

ART WANG  
Chief Administrative  
Law Judge



STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS

1904 Third Avenue, Suite 722  
Seattle, Washington 98101-1100  
(206) 464-6322 FAX (206) 587-5136

July 19, 2002

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Superintendent of Public Instruction  
Legal Services



School District  
Virginia Alonzo, Co-Director SE Services  
Clover Park School District  
10903 Gravelly Lake Drive SW  
Lakewood, WA 98499-1341

Vanessa Lewis, PAVE  
6316 South 12th Street  
Tacoma, WA 98465

Bill Coats  
1201 Pacific Avenue Suite 1900  
PO Box 1315  
Tacoma, WA 98401-1315

RE: **Clover Park School District  
Special Education Cause No. 2002-SE-0025**

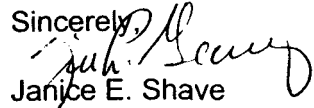
Dear Parties:

Enclosed please find the Decision entered in the above-referenced matter. Please take time to review the Decision carefully.

If you have any questions, please contact Legal Services at the Office of the Superintendent of Public Instruction at:

Office of State Superintendent of Public Instruction  
Attn: Legal Services  
Old Capitol Building  
PO Box 47200  
Olympia, WA 98504-7200  
Phone: (360) 725-6133

Sincerely,

  
for Janice E. Shave  
Administrative Law Judge

cc: Legal Services, OSPI  
Jill Geary, OAH ALJ Hearing Coordinator

JUL 19 2002

OFFICE OF  
ADMINISTRATIVE HEARINGS

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

IN THE MATTER OF

Clover Park School District

SPECIAL EDUCATION  
CAUSE NO. 2002-SE-0025

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

A hearing was held before Administrative Law Judge (ALJ) JANICE E. SHAVE, beginning May 23, 2002. The parent of the student whose education is at issue (hereinafter the Parent and the Student) appeared. Vanessa Lewis, non-attorney advocate with PAVE, assisted the Parent as did a second non-attorney advocate with PAVE, Russell Cadman, Ed.D. Gary Larson, Ph.D. also attended the hearing on behalf of the Parent. Virginia Alonso, Director of Special Education with the Clover Park School District (hereinafter School District), and Gary Wilson, Principal of [REDACTED] School, were present. William Coats, Attorney at Law, represented the School District.

The parties requested postponement of the hearing from May 23, 2002 to a later date so that the Parent and School District could meet with the psychologist and psychiatrist to discuss the evaluations and reports, and to attempt to resolve the case through agreement. The matter was reconvened for testimony June 14, 2002. Persons present included the Parent, her PAVE advocates Vanessa Lewis, Russell Cadman and Gary Larson. Robin Train, special education teacher, testified on behalf of the Parent. The School District was represented by William Coats. Virginia Alonso and Gary Wilson testified on behalf of the School District.

The record was left open for the parties to submit additional exhibits. The record closed June 28. The exhibits offered post-hearing were admitted without objection. The due date for the written decision is the close of the record plus 21 days, which is July 19, 2002.

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### ISSUES

1. Whether the manifestation determination team correctly concluded the Student's behavior (threatening a teacher and classmates) was not a manifestation of the Student's disability.

2. Whether the Student's individualized educational program (IEP) was appropriate to provide a free, appropriate public education (FAPE) because the evaluation under which special education services did not include the newly-made diagnosis of [REDACTED]

3. Other issues identified in the prehearing orders were resolved or became moot by the time the due process hearing was held.

### FINDINGS OF FACT

#### Background

#### The Student

1. The Student is classified as a special education student by the School District and receives his education pursuant to an individualized education program (IEP). During the 2001-2002 school year (01-02 SY) he was in [REDACTED] grade at [REDACTED] School in the School District in a self-contained classroom. The Student was classified as a "health impaired" student because of [REDACTED]. The Student was age [REDACTED] during most of the 01-02 SY.

#### Evaluation and Planning

2. The Student's IEP for [REDACTED] grade is dated April 24, 2001. School District Exhibit 1. The IEP addressed academic issues, including reading, math and written language. It called for the Student to be placed in a self-contained classroom "due to his need for specialized services in the areas of reading, written language, and behavior." Exhibit SD#12, p. 10. However, the April 2002 IEP did not address behavior. The School District placed the Student in a classroom with few students and increased individual assistance to assist with behavior issues.

3. In late April 2001, while the Parent and the School District were involved with the annual review of the IEP, the Parent first requested a functional behavioral assessment (FBA) be conducted by the School District because of the Student's problematic behaviors. Those behaviors included talking to himself to the distraction of others around him, his own

distractability and difficulty returning to the academic task at hand, and argumentative behavior with other students.

4. On or about May 1, 2001 an IEP Revision was made to the 4-24-01 IEP for the purpose of adding behavior goals. Apparently related to extended school year (ESY) issues, compensatory services were to be provided for 1 and 1/2 hours per week in August 2001 in the areas of reading, math, and written expression. The two behavior goals were: (1) the Student "will increase positive comments and communication to 80% accuracy with peers by Nov. 2001" and (2) the Student "will accept responsibility for his behavior and its consequences at 80% acc. by April 2002." Exhibit SD#12, p. 15. According to the Revision, the Parent had concerns about the behavior goals.

5. On or about May 21, 2001, the Parent submitted to the School District a written request for an FBA. She requested documentation on positive intervention, so everyone would know what worked for the Student. Exhibit SD#14. In June, 2001, the Parent submitted a second written request for the School District to perform an FBA.

6. On May 31, 2001 the IEP team began a functional assessment and behavior plan review. The School District began behavioral testing of the Student in or about late May 2001, utilizing School District personnel. The Student did not participate in ESY during the summer of 2001, for reasons which were not addressed at the hearing, and not made part of the Parent's request for relief.

7. The behavioral evaluation or assessment was completed September 2001. Exhibit SD#16, page 3, submitted and admitted post-hearing, Functional Assessment and Behavior Plan Review. On September 11, 2001, the School District issued an invitation to the Parent to attend a meeting to review and discuss the behavior assessment/behavior plan findings. Exhibit P #5. The meeting was to be held September 18, 2001.

8. The Parent and the School District met September 18, 2001 to address the Student's behavioral issues, including the FBA.

9. The Parent did not agree with the FBA. She felt it was inaccurate. She was concerned the School District's entire assessment of the Student was inaccurate and inadequate. She felt a part of the picture of the Student's disabilities was missing.

10. On October 4, 2001, the Parent and the School District met to discuss the triennial re-evaluation report. The 9-18-01 Behavior Assessment was utilized. At the October, 2001 triennial re-evaluation meeting, the Parent notified the School District she would be

requesting an independent educational assessment (IEE) at public expense, in writing, shortly thereafter. The School District then requested an administrative due process hearing to show that its evaluation of the Student was appropriate. However, that matter was resolved by agreement of the parties when the School District agreed to pay for the requested IEE. During Spring, 2002 the School District paid for a psychiatric evaluation completed by Bartlett Vincent Jr., MD, and a psychological evaluation completed by Audrey Don, Ph.D. SD Exhibits 6 and 7.

11. The Student's assigned special education teacher for 01-02 SY was Robyn Train. She reviewed the Student's records at the beginning of 01-02 SY. She spoke with [REDACTED] principal, Mr. Wilson. She did not agree with the IEP, and felt it did not state sufficient baselines for math, and did not address behavior issues. She tested the Student to ascertain his baseline levels of achievement as of September, 2001. She was concerned she was not able to attend the September 19, 2001 IEP meeting because the School District did not provide a substitute teacher for her. She observed impulsivity, frustration, obsessive compulsive behaviors and an obsession with death and weapons. In the Autumn of 2001, the Student picked up a piece of broken glass and asked why he could not kill another student. Ms. Train did not perceive or act on this as a threat. According to Ms. Train, 60% of the Student's discussions were inappropriate. She noted large groups brought out aggressive and inappropriate behaviors in the Student.

12. Ms. Train completed a functional assessment of the Student. Based upon that, she developed and implemented a behavior program for the Student. Exhibit SD#16, page 2. Ms. Train feels it was a very good behavior program. She wanted to use scripted responses, and did utilize them along with set prompts in her teaching.

13. The Student missed school due to excused absences 2 days in September, 2001, 9 days in October, 2002, some days in November, 2001, December 7 through 31, 2001 (including Winter Break), January 2, 3 and 4, 2002, plus parts of February, March, April, May and June, 2002. He was taken to [REDACTED] by his family in April, 2002 due to a death in the family, and was removed from school early in June, 2002 to return to [REDACTED]. According to the Parent, the Student will return to the School District for the 02-03 SY. He was absent approximately 25% of the 01-02 SY.

14. In September and October, 2001 the Student engaged in some problematic behaviors while in his special education placement at [REDACTED]. However, according to

Ms. Train, who was the Parent's only witness on this subject, the Student made academic progress in math, reading, writing and classroom comments (behavior) while in class with Ms. Train. She signed off on the quarterly report. She did not feel his attendance was a problem because he generally made up the work he missed. Ms. Train resigned her position with the School District January 6, 2002 and the Student was out of her classroom at the interim placement, or on excused absences, beginning October 18, 2001 and continuing thereafter.

15. The Student returned to his placement at [REDACTED] in early January, 2002 after completion of his interim placement and his extended Winter Break.

16. The parties worked toward obtaining the updated evaluation pursuant to the Parent's request for an IEE which had been resolved by agreement in or about November, 2002. Exhibit P #11. The process was quite slow, however, due to difficulty obtaining acceptable names to do the IEEs, and to scheduling difficulties. An IEP meeting was held January 29, 2002 and the IEP was revised that date to reflect that services would again be delivered at the interim alternative educational setting. Exhibit SD #2.

17. On January 31, 2002 the Parent made a written request for an IEP meeting, noting the Student had three occurrences within three months that led to the Student's removal from his regular placement, which she felt made it apparent his behavioral needs were not being met. She requested a behavioral plan of action. Exhibit P #8.

18. The IEP was revised February 28, 2002 to note that a new FBA would be done, and to address transition from the interim alternative educational placement back to Lochburn. Exhibit SD #3. On or about March 7, 2002 the IEP was revised again to address behavior and transition issues. Exhibits SD #4 and P #41, 42 and 43.

19. An FBA was completed by Jocelyn Chen, Ph.D. March 22, 2002 to address various inappropriate behaviors, including threats to other students, touching of other people, arguing with others and dancing/rapping while at school. Exhibit SD #5. Ms. Chen made the following recommendations: define desired behaviors in specific, concrete and measurable ways; develop a list of what motivates the Student by asking the Student and others; develop specific positive/negative reinforcing consequences with immediate implementation; adhere to above plans consistently and coordinate with family at home for greatest consistency; develop a maintenance plan to sustain the expected positive change.

20. In March, 2002, the School District scheduled an IEP meeting for April 3, 2002 to discuss the various reports and revise the IEP to implement changes identified in those

reports. The Parent initially agreed to the date. The Parent was then unable to attend as scheduled, and asked to reschedule. Finding a new date was difficult, because an emergency in the Parent's family caused the Parent and Student to be out of state the rest of the month of April, 2002. The School District attempted to schedule the meeting for the Parent to attend by telephone, since her return date was uncertain and the date to complete the annual IEP revision was fast approaching. The School District was ultimately unable to schedule the annual IEP meeting with the Parent's participation, because the Parent declined to participate in a meeting by phone, and ultimately requested the School District not continue to communicate with her while she was in [REDACTED]. She did not give permission for the School District to communicate with the Parent's PAVE advocate regarding scheduling issues. Exhibit P #38.

21. Based upon advice from the Office of the Superintendent of Public Instruction, the School District went ahead and conducted an IEP meeting in April, 2002 without the Parent. A new IEP was adopted by the School District April 23, 2002. Exhibit P #45. The School District advised the Parent by mail of its actions, and offered to hold another IEP meeting as soon as the Parent returned to Washington so she could participate. The School District was not certain whether the Parent was receiving her mail, but was instructed by the Parent not to telephone her in [REDACTED].

22. The April 2002 IEP (Exhibit P#45) states that "[the Student] will received [sic] specialized instruction in a small group setting." Supplementary aids and services necessary to support the student, or on behalf of the student, in the general education classroom or activities was defined as "clarification of directions, directions repeated." His written language instruction was to include receipt of "specialized instruction in written language in a small group setting." The placement remained at [REDACTED] in the same self-contained classroom. His measurable goals and annual objectives/benchmarks for written language included "increase written language skills from writing simple sentences to writing complex sentences and accurate paragraphs w/75% accuracy." The measurable annual goals and objectives/benchmarks for behavior were listed as "[The Student] will follow classroom rules and guidelines." Specifically, he was to be able to remain seated without outbursts 80% of the time, to be able to raise his hand for assistance 80% of the time, and to be able to remain seated for a sustained length of time. The methods to reach these goals were "positive reinforcement, praise, rewards, reminders, cool down." The need for ESY was to be determined at a later date in the Spring of

2002. He was to receive 22-23 hours per week of special education service, and 7-8 hours per week of general education, although the general education was not specified.

23. The Parent returned to Washington State in May, 2002, and the Parent and the School District agreed to first participate in a meeting with Drs. Bartlett and Don to discuss the IEE reports and then to have the IEP meeting. The Parent notified the School District at the hearing on May 23, 2002 that she and the Student would be leaving Washington State on or about June 15, 2002, before the end of the school year. The parties were to meet in person to review the two new reports, and to discuss a new IEP prior to the reconvened date of the hearing, set for June 14, 2002. The meeting between the Parent, the School District, the psychiatrist and psychologist to review the reports took place at the end of May, 2002. However, the Parent and the Student left the State of Washington again earlier in June, 2002 than the Parent had indicated at the May portion of the hearing, and were unavailable to participate in an IEP meeting. The Parent had not yet made herself available for an IEP meeting as of the date of the due process hearing, although the School District continued to offer to hold the IEP meeting.

#### History of Incidents

24. In early October, 2001, the Student was discovered with a small quantity of marijuana at school. On October 18, 2001, the School District conducted a manifestation determination for the purpose of determining whether the Student's conduct (bringing marijuana to school) was a manifestation of his disability [REDACTED]. The School District concluded the conduct was not a manifestation of his disability. Ms. Train agreed with this decision at the time it was made, and continued to agree with the decision as of the time of the May, 2002 hearing.

25. The Parent disagreed that the Student understood having marijuana at school was wrong or that he understood what the consequences would be for having marijuana at school. She continued to assert the Student had not been adequately evaluated.

26. The School District placed the Student in an interim alternative educational setting (alternately referred to throughout the hearing as the [REDACTED] or [REDACTED] or [REDACTED] for a period of 45 days beginning in October, 2001. The services provided there were highly structured. During that placement, the Student was provided special education services which are not at issue in this proceeding, except to the extent the Parent alleged that the Student's evaluation was incorrect, and therefore the IEP, FBA and behavior plan were all

inappropriate. She does not allege any specific inadequacy in the educational services provided at [REDACTED]

27. The Parent requested a hearing to challenge the determination made by the School District that the Student's behavior (bringing marijuana to school and not turning it over to a School District employee) was not a manifestation of his disability. A due process hearing was conducted, and the decision issued on or about December 3, 2002 held the Student's action which led to the discipline was not a manifestation of his disabling condition. That decision was not appealed by either party.

28. On January 24, 2002 while being disciplined by being sent back to his classroom for a timeout, the Student threatened to take a gun to school and kill his teacher and another student. The School District issued a notice to the Parent January 24, 2002, informing her of the emergency expulsion for violation of Policy 300-P1 Exceptional Misconduct, and Policy 3300-P5 Interference and Intimidation. The Student was expelled until after the manifestation determination was made.

29. On January 29, 2002 the manifestation meeting was conducted pursuant to notice provided to the Parent. Exhibit P #12. There is no challenge to the adequacy of notice provided to the Parent. The MDT team found after a review of the relevant information that the Student was properly evaluated, his Parent was included in the IEP process, and his IEP and placement were reasonably calculated to confer educational benefit. Exhibit P #16. The Parent disagreed that the Student was properly evaluated, and disagreed that the IEP placement was appropriate.

30. All members of the team, except the Parent, agreed as follows: the Student had been advised about the School's code of conduct, had demonstrated the ability to follow school rules, had expressed that this or similar conduct was wrong, had expressed an understanding of the consequences of this or similar behavior, was able to understand the impact (wrongfulness, criminality, consequences) of his conduct and was able to control his behavior in order to conform with school rules.

31. All members of the manifestation determination team, except the Parent, agreed this was an isolated instance of this behavior, the Student's behavior was not affected by psycho-social events (such as death in family, illness, etc.) unrelated to his disability, the behavior was not premeditated, and the Student was able to control his behavior. Based upon the above, the team, with the exception of the Parent, determined the Student was able to

conform to the code of conduct of the school, and therefore found the conduct was not a manifestation of the Student's disability. Exhibit P #16.

32. The School District placed the Student in an interim alternative educational setting [REDACTED] for a period of 45 days. Exhibits P #18 and 19. During that placement, the Student was provided special education services which are not at issue in this proceeding.

33. The Student was returned to [REDACTED] on or about March 7, 2002 after completion of the 45-day interim alternative educational placement.

#### Hearing Request

34. On February 11, 2002 OSPI received the Parent's request for a due process hearing to challenge the determination made by the School District that the Student's behavior (threat to bring gun to school and kill teacher and another student) was not a manifestation of his disability. In the same hearing request, the Parent raised a number of issues relating to the ongoing IEE, and asserted the Student was denied a FAPE. The scheduling of the hearing was repeatedly delayed to allow the IEE process to be completed and to allow the parties time to meet to discuss the IEE reports.

35. At the June 14, 2002 portion of the hearing, the Parent specified her request for relief from the School District's alleged inappropriate evaluation, IEP and 01-02 SY placement. She requested (1) the results of both manifestation determinations be reversed to hold the Student's behaviors were a result of his disabling conditions: (2) an appropriate IEP be developed to include the Student's new diagnosis - the IEP should include the suggestions made by the psychiatrist and psychologist in the reports developed during the IEE process - specifically, speech and language therapy evaluation and services, occupational therapy evaluation and services, physical therapy evaluation and services: (3) [REDACTED] tutoring be provided to the Student in [REDACTED] during the Summer of 2002 in an unspecified amount: (4) inclusion of the new diagnosis in the Student's reevaluation.

#### IEE of April, 2002

36. Dr. Vincent Bartlett, Jr., a psychiatrist, evaluated the Student during the Spring of 2002 as part of the IEE. He issued a report dated March 29, 2002 in which he diagnosed "a [REDACTED] best conceptualized as [REDACTED] [REDACTED]" which was a new diagnosis for the Student. SD Exhibit #6, page 4. Dr. Bartlett noted the following symptoms: eye blinking, lip pouting, finger jabbing (and pencil bopping), touching someone whenever he walks by that person, arranging things in a particular pattern (things

frequently have to be “just so”), rolling eyes to the ceiling, sticking out his tongue, holding funny expressions, licking things, doodling or drawing constantly when having to sit still, tearing paper or books, whistling, humming, screeching, barking, grunting, hissing, sucking, making high-pitched sounds, and singing rap songs, particularly ones with “R” rated lyrics (obscene and aggressive words).

37. According to Dr. Bartlett,

[REDACTED] . . . can frequently include very deceiving brief periods of reasonably well-behaved behavior (especially when highly motivated to look good) . . .; however, once the typical Tourette's Disorder person is free of the expectation to be good, he may 'let go,' and release a number of behaviors that have been building up during the well-behaved period. . . .[H]e may have little, if any control, especially when things have been building up and if hyperarousal is added to a period when he has had to be particularly well behaved, he may go 'haywire,' ....

. . . [T]his diagnosis [of [REDACTED]] not only involves a [REDACTED], but frequently also an [REDACTED] a generalized [REDACTED], and an [REDACTED] with [REDACTED] and [REDACTED] and [REDACTED]

Exhibit SD 6.

38. Dr. Bartlett made the following recommendations:

1. Consider in addition to his [REDACTED] other medications such as the [REDACTED] [REDACTED] medications (such as [REDACTED] or [REDACTED]); possibly, too, an [REDACTED] medication (such as [REDACTED] or [REDACTED], and lastly possibly the [REDACTED] (such as [REDACTED])
2. Recommend an addendum to his behavior intervention plan that recognizes the difficulty for him to control certain behaviors but at the same time does not allow aggressive or harmful behaviors (such as hitting, pinching, kicking, tripping, inappropriate touching, etc.) or remarks (such as verbal threats, obscenities, R-rated rap singing, etc.) to go without consequences or punishment but does allow some latitude for the control of difficult-to-control behaviors, rewards the absence of unacceptable behaviors, and disciplines/consequences unacceptable behaviors but with an expectation on the school's part to limit or avoid suspensions or expulsions;

3. Recommend a neuropsychological assessment in order to determine the nature and the pervasiveness of his [REDACTED] with recommendations as indicated;
4. Recommend a speech and language pathology assessment to determine if language problems are present such as deficiencies in phonemic awareness that might be interfering with his reading comprehension and his language expression;
5. Recommend an occupational therapy assessment to rule out such issues as fine and large motor incoordination [sic], motor dyspraxia, sensory integration problems, or eye-hand incoordination [sic];
6. Recommend individual therapy, parental counseling, and socialization group therapy; and
7. Consider meeting with all involved to assure that everyone is aligned in their understanding of this youngster's problems and in agreement about compensations, accommodations, modifications, and strategies that will help this youngster remain comfortably in the school setting and begin to make academic progress.

39. Audrey Don, Ph.D., a psychologist with the Children's Therapy Unit in Puyallup, issued a Psychological Evaluation Report as part of the IEE on or about May 15, 2002. Exhibit SD 7. She noted the Student's longstanding history of [REDACTED] and behavioral and learning difficulties. She described him as having a significant reading disability and significant attention problems. Based upon testing, it is her opinion that the Student made good progress in written expression and no longer meets Washington State criteria for a severe discrepancy between achievement and intellectual functioning. She determined he had made no progress in reading since the school evaluation in September, 2001, and his test scores currently meet Washington State criteria for a significant discrepancy. (It is noted Robyn Train testified the Student is able to read in class at a higher level than he tests at, so there may be a testing problem.) He made limited progress in math. He was diagnosed with a [REDACTED]. Dr. Don's report asserts the April, 2002 IEP contains "numerous excellent recommendations."

1. [The Student] expressed a desire to go to college during the assessment. Based on his history and current levels of performance, exploration of alternative options is recommended. Given his age, interest in art, best and better attention when

working on paper and pencil task, I would recommend exploration of vocational/technical classes and opportunities.

2. [The Student] exhibited his best attention and focus when working on pencil and paper tasks such as math computation and expository writing. It is recommended that paper and pencil and other hands on tasks be incorporated whenever possible.
3. Given [the Student]'s limited progress over the years, it is recommended that he be enrolled in an extended school year program.

#### Reading, writing and language

1. Because language difficulties were so pervasive, it is recommended that [the Student] receive a speech language evaluation to better understand these difficulties.
2. [The Student]'s performance on most tasks was affected by weak vocabulary and language comprehension difficulties. It is recommended that [the Student]'s special education focus specifically on vocabulary enrichment and increasing language comprehension.
3. Because of language comprehension and attention difficulties, use of simplified vocabulary and limiting the quantity of information presented at one time is recommended.
4. [The Student]'s reading difficulties appear to reflect significant phonetic processing problems. Because his reading difficulties are so longstanding it is unclear whether intensive work on phonics would be helpful.
5. Use of simplified oral text is recommended for teaching academic subjects such as history to limit difficulties caused by poor reading and limited vocabulary.
6. Use of oral testing for subjects such as history to avoid reading difficulties is also recommended.
7. Because [the Student] enjoyed writing and has showed [sic] good progress in this area, he may benefit from learning keyboarding skills. Use of spell-check and grammar-check programs may aid improvement in these areas.
8. It is recommended that [the Student] be taught how to identify the main theme or idea. Because [the Student] responded well

to visual images, it may be helpful to begin with pictures. When beginning with pictures, it is often helpful to use the “who, what, when, where, how” questions to focus on the information presented and then use that information to make one summary statement about the picture.

### Math

1. [The Student] enjoyed math and would benefit from work on memorizing math facts. Because of this enjoyment of written work and difficulties with auditory attention, use of math worksheet type of flashcards is recommended. To aid memorization, it is recommended that only a limited set of math facts be memorized at a time with several repetitions over time to aid consolidation before moving on to new material.
2. Further development of math vocabulary is also recommended as is continued work on fractions and decimal[s].

### 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 United States Code (USC) § 1401 *et seq.* (Individuals with Disabilities 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 Washington Administrative Code (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.

103 S. Ct. at 3051.

3. 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. 103 S. Ct. at 3041, 3042.

4. The crux of the procedural safeguards for a parent's rights in a discipline case is whether the child's right to receive a free, appropriate public education (FAPE) was affected, whether his parents' ability to participate in developing his program and placement was affected, and whether there was a loss of educational benefits. *Bd. of Ed. of Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1984).

5. School districts have the burden of establishing by a preponderance of the evidence that they have complied with the procedural requirements of the Individual with Disabilities Education Act (IDEA), 20 U.S.C. §1401 *et seq.* , and its implementing regulations, 34 C.F.R. §300 *et seq.*, and state law. *Clyde K. v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Cir. 1994). This includes the appropriateness of School District evaluations, notices, and eligibility determination for the student. See *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1497 (9th Cir. 1996); *Hacienda La Puente School District v. Honig*, 976 F.2d 487 (9th Cir. 1992).

#### Duty to Evaluate

6. The evaluation of a student for special education shall be in all areas related to the suspected disability. The evaluation shall be sufficiently comprehensive to identify all of the student's special education and any necessary related service needs, whether or not commonly linked to the disability category in which the student has been classified. WAC 392-172-106. As part of an evaluation, existing evaluation data on the student, including evaluations

and information provided by the parents of the student, and other specified information. WAC 392-172-10900. The evaluation report must include a description of how the student's disability affects a variety of factors related to his education. WAC 392-172-10905.

7. The evaluation report utilized by the School District throughout the 2001-2002 SY failed to include correct diagnoses, despite the Parent's repeated expressions of concern about this point, both spoken and written, despite the Student's demonstrated failure in the placement, and despite the agreement of the School District in November, 2001 to provide an IEE. The School District failed to fulfill its duty to appropriately evaluate the Student's disabilities for the 01-02 SY.

8. The School District committed a significant procedural violation by failing to obtain an appropriate, complete evaluation of suspected areas of disability. Although the Parent was involved at every step of planning for the Student's education within the School District, she was unable to participate in developing a program and placement appropriate for a student with the diagnosis of [REDACTED]. The failure to have an appropriate evaluation, and a behavior assessment and plan which address the [REDACTED] negatively affected the Parent's right to meaningful participation.

9. The IDEA contains strict procedural requirements. *Amanda J. v. Clark County Sch Dist.*, 267 F.3d 877, 891 (9<sup>th</sup> Cir. 2001), quoting *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982). Procedural compliance is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important. *Id.* at 891. It is necessary to evaluate the significance of procedural error when deciding whether a school district denied a FAPE. Not all procedural errors constitute a denial of FAPE. Errors that result in loss of educational opportunity or seriously infringe the Parent's to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Tr. of Target Range Sch. Dist.*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992).

10. In the present case, there was one significant error which tainted the subsequent actions. The School District did not properly evaluate the Student. Therefore, the Parent could not have appropriate participation in his educational process, the School District could not properly design an IEP to educate him, and an informed decision on the Student's conduct could not be made.

11. The Student did receive educational benefit during Autumn, 2002, which the Parent's only witness (Ms. Train) stated resulted in the Student making educational progress.

According to Ms. Train, she developed a very good behavior plan, which was working, although clearly not working 100% of the time. When the Student was removed from his [REDACTED] placement, he was sent to a specialized program where he received close supervision in a highly structured environment, and where he made educational progress, according to his teacher there. Dr. Don felt he made progress, except in reading and behavior.

12. The Parent's challenge to the adequacy of the education the Student received while at the interim placement was that it did not include the [REDACTED] diagnosis. The IEP utilized from September, 2001 through late April, 2002, when the Student effectively left the School District for the rest of the 01-02 SY did not include the recommendations later made by Dr. Vincent - to wit, an addendum to the behavior intervention plan that (a) recognizes the difficulty for the Student to control certain behaviors but at the same time does not allow aggressive or harmful behaviors to go without consequences, does allow some latitude for control of difficult to control behaviors, rewards absence of unacceptable behaviors and is premised upon an expectation that the school will limit or avoid suspensions or expulsions; (b) SLP assessment; (c) OT assessment; (d) individual therapy, parental counseling and socialization group therapy and (e) a meeting with all involved to facilitate understanding about the problems, and the plan to allow the Student to remain comfortably in the school setting and begin to make academic progress. These recommendations were unchallenged by the School District, and indeed were to be a topic of discussion at the IEP meeting the School District offered, but was unable to schedule due to the Parent's unavailability.

#### Manifestation Determination

13. Disciplinary exclusions of special education students are closely regulated to ensure that special education students are not being improperly excluded from school for disciplinary reasons. If a child with a disability misbehaves in school, the federal IDEA, mirrored by State of Washington regulations, provides detailed procedures that the local educational agency must follow to suspend or expel the student.

14. Each school district in Washington State is required to take steps to ensure that each employee, contractor and agent of the school district responsible for education of special education students is knowledgeable about the disciplinary exclusion provisions in the Washington Administrative Code (WAC), codified at WAC 392-172-370 through 392-172-385.

15. The IDEA and state law permit a school district to discipline a child with a disability for more than ten days, the same as it would discipline a non-disabled child, provided

the disabled child's misbehavior was not a manifestation of his disability. See 20 USC § 1415(k)(5)(A). This power to impose a long-term suspension arises when a child with a disability commits an offense involving weapons or drugs. When discipline results in a child with a disability being kept out of school for more than ten consecutive days, under the IDEA and state law a change of placement has occurred. See 34 CFR § 300.519, WAC 392-172-373. A specific set of procedural safeguards apply to protect a disabled child when a school district orders a long-term suspension.

16. In the present case, the Student was removed for a period in excess of 10 consecutive days, so the action of the School District constituted a change of placement for a disciplinary purpose.

17. Within 10 business days after first removing a student from more than ten school days in a school year, including weapons violations, drug violations, or behavior that is substantially likely to result in injury to the student or to others, certain specified actions are required to be taken by a school district. WAC 392-172-377. If the student already has an FBA, the IEP team shall meet to review the plan and its implementation and modify it, as necessary, to address the behavior. In the present case, the Student's January, 2002 conduct (threat) did not involve a weapon or drug, but it was appropriately treated as behavior that was substantially likely to result in injury to the Student or to others.

18. In cases where a school district removes a special education student for a period in excess of 10 school days in a school year, that school district is still required to provide services to that student to the extent necessary to enable the student to appropriately progress in a general curriculum and appropriately advance toward achieving the goals set out in the student's IEP. WAC 392-172-37505. In this proceeding, the Parent is not challenging the adequacy or appropriateness of the services that were provided to the Student during the 45-day interim alternative educational placement for disciplinary purposes, except in the general context that because the Student's evaluation in January, 2002 did not contain a diagnosis of [REDACTED], the evaluation and IEP based upon that evaluation were not appropriate.

19. Once a school district contemplates a disciplinary removal of a student for a dangerous behavior, not later than the date on which the decision to remove the student is made (January 24, 2002 in the present case) the student's parent must be notified of that decision, and be provided the procedural safeguards notice required under Chapter 392-172 WAC. Additionally, immediately if possible, but in no case later than 10 days after the date on which

the decision to remove the student is made, a review must be conducted of the relationship between the student's disability and the behavior which is the subject of the disciplinary action. This is referred to as a manifestation determination. WAC 392-172-38300. A manifestation determination meeting is required to be conducted and is required to include certain specific individuals, including the IEP team, and other qualified personnel, along with the parent. WAC 392-172-38305. In the present case, the manifestation determination was conducted on January 29, 2002, which was within 10 days of the date on which the decision to remove the Student was made.

20. The manifestation determination meeting is required to include certain specific individuals, including the IEP team, and other qualified personnel, along with the parent. WAC 392-172-38305. The team must consider the disciplined student's identified disability, as well as any alleged disability that has yet to be identified in the child. See *Farrin v. Maine*, 01-43-B-S, 2001 U.S. Dist. LEXIS 16358, at 3. (Dist. of Maine October 10, 2001); *Richland Sch. Dist. v. Thomas P.*, No.00-C-0139-X, 2000 U.S. Dist. LEXIS 15162, at 25-28 (W.D. Wis. May 24, 2000).

21. In the present case, the Parent alleged the Student may have another, as yet undiagnosed, disability at least as early as April and May, 2001. The Parent was correct. The Student did have another disabling condition, which could have been expected to affect his behavior, and his education.

22. The participants in a manifestation determination proceeding must first consider, in terms of the behavior subject to the disciplinary action, all relevant information including (a) evaluation and diagnostic results, including the results of other relevant information (if any) supplied by the parent, (b) observations of the student and (c) the student's IEP and placement. WAC 392-172-3805(1). Thus, the team present at the manifestation determination looks at the behavior subject to disciplinary action, and the relevance of other information is determined from that perspective.

23. The information and documentation considered by the MDT team was inadequate, because the evaluation itself was inadequate. Further, the Student's reported and documented behavioral problems in class were consistent in nature with the behavior which was the subject of the disciplinary action.

24. After a school district has considered the relevant information specified by regulation, the school district is then required to evaluate, in relationship to the behavior subject

to disciplinary action, the student's IEP and placement -- whether the student's IEP and placement were appropriate, and whether the special education services, supplementary services and behavioral intervention strategies were provided consistent with the student's IEP and placement. WAC 392-172-38305(2)(a).

25. The School District expressed surprise and unreadiness to proceed on the issue of an alleged denial of FAPE at the hearing, but did not request a postponement of the due process hearing beyond June 14, 2002. It is noted that an analysis of a disciplinary exclusion for dangerous behavior includes by regulation analysis of the appropriateness of the evaluation and of the IEP.

26. There is no jurisdiction in this proceeding to address the administrative decision issued in December, 2001 relating to the marijuana. That decision was not appealed by either party. 20 USC §1415 (i), Chapter 34.05.542 RCW. (Further, the Parent presented no evidence, other than her unsupported allegations, that the Student's October, 2001 behavior (the marijuana incident) was a manifestation of the Student's disabling condition. The Parent's only witness, Robyn Train, expressed her opinion that the Student's conduct was not a manifestation of the Student's disabling condition.)

27. The IDEA and state regulations provide a disabled child's parents an array of procedural rights intended to ensure their participation in the development of their child's program and placement. See generally 20 USC .§ 1415(b). Parents have the right to request a due process hearing to challenge the adequacy of their child's evaluation, IEP, results of a manifestation determination and imposition of discipline. See *id.* at §1415(f); 1415(b)(6); 1415(k)(6). Washington law accords a parent the right to a due process hearing to challenge a school district's determination that the student's behavior was not a manifestation of the student's disability. WAC 392-172-38400. The presiding officer (ALJ) at such a hearing is required to determine whether the school district has demonstrated that the student's behavior was not a manifestation of the student's disability, consistent with WAC 392-172-38305. The burden is thus on the School District, not the Parent, and in the present inquiry, the School District failed to sustain its burden.

28. The MDT team considered the Student's diagnosed disability, his IEP and his placement. Where the Student was not properly evaluated and no accommodation is made in the IEP for a diagnosis of the significance of [REDACTED], it cannot be said the IEP was appropriate, or that the placement was appropriate.

29. The requirement of WAC 392-172-38305(2)(a) that the student's IEP and placement be evaluated and determined to be appropriate, and behavior intervention strategies and special education services, supplementary aids and services be provided consistent with the IEP and placement, are evaluated in relationship to the behavior subject to disciplinary action. The manifestation determination team, except for the Parent, incorrectly concluded that the IEP and placement were appropriate.

30. The manifestation team is required to determine whether the Student's disability impaired his ability to control the behavior subject to disciplinary action. The Student's disability was not known to the team participants. It was known he demonstrated impulsivity and aggressive behavior

31. The final element of a manifestation determination is whether the student's disability impaired his ability to control the behavior subject to disciplinary action. WAC 392-172-38305(2)(c). In the present case, the School District, which bears the burden, has failed to demonstrate that the Student's disability, [REDACTED], did not impair his ability to control his behavior which was subject to the disciplinary action.

#### Remedies

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

33. A procedural error resulting in the denial of FAPE has occurred in the District's failure to properly evaluate the Student and consider all of his diagnoses in the manifestation determination. Consideration of equitable remedies for that denial is therefore appropriate. The only equitable remedy the Parent requested was an award of compensatory education in the form of an unspecified amount of tutoring during Summer, 2002, in unspecified subject areas at a [REDACTED] in [REDACTED]. She requests an appropriate IEP be developed, based upon an appropriate evaluation and evaluation report that address the Student's new diagnosis as well as his prior educational issues of [REDACTED] and learning disorder. The request for an

appropriate evaluation, evaluation report, and IEP is consistent with the duties already imposed upon the School District by both Federal and State laws.

34. The appropriate award of compensatory education is not automatically a day-for-day for educational time spent in an inappropriate placement. *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d at 1489 (9<sup>th</sup> Cir. 1994).

35. The School District made repeated attempts to assist the Parent with scheduling the IEE, and to schedule meetings to discuss results of the IEE, and meetings to redo the IEP based upon the IEE results throughout the pendency of this proceeding. It was extremely difficult to schedule meetings given the Parent's absence from the area, even if it was understandable on her part that she was occupied with her extended family's emergency. She did participate by telephone even in the scheduling of meetings, which would have expedited the process.

36. Further, the effect of the Parent removing the Student from his educational placement for approximately 25% of the school year is a significant factor in the amount of educational benefit the Student received, but one which is difficult to quantify. The Student was absent from a placement that was determined following an inappropriate evaluation with procedurally inadequate participation by the Parent. The burden of complying with the IDEA is on school districts, not parents, to obtain appropriate evaluations and to develop appropriate IEPs. It would not be surprising that a parent who believed and repeatedly stated her child was inappropriately evaluated, and therefore not receiving a FAPE, one whose child was involved with disciplinary action after disciplinary action, might keep the child home from that placement a significant amount of time.

37. However, the School District may not shift its burden to the Parent. The Student is entitled to some remediation for the School District's failure to appropriately evaluate and to draft an appropriate IEP in the areas of math and behavior.

38. During the two 45-day interim placements, the evidence supports the determination the Student may have actually received a better education than he did in his Lochburn placement. The classes were small, he received a great deal of individual attention, and the environment was quite structured, with great attention on the Student's behavior. Neither party submitted sufficient evidence in this proceeding to determine exactly what the Student's IEP should be, or in what specific way his 01-02 SY IEP, as repeatedly amended, was inappropriate.

39. A significant procedural violation occurred and the Student received a school year's worth of education without consideration of the [REDACTED] diagnosis. However, the Parent's requested remedy is not appropriate. The vagueness of the request for summer tutoring, coupled with a lack of evidence regarding what educational opportunity was lost, make such an award inappropriate.

#### ORDER

1. The evaluation of the Student utilized by the School District as of January, 2002 was inappropriate and inadequate. It failed to include a diagnosis of a suspected area of disability. The failure to obtain an appropriate evaluation in a timely fashion constituted a failure of the School District to provide the Student a FAPE. The Parent was denied meaningful participation in development of the Student's program and placement.

2. The School District failed to demonstrate that the Student's behavior was not a manifestation of the student's disability, consistent with WAC 392-172-38305. Therefore, his behavior is found to have been a manifestation of his disability, and the January, 2002, 45-day change in placement was inappropriate.

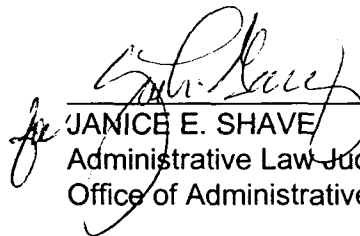
3. The Parent's request for an award of compensatory education in the form of unspecified amounts of tutoring by a [REDACTED] in [REDACTED] over the Summer of 2002 is denied. The request for ESY in the form of summer school is denied, as the Parent removed the Student from the state.

4. In the event the Parent returns the Student to the School District to resume his education, the parties shall participate in an IEP meeting no later than two weeks after the first day of the Student's return (expected to be the first day of the 2002-2003 SY) consistent with the procedural requirements of the IDEA and state regulations that pertain to the holding of IEPs. WAC 392-172-153 *et seq.* Further, in accordance with Dr. Bartlett's recommendations (a) the IEP shall include an addendum to the behavior intervention plan that recognizes the difficulty for the Student to control certain behaviors but at the same time does not allow aggressive or harmful behaviors to go without consequences, does allow some latitude for control of difficult to control behaviors, rewards absence of unacceptable behaviors and is premised upon an expectation that the school will limit or avoid suspensions or expulsions; (b) the District shall conduct an SLP assessment and an OT assessment of the Student; (c) the District shall provide individual therapy, parental counseling and socialization group therapy; and (d) the District shall conduct a meeting with all involved to facilitate understanding about the

problems, and the plan to allow the Student to remain comfortably in the school setting and begin to make academic progress.

5. Further, the School District shall provide compensatory education to compensate the Student for the loss of educational benefit in reading and behavior in the form of tutoring for the Student one hour a week for a total of twenty hours in the School District, after he returns for the next school year. The School District shall provide counseling for the Student for behavioral issues not addressed during the 01-02 SY in the form of out-of-class counseling one hour a week for twenty hours. The reading tutoring and counseling shall not interfere with the Student's regular school day. The School District shall offer these services to the Parent and the Student within 2 weeks of his return to the School District. In the event the Parent does not begin the counseling within one month of the School District offering the counseling to the Student, the requirement that the School District provide such counseling as a form of compensatory relief will expire.

Served on the date of mailing, stamped above.

  
\_\_\_\_\_  
JANICE E. SHAVE  
Administrative Law Judge  
Office of Administrative Hearings

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 the mailing date, stamped above, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Parent



Vanessa Lewis, PAVE  
6316 South 12th Street  
Tacoma, WA 98465

School District  
Virginia Alonzo, Co-Director SE Services  
Clover Park School District  
10903 Gravelly Lake Drive SW  
Lakewood, WA 98499-1341

Bill Coats  
1201 Pacific Avenue Suite 1900  
PO Box 1315  
Tacoma, WA 98401-1315

## 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.