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Chief Administrative
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Superintendent of Public Instruction
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STATE OF WASHINGTON

OFFICE OF ADMINISTRATIVE HEARINGS

Liberty Building, 32 North Third Street, Suite 320 • Yakima, Washington 98901 • Phone: (509) 575-2147

June 8, 2001

Parents




Dr. Hans Michielsen, Director
Special Services
West Valley School District
1000 So. 72nd Ave
Yakima WA 98902

Special Education
Cause No. 2001-SE-0038

Dear Parties:

Enclosed is a copy of my Findings of Fact, Conclusions of Law and Order. This order will become final if no party appeals. Your right to appeal is explained on the last page of the Order.

Sincerely,


Johnette Sullivan
Administrative Law Judge

JS:pvb

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



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

IN THE MATTER OF:

WEST VALLEY SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2001-SE-0038

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

A hearing in the above-entitled matter was held before Administrative Law Judge Johnette Sullivan in Yakima, Washington, on May 14, 2001. Appearing at the hearing was the interested parent, [REDACTED]. The West Valley School District (hereafter "District"), was represented by Dr. Hans Michielsen, Director of Special Services. Also appearing on behalf of the District was Frederick D. Jaeger, Principal of the District's [REDACTED] school, and Richard M. Layman, school psychologist. 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

The District filed an appeal with the Office of the Superintendent of Public Instruction on April 12, 2001, to show that its evaluation is appropriate and to dispute the student's request for an independent educational evaluation (IEE) at public expense.

FINDINGS OF FACT

The Student

1. The student was born [REDACTED]. He met developmental milestones at approximately appropriate times. There is no evidence of pre-, peri-, or post-natal difficulties that might have impacted his educational assessments.
2. The student lives with his mother and father and [REDACTED] and [REDACTED]. He has always attended District schools. He has been receiving some form of special services since age [REDACTED]. The student has continued to attend District schools and is currently in [REDACTED] grade at the [REDACTED] school.

History of Evaluations

3. At age [REDACTED] in [REDACTED] the student's need for [REDACTED] services was recognized. The District began offering language services with a [REDACTED] Specialist [REDACTED]. The [REDACTED] services were still being offered then the student began [REDACTED] grade at age [REDACTED] in [REDACTED].

4. The student's [REDACTED] grade teacher requested the student be evaluated during the first month. For cognitive assessment, the student was administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). For academic assessment, the student was administered the Woodcock-Johnson Revised Tests of Achievement-Revised (Woodcock-Johnson). In October 1994, a Multi-Disciplinary Team (MDT) met and reviewed the results of cognitive and academic achievement testing, and other school and family records.

5. The MDT included the school psychologist, a teacher, the principal, the resource room teacher, the special services director, and the [REDACTED]. The MDT determined the student continued to be qualified for [REDACTED] services, that he was functioning within the average range of intellectual ability, and that he measured below the criterion value in reading, math calculations, and written language.

6. The MDT found that a discrepancy did exist between the student's ability and achievement which could not be explained by health, sensory impairment, behavior, cultural, economic or environmental factors. The assessment results examined by the MDT concluded that the student was eligible for special services as specific learning disabled (SLD) in the areas of reading, mathematics and language.

7. A re-evaluation was conducted three years later, in October 1997. The student had just begun the [REDACTED] grade. The WISC-III and the Woodcock-Johnson were again administered. The MDT which reviewed the results and other school records included the school psychologist, resource room teacher, [REDACTED] grade teacher, the principal, and the speech-language pathologist (for [REDACTED]). The student continued to need special [REDACTED] services for language. There were no behavioral or social concerns evident at that time. While his full-scale IQ had been 94 and within average range in 1994, his full-scale score measured 76 in 1997. The school psychologist deemed these results to be within borderline range of abilities.

8. The academic testing showed results which fell within the low to far below average range for math, written language and reading. In his summary, the school psychologist observed the student has "extreme difficulty" in math, written language and reading and continued to be need of special education services. However, the student tested in the borderline range for math, and his teacher had opined that math was his strength. The teacher also felt the student's classroom computation skills were at [REDACTED] grade level.

History of Independent Education Programs

9. Following evaluation and review by the MDT's, there have been annual meetings of an Independent Education Program (IEP) team each October. Appropriate District representatives have attended, with one or both parents. Sometimes the student has attended. Relevant to this issue, the parties offered as evidence actual copies of the IEPs beginning with the [REDACTED] grade (October 1998).

10. The October 1998 IEP team consisted of the father, regular and special education teachers, the CDS and the principal. The October 1999 IEP team consisted of the parents, the student, the assistant principal, a special education teacher and a counselor.

11. The October 26, 1998 IEP is completely silent regarding the subject of math. It identifies written language and reading, and sets forth amount and frequency of service in the resource room with the resource teacher. It contains annual goals and measurable short-term objectives in written language and reading. It also contains a recommendation for continued language services with the [REDACTED], sometimes also referred to as the SLP (speech & language pathologist.) There are annual goals and measurable short-term objectives for language skills. The amount and frequency of language therapy with the [REDACTED] is not specified. The student would spend most of his day in his regular [REDACTED] grade classroom, with pull out to the resource room daily.

12. The IEP developed on October 15, 1999 at the start of [REDACTED] grade is similar to the prior year's IEP regarding written language and reading. It is also completely silent regarding the subject of math. The student would still spend most of his day in his regular classroom with pull out to the resource room daily. There is no reference to [REDACTED] or language services. There were no behavioral concerns prior to the fall of 1999, so the IEPs are silent on that issue.

13. The student's father signed the IEPs through October 1999, and does not challenge them in this proceeding. However, he has begun to doubt the District's assessments of his son's level of functioning. Specifically, the teacher's reports seem too positive. For example, the father questions the summary of present levels of performance in reading. In 1998, the teacher reported the student read at an average rate of 95 words per minute with an average of 3 errors, with an average of 84% on daily comprehension. In 1999, the teacher reported the student read at an average of 92 words per minute with 96% accuracy and 100% comprehension at the [REDACTED] grade level. The father questions these results because when asked, his son cannot say the entire alphabet, a to z. He also has observed his son have difficulty reading signs or labels. He does observe his son with newspapers and magazines, but has not questioned his son to determine whether he's actually reading and comprehending. He could just be looking at pictures. The father doesn't know.

Behavioral issues

14. During [REDACTED] grade, [REDACTED] the student's behavior began to be an issue. He was sent home or suspended under the school's disciplinary policy, or went home voluntarily, a total of about 25 days. This includes about 15 days following an emergency expulsion on [REDACTED]. There was an allegation that the student threatened to kill another student. The Yakima County Sheriff's office was called to investigate. In a letter to the parents dated [REDACTED] the school principal informed the parents of an emergency expulsion.

15. The District conducted a manifestation determination regarding the [REDACTED] allegation. The participants were the special education director, the assistant principal, a regular education teacher and a special education teacher. They determined that the behavior was not related to the student's disability. The District informed the student's parents of the manifestation determination in writing on [REDACTED] and of the decision for a 15-day suspension. The District offered a "suspension alternative program" starting Thursday, [REDACTED] to allow the student to access his specially designed instruction and his regular education program. The parents declined that offer.

16. Immediately following the manifestation determination, the District also began the process of scheduling an IEP team meeting, proposing a date of May 17, 2000. During conversations and/or meetings between the parents and District representatives thereafter, there was also discussion of a plan for reassessment or reevaluation. Meanwhile, the student was alleged to have brought a knife on school property on the last day of school. The school instituted an emergency expulsion. The student's father then questioned the appropriateness of District reevaluation and on June 14, 2000, stated in writing he would not give his consent for reevaluation.

17. By August, the father agreed to reevaluation. The student remained in an expelled status over the summer, pending reevaluation and discussion of the terms of his return at an IEP meeting before school resumed in the fall.

Most Recent District Evaluations

18. The student met with the school psychologist on August 21, 2000. Cognitive ability was again measured using the WISC-III. His full-scale score measured 89, which indicated average abilities. Academic ability was again measured using the Woodcock Johnson. In a letter from the director to the father on June 20, 2000, the director suggested that the reevaluation include a functional behavioral assessment. There is no evidence that the District ever followed through on that suggestion. There is no evidence that a functional behavioral assessment was completed.

19. On August 25, 2000, the District informed the father that the assessment results continued to show the student had average ability, and that his reading and mathematic achievements are commensurate with those abilities. However, the student continued to lag in his written language achievement; that is, his skill at writing down thoughts appears to remain below what his ability would predict. Behavioral problems had arisen, particularly the student's inclination to respond angrily when something does not go as he would wish or when he is told what to do. This prompted the District to propose changing his eligibility category from specific learning disabled to emotionally/behaviorally disabled.

20. The father and appropriate District representatives met for an IEP meeting on August 29, 2000. The father disagreed with the proposal to change the eligibility category. That subject was tabled, to be discussed at some future date. The IEP proposed by the District on August 29th offered resource room pull out for written language and math, but not for reading. It also included a Behavioral Support Plan. There were no annual goals or measurable short-term objectives as yet developed.

21. It appears that some agreements were reached, but the father did not wish to sign the IEP with the new Behavioral Support Plan. There was some confusion on his part, regarding whether and how the proposed change in eligibility category would effect the student. There was also some confusion regarding the conditions under which the student could return to school. The student did return, while the parents and the District continued to communicate.

Current IEP and Behavioral Support Plan

22. The IEP team met again on October 12, 2000. In a letter to the father dated October 19, 2000, the director noted they were sorry he was not able to attend the meeting. A copy of the IEP and Behavioral Support Plan signed by District representatives was attached to the letter.

23. The IEP continued to recommend placement in the regular classroom with resource room pull out. It has several internal inconsistencies. There is a table which describes the special education and related service, amount and frequency, start and duration dates, responsible person and location. That table contains references to pull out to the resource room daily for written language and for math. There is no reference to reading. However, the next section gives a summary of present levels of performance, and states that the student is "currently being served in the resource room for reading, written language, and math". It goes on to specify the student's difficulties in reading, written language and math. Next, there follows a single page which contains annual goals and measurable short-term objectives. Goal #1 addresses written language, and Goal #2 addresses reading. There is no goal or measurable short-term objectives for math. The final page contains the same Behavioral Support Plan first proposed in August 2000.

24. The District expected that the father would sign the IEP and return a copy. He had given them some indication verbally of agreement. The father may have delayed in returning a signed copy because he was waiting for the District to agree not to change the eligibility category.

25. For reasons unknown, the MDT didn't sign its evaluation report showing review of the August 21, 2000 cognitive and academic test results until January 16, 2001. The District also then decided to let the student's eligibility category remain specific learning disabled. The father learned of this decision that same month. However, he overlooked signing the IEP after that final source of conflict was resolved. The father confirmed at hearing that he has been and still is in agreement with the terms of the October 12, 2000 IEP. He had not realized he had not returned a signed copy, and explained his failure to sign the IEP was an oversight. He was willing to sign it to show his agreement at the hearing. He also continues to agree with the terms of the Behavioral Support Plan. He confirmed at hearing that the plan has worked well. The instances of the student leaving school have dropped dramatically, from over two dozen the prior year to less than six the current year.

26. The Behavioral Support Plan provides that when there is an infraction of school rules or when the student feels that he will be too angry or upset that:

- a. The student will announce to his teacher that he will go to the office to calm down. He will return when calmed down. When going to the office, the student will bring work or a reading book. Staff will mark the time that the student comes to the office and when he leaves.
- b. If Step 1 does not calm the student down, the student is allowed to call home from a telephone assigned by the office staff. Three numbers were specified for him to use in order to contact his father, who would talk to him and calm him down or come meet him at school. The student would stay in "time out" area in the office if waiting for his father to come. It was agreed that the parents did not want their student questioned about any incidents without their presence.
- c. If the father is unable to calm the student down, he may prefer to take the student home. However, the student is offered the suspension alternative program in lieu of going home.

27. During ██████████ grade, academic year 2000-2001, the student has frequently used the behavioral support plan. He has successfully calmed down, particularly when speaking to his father by telephone or when his father comes to the school.

Request for IEE at public expense

28. On or about March 28, 2001, the assistant principal called the father to the school because of a problem with the student's behavior toward another student. The Sheriff was also called, but there has subsequently been no action by law enforcement regarding this event. The father thought the District over-reacted. The student is large for his age, and the father believes the District perceives him to be a bully. The father believes that to be a mis-perception. The student had been behaving well and the number of behavioral incidents had significantly diminished prior to March 28th. The student had even just received a letter of good conduct. The implementation of the Behavioral Support Plan was working. However, the March 28th incident caused the father to again consider why his son becomes frustrated at school and expresses his desire not to attend.

29. The father has wondered for some time if the formal testing by the school psychologist as well as the daily classroom reports overstate his son's abilities. He wonders if his son is truly getting the level of help he needs. If not, he wonders if that might account for the level of his son's frustration. The incident of March 28th prompted him to act, to see if someone outside the district might be able to test his son's abilities. He had no idea who that person might be, or what type of testing to request. He wrote a short, one sentence note in which he requested an IEE. He gave no other specifics.

30. In a subsequent telephone conversation with the director, the father mentioned his desire that his son be tested at Children's Hospital in Seattle. He was not specific about the subject of the testing or type of specialist sought for the testing.

31. The director responded to the parent on March 30, and advised him that Dr. Paul Schneider or Dr. Judith Billings could be selected as independent evaluators. The District also provided the parent with copies of the regulations concerning independent evaluations and other informational material. The District intended to offer to re-evaluate with District personnel. Through oversight, it neglected to make that offer until May 1, 2000. However, the parent declined that offer.

32. During the summer of 2000, at their own expense, the parents paid for the student's participation in a tutorial offered by Sylvan Learning Center. They would have liked to enroll him in all three subjects (math, written language and reading), but were only able to select one due to their limited finances. The student's mother has asked for extra help for reading during the [REDACTED] and [REDACTED] grade years. The district has made available extra reading help through the resource room, but declined the parent's offer for use of Sylvan's materials.

33. On April 10, 2001, the District requested a due process hearing to establish that their current assessment of the student's special education needs was appropriate and that the independent evaluation at public expense was not appropriate.

34. The student's father expressed his frustration with inability to articulate the specific remedy he seeks. He has not had legal advice due to lack of funding. He is not well educated himself, and relies upon the District for professional academic expertise. Nevertheless, he questions his son's reading comprehension and written language skills.

35. The student has told his parents he does not like to raise his hand to ask for help. The student may believe that the teacher will only respond to a raised hand in the classroom setting. The environment involves 4 teachers per "pack" of students. The student is embarrassed when the teacher announces grades out loud. None of these specific concerns are addressed in the current or past IEPs.

36. The parent is not certain as to what type of independent evaluation should or could be done. He did ask the student's teacher, Mr. Robert Harris, for a reading reassessment. The request was made on May 3, 2001. Although the parent thought the teacher was willing, the teacher informed him that he had been instructed by his supervisor, the director of special services, not to give the reading assessment until after decisions were made in the hearing process. The teacher confirmed that denial in a note dated May 7, 2001.

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. 1786, 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.

Clearly a "free appropriate public education: consists of both the procedural and substantive requirements of EHA. 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. Federal and state regulations provide that reevaluation of each child with a disability be conducted periodically, at least once every three years. 34 C.F.R. §300.536 and WAC 392-172-182. The District procedurally met the requirement for notice and consent for the August 2000 reevaluation set forth at WAC 392-172-185.
4. Parents of a special education student have the right to obtain an independent educational evaluation (IEE) of the student if the parent disagrees with the school district's or other public agency's evaluation. WAC 392-172-150(1).
5. A parent has a right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district or other public agency. WAC 392-172-150(4). If the District objects, the District must establish through the hearing process that its evaluation is appropriate. WAC 392-172-150(5).
6. The District's August 2000 evaluation reports and testing data meet the criteria of the regulations, particularly WAC 392-172-108 (evaluation procedures), WAC 392-172-1900 (determination of needed evaluation data), and WAC 392-172-10905 (evaluation report and documentation of determination of eligibility). The District also complied with the determination of eligibility and parental notification requirements at WAC 392-172-111.
7. There are some discrepancies or areas of inconsistency, but they do not appear to be relevant to the issue of an IEE at public expense. For example, the District once suggested the need for a functional behavioral assessment. None was completed. However, both the District and the parents have been satisfied with the manner in which the Behavioral Support Plan has been implemented. Secondly, prior IEP's made no

reference to math, while the current IEP does (though there are no goals and short-term objectives related to math.) Yet, both the parents and the school are satisfied with the student's progress in math. There is no allegation of denial of FAPE in the area of math, nor is the IEE request based on problems in the subject of math.

8. Conversely, prior IEP's referred to pull outs to the resource room for reading, while the current IEP contains inconsistent statements regarding reading. There's no reference to resource room pull out for reading services, but there are stated goals and objectives. This inconsistency is not due to inappropriate District evaluations; rather, the inconsistency appears to relate to carelessness or oversight at the IEP meeting. It's clear that while the District's own evaluation proved the student most needed services in written language, the district also recognized a need for services in reading. The student has in fact received special services in reading. There is no evidence of substantive denial of FAPE as a result of these IEP inconsistencies regarding reading services.

9. There is not enough evidence for the undersigned to reach any conclusions regarding the effect of the District's knowledge that the parents sought private psychological evaluation. The parents wished to keep that information private. That is their right. However, they can't expect the District to be aware of the need for additional areas of assessment or services if they choose not to keep the District fully informed. Even so, the District has its own independent obligation to evaluate a student for any known or suspected area of disability. The District was on notice that the child developed a behavioral problem in [REDACTED] grade, and that the level and frequency of incident was increasing. They became aware (through the doctor's error) that the parents had consulted with a psychiatrist or psychologist. The issue then is whether that was sufficient information for the District to convene an MDT, or call for a meeting of the IEP team.

10. Should the District have obtained a psychological or psychiatric evaluation? Neither party offered any evidence about the nature of the report which the doctor's office sent in error to the District. The school psychologist and other District professionals consistently concluded there was no medical evidence of a disability. The District's manifest determination team and other professionals have consistently determined that the events which have resulted in discipline are not related to the child's disability. No District professional has raised any concern about mental illness or other mental health related issues. Moreover, mental health or other medical issues are not the basis of the father's request for an IEE at public expense, or his concern about the child's reading and written language abilities. No violation of FAPE is found on that basis. The parent's decision to withhold that data may not now be a basis for an IEE at public expense under these facts.

11. The preponderance of evidence establishes that the evaluations of cognitive ability and academic achievement conducted by the District during the most recent three-year reevaluation were appropriate and proper. They are the basis of the IEP to which the

parent and school district have been stated their agreement. The request for an independent educational evaluation at public expense is denied.

12. Nevertheless, the father does raise some valid concerns which would be proper for consideration by the IEP team. The IEP team may consider whether or not the student should have alternatives to raising of a hand to ask a question or seek help. The IEP team may consider whether there should be an alternative to the practice of announcing grades out loud, and the potential for negative impact upon this student's attainment of annual goals and short-term objectives. Many of the questions on cross examination—by the parent of District staff, and by District staff of the parent—are more properly raised in the context of an IEP meeting. For example, whether or not the student can recite his A, B, C's in proper sequence to Z, and the meaning to be drawn from any such deficiency in that regard. Also, the father expressed concerns about isolated instances in which his son didn't appear to be able to read or comprehend a sign or a label. That information is the type that should be shared with the regular and special education or resource teacher, and perhaps discussed at an IEP meeting. Finally, both the District and the father made presumption about the student's use and comprehension of secular magazines and newspapers. The father questions whether his son is just looking at the pictures, but he hasn't directly asked his son to know for certain the level of comprehension (or lack thereof.)

13. The parents are rightly commended for their concern about their son's difficulty with reading and written language. While they are not entitled to an IEE at public expense, they may certainly obtain an IEE at any time at their own expense. If they do, and choose to share the results with the District, the District must consider those results in developing the student's educational plan. Either the District or the parent may request that an IEP be held to consider any of these concerns. When the next IEP is developed, care should be taken to be specific and through to avoid the types of inconsistencies apparent in the current IEP (noted particularly in Finding 23 above).

DECISION AND ORDER

The District has established that its cognitive and academic achievement evaluations are appropriate. The parents may proceed with an IEE, but at their own expense. If the parents do obtain an IEE at their own expense, the District must consider that data if presented to them pursuant to WAC 392-172-150(8). Either party may request an IEP team meeting at any time.

Dated at Yakima, Washington this 8th day of June, 2001.



Johnette Sullivan
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 with the date of the mailing of this decision.

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 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.

Certificate of Mailing

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 June 8, 2001 by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following:

Parents



Dr. Hans Michielsen, Director
Special Services
West Valley School District
1000 So. 72nd Ave
Yakima WA 98902

Legal Services Office, OSPI

Mary Radcliffe, OAH ALJ Hearing Coordinator