3. As to [REDACTED] the summary of service matrix contained on District Exhibit D-5.17 notes that the ESY for [REDACTED] is attached. At D-5.16, the ESY for [REDACTED] for [REDACTED] provides:

ESY for [REDACTED]

To provide programming for [REDACTED] during the periods that school is not in session because of scheduled breaks (summer, winter, mid-winter, spring) during the regular school year, services may be provided through some combination of [REDACTED] and/or individual training paid for by the District that is selected in consultation with the BSD Program Director. Should the parents prefer to provide private therapy in the home or elsewhere during these breaks, the District will reimburse the parents at a rate for such therapy not to exceed \$15.00 per hour. The district will reimburse the parents within 30 calendar days after the receipt of documentation from the parents verifying that such individual therapy was provided. For SLP therapy (one hour per week) the District will contract for direct services to be provided through private providers during the summer break. However, the total obligation for the District to provide ESY services, through any type of provider, shall not exceed a total of 28 hours per calendar week.

For the summer break the District will contract for three hours per month with the program director, or if the current program director is not available, with a substitute director approved by the program director to consult with the parents and/or district concerning the services provided during the summer.

In addition the District will provide during the school year for up to two persons to be trained to provide the individual training in the home during school vacations or other breaks in the school calendar and will also train the parents should they wish to be able to provide the therapy. Data by any private providers will be reviewed and considered by the District in the delivery of its services when the school program resumes. Privately contracted SLP therapy providers will also share data they obtain.

D-5.16 (emphasis added). The Parents signed [REDACTED] IEP as "participating only."

4. Similarly, the summary of service matrix notes that the ESY provisions for [REDACTED] for [REDACTED] are contained in an attached document. D-6.20. The ESY for [REDACTED] for [REDACTED] provides at D-6.22 as follows:

ESY for [REDACTED]

To provide programming for [REDACTED] during the periods that school is not in session because of scheduled breaks (summer, winter, mid-winter, spring) during the regular school year, services may be provided through some combination of preschool and/or individual training paid for by the District that is selected in consultation with the BSD Program Director. Should the parents prefer to provide private therapy in the home or elsewhere during these breaks, the District will reimburse the parents at a rate for such therapy not to exceed \$15.00 per hour. The district will reimburse the parents within 30 calendar days after the receipt of documentation from the parents verifying that such individual therapy was provided. For SLP and motor services therapy (one hour of each per week) the District will contract for direct services to be provided through private providers during the summer break. However, the total obligation for the District to provide ESY services, through any type of provider, shall not exceed a total of 28 hours per calendar week.

For the summer break the District will contract for three hours per month with the program director, or if the current program director is not available, with a substitute director approved by the program director to consult with the parents and/or district concerning the services provided during the summer.

In addition the District will provide during the school year for up to two persons to be trained to provide the individual training in the home during school vacations or other breaks in the school calendar and will also train the parents should they wish to be able to provide the therapy. Data by any private providers will be reviewed and considered by the District in the delivery of its services when the school program resumes. Privately contracted SLP therapy providers and motor therapy providers will also share data they obtain.

D-6.22 (emphasis added). The Parents signed [REDACTED] IEP.

5. Prior to attending [REDACTED] the Students had difficulty related to feeding. At home, they would throw tantrums and would usually only eat baby food. Since September of 2000, while at [REDACTED], the Students participated in snack which was provided by the District. In the beginning, the Students were reluctant to participate in snack or try new foods. After the first few months the Students did eat snacks with minimal problems at [REDACTED]

6. As the Students were younger than [REDACTED] when they began at [REDACTED] in [REDACTED] of [REDACTED] they went home for naps and lunch and then returned to [REDACTED] for afternoon training.

Winter, Mid-Winter and Spring Breaks

7. For winter break, in December of 2000, the Parents went to the Four Seasons in British Columbia for a vacation. The Parents informed the District that they hired a service entitled [REDACTED] to provide therapy for their Students. The Parents submitted invoices to the District from [REDACTED] for \$1,360.00 for services rendered between Thursday, December 27, 2000 and Sunday, December 31, 2000. D-85.11-21.

8. The District was concerned that the services provided were not therapy, but were babysitting. Therefore, the District contacted [REDACTED] and was informed that some of the services were provided until midnight. Therefore, on January 18, 2001, the District requested additional information from the Parents to verify the qualifications and the services rendered by [REDACTED] D-85.2. The Parents responded that [REDACTED] is a baby-sitting service, but the Parents trained the babysitters to provide therapy and some of the babysitters had previous training with children with [REDACTED] D-85.3

9. However, the District needed additional information to be able to pay for the [REDACTED] services as ESY pursuant to their own auditing requirements.

The District offered to work directly with [REDACTED] but the Parents declined. D-85.4 On February 21, 2001, the District prepared a declaration to be signed by the Parents under penalty of perjury to verify the hours and verify that the babysitters were trained. D-84.5-84.21 The Parents refused to sign the declaration. D-84.22 through D-84.23.

10. Winter break was from February 19, 2001 to February 23, 2001. There was an earthquake on February 28, 2001 in which the Students missed school.

11. Anita Fischer, who was trained by the District at District expense, provides therapy to the children on weekends. On or about March 1, 2001 the Parents requested reimbursement for winter break for one aide, Ms. Fischer, for services provided between February 16, 2001 and February 25, 2001. D-14.6. The District issued a check on June 5, 2001 for all the services provided by Ms. Fischer.

12. The Parents requested that the District pay for services rendered on Sunday, March 18, 2001 and Monday, March 19, 2001.

13. On March 28, 2001 the District forwarded a letter to the Parents indicating it was willing to pay for 28 hours a week for winter break in December 2000 in the amount of \$1,440.00 even though there was dispute about the actual services rendered. D-84.12. The letter notes that the reimbursement would be provided for individual training services to the Students from Ms. Fischer, not [REDACTED] without regard to what dates or days the Parents chose to employ Ms. Fischer. In addition, the District would reimburse the Parents for March 18, and 19, 2001.

14. The Parents understood the March 28, 2001 letter from the District to mean that anytime in the future when the Students did not receive 28 hours of ESY in a week the Parents could "make up" missed hours at other times not during the break and still be reimbursed by the District. The Parents' interpretation of the March 28, 2001 letter from the District is not correct. The letter clearly states that the District was paying

\$1,440.00 for Ms. Fischer's services already rendered or in the future. It does not say that, once the Parents have incurred more than \$1,440.00 for in home therapy services, they can request reimbursement from the District based on hours not used during ESY. The IEP provides that the District will pay a maximum of 28 hours of ESY for school breaks. The IEPs do not guarantee that if the Students do not receive the 28 hours during the break the hours could be "made up."

15. The Parents signed the March 28, 2001 letter agreeing to its terms on March 30, 2001. However, the Parents did not return the letter to the District until May 25, 2001. D-84.12.

16. The Parents provided in-home therapy services in the total amount of 28 hours for each the Students for Spring Break. The services were provided before, during and after Spring Break. D-82.10. The Parents were reimbursed by the District for 28 hours of service for each Student for Spring Break.

Revision to IEP

17. Pursuant to notices provided to the Parents, an IEP meeting, was held on January 9, 2001, with the Parents and District personnel. Also present at the meeting was Dr. Carol Davis, the Program Director for the Students. Dr. Davis has an Ed.D. in special education, educational psychology. She is currently a senior research associate at the University of Washington in special education. Previously, she was an Associate Professor with the University of Minnesota. Dr. Davis has written several articles regarding [REDACTED] and has had extensive experience with children with [REDACTED]. She is an expert in the field of [REDACTED].

18. During the January 9, 2001 IEP meeting the Parents indicated that the children still had feeding issues and were not eating a variety of food. The District informed the Parents that the Students needed to have consequences for refusing to eat. Dr. Davis agreed she would look for some assistance on the matter. At the

January 9, 2001 IEP meeting the District did not agree that the Students' feeding issues were impinging on the Students' education. D-11. No evidence was presented that the Students were having difficulty concentrating or were throwing tantrums during school hours as a result of not eating enough food. Therefore, the Students' feeding issues at home were not impeding their ability to learn.

19. A notice dated March 12, 2001 was forwarded to the Parents indicating that there would be an IEP meeting on March 20, 2001. D-14 and 15. Prior to a March 20, 2001 meeting, the District proposed that the Students eat lunch at school. D-18. Jennie Haydon, Alic Amos, Karly Lee, Judy Jurden, Shannon Kingsley, Brenda Nash, Dr. Carol Davis and the Father attended the March 20, 2001 IEP meeting.

20. On March 20, 2001, a revision was made to the November 2000 IEP for [REDACTED] which provides the reason for the change as follows:

To add paraeducator support during lunch at school under *Supplementary Aids and Services* in the SUMMARY OF SERVICES MATRIX section of the IEP.

D-21. A Summary of Aids & Services matrix was provided on the March 20, 2001 revision. In the column regarding duration of the service it provides that the duration is "one year: school year." D-21. The Father did not sign the IEP revision.

21. [REDACTED] November 2000 IEP was also revised on March 20, 2001. D-22. The reason for the change was as follows:

- To delete one SLP objective because it is a duplicate of a classroom objective.
- Change SLP delivery service mode.
- To increase OT feeding consult time.
- To add paraeducator support during lunch at school under *Supplementary Aids & Services* in the SUMMARY OF SERVICE MATRIX.

D-22. The duration of the service for the paraeducators at lunch is "one year: school year." D-22. The Father did not sign [REDACTED] IEP revision. The Mother did not attend the March 20, 2001 IEP meeting.

22. On April 30, 2001, Dr. Davis sent an e-mail to the Parents which discusses an opportunity to start lunch at school and provided her opinion regarding the benefits of lunch at school. The e-mail provides:

. . . First, we have trained the assistant that will be eating lunch with the boys. She has at least 10 hours of training and previous experience with children with [REDACTED]. The boys will be having lunch with the child care children. We continue to use the same eating behavior instruction that we use at school and home. The paraeducator will also assist the boys during toileting times. We believe that this assistant has the skill to care (sic) of the boys during this time. I do want you to know that there are other adults in the room that will be able to assist the children if necessary. In addition, I will be available and will monitor their progress during this time. Second, I believe the opportunity to eat with peers will assist us in reaching our goal of getting the boys to eat new food in a variety of settings. As we have seen at school during snack and in the home with Karly and myself, the boys are often motivated to eat food that their peers (others sitting at the table) are trying. I believe that this time will provide us with many benefits and excellent models. . . .

D-28, P-61 (emphasis added). Therefore, the Parents were on notice that lunch at school would be beneficial to the Students. It was the Parents' decision to not have the Students have lunch at school until mid-May 2001.

ESY

23. On May 9, 2001, the Father provided an e-mail to the Special Education Director, Ms. Hawkins, indicating that [REDACTED] would be acceptable for the summer ESY, from 9:00 to 11:30 a.m. The e-mail states that the Parents have found only one aide for the summer and were losing their current aide, Ms. Fischer, in June 2001. The Father informed the District the Parents have a new aide, Ms. Prasad. The e-mail implies that, during the summer, the Students would have afternoon therapy services at home and the Parents would seek reimbursement from the District. The Father notes that it is difficult for them to pay for the services first and then seek

reimbursement. D-29. The e-mail does not state that Ms. Prasad will only provide services at the Parents' home.

24. The parties had an IEP meeting on May 29, 2001. In attendance at the meeting were Linda Hawkins, Judy Jurden, Sheila Wimberly, Carly Lee, Alice Amas, Brenda Nash, the Parents, Jennie Hayden and Shannon Kingsley. D-33. At the meeting, the Parents informed the District that they had found one aide, Ms. Prasad, for the summer but that aide could not start until July 2, 2001. The Parents noted that Ms. Prasad was in the United States legally, but was working on her green card to allow her to work. She had not yet received the green card. The Parents did not mention in the May 29, 2001 meeting that Ms. Prasad would not work on District property. Ms. Prasad did go to District property to be trained to provide services to the Students.

25. At the May 29, 2001 meeting the Mother asked if the Students would eat lunch at school. The Father also noted that it took a long time for reimbursement from the District and it was stressful. The District suggested the Parents submit the bills more often.

26. At the May 29, 2001 IEP meeting, the District stated that ESY was still "a work in progress." D-22 p. 3.

27. In early to mid June of 2001, the District believed that its classified employee, Teresa Eseman, agreed to provide ABA (applied behavior analysis) services to the Students for afternoon therapy in the Parents' home. Therefore, the Students would attend [REDACTED] in the morning and would go home for lunch and afternoon therapy.

28. The parties had a June 15, 2001 meeting in which ESY services were again discussed. At that meeting, the District believed Ms. Eseman and Ms. Prasad would be available to provide afternoon ABA services. At that meeting, the Parents did not mention that Ms. Prasad was unwilling to work at the District to provide services.

29. On or about June 17, 2001, the Father sent an e-mail to the special education director indicating that he believed the March 20, 2001 IEP revision required that an additional 30 minutes a day be added to the summer ESY program for lunch therapy. He noted that feeding was a huge behavior problem for the Students at home. D-36.

30. In an e-mail dated June 18, 2001, Sharon Howard, General Counsel for the District, informed the Parents that it was not District policy to allow classified employees, such as Ms. Eseman, to go to a person's home to provide services. Therefore, if Ms. Eseman chose not to go the Parents' home for services, the District would not be replacing her with a classified District employee. D-37 and P-46-46. On or about June 20, 2001 Ms. Eseman informed the District she would not provide therapy to the Students at their home. She would, however, provide therapy at school in the morning and afternoons.

31. The regular school year ended for the Students on June 21, 2001. The District had agreed to provide services to the Students on June 22, 2001 as a make up day for school missed because of the February 28, 2001 earthquake.

32. On June 21, 2001, Dr. Davis went to the Parents' home and orally proposed the following schedule for the summer for the Students:

9:00 - 11:30	[REDACTED]
11:30 - 11:55	Lunch
11:55 - 12:10	Transport to [REDACTED]
12:10 - 2:36	ABA services

P-50. [REDACTED] is a District [REDACTED] school.

33. On June 22, 2001, pursuant to the Parents request for the District to provide the proposed summer ESY options in writing, a letter from Ms. Howard was provided to the Parents outlining four separate options. The options are as follows:

OPTION 1		
9-12	[REDACTED] & Lunch SLP, OT, PT during school time	3 hrs/day = 15 hrs / week
12-1	Transport and Outside Time -- Non-instructional time, but supervision for safety will be provided. This break is needed to provide mandatory lunch and break time for adult aides.	
1-3:36	Individual Training	2 hrs 36 min/day = <u>13/week</u>
		TOTAL: 28 hours inst. time per week
OPTION 2		
9-12	[REDACTED] & Lunch SLP, OT, PT during school time Break for aides would be during preschool time -- could mean on some days that one aide would be with both boys while other person is on break -- however, on days SLP PT/OT would be working with boys that time could be break for adult aides	3 hrs/day = 15 hrs / week
12- 12:45	Transport and Outside Time -- Non-instructional time but supervision for safety will be provided. Lunch break for adult aides is during this period, but break is shorter because a.m. employee break would be built into morning preschool time.	
12:45- 3:21	Individual Training	2 hrs 36 min/day = <u>13/week</u>
		TOTAL: 28 hours inst. time per week
OPTION 3		
9-12	[REDACTED] & Lunch SLP, OT, PT during school time Individual training at home Parent Reimbursed	3 hrs/day = 15/week <u>13/week</u> 28 hours
OPTION 4		
9-11:30	[REDACTED] (No lunch) SLP, OT, PT during school time NO Lunch at preschool Individual training at home Parent Reimbursed	2.5 hrs/day = 12.5/week <u>15.5/week</u> 28 hours

D-40 and P-42.

34. When the District issued the June 22, 2001 letter, it knew Ms. Eseman would provide services at [REDACTED] in the afternoon to the Students. The District did not know at this time that Ms. Prasad was not willing to provide services to the Students at [REDACTED], but would only provide services in the Parents' home. Therefore, the District believed the two aides in the afternoon at [REDACTED] would be Ms. Eseman and Ms. Prasad. The District could have paid both the aides directly so the Parents would

not have to pay Ms. Prasad and seek reimbursement from the District. In addition, the Students would have received 28 hours of services each, which included lunch as part of the services.

35. As of June 22, 2001, neither Ms. Eseman nor Ms. Prasad had provided services to the Students. However, both were trained by Dr. Davis. Ms. Prasad had more experience in ABA training than did Ms. Eseman.

36. The District provided sufficient evidence to establish that, had it been informed at that time it needed a second aide because Ms. Prasad was not willing to work at [REDACTED], the District could have provided another aide to deliver services in the afternoon at [REDACTED]. Specifically, Donelle Booth, an individual who just graduated from the University of Washington with a Master's Degree in Special Education, was available and could have provided services in the afternoon to the Students.

37. On June 22, 2001 the Parents decided Ms. Prasad would do a better job with their Students than Ms. Eseman would. Since the Parents believed only one aide was available, they decided to have services at their home and have the Students come home for lunch. The Parents decided it was more important for the Students to receive ABA service hours than have supervised lunch. The Parents believed that the March 20, 2001 IEP revision required that supervised lunch be added to the 28 hours of ESY services a week.

38. The District arranged to support the Students' programs in the morning at [REDACTED] with individual paraeducators, Ms. Eseman and Ms. Prasad. The Students began attending [REDACTED] in the mornings on June 21, and continued to do so through August 31, 2001.

39. Between June 22, 2001 and August 1, 2001, the correspondence from the Parents indicates that the reason the Students did not attend [REDACTED] in the

afternoon was that the Parents insisted upon having the Students at home for lunch and the Students needed more time to get their lunch, go to the bathroom, and get on the bus. There was no indication between June 22, 2001 and August 1, 2001 that the reason the Parents did not send the Students to [REDACTED] was because Ms. Prasad was willing to go to [REDACTED] to provide services.

40. Ms. Prasad testified that she told the District sometime after July 2, 2001 that she would not work on District property. However, Ms. Prasad's testimony is not credible. She refused to appear in person to testify at the hearing at any location, but did appear by telephone. When asked direct relevant questions, she declined to answer so it appeared she was hiding something. Her answers were evasive and she could not remember the exact date she told the District she would not work on school property. She could not even remember a general time frame.

41. On July 20, 2001, the Parents requested two due-process hearings, one for each Student.

42. On August 1, 2001, the attorney for the Parents provided the following proposal for the Students to attend school at [REDACTED]

In regards to the schedule that you have proposed for the students' ESY program, [the Parents] would be willing to accept that schedule while the due process hearing is pending with the following adjustments:

9:00 - 11:30 a.m.	[REDACTED]
11:30 - 11:48 a.m.	Transport home
11:48 - 12:45 a.m.	Lunch at home
12:45 - 1:00 p.m.	Transport to [REDACTED]
1:05 - 4:11 p.m.	ABA/Individual training at [REDACTED]
4:15 - 4:30 p.m.	Transport home

[The Parents'] aide, Reena, is not available to provide services at [REDACTED]. The District will need to provide the aides for each student.

D-64. In the August 1, 2001 letter from Ms. Royer, the Parents informed the District for the first time that Ms. Prasad was not available to provide services at [REDACTED] D-64.

43. On August 2, 2001, the District informed the Parents, through their lawyer, that the District needed to locate a second aide and were not aware that Ms. Prasad would not be available for work on District property. D-65 and P-37. Six days later, on August 7, 2001, the District informed the Parents' lawyer that they had located a second aide and the Students would attend [REDACTED] in the afternoon on August 13, 2001. D-67. The Students attended [REDACTED] in the afternoon from August 13, 2001 to August 30, 2001. In the afternoon, the Students had two aides at [REDACTED]. Throughout the summer, the Students had one aide each at [REDACTED] in the morning.

44. On August 23, 2001, Dr. Ilene Schwartz observed the Students in their educational program provided by the District. D-71. Dr. Schwartz has a Ph.D. in child and developmental psychology. She is presently a professor at the University of Washington in the area of special education. Dr. Schwartz has extensive experience regarding children with [REDACTED]. She is currently administering a program which is studying how certain programs assist children with [REDACTED]. She is an expert in the field of children with [REDACTED].

45. Dr. Schwartz reviewed the goals and objectives in the Students' IEPs. Dr. Schwartz was impressed by the services being provided by the District. In her opinion the District staff did an outstanding job of providing many opportunities to practice and receive specialized instruction on social, self-care and communication objectives at [REDACTED] D-71, page 2. The only criticism Dr. Schwartz had is there were too many staff at [REDACTED] and she felt that the Students could have been acting more independently with fewer aides.

46. Dr. Schwartz observed that it was an awkward break for the Students to leave prior to lunch at [REDACTED]. The Students were noted, by their peers, as different because they did not stay for lunch.

47. Dr. Schwartz agreed with Dr. Davis that having lunch with their peers would have been very beneficial for the Students. The Students would have opportunities to learn to socialize with other children, which is a problem with [REDACTED] children. In addition, they would have been able to use their communication skills to speak with peers during lunch. Finally, the Students would have had an opportunity to try different foods which their peers were eating. Children are more likely to eat food which they see their peers also eating. Dr. Schwartz believes that eating lunch at school for a half an hour would be more beneficial to the Students than one-half hour of individual ABA services in the afternoon.

48. Similarly, it is Dr. Schwartz's opinion that the District implemented the program outlined in the Students' IEPs at [REDACTED]. Dr. Schwartz believed the quality of the programming at [REDACTED] was outstanding. She had a concern that the program was too restrictive for the Students and again they needed more time for socializing with other children. D-71, page 3.

49. The District provided all of the SLP, OT, and PT services specified in the Students' IEPs for summer 2001. D-72 through D-80. Dr. Davis provided more than the required amount of support for the Students' IEPs for summer 2001. Over the summer, both Students made progress toward their IEP goals. D-72, 73, 74, 75, 76, 77, 78, 79, and 80.

50. During the summer, [REDACTED] met certain physical therapy goals and maintained other goals. D-74. [REDACTED] continued to make good progress in his gross motor skills over the summer. D-75. [REDACTED] met goals regarding communication. D-79. As to communication goals, in August 2001, [REDACTED] met the goal regarding requesting to play with

peers/adults by asking for play. D-77. Therefore, even though the Students had only one aide in the afternoon while receiving ABA services between June 22, 2001 and August 12, 2001, they continued to make progress on their IEP goals.

51. The Parents paid for ESY services for the children for Monday, August 27, 2001 through Labor Day, September 3, 2001 as school was closed. The Parents requested reimbursement for these services. On the same request, the Parents sought reimbursement for services rendered after September 3, 2001. The District has denied payment for services after September 3, 2001 and has a separate hearing pending on those issues, which are not involved in this case. However, in preparing for the hearing, the District noticed that they had not paid for hours at the end of August 2001. Therefore, on November 6, 2001, the District forwarded a check for \$206.25 to the Parents. D-57 and P-41. With this check, the Parents agreed that they have been paid in full for all ESY services which they paid for during the summer and during the school year. As of the date of the hearing, the Parents had not received this check.

CONCLUSIONS OF LAW

Jurisdiction.

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and the subject matter of this action for the Office of the Superintendent of Public Instruction (OSPI) as authorized by 20 United States Code (USC) § 1401 *et seq.*, (Individuals with Disability Education Act (IDEA)), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) 300 *et seq.* and Chapter 392-172 of the Washington Administrative Code (WAC).

2. A District has the duty of proving compliance with the IDEA at the administrative hearing, including the appropriateness of its evaluation and its proposed

placement for the child. 34 CFR § 300.503(B); *Clyde K v. Puyallup District*, 35 F.3d 1396, 1398 (9th Circuit, 1994).

3. The IDEA assures all disabled children receive a free, appropriate education (FAPE) 20 USC § 1400(c) and § 1412(1). The IDEA provides federal money to assist states in educating disabled children and conditions such funding upon the states' compliance with extensive goals and procedures. *B.S.*, 82 F.3d at 1500. *See also Rowley*, 458 U.S. at 179, 102 S.Ct. at 3037.

An 'appropriate' public education does not mean the absolute best or 'potentially maximizing' education for the individual child. . . . The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child.

B.S. 82, F.3d at 1500, quoting from *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Circuit, 1994). "[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services. . . ." *B.S.* 82, F.3d at 1500; *Rowley*, 458 U.S. at 201, 102 S.Ct. at 3048. Concerning early intervention programs, the District is obligated to provide a basic floor of opportunity through an IEP, individually designed to provide developmental benefit to the infant or toddler with a disability. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

4. There are both a procedural and a substantive test to evaluate compliance with the IDEA. The Court must inquire:

First, has the district complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Seattle School District v. B.S., 82 F.3d, 1493, 1498-1499 (9th Circuit, 1996). *See also, Board of Education v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).

Procedural Requirements.

5. There are three issues that could be considered procedural violations. First, the Parents assert that it is not appropriate for them to be required to advertise and locate their own aides to provide ESY services. Second, the Parents believe it is not appropriate that they are required to have to pay for the aides first, and then seek a reimbursement from the District through cumbersome District procedures. Third, the summer ESY program was not proposed in a timely fashion.

6. First, on August 13, 2001 in a Prehearing Conference, the Parents, who were represented by counsel at the time, agreed that the November 2000 IEP, which provides an option for the Parents to be reimbursed for therapy provided during ESY, was appropriate. The Parents cannot now argue that the ESY provisions allowing for reimbursements for in-home providers is not appropriate.

7. Second, the November 2000 IEP does not require that the Parents locate and pay for those who provide services during ESY. The IEP gives the Parents the option, if the Parents want services in the home, to be reimbursed by the District. The Parents could have opted for the District to provide services at School. Instead, the Parents chose the option which allowed for services to be at home during ESY and chose to be reimbursed for costs incurred.

8. Third, the regular school year ended on June 21, 2001. The entire ESY program for the Students was not finalized until between June 15, 2001 and June 21, 2001. It is a concern that the entire summer ESY program was not proposed earlier so the parties could have sufficient time to study the matter.

9. However, as early as May 9, 2001 the parties agreed that the Students would attend [REDACTED] in the morning. Therefore, the first portion of the ESY program was set. The only question was the afternoon program. Based on the notes from the May 29, 2001 meeting, it appears the parties agreed the afternoon would

consist of one-to-one therapy. D-33 and P-105-107. The only question was who was to provide the therapy and the location of the services.

10. As June 17 or 18, 2001, the parties believed Ms. Easeman and Ms. Prasad would be providing services in the afternoon at the Parents' home. Therefore, at least a few days before the end of the regular school year, the summer ESY program was set. It was only on or about June 20, 2001 that Ms. Easeman announced she would not work at the Parents' home, that summer services became so uncertain.

11. However, by the time Summer ESY was to begin, the District had in place a program which, as discussed below, would have provided the Students with a FAPE. Therefore, although it is disconcerting that the District did not have the Summer ESY finalized earlier, it is not a procedural violation.

Substantive Requirements.

A. Did the District properly implement the ESY provisions of the November 2000 IEP for both Students?

12. The District paid for, and the Students received, all ESY services during the school year. Therefore, for the regular school year breaks, the District properly implemented, the ESY provisions of the November 2000 IEP for both Students.

13. As to the ESY services that were provided in the summer, the District's June 22, 2001 letter provided several options for the Parents. In particular, the first two options in which the Students would attend school at [REDACTED] including lunch, and then go to [REDACTED] for afternoon therapy would have provided the Students with a FAPE. D-40 and P-42. The Students would have received substantial benefits by staying for lunch. Testimony of Dr. Schwartz and Dr. Davis. The Students would have opportunities to learn to socialize with other children, which is a problem for [REDACTED] children. In addition, they would have been able to use their communication skills to

speak with peers during lunch. Finally, the Students would have had an opportunity to try different foods which their peers were eating. Children are more likely to eat food which they see their peers also eating. Therefore, lunch at [REDACTED] would have provided an excellent opportunity for the Students. Lunch at [REDACTED] would have been more beneficial to the Students than an extra half-hour of ABA services.

14. In addition, the District established that it would have provided two aides at [REDACTED] in the afternoon. Therefore, the District's first and second options would have provided a FAPE to the Students.

15. The Parents argue that the maximum time of 28 hours a week for ESY 2001 during summer breaks was increased by the March 20, 2001 IEP revision. However, the IEP revision specifically states that it revised the Summary of Services Matrix of the IEP, the section involving supplementary aids and services. D-21 and 22. The section on supplementary aids and services discusses para-educators and similar items. The provision regarding the ESY is under the Special Education related services. Therefore, the Parents' interpretation that the March 20, 2001 revisions increased the time for ESY is simply not supported by the evidence.

16. In addition, the plain language of the ESY provision is clear. Both Students' ESY provisions of their IEPs note that "the total obligation for the District to provide ESY services, through any type of provider, shall not exceed a total of 28 hours per calendar week." D-5.16 and 6.22 (emphasis added). If the March 20, 2001 IEPs revisions were changing the ESY section, the revision should have stated that it included ESY provisions. In fact, the March 20, 2001 revisions note that it is for the school year, not the ESY provisions. Therefore, the Parents' interpretation is simply not supported by the facts or the documentation.

B. Are the Students entitled to compensatory education if the November IEPs have not been properly implemented?

17. As the District offered a FAPE and there were no procedural violations, the Parents are not entitled to compensatory education. The fact the Parents did not accept the offer of FAPE does not allow the Parents to come back later and request compensatory education for the opportunity lost.

18. However, even if there were procedural violations or a denial of FAPE, the Students would not be entitled to compensatory education. The evidence is clear that these Students maintained the progress they had achieved during the regular school year or made progress over the summer. The progress was made with only one aide for a majority of the summer. As indicated earlier, the standard is not that the Students should receive the best education possible. The *Rowley* standard is that the Students should receive educational benefit which is more than minimal and trivial. Both these Students received educational benefit which is more than minimal and trivial.

19. There is a question as to whether the Parents received the check dated November 6, 2000 for \$206.25 to reimburse the Parents for ESY for the end of August of 2001. D-85.57. The District is directed to determine whether the check has been cashed. If it has not been cashed, the District shall mail a new check to the Parents for \$206.25.

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DECISION

1. The District properly implemented the ESY services provision of the November 2000 IEPs for both Students.
2. The Parents are not entitled to compensatory education.
3. The District is directed to check to determine whether the Parents have cashed the November 6, 2000 check in the amount of \$206.25. If the Parents have not cashed the check, then the District shall, within 20 days of the date of this order, reissue the check and mail it, return receipt requested, to the Parents.

DATED at Seattle, Washington this 11th day of December, 2001.



Andrea Conklin
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 USC 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.

This certifies that a copy of the above Order was served upon the parties or their representatives on December 11, 2001. by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

PARENT



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