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OFFICE OF
ADMINISTRATIVE HEARINGS

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

IN THE MATTER OF:

NORTH KITSAP SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2002-SE-0146

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

A hearing in the above-entitled matter was held before Administrative Law Judge Jill L. Geary (ALJ), in Poulsbo, Washington, on April 7 and 8, 2003. The Grandparents, and of the Student,¹ were represented by Randal Brown, Attorney at Law. North Kitsap School District (District) was represented by William Coats, Attorney at Law. 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

On December 5, 2002, the Grandparents filed a request for due process hearing with the Office of the Superintendent of Public Instruction (OSPI). On December 16, 2002, the matter was sent to the Office of Administrative hearings to conduct a due process hearing. On December 13, 2002, notice was sent to the parties scheduling a prehearing telephone conference for December 20, 2002, and a due process hearing for December 31, 2002.

A prehearing telephone conference was held on December 20, 2002. Both parties were represented. By prehearing order dated December 30, 2002, the due process hearing was continued to February 5, 6 and 7, 2003. A readiness prehearing conference was scheduled for January 29, 2003. The due date for the written decision was continued to thirty days from the close of the record.

On January 29, 2003, the readiness telephone conference was held. The hearing date was confirmed.

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

On February 3, 2003, the Grandparents requested a continuance of the due process hearing in order to gain more time to settle the matter. In an order dated February 11, 2003, the continuance was granted, and a prehearing conference was scheduled for February 18, 2003.

On February 11, 2003, the Grandparents informed the ALJ that they had been unable to reach agreement with the District, and requested that the matter be scheduled for hearing.

On February 18, 2003, the prehearing conference was continued to February 24, 2003, to allow the Grandparents' attorney an opportunity to participate in the matter. A prehearing conference was held on February 24, 2003. Pursuant to the prehearing order dated February 25, 2003, the due process hearing was scheduled for April 7, 8 and 9, 2003, and a readiness prehearing conference was scheduled for March 24, 2003.

On April 4, 2003, the Grandparents filed a motion to sequester District witnesses. The motion was granted at the commencement of the due process hearing.

Evidence Relied Upon:

Exhibits Admitted: School District Exhibits SD1 through SD27, Parent Exhibits P1 through P30, and ALJ Exhibits C1 through C11.

Witnesses Heard: _____, Coordinator at _____ program (_____); _____, Special Education Teacher at _____; Peggy Brown, certified School Psychologist, formerly with the District; Grandfather; Grandmother; _____, Special Education Teacher, District autism program; Clare Dasler, District Learning Specialist; Ron Hunter, certified School Psychologist, with the District; and Dr. A. Ronald Seifert, Clinical Psychologist, Glen Eden Institute.

ISSUES

The issues for hearing are:

1. Whether the District provided the Student with a free appropriate public education (FAPE) for the 2001-2002 and 2002-2003 school years;

2. Whether the District's evaluation of the Student was appropriate, and if not whether the District shall pay for an independent educational evaluation (IEE) of the Student, performed by a neuropsychologist;²
3. Whether the Student is entitled to compensatory education; and
4. Whether the Appellant/Grandparents are entitled to other equitable remedies, as appropriate, including but not limited to placement at Glen Eden Institute (Glen Eden).

See Prehearing Order dated December 30, 2003.

FINDINGS OF FACT

1. The Student, _____, was born _____, 1993, and was 9 years old at the time of the due process hearing. He lives with his Grandparents, _____ and _____, within the boundaries of the District. The Student is a ward of his Grandparents, and the Grandparents have always acted as the Student's parents.
2. At various times since his birth, the Student has been diagnosed with or suspected of having Pervasive Developmental Disabilities (PDD), Autism, Asperger's Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Separation Anxiety/Attachment Disorder (SAAD), Childhood/Early Adolescent Depression, and most recently, Dandy Walker Syndrome. The Student has a history of disruptive behavior problems, as well as significant delays in his academic and cognitive functioning abilities, when compared to his non-disabled peers. The Student is eligible for special education under the category of emotionally/behaviorally disabled (EBD).
3. The Student attended first grade in the District at _____ Elementary School (_____) for the 1999-2000 school year (SY). During much of the school year, the Student was placed in a half-day program due to his behavior needs.
4. The Student repeated first grade at _____ for the 2000-2001 SY. He attended full time, splitting his time between a regular education classroom, and the Resource Room 2 program. The Student was provided one-on-one paraeducator support due to his behavior needs.

²The Grandparents waived the requirement that the District file for a due process hearing within 15 days of a request for an IEE pursuant to WAC 392-172-150(5)(a), should the District dispute that the IEE should be paid at public expense.

5. The Resource Room 2 program is for special education students who need additional assistance outside the general education setting. The students in the program receive much of their instruction in a general education class, and then go to the resource room for additional support.

6. During the course of the 2000-2001 SY, the Student's behavior in the general education environment deteriorated.

7. At an individual education program (IEP) meeting held June 15, 2001, the Student's IEP team decided to place the Student at the District's program for the 2001-2002 SY. The meeting was attended by the school psychologist; the Student's special education teacher; the Student's regular education teacher; the Grandmother; and the Student's speech language pathologist (SLP). No one from the program was in attendance. No other placement options were discussed with the Grandparents. The program was described as being able to offer better behavioral supports to the Student. It was not described as being a program for children who have serious emotional difficulties.

8.

9. () program is a self-contained program for special education students whose disabilities manifest themselves in behavioral and social extremes. The three classrooms are divided by age groups. serves grades K through 5. Each program uses a level system that a student rises through as he or she develops appropriate classroom behaviors. As a student nears the top of the level system, he or she is given more and more opportunity to attend classes in the general education environment.

10. Prior to the June 2001 IEP meeting, Ms. the special education teacher, spoke to a teacher and a psychologist with the program at length. They had agreed that the program would be appropriate for the Student.

11. The Grandparents did not agree with the District's decision to place the Student in a program with emotionally/behaviorally disabled students. Further, the Student's record contained information stating that the Student's local doctor, Dr. Brown, "adamantly disagreed with placing [the Student] in a program designed to serve children who have Emotional/Behavioral disabilities because of his indiscriminate style for mimicking behaviors." See D21, page 1

12. The 2001-2002 SY started on September 6, 2001. Up to that time, no one from the District had contacted the Grandparents about where to take the Student. The Grandparents were not sure where the program was. When the Grandparents did talk to District staff, they did not get the impression that anyone was familiar with the Student or his IEP. The Grandparents did not send the Student to

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until September 20, 2001, because they wanted to make sure that his teacher was familiar with his IEP.

13. The Grandparents were also very concerned about sending the Student into a new program that was designed for student's with behavior problems. The Grandparents were very concerned for the Student, because they knew he was generally frightened of other children and could not tolerate loud noises. The Grandparents did not want the Student with aggressive children.

14. The Student was placed in the _____ classroom. It was taught by a teacher who was new to the program, _____. However, Mr. _____ had over ten years experience as a behavioral program teacher at the time of placement. Mr. _____ finds behavior issues to be a challenge he enjoys. He spends a great deal of time looking for techniques to use for any given child. He understands that each child is different and cannot be expected to respond to any given technique. He will try something with a child, and if he does not see success, he will try something else. He researches behavior issues and techniques if he finds that what he knows is not working.

15. In the 2001-2002 SY, the _____ program had one special education teacher, and two full-time aides. The program also had weekly guidance from a behavior specialist, Suzanne Ochen, who would work with the students on social skills. There were eight students in the program.

16. After the Student started the _____ program, he would come home crying and then become completely out of control. The Grandmother had never seen this before. He also started demonstrating behaviors that the Grandparents had not seen before, including cussing and talking about private body parts. The Student also started demonstrating other behaviors at home that they previously had under control, like hitting and kicking. The behaviors became worse over the course of the school year. The Grandparents would have to fight to get the Student dressed for school in the morning, and would then have to carry him to the bus and physically force him into his seat. The Grandparents reported this behavior to the teacher and the school psychologist throughout the year.

17. The Student's IEP for the 2001-2002 SY was due for revision on October 18, 2001. See Exhibit SD 27. However, the Grandparents informed the District that the Student was obtaining a comprehensive medical work-up at Children's Hospital (Children's). It was initially agreed that the IEP meeting should be delayed, so as to give the District an opportunity to consider the information from Children's. However, when the information was delayed, the District went ahead with the IEP meeting.

18. An IEP meeting was held on December 14, 2001, and as a result an IEP was developed and put into effect placing the Student in the _____ program. The Student's

eligibility category was autism. With regard to the Student's social skills, the present levels of performance in the IEP state:

[The Student] demonstrates inappropriate skills which are attributes of Asperger's. [The Student] struggles with turn taking and often grabs things out of other students (sic) hands because he wants the object. This process, has in the past included slapping, hitting, and pushing other students. He also engages in inappropriate touching and communications.

* * *

[The Student] does respond to behavioral modification techniques over time. We have acquired some degree of success with his desire to constantly touch other students however, this process has taken three months to acquire. The positive note is that [the Student] can acquire a degree of change in behavior but it is a very slow process

See Exhibit D16, page 12. The December 2001 IEP contained behavior objectives for the Student to display appropriate contact with others, and to initiate positive interactions with others. *Id.*

19. The IEP provided that the Student would receive 180 minutes per day of special education in the areas of Reading, Written Language, Math and Social Skills, five days per week. The IEP also provided occupational therapy (OT)/physical therapy (PT) for 30 minutes per week, speech services for 60 minutes per week, and behavior intervention instruction 60 minutes per week. See Exhibit D16, page 2.

20. Although the Grandparents had shared their concerns with the District about the Student's at home behaviors, this information is not included or addressed anywhere in the Student's IEP. The Grandparents did sign that they agreed with the Student's IEP, but testified that they did not agree that it should be implemented in a behavior program. No other location options in the District were discussed during the IEP meeting.

21. For much of the 2001-2002 SY, the Student attended the _____ program only four days a week because the District would not provide transportation on the fifth day.

22. The IEP also contained an aversive therapy plan for the Student. See Exhibit D16, page 20. According to the terms of the aversive therapy plan, the rationale of the plan was to deal with situations when the Student had invaded the personal space of other students and triggered an unsafe situation. The plan allowed the District to remove the Student from the room forcibly when needed.

23. In the _____ program, the Student would throw tantrums when he was redirected in a way that he did not like. The teacher noted that the Student's tantrums were more like those of a toddler. This was different from the other students, who would act out with aggression and rage. Initially, the Student's tantrums would last from 45 minutes to two hours. The teacher tried many interventions to curb the tantrums, but only using the time out room was successful. By the end of the year, the Student's tantrums decreased to five to ten minutes per episode.

24. Another behavior the Student demonstrated was the tendency to become fixated on objects. He would get lost in staring at things. This behavior did not decrease over the course of the year, but, as indicated above, the length of the tantrums that occurred when the Student was redirected did decrease.

25. Another behavior the Student demonstrated in the _____ program was repetition of words. If asked to do something he did not want to do, the Student would start to repeat a word or phrase over and over again. By the end of the year, the Student experienced approximately a 50% reduction in this behavior.

26. Another behavior the Student demonstrated in the _____ program was that he would change personalities. The teacher noted six distinct personalities. The Student would use different voices and traits for each personality. The Student would stay in character for up to a half hour. If the teacher asked the Student something, he would respond with a character saying that the Student was not there. The teacher handled this by refusing to deal with the characters and consistently asking for the Student. Over the school year, the time the Student spent as a different character decreased.

27. Over the course of the 2001-2002 SY, the teacher saw the Student make significant gains behaviorally and academically. However, the teacher also determined that the Student was not making gains in his social skills. The Student did not interact appropriately with other students. He would come close to them and want to touch them. The Student has no ability to read other peoples' reactions. As a result, the other students would often respond to the Student's actions with physical and verbal aggression. According to the teacher, this could be expected, given that most of the other students' behaviors were very different from those of the Student. The other students were much angrier than the Student, and rather than having no understanding of social interactions, like the Student, they had a very negative understanding of social interaction. In response to the anger and yelling of other students, the Student would hide under a table.

28. By the end of the year, the teacher and the school psychologist had concerns about the Student's placement in _____ because of his exposure to the other students with more aggressive behavior tendencies. The teacher had tried different methods for teaching the Student better social skills, but was not seeing much improvement. The

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Student continued to incite aggressive responses in the other students. The teacher feared for his safety. The teacher also had concern that the other students were inflicting psychological harm to the Student by their name calling. The students would call the Student a name, and he would start to cry, only causing the other students to further tease him. The teacher had some success in managing physical hostility, but it was harder to prevent other students from saying things.

29. A three-year evaluation of the Student was completed by the District in June 2002. See Exhibit SD21. In the conclusions of the evaluation, the District questioned the appropriateness of placing the Student in a program designed for EBD children. The District recommended that the Student obtain a neurological examination. The evaluation also noted the discrepancy in the Student's Performance IQ of 103 and his verbal IQ of 57, indicating that such a discrepancy would contribute "to learning and emotional challenges in the classroom" as the Student grew older. See Exhibit D21, page 9.

30. On June 12, 2002, there was an IEP meeting held to review the evaluation and the Student's Placement. During the meeting, both the Student's teacher and the school psychologist expressed their opinion to the Grandparents that they did not think the program was appropriate for the Student. Their primary concern was for the Student's safety. The IEP team did not propose or develop a change of placement, but recommended that the team meet in August 2002, prior to the start of the 2002-2003 SY. The team discussed the need for a neurological evaluation of the Student prior to making a placement decision.

31. The District took no steps to obtain a neurological or neuropsychological evaluation of the Student over Summer 2002. The District did not inquire of the Grandparents as to whether they had obtained such an exam.

32. Over the summer, the Grandparents enrolled the Student in a program for disabled children that he had attended with success in Summer 2001. During Summer 2002, the Student was sent home several times for his poor behavior, and the camp staff commented to the Grandparents on how the Student's behavior had worsened from the previous summer. The Grandmother also noted a new behavior from the Student, which was that he would panic if he lost sight of her.

33. An IEP meeting was not scheduled or held during August 2002.

34. After the commencement of the 2002-2003 SY, the Grandparents were called by the special education teacher and told that the Student's placement would be in the program. The Grandparents told the teacher that they would not place the Student in that program. The Grandparents made this decision relying on the statements of the teacher and the school psychologist that the program was not appropriate for the Student,

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and their reasonable concerns for the Student's safety. The Grandparents never told the District that they were withdrawing the Student from the District. From the Grandparents perspective, it took them all summer to get the Student's behavior to the level it was prior to his entering the _____ program the previous year.

35. The Student did not attend school during the 2002-2003 SY.

36. The District did not contact the Grandparents again until January 2003, after the Grandparents filed for a due process hearing on December 5, 2003.

37. Annual review of the Student's IEP was due as of December 14, 2003.

38. In January 2003, the District invited the Grandparents to meet on February 3, 2003. At the meeting, the Grandparents shared that they had not returned the Student to _____ because they were concerned for his safety. The District offered to place the Student at the _____ Program or in the Resource Room 3 Program, at either _____ or _____ Elementary Schools.

39. The only difference in the _____ program between the 2001-2002 and 2002-2003 SYs was that there had been a reduction of the number of students. In 2002-2003, the program had two students, one of which was spending half his time in the general education environment. The District testified that the other full-time student had his behaviors under control. However, there is no way to determine whether that student would have maintained the same control if he or she had to interact with the Student and his tendency to violate other's personal space and engage in inappropriate touching.

40. The _____ teacher testified that with the low number of students in the classroom, the safety issue for the Student would not have been as great. However, had another elementary age student with behavior problems entered the District, that student would have likely gone into the _____ program. The teacher could not control who was placed in the classroom. The teacher expressed his concern about the Student being out of school for a year, and stated that the Student needed to be with other students to work on social skills. The teacher did not express an opinion as to whether it would or would not be appropriate to work on the Student's social skills in a classroom with students who were likely to react in an overtly hostile way to the Student's inappropriate behaviors.

41. The _____ teacher believes that his strengths are in dealing with behavior issues. Although not an expert, he believes the Student's behaviors resemble those behaviors of children with an autistic-related disorder. The teacher does not have special training on those issues, and could not testify as to whether an autism education program would look different from his behavior program.

42. The Resource 3 program is for special education students that are low functioning. The Resource 3 program at _____ is taught by teacher with extensive training in autism.

43. After visiting the offered programs, the Grandparents refused to place the Student in either program. The District then invited the Grandparents to meet on March 8, 2003, to review program options. The Grandparents indicated that they would not meet on that day because they wanted their attorney present and he was not available. The District called the attorney on March 8 and March 12, to set a meeting, but were unable to reach him. No invitation to meet was sent to the Grandparents or their attorney after March 8, 2003.

44. The District has also offered to retain an outside expert to observe the Student once he is enrolled in a program, and advise the District on the appropriateness of the program and what, if any, changes need to be made to the program. The Grandparents expressed their concern that the Student would be shuffled around.

Report of Dr. William O. Walker, Children's Hospital

45. The Student obtained a neurological examination in February 2003, from Dr. William O. Walker, Attending Physician in the Neurodevelopmental Clinic at Children's Hospital in Seattle, Washington. In his report, Dr. William O. Walker, stated the following about the Student:

IMPRESSION: A nine-year-old with long and significant past history of difficulties with behavior and academic concerns. [The Student] has carried a variety of diagnostic "labels" in the past to include ADD, ODD, and possible autism or pervasive developmental disorder. At the present time, I do not think that [the Student] would meet diagnostic criteria for autism. He certainly has a history of impulsivity, inattention and difficulty with concentration that are seen in children with attention deficit hyperactivity disorder. He has been seen primarily in the clinic setting, which may not represent his typical level of activity either at home or at school. There have been no standardized questionnaires completed by family or school personnel to address some of these symptoms today. [The Student] has certainly come across as much more oppositional in the past than he was today. However, this clinic setting does not require consistent performance or adherence to particular rules and/or regulations. I am sure that in such settings he may have more difficulty than he does here. He continues to respond reasonably well to direct verbal directions and redirection. As noted above, I think he was much more tolerant of the routine and more cooperative today than I have seen him in the past.

See Exhibit P30, page 2-3.

46. With regard to the neurological examination of the Student, Dr. Walker's report states:

NEUROLOGICAL EXAMINATION: Cranial nerves II-XII are intact and are of normal function. Deep tendon reflexes are 2-3/4 in the upper and lower extremities without spread, asymmetry or clonus. The patient has normal muscle mass, tone and strength. The patient demonstrates no sensory deficits. The patient is left handed. The patient has normal gait. The patient has a negative Romberg exam. The patient has normal tandem gait. The patient has normal rapid alternating movements. The patient has normal finger-to-nose examination. The patient is oriented and cooperative. He can answer simple questions regarding current time and place.

* * *

As noted on multiple previous examinations, [the Student] has a completely normal neurologic exam. In addition, he has a normal EEG, normal chromosomes and negative DNA studies for fragile X. He is noted to have some structural abnormalities in the posterior area of the brain. This area primarily involves the cerebellar structures. This area typically has its greatest affect on balance and motor control. There should be nothing in this area that would have a significant impact on his behavior.

See Exhibit P30, pages 2 and 3.

47. In his report, Dr. Walker makes no specific educational or social recommendations, other than to express his concern for the Student being out of school.

Glen Eden Institute

48. Glen Eden, the Grandparents' proposed placement for the Student, is a private educational clinic in Poulsbo, Washington. There is also a residential branch of Glen Eden in Vancouver, Canada. The Poulsbo branch opened in April 2000. Glen Eden is located in a suite of offices. It currently serves three students, with one student attending on a half-time basis, . The other students are ages 10, 14 and 16 years. Glen Eden has served children under contract with public school districts in Washington, but not the District.

49. The program is designed to serve children with complex medical, psychological, educational or learning problems contributing to their inability to succeed in other school settings. Initially, the staff take data on a student in intervals as short as every minute, but usually every six minutes. As the students become higher functioning, the staff increases the intervals to up to 30 minutes. The staff monitor the arousal state of the students to

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keep track of how they are responding to their environment. With the data, the staff attempts to predict a student's behavior and modify the situation as needed. Each student's program is designed for his or her specific needs. On average a student stays in the program for three years, with the ultimate goal of integrating the student back into a more traditional setting. If he attends, the Student would likely be served under a one-to-one student/teacher ratio.

50. Staff at Glen Eden have met with the Student and have determined that he could be appropriately served by its program.

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 392-172 WAC.

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

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 103 S. Ct. at 3051.

A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the 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.

Id. at 103 S. Ct. at 3041, 3042.

3. Generally, procedural error will constitute a denial of FAPE only where it results in the loss of educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994, (1st Cir. 1990), cert. den., 499 U.S. 912, 111 S.Ct. 1122 (1991); *Hall by Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

4. An inquiry must be made into whether a school district has met the "rigorous procedural requirements of the IDEA" and any "State standards that impose a greater duty." *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures in the IDEA and state education laws, the question of whether its proposed program meets the substantive benefit test need not be addressed. *W.G. v. Target Range Sch. Dist. No. 23, Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992).

5. As for the second prong, a school district shows substantive compliance with the IDEA by offering a placement that (1) is specially designed to meet a student's unique needs and would allow the student to benefit educationally; (2) contains sufficient support services to allow the student to benefit educationally from the instruction; and (3) provides instruction and services that comport with the goals and objectives of the IEP. *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

6. A school district does not have to offer the "absolutely best, or 'potential-maximizing' education for the individual child." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). The purpose of the IDEA is to "confer educational benefits," and to offer children a "basic floor of opportunity." See *Rowley*, 458 US at 201.

2001-2002 School Year

7. The Grandparents argue that the Student was denied a FAPE in the 2001-2002 SY due to both procedural and substantive errors. Procedurally, the Grandparents argue that the District failed to have a representative from the _____ program participate in the decision to place the Student in that program in June 2001; the District failed to have a program in place for the Student until December 14, 2001. Substantively, the Grandparents argue that the _____ program was not appropriate because it provided no transition to the Student into the program, and because it did not address the Student's unique behavioral and social needs. The decision will take each in turn.

8. The Grandparents argue that it was a procedural violation of the IDEA for the District to not include a teacher from the _____ Program in the meeting during which it was decided to place the Student in that program.

9. Regulation does not specifically require that a person from a proposed placement be present at the IEP meeting. See WAC 392-172-153. However, the regulations do require that parents have a meaningful opportunity to participate in a placement decision. WAC 392-172-15705. A parent's need for meaningful participation was discussed at length in *WG v. Board of Trustees of Target Range School District No. 23.*, 960 F.2d 1479 (9th Cir. 1992).

10. In *Target Range*, the Court of Appeals determined that the district in question had inappropriately failed to include staff from the student's prior private placement in the IEP meeting. The Court also determined that the district had placed the student in a "preexisting, predetermined program." *Id.* at 1484. Considering this, the Court determined that the district's procedural violations alone denied the student in that case a FAPE. *Id.* at 1485. The Court reasoned that without input from the people most knowledgeable of the child, the district was not in the position to make an appropriate placement decision.

11. In this case, it is true that the Student's prior teachers were included in the placement decision. However, the reasoning of *Target Range* is still applicable because without direct input from the _____ program at the IEP meeting of June 2001, it would have been impossible for the Grandparents to obtain the information they needed about the program that was being offered in order to provide meaningful input. Rather, the District told the Grandparents that the former program was inappropriate and that the Student was going to be placed in the _____ program. This decision, for all intents and purposes, had been made between the _____ staff and Ms. _____, the special education teacher, prior to the IEP meeting and without any meaningful input from the Grandparents. This was in violation of the requirements of the IDEA. The next question is whether it resulted in a denial of FAPE.

12. As stated above, in order to conclude that there has been a denial of FAPE due to a procedural error, the record must establish that either the error infringed upon the parents opportunity to participate in the IEP formulation process or that the student lost an educational opportunity. *Id.* at 1484.

13. In the present case, it is clear that the District's decision to put the Student in a predetermined program, without giving the Grandparents an adequate opportunity to learn about that program and provide input as to the appropriateness of placing the Student with children with different kinds of serious behavioral disorders, denied the Grandparents a meaningful opportunity to participate in the IEP formulation process. The Student was, as a result, denied a FAPE. The denial of FAPE under this reasoning lasted from the commencement of the 2001-2002 SY, until a properly constituted IEP meeting was held on December 14, 2001.

14. As a result of the foregoing conclusion, this decision will not address whether the Student was denied a FAPE at the commencement of the 2001-2002 SY due to the District failure to plan for the Student's transition into the _____ program, or its failure to revise the IEP in a timely manner as of October 18, 2001, both of these issues were resolved by December 14, 2001.

15. The next issue raised by the Parent is whether the _____ program was substantively appropriate for the Student. As stated above, a school district shows substantive compliance with the IDEA by offering a placement that (1) is specially designed to meet a student's unique needs and would allow the student to benefit educationally; (2) contains sufficient support services to allow the student to benefit educationally from the instruction; and (3) provides instruction and services that comport with the goals and objectives of the IEP. *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

16. Although the Student made progress on his behavioral goals and objectives within the classroom, it is not consistent with the IDEA that his improvement in the highly regulated environment of the _____ program came with the cost of his behavioral deterioration in other settings. This is contrary to the IDEA's ultimate goal of preparing students for independent living outside of the educational environment. 34 CFR §300.1.

17. In this case, the deficiency in the District's program came in offering a program for the Student that was not "specially designed to meet a student's unique needs." In order to gain meaningful benefit from his behavioral education, the Student needed to be served in an environment where he was not subjected to the teasing, and aggression of the other student's in his room. The Grandparents conveyed this concern to the District very early in the Student's participation in the program, reporting his deterioration at home. Likewise, prior to December 14, 2001, both the _____ teacher and the school psychologist

recognized that the Student's lack of social skills, outside his behavior issues, was creating a safety and mental health problem for him vis-a-vis the other students in the classroom. They further recognized that the _____ program was not successful in addressing this problem, and as a result, by the end of the year, they both recommended that the Student not return to the _____ classroom. It is acknowledged that the Student demonstrated some success while in _____, but there is no evidence that the Student was able to take this success out of the classroom. Further, it cannot be ignored that the Student's success came at the cost of his safety and deterioration of his behavior outside the highly structured environment offered by the classroom. Any success that the Student had in the classroom is not determined to be meaningful educational progress under the requirements of the IDEA.

18. Based upon the foregoing, it must be concluded that the _____ program was not substantively appropriate for the Student and denied him a FAPE as of December 14, 2001, through the end of the school year. The program was not specially designed to meet the Student's immense social skills deficits, and in reality, by ignoring those deficits, placed the Student in a physically and mentally unsafe situation and deprived him of meaningful educational benefit for the remainder of the 2001-2002 SY.

2002-2003 School Year

19. The next issue presented by the Grandparents is whether the District provided the Student with a FAPE in the 2002-2003 SY, by offering him placement in the _____ program. This question raises procedural and substantive issues.

20. The first procedural issue is whether the District was appropriate in its failure to convene an IEP team meeting, after June 2002, and prior to the commencement of the 2002-2003 SY.

21. According to the regulation on IEP meetings, an IEP should be revised, as appropriate, to address in part, information about the student provided to or by the parents, or the student's needs. WAC 392-172-156.

22. In June 2002, the Grandparents attended a meeting where they were told that the Student's placement in the _____ program was inappropriate, that the Student needed further neurological testing, and that an IEP meeting would be convened prior to the commencement of the next school year to determine a placement for the Student. The District failed to convene an IEP meeting, as it had assured the Grandparents that it would. This was a procedural error.

23. In this case, the consequence was that the Grandparents were offered a placement at _____ that they had been told by the District was inappropriate, and were not

again contacted for over four months. The District's action and inaction, both infringed upon the Grandparents' opportunity to participate in the IEP formulation process, as well as denied the Student educational opportunity.

24. The District argues that it should not be held accountable for this error because the Grandparents were to get back to them with the results of the neurological examination. This does not mitigate the District's error for two reasons. First, many evaluations take time to obtain, and the District could have made an educational decision based on what it knew at the time. Second, if the District determined that the Student needed a neurological examination, the Grandparent's failure to obtain one does not relieve the District from its obligation to "procure the same information for itself." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523-24 (1994).

25. The District also argues that any denial of FAPE to the Student should be mitigated by the Grandparents' refusal to send him to school. This is not a persuasive argument. The Grandparents always had concerns for the Student's safety in a class with behaviorally disabled Students. The Grandparents discovered that the classroom was harmful to the Student shortly after his placement in the program. Finally, the Grandparents' beliefs were confirmed by the District as of June 2002. It would be unreasonable to expect any parent under these circumstances to willfully place their disabled child in a situation that had been confirmed inappropriate.

26. The District also argues that a denial of FAPE to the Student should be mitigated by the substantive appropriateness of the program, given the reduced class size for the 2002-2003 school year. However, this does not mitigate the procedural error of failing to hold an IEP team meeting prior to February 2003, because this information would only have been appropriately presented and considered at a properly held IEP meeting. There is no indication that the Grandparents were given an appropriate or timely opportunity to consider this information.

27. The Student was denied a FAPE from the commencement of the 2002-2003 SY due to the District's failure to hold an IEP team meeting prior to February 3, 2003.

28. Given the foregoing conclusion, this decision will not discuss whether the District's failure to have an IEP in place for the Student as of December 14, 2003, when the 2001-2002 IEP expired, was a procedural error that denied the Student a FAPE.

29. The next issue is whether the District made an appropriate offer of placement for the Student at the February 3, 2003 IEP meeting. By February 3, 2003, the Student did not have a current IEP. At the IEP meeting, the District made two offers of placement, a self-contained behavior classroom, and Resource Room 3, a special education classroom with some general education exposure. Neither offer was ever put into writing.

The Grandparents were then asked to look at the programs and to tell the District what they preferred. The open offer, was coupled with an offer to hire an educational consultant after the Student was placed, to assist in making the placement appropriate as needed. The appropriateness of this type of offer has been discussed by the Ninth Circuit Court of Appeals in *Union v. Smith*, 15 F.3d 1519 (9th Cir. 1994).

30. In *Union*, the Court of Appeals discusses a school districts obligation to make an offer of placement, even when the parents have expressed a disagreement with the placement. The decision states in pertinent part:

We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement. The IDEA explicitly requires written notice to parents when an educational agency proposes, or refuses to initiate or change the educational placement of a disabled child. See 20 U.S.C. § 1415(b)(1)(C).

* * *

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

Id. at 1526. The *Union* Court goes on to explain, short of formal offer, neither the parents nor the district can fully assess the appropriateness of a placement.

31. Following the reasoning of the *Union* decision, it must be concluded that the District denied the Student a FAPE when it did not make a formal written offer of placement as of February 3, 2003, or anytime thereafter. The denial of FAPE extended from February 3, 2003, through the remainder of the 2002-2003 SY, as a formal written offer of placement was never forthcoming.

32. This decision is further supported by the idea that it is inappropriate for a district to propose two different placements to a parent, without first determining what a student needs. See *Glendale Unified School District v. Talar Almasi*, 122 F. Supp. 2d 1093 (US Dist Cal. 2000). In *Almasi*, the offering of multiple placements was considered to be a denial of FAPE. The US District Court explains:

A specific program offer 'alert[s] the [parents] to the need to consider seriously whether the [specific program] was an appropriate placement under the IDEA.' *Union*, 15 F.3d at 1526. Offering a variety of placements puts an undue burden on a parent to eliminate potentially inappropriate placements, and makes it more difficult for a parent to decide whether to accept or challenge the school district's offer.

Id. at 1107.

33. In the present case, the District offered the Parents two very different placements, and then shifted the burden to the Parents to determine which was ultimately appropriate for the Student. This was not in compliance with the IDEA. This conclusion recognizes that an IEP is a program and not a place. However, in the present instance, the two different places offered were really two different programs. A resource room would provide a different program than that of a self-contained behavioral classroom.

34. Having determined that the District failed to provide the Student with a FAPE for the 2001-2002 and 2002-2003 SYs, the next issue is what relief should be provided the Grandparents and Student.

Relief for Denial of FAPE

35. If a violation of the IDEA is found either procedurally or substantively, the court shall grant such relief as [it] deems appropriate. 20 U.S.C. 33 Sec. 1415(i)(2)(B)(iii) and *Hacienda La Puente School v. Honig*, 976 F.2d 487 (9th Cir. 1992).

36. Compensatory education and reimbursement for parentally supplied educational services are remedies provided to a parent and student when a district has failed to offer and/or provide a student with a FAPE. See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cr. 1990), cert. denied, 111 S.Ct. 1317 (1991), and *Burlington Sch. Comm. v. Massachusetts Dept. Of Ed.*, 471 U.S. 359, 369 (1985). In the 9th Circuit, compensatory education does not need to be a day for day equivalent of the time when the education was not appropriate. *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F3d at 1497.

37. For the denial of FAPE, the Grandparents request that the Student be placed at Glen Eden as a matter of both an appropriate placement and compensatory education.

38. The District's primary argument with regard to Glen Eden is that it would be too restrictive a placement for the Student. However, in light of the District's offer to place the Student in a self-contained behavior classroom with one to two other students, this argument is not persuasive.

39. Therefore, based upon the testimony of Glen Eden staff, Glen Eden is determined to be the appropriate placement for the Student for the 2003-2004 SY. It is understood that this is a prospective placement, and not purely a matter of reimbursement. However, in light of the Student not receiving a FAPE for two years, and the District's failure to propose an appropriate placement, it is not the obligation of the ALJ to find a placement for the Student when an appropriate placement has been offered by the Grandparent.

40. While the Student is placed at Glen Eden, the District shall be responsible for meeting the requirements of the IDEA and pursuant to applicable regulation, as though the Student was placed by the District. Further, the Grandparents shall fully cooperate with the District as necessary for it to meet its obligations under the law.

41. The question of compensatory education remains, as the Student's placement for the 2003-2004 SY at Glen Eden does not necessarily make up for the two years of appropriate education that the Student has lost. However, considering the education that the Student received in the 2001-2002 SY, it is ordered that in addition to a year at Glen Eden, the Student shall receive only one additional year of compensatory education. The nature of the compensatory education shall be determined by the IEP team prior to the conclusion of the Student's 2003-2004 SY at Glen Eden.

Independent Educational Evaluation

42. As relief, the Grandparents also request that the District pay for an independent neuropsychological evaluation of the Student.

43. A parent has the right to an independent evaluation at public expense when he or she disagrees with the District evaluation, provides written notice to the District requesting an IEE at public expense, and the District is unable to show the appropriateness of its evaluation at a due process hearing. WAC 392-172-150(1) - (4).

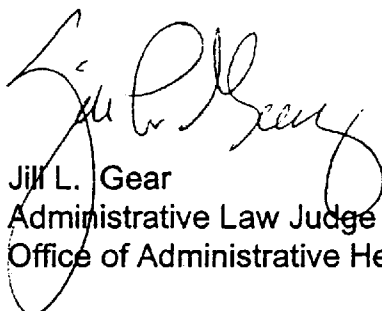
44. The Grandparents' request for a neuropsychological evaluation of the Student is granted. This decision is based upon the following: the lack of explanation of the educational relevance of the significant discrepancy between the Student's verbal and performance IQs; the lack of educational programming recommendations from the Student's neurological physician, Dr. Walker; and what effect if any the Student's diagnosis of Dandy Walker Syndrome would have on the Student's education. As of June 2001, when the District completed its triennial evaluation of the Student, there were questions about the Student's abilities that remained unanswered, and that is why the District recommended further examination. Although the Grandparents obtained a neurological examination for the Student from Dr. Walker, Dr. Walker's report does not answer those questions and only indicates that there is not neurological explanation for the Student's behaviors. The report does not address how the Student's brain functioning affects his

education overall. For this reasons, the Student's evaluation dated June 12, 2002, is determined incomplete, and the Grandparents' request for an IEE is granted.

ORDER

1. The District denied the Student a FAPE in the 2001-2002 SY;
2. The District denied the Student a FAPE in the 2002-2003 SY;
3. The Student shall be placed at the Glen Eden Institute for the 2003-2004 SY at public expense. The District shall follow the requirements of the IDEA with regard to the Student's placement at Glen Eden;
4. The Student shall receive compensatory education for the denial of FAPE. The compensatory education is satisfied in part by the Student's year at Glen Eden, and by one additional year of compensatory education, to be determined by the IEP team prior to the end of the Student's year at Glen Eden; and
5. The Grandparents are entitled to an IEE at public expense, to be performed by a neuropsychologist.

Dated at Seattle, Washington this 24th day of June, 2003.



Jill L. Gear
Administrative Law Judge
Office of Administrative Hearings