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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-0113 CAUSE NO. 2002-SE-0114 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing was held before Administrative Law Judge (ALJ) Janice E. Shave in Poulsbo, Washington, November 20 and 21, 2002. The Appellants, the parents of the student whose education is at issue in this proceeding (hereinafter the Parents and the Student), participated. They were represented by Randall Brown, Attorney at Law. The North Kitsap School District (the School District) participated through Dorothy Siskin, director of special education. The School District was represented by William Coats, Attorney at Law.

Witnesses included the Mother, the Father, (general education teacher), Randall Hand (school psychologist) and (special education teacher).

School District Exhibits 1 - 54 were admitted without objection. Parents' Exhibits 1 - 10 were admitted without objection, including a waiver of any objection to timeliness.

Issues

The issues were identified in a prehearing order dated October 10, 2002, and were redefined as follows at the conclusion of the hearing:

1. Whether the School District has provided an appropriate evaluation of the Student, and if not, whether the Parents are entitled to an independent educational evaluation at public expense (assigned Cause No. 2002-SE-0113);

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2. If the School District did not follow procedural requirements for the evaluation and/or provision of special education services for the Student, whether the Student was denied a free appropriate public education (FAPE) as a consequence;

3. Whether the Student is eligible for special education services under the category of specific learning disability;

4. If the Student is not eligible for special education, whether she is eligible instead for Section 504 accommodations or should be educated solely in a general education environment;

5. If the Student is eligible for special education, whether the individualized educational program (IEP) provided a FAPE in the least restrictive environment (LRE);

6. If the Student is eligible for special education, whether the placement provided by the School District has provided a FAPE;

7. If the Student is eligible for special education, whether the Parents are entitled to their requested relief, including but not limited to reimbursement for summer school at Sylvan Learning Center, evaluation of the Student during the Summer and the Autumn of 2002 at Sylvan Learning Center, ongoing tutoring. Under Cause Number 2002-SE-0113 the Parents request an additional evaluation in the form of an independent educational evaluation (IEE) at public expense by the neuropsychologist of the Parents' choice.

Background

The Student was home-schooled until age 8. The School District tested the Student, found her eligible for special education, and placed her in a special education Resource Room for part of each school day. The Parents question whether the Student is truly in need of special education, or instead demonstrated academic achievement problems due to having been home-schooled, and not exposed to a regular school environment.

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Findings of Fact

1. The Student is 10 years old (dob '92). She resides within the School District boundaries with her Parents, two younger sisters, and one younger brother. She was home-schooled by her Parents through the end of the summer of 2001, which would have been after her 2nd grade year, had she attended school. In September, 2001, the Parents enrolled the Student as a third-grader in the School District and she began school at Elementary ( ) in the School District at the start of the 2001-2002 school year (01-02 SY). She was placed in regular education third grade class. The class is a 3rd grade/4th grade loop, meaning the teacher remains with the same students for 3rd and 4th grades.

2. The classroom teacher became concerned about the Student's functional abilities in the first day or two of school. The Student had difficulty sounding out simple, one syllable words, had great difficulty writing anything that could be read, even phonetically, by herself or others. She could not add or subtract consistently, could not count by 2s or estimate. She demonstrated difficulty retaining information from day to day. The Student did not stay on task, or behave within the classroom appropriately. For instance, she did not demonstrate she understood she needed to sit in her seat during class.

3. The teacher told the Parent over the telephone that there were some problems in class, and asked for information about the Student's educational history. The Parent explained the history of home-schooling, and agreed the Student had some problem areas, primarily in reading and math. The Parent told the classroom teacher that while doing home schooling she had hit some walls in instruction, and had backed off - not pursued those areas of instruction. Those areas which the Parent did not pursue during home schooling included reading, writing and mathematics. Instead, they focused on science, on developing the love of learning and the Student's powers of observation, and

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on social skills based on their large family and non-school activities. The Parents viewed mastery of these academic skills (reading, writing and arithmetic) like other developmental milestones, such as toilet training. They figured that when the Student was ready to do those subject areas, she would do them. They felt she was just about ready to turn the corner and do better on reading. The Mother noted the Student's younger sister, who had also been also home-schooled and was just starting public school, did better at reading than the Student did.

4. The Parents had only given the Student one test while home-schooling, so they did not know where the Student was in comparison with other students her age. By approximately September 10, 2001, the Parent had met the special education teacher, and had visited the Resource Room.

5. The regular education classroom teacher also obtained telephone permission for the Student to spend part of each day in the Resource Room, primarily for the purpose of evaluation. The regular education teacher did not mention "special education," because those words scare some parents away from the idea. Initial observations of the Student by the regular education and special education teachers indicated the Student was functioning significantly below the 3rd grade level in reading, writing and math, although the Student seemed quite intelligent in conversation with teachers and peers.

6. The regular education teacher consulted with the special education teacher, Ms. . They determined additional testing, beyond classroom observation, was needed. They were uncertain whether the Student's demonstrated delays were due to one or more learning difficulties, or were caused by not being exposed to reading, writing and mathematics in her home-schooling. From the beginning of her experience with the Student, Ms. was concerned that School District staff not rush to a determination that the Student had a learning disability before they had adequately tested her, because

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as a child (5th grade) Ms. , herself had moved to a new country, with a new language. She had the experience of starting school as a 5th grader and knowing only two words in the local language.

7. The Parent gave telephone and/or verbal consent for the Student to spend part of each day in the special education resource room, to assess the Student's ability. The Student was assessed, and also educated on a half-day general education and half-day Resource Room schedule for approximately one month while the School District conducted its initial special education evaluation and made its initial special education eligibility determination.

8. School District personnel completed a Special Education referral form on September 10, 2001, and on September 10, 2001, the school psychologist prepared a form entitled Prior Written Notice. It was addressed to the Parents and informed them the School District was proposing to initiate evaluation to determine if a specific learning disability existed that interfered with the Student's academic skills. The reason stated for the testing was "deficits in reading, writing, and math." Exhibit SD6. The form stated other options considered and rejected included not assessing the Student, but that option was rejected as the Student "needs assistance, knowing her strengths and weaknesses will give" useful information to help. The testing that was proposed was in the areas of "cognitive, reading, math, and written expression."

9. The Prior Written Notice form states in its body:

> Your child has procedural protections under IDEA. These protections are explained in the Notice of Procedural Safeguards for Special Education Students and Their Families. If this prior written notice is given to you as part of your child's initial referral for evaluation, a part of a request for a reevaluation, or notice to you regarding disciplinary action that constitutes a change of placement, the procedural safeguards accompanies this notice. If a copy of the Notice of Procedural Safeguards for Special Education Students and Their Families is not enclosed and your

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would like a copy, or you would like help in understanding the content, please contact:

at [telephone number]

Exhibit SD 6.

10. The Parents did not receive a copy of the Notice of Procedural Safeguards for Special Education Students and Their Families (hereinafter Notice of Procedural Safeguards) which was supposed to be included with the Prior Written Notice. The Parents returned the Prior Written Notice form to the School District on an unidentified date, having annotated the form to request a copy of the Notice of Procedural Safeguards. The School District did not provide the Parents with a copy of the Notice of Procedural Safeguards for more than one month after the Parents' written request for it.

11. On or about September 10, 2001, the Parent signed the Consent for Initial Evaluation for Special Education Services. Exhibit SD 7. The forms states:

> I, as parent or guardian of the above-named student, ☒ **do** ☐ **do not** give my consent for the initial evaluation of my child in order to determine if he/she is eligible for and in need of special education services.
> I have been fully informed of all information relevant to the proposed evaluation of my child as described in the Notice of Action form (attached). I understand that my consent is voluntary and may be revoked at any time prior to the completion of the evaluation.
> ...
> Procedural safeguards and notice of action forms are attached to this letter.
>
> /s/

12. The consent form was returned to the School District, where it went first to the special education teacher. She held on to the consent form for a few days, and then sent it on to the school psychologist, who received it September 26, 2002. Exhibit SD 7. The Parents did not annotate the consent form in any way to limit the testing. However,

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in a discussion with the regular education teacher, the Mother stated she wanted the Student tested for achievement levels first, before proceeding with any testing administered by the school psychologist. The regular education teacher passed this information on to the special education teacher, who conducted the achievement testing (Woodcock-Johnson - Revised, Exhibit SD 10) on September 11, 2001. The verbal limitation to the written consent was not communicated to the school psychologist.

13. The special education teacher and regular education teacher commenced evaluation of the Student on September 11, 2001, and continued for a few weeks thereafter. Exhibits SD 9, 10, 11, 12, 14 and 16, P 2. The results of the achievement testing done by the teachers indicated the Student had significant deficits in the areas of mathematics (2nd grade, 0 month level), reading (1st grade, 2nd month level), and written language (1st grade, 2nd month level). Exhibit SD 17. Both teachers believed the achievement testing accurately reflected the Student's abilities. They wanted to be certain whether the Student had a learning problem of some type, such as a learning disorder, or was simply having problems adjusting to being in a regular public school for the first time in her life. The testing was consistent with both teachers' classroom experience with the Student, where the Student was an obviously intelligent student with holes or gaps in her knowledge and abilities.

14. The school psychologist, unaware of any limitations on the consent to test, administered aptitude testing in October, 2001. Exhibits SD 15, 18 and 19. On October 5, 2001, the school psychologist administered the Wechsler Intelligence Scale for Children - Third Edition (WISC-III) to the Student. This is an intelligence test. The Student did not demonstrate any greater degree of stress or tension than other students do when required to take this test. The Student enjoyed the test, thought it was fun, and has asked to be allowed to take the test again after taking it with Mr.

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15. The cognitive testing indicated the Student fell within the normal range with a verbal score of 99 and a performance score of 112. The school psychologist wrote:

> The discrepancy between the verbal and performance IQs is significant. The verbal (auditory/hearing) score is significantly lower than the performance (visual/eye-hand coordination). This may indicate weakness in the ability to process information auditorily, listening. In strength and sequential processing, eye-hand coordination, spatial reasoning, visual awareness and attention to details, visual thinking speed, visual motor speed.
> ...
> The scatter among the six verbal subtests is remarkably unequal. Using specific subtests of the WISC III (AID v VCS), we can develop a theory about [the Student's] attention and concentration ability in a controlled, quiet, one-on-one setting. [The Student]'s demonstrated, remarkable difficulties in how she attends to or concentrates on information presented to her versus what might be considered a less contaminated view of her ability and potential for learning (VCS). This deficit is likely to be more exaggerated in a classroom setting. This is one factor supporting the possibility of ADHD/inattentive type.

Exhibit SD 19.

16. The IQ testing indicated the Student had some problems with distractability. The school psychologist did not believe the Student had attention deficit disorder (ADD.) He thought it possible the Student had some sort of auditory processing disorder because of test scores.

17. The school psychologist believed the Student qualified for special education as learning disabled, needing instruction in basic reading skills, reading comprehension, written comprehension, math calculation, and math comprehension. Thereafter, the School District determined the Student was eligible to receive special education and services as a child with a specific learning disability.

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18. Throughout September and early October, 2001, the Student was still assigned to the regular education classroom but went to the resource room for instruction in reading, writing and math for some unspecified amount of time each morning.

19. On October 18, 2001, the Parents were scheduled to go to the Student's school for a parent-teacher conference. The classroom teacher suggested they schedule two ½ hour sessions so they would have enough time to go over the results of the academic testing with Ms. , and the psychological testing with Mr. , and discuss adjustments to the Student's education that would be appropriate for the Student. The Parents understood this was the purpose of the meeting. However, the School District did not provide the Parents with any written notice that the School District intended to classify the Student as eligible for special education, or intended to present a draft of an IEP to the Parents at the October 18, 2001 parent-teacher conference.

20. At the parent-teacher meeting held October 18, 2001, the test results were discussed, including the possibility of an auditory processing disorder, and of ADD.

21. The Mother was not surprised by the achievement test results, since she knew the Student had some problems in those three academic areas. The test results seemed reasonable to the Mother, based upon her observation of her daughter during home-schooling.

22. The School District's proposed IEP was reviewed page by page with the Parents. The IEP called for the Student to continue to receive academic instruction in the resource room for the three subjects, but to spend the majority of her day in regular education. The IEP contained math, reading, and written language goals. Extended school year services (ESY) services were mentioned, but were listed as not necessary, since the Student was brand-new to the School District, and there was no information as of October, 2001, that the Student would need ESY services the following summer due to

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the Student regressing excessively over the Summer or taking exceptionally long to recoup any regression.

23. The IEP was signed by School District staff and the Parents at the October 18, 2001 parent-teacher conference. The Parents were provided with the Notice of Procedural Safeguards during the meeting when the evaluation results and IEP were discussed and the IEP signed.

24. The Parents read the IEP and the Notice of Procedural Safeguards during the days immediately following signing the IEP. The Parents had concerns about the IEP within a few days of the meeting, and telephoned the regular education teacher early the next week to inform her of their concerns about the testing, the results of the testing, and about the time in the Resource Room. They were told by Ms. that the IEP was not cast in concrete, they could discuss it and could discuss the testing. Ms. understood the Parents to say they wished to have another IEP meeting, but wished to think about doing some additional testing before the next meeting. Therefore, Ms. did not schedule another IEP meeting, waiting instead for the Parents to decide on testing. The Mother believed she had made it clear she wanted the Student out of the Resource Room, and out from under the IEP, right away. However, the Mother did not want another meeting right away, preferring to speak to the IEP team members individually.

25. In or about December, 2001, the Parents requested the School District conduct some further testing of the Student. The Mother asked the school psychologist if he needed a new Consent to Test form, but he stated he did not. He administered the Test of Auditory Processing Skills (TARPS), which measures distractability. Exhibit SD 23. The test results showed the Student ranked at the 33rd percentile, was not distracted by external activity, but seemed to be distracted by internal "noisy thinking." This was not consistent with an ADD diagnosis, and Mr. did not believe additional evaluation of the distractability issue, or of the possible auditory processing issue, was necessary. The

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IEP as written addressed the Student's actual learning needs, including distractability, as well as her deficits in the three subject areas.

26. The parties agreed that prior to any next IEP meeting, a new Woodcock-Johnson test of achievement would be completed. That was administered November 16, 2001 by the regular classroom teacher. Exhibit P 3. Those results again showed difficulty in the areas of reading, written language and mathematics.

27. An IEP meeting was scheduled to be held in December, 2001, but was canceled because the Parents first wanted to speak with the IEP team members individually, rather than as a group.

28. The Student did quite well in the Resource Room, and made significant progress there. She continued to go to the Resource Room for instruction in the same three academic areas for approximately 3 to 3.5 hours per day.

29. An IEP meeting was held March 26, 2002, resulting an amendment that provided the Student would spend less time in the Resource Room, and provided accommodations (more time was allowed) to the Student when taking a standardized test (Iowa Test of Basic Skills, ITBS). Exhibit P 7. The amendment also accommodated the Parents' request that they take on more responsibility for portions of the Student's education. The Parents' effort was aimed at reducing or eliminating the Student's time in the Resource Room, and they agreed to the IEP Amendment as a compromise. The 3/26/02 IEP called for the Student to be in the resource room for 120 minutes each day. The Mother agreed to the amendment at the meeting, but did not actually sign off on the amendment until September 12, 2002. Exhibit SD 37. At the time that IEP was signed, the parties contemplated they might proceed to a due process hearing over the issue of the Student's special education.

30. The School District did not believe the reduced Resource Room time was the best for the Student. The School District did not truly agree with the 3/26/02 IEP,

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feeling the Student would make some progress with it, but not as much as she would make if she had a bit more time in the Resource Room. The School District agreed to the terms, including reduced time in the Resource Room, as a compromise, signed the 3/26/02 IEP, and provided services consistent with it. The Student received her academic instruction for a relatively brief period (2 hours out of 6 or 6.5 per day) each morning in the Resource Room, then returned to the regular education classroom to work on assignments. However, the timing of her transition between classrooms did not work out well, and she had difficulty keeping on task. Her academic progress slowed considerably.

31. Over Spring Break, 2002 the Student broke her right arm. She is right handed, so this was a major problem for her ability to write. The special education teacher offered to the Student to accept work done orally - the Student was allowed to just speak the answers, but the Student's progress slowed. The Student was aware her Parents did not want her in the resource room, and instead of concentrating on her academics, she often instead announced she would not be not returning to the resource room after that day or week.

32. The regular education teacher offered to provide all her students with biweekly assignments (a single sheet of problems designed to be fun but keep the students engaged) over Summer, 2002, but the Parents declined. School District personnel on the IEP team did not believe the Student was a risk for significant regression over the Summer, and did not recommend ESY services. The Parents did not request ESY services. The Student made good progress during most of the 01-02 SY. She did not appear to regress significantly over the school breaks, and the teachers did not believe she would significantly regress over the Summer break or have difficulty recouping educational gains any differently than other 3rd graders. The Parents did not want the Student to participate in regular Summer School, (which they had heard about from another teacher and in a different context) because they believed it would be on the level of babysitting.

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They planned to read with the Student and do various home schooling activities over the Summer.

33. The Student's Parents have provided considerable out-of-school support and instruction to the Student at all times material to this matter, and under the 3/26/02 IEP they were responsible for even more of her education, at their request and insistence. They were frustrated that they could not or did not get a set of text books from the classroom teacher and/or the special education teacher to work with at home. The teachers use a variety of sources for teaching, and do not teach out of one, or even two, texts. The Parents were frustrated they could not, or did not, routinely get a lesson plan from the teachers so the family could pre-teach or review instruction at home. However, the teachers' lesson plans are fluid, and change daily, depending on a variety of factors, such as the progress made in the classrooms on any given day. The classroom teacher and special education teacher consult three to four times each day on students and strategy.

34. The Parents had the Student evaluated by the Sylvan Learning Center in early July, 2002, and then enrolled her at Sylvan for math tutoring throughout the summer, four hours per week. According to Sylvan's evaluation, the Student made progress in math. The Student was re-evaluated by Sylvan two days prior to the due process hearing, on November 19, 2002. That testing showed additional progress. Whether the progress is due to Sylvan, or to the Parents; significant efforts at home, is not possible to determine. The likelihood is that both contributed.

<u>2002-2003 School Year</u>

35. The Parents do not want the Student to receive her education in the resource room, or at least not much of it, and not for very long. Therefore, when the Student returned to school in the Fall of 2002, her time in the resource room was problematic. The Parents believed the Student told them she was spending all day, or all

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morning, in the resource room. She was actually spending 120 minutes per day in the resource room, as called for in the 3/26/02 IEP.

36. They now seek an independent educational additional evaluation, performed by someone other than School District staff, to determine the Student's actual areas of weakness and strength. They question whether the Student has a learning disability, or merely has a different learning style, after having been home-schooled all her life. They are not certain the Student needs specially designed instruction, and believe the Resource Room is not the least restrictive setting for the Student to receive her education.

37. An IEP meeting was scheduled to be held October 31, 2002. The Parents do not contest the adequacy of the procedural notice provided to them regarding that meeting. The meeting was scheduled for one hour, and the parties discussed many topics. The School District gave the Mother a draft of a new IEP, dated October 31, 2002. Exhibit SD 54. The School District explained the IEP was a draft, and could be changed. The Mother inquired whether the IEP called for the Student to exit the special education program. When she was told that it did not, she declared the meeting over, and stood up to leave. The classroom teacher asked the Parent to stay long enough to hear about the proposal, and the Mother stayed for a few minutes more. The Parent did not sign the proposed IEP, but took it with her. She understood she had five days to read it, sign it, and return it to the School District. She did not read it, and instead delivered it to the family's attorney, unread.

38. Finally, in or about early November, 2002, the Mother physically removed the Student from the resource room while the special education teacher was engaged in instruction, and returned the Student to the regular education classroom. The Mother stayed in the regular education classroom the rest of the school day. The parents refused to allow the Student to return to the resource room after that day throughout the hearing,

until the issue of the stay put placement was raised. A stay put order was then entered, finding the March, 2002, IEP to be the stay put placement.

39. The Parents believe the Student is making good progress in school, keeping up with lessons, and became much happier at home, including doing her household chores, once she stopped going to the Resource Room.

40. Although the Parents disagree, the teachers provided credible testimony the Student is not functioning at grade level, is below all the other students in the 4th grade class, and is not making much progress now that she remains in the regular education classroom all day. The Student is found to be in need of specially designed instruction in order to make academic progress. It is not possible to deliver the appropriate education in the regular classroom, where there are 25 students. The Resource Room has many students in and out throughout the day, but is staffed by the special education teacher, plus 4-5 instructional aides. The Student is able to receive significantly more attention on her individual problem areas in the Resource Room than in the regular education classroom as one student among 25.

41. The Parents requested a due process hearing by means of a September 4, 2002 letter to the School District. They requested reimbursement for an independent educational evaluation (IEE) (the Sylvan evaluation) and also requested the Student be exited from special education, and returned to the general education classroom with maximum use of supplementary aids and services provided. The School District forwarded the Parents' letter on to OSPI, and included their request for a hearing to demonstrate the School District's evaluation was appropriate. OSPI received the requests September 18, 2002. The request for an IEE was assigned cause number 2002-SE-0113 and the request to exit special education was assigned cause number 2002-SE-0114.

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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 Code of Federal Regulations (CFR) 300 *et seq.* and Chapter 392-171 WAC (or Chapter 392-172 WAC for cases arising after November 11, 1995).

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 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 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

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> 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.

Procedural Compliance

4. A copy of the notice of procedural safeguards that are available to parent of a child with a disability must be given to the parents at various specified times. Those specified times include upon initial referral for evaluation. 34 C.F.R. 300.504; WAC 392-172-302. The Parents did not receive written notice of the procedural safeguards prior to the initial evaluation of this Student, although the first written notice home to the Parents stated it included such notice, and although the Parents annotated the notice they received of the evaluation, requesting a copy of the procedural safeguards.

5. The significance of the written notice of procedural safeguards cannot be understated. Congress and the Washington Legislature both insist the notice be written, be prior to any action taken by a school district, and identify the parents' rights to participate - indeed, identify the need for parental consent. 34C.F.R.300.504; WAC 392-172-304. Adequate notice of the procedural safeguards was not provided in the present case. The evaluation process pursued by the School District was a transparent process, but not a collaborative process by parties who were informed of the options, rights and consequences.

6. School District personnel did not know, initially in September, 2001, whether they were dealing with a Student who was suffering the effects of indulgent home-schooling, where the Parent simply backed off every time the Student hit a difficult subject,

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or whether the Student's unusual academic skills were signs of a learning disability. It was appropriate to evaluate the Student further - and appropriate and even admirable that the School District was on top of the situation so very quickly. However, good intentions do not make up for a lack of procedural compliance in the area of the provision of notice of procedural compliance prior to evaluation.

Notice of Procedural Safeguards - Initial Placement.

7. Notice of procedural safeguards must also be provided whenever a school district proposes to initiate or change the identification of a special education student. WAC 392-172-302. Consent for initial evaluation may not be construed as consent for initial placement. WAC 392-172-304.

8. In the present case, the regular education teacher in effect changed the Student's placement from the regular education classroom to ½ day of special education in the Resource Room, and ½ day of regular education. This situation existed from the first week or so of class, through October 18, 2001, when the first IEP was proposed by the School District and signed by the Parents. The School District considered this classroom arrangement to be part of the Student's evaluation process - since it assisted the School District special education teacher in her determination of the Student's skills.

9. According to WAC 392-172-108, prior to the initial provision of special education and any necessary related services, a full and individual initial evaluation of the Student's educational needs must be conducted. The evaluation of a student with a suspected disability will be conducted by a group of qualified professionals selected by the district or other public agency and knowledgeable about the student and the suspected areas of disability. For a student suspected of having a learning disability, the determination of whether the student is eligible under Chapter 392-172 WAC shall be made by the student's general education classroom teacher, or other specified individual. In the present case, the Student was evaluated by the general education teacher, and by the

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special education teacher. Given the particular circumstances here, it is determined that the Student was present in the special education classroom primarily to assist with evaluation, rather than for the purpose of changing the placement to special education. This is borne out by the fact that once the testing was completed, the School District acted quickly to draft and present an IEP for the purpose of changing the Student's placement.

10. In the present case it is easy to see why oral notice to parents is not deemed sufficient to satisfy written notice requirements. The Parents were well informed by telephone and in person of the School District's actions in evaluation and interim placement (for evaluation) of the Student from day one or two of her education within the School District. The Parents knew the Student was being evaluated by the School District for possible learning disorder(s), knew she was placed in the Resource Room for evaluation and to receive some specially designed instruction. However, lacking the notice of procedural safeguards, they lacked context for the information. The practical importance of correctly providing the written notice of procedural safeguards, both prior to testing and prior to an interim placement, is visible where, as here, as soon as the Parents received their first copy of the notice of procedural safeguards, they began efforts to have the Student removed from her special education placement. The Parents lost trust in the School District, and were not able to fully participate in the process.

11. A transparent process determined by a school district without meaningful informed consent and, ideally, participation by parents, does not satisfy federal or state law. Failure to provide such notice, even where the School District did provide written notice to the Parents that was captioned with the words consent to evaluate and "special education" constitutes a significant procedural violation of the provision of a FAPE where there was no notice to the Parents of the procedural safeguards.

12. School districts are required to provide to parents of a special education student a description of the action proposed or refused by the school district, options

considered and rejected, and a description of each evaluation procedure, test, record, or report the district used as a basis for the decision, and sources for parents to contact to obtain assistance in understanding the procedural safeguards provisions of Chapter 392-172 WAC. WAC 392-172-306.

13. The written notice provided by the School District of the proposed testing did not identify special education, other than in the title. That, coupled with the regular classroom teacher's purposeful avoidance of the words "special education," words which she noted sometimes alarm parents, contributed to the Parents' lack of informed consent to participate in the process.

14. The School District Prior did provide written notice that it intended to test the Student, and the Parent signed the consent form. She did not annotate the consent form, or limit it on its face, but did attempt later to limit the consent to only achievement, rather than aptitude or psychological testing. The limitation should have been written by the Parent on the consent form. In an ideal world, the oral limitation she placed on the consent would have sufficed.

15. The written notice that the School District provided did sufficiently describe the types of testing performed by the School District. The insufficiency of that notice is basically that it did not provide the Parents with the context - no notice of procedural safeguards, and no information to the parents about sources for them to contact to obtain assistance in understanding the procedural safeguards.

16. However, after the School District psychologist did the testing (pursuant to written consent but contrary to spoken limitation) the Parents in essence ratified the school psychologist's actions when the Parents requested additional testing be performed by the School District.

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Procedural Compliance - Invitation to IEP Meeting.

17. School districts are required to take steps to ensure that one or both parents of a special education student are present at each IEP meeting, or are afforded the opportunity to participate. School districts are to accomplish this by notifying the parents of the meeting early enough to ensure the parents will have an opportunity to attend, and by providing notice to the parents that includes the purpose, time, and location of the meeting, and identifies who will attend the meeting. If the purpose of the meeting is to develop an IEP, the notice must also inform the parents of the provisions relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the student. WAC 392-172-156.

18. The School District orally notified the Parents that the October 18, 2001, meeting was for the purpose of discussing the Student's test results and proposed educational plan. The School District also orally notified the Parents that the regular education and special education teachers, and the school psychologist - who all had knowledge about the Student, would be present. However, the School District did not provide written notice to the Parents of the meeting and did not identify it as an IEP meeting. That failure is puzzling. The standard written notice to parents of an IEP meeting generally informs parents of the necessary items. The School District clearly knew it was going to meet with the Parents, knew it had determined the Student to be eligible for special education, and knew it was going to propose a draft IEP. Failure to provide the required notice was a procedural violation.

Timing of Subsequent IEP Meetings.

19. The Parents objected to the Student's placement in special education as soon as they had an opportunity to review the notice of procedural safeguards. The School District did offer to schedule an additional IEP meeting to address the placement, but then the Parents delayed in making themselves available for scheduling the meeting.

The Parents requested additional testing, and stated they wished to speak with team members individually, rather than in a group. It was not error for the School District to then delay scheduling the next IEP meeting, consistent with the Parents' request.

Substantive Violations.

20. School Districts are required to evaluate students suspected of having a disability in all areas of suspected disability. 34 C.F.R. § 300.532(g); WAC 392-172-106. Although the test results indicated the Student was somewhat distractable, the school psychologist did not suspect, or believe, Attention Deficit Disorder/Attention Deficit-Hyperactivity Disorder (ADD or AD/HD) were among the Student's disabling conditions. Therefore, he did not initially do testing to follow up on the first set of test results. The further testing requested by the Parents, and performed by the school psychologist, supported his position that the Student did not have ADD or AD/HD. So far as the school psychologist was concerned, this was not an area of suspected disability. It was appropriate not to engage in further testing on that subject prior to the Parents' request. However, he did suspect there might be some neurological disorder.

21. The credible evidence offered by the School District employees supports the determination that the October, 2001 and March, 2002 IEPs were not only reasonably calculated to enable the Student to receive educational benefit, but in fact the Student made excellent progress throughout the 01-02 SY, although she made less progress after the March, 2002 IEP amendment was made, which reduced the Student's time in the Resource Room. The Parents' evidence does not differ on that point. There is insufficient evidence in the record to support a determination that there was a substantive violation of the provision of a FAPE to the Student, and therefore no such determination is made. The Student's progress was significant, especially in the 2001-2002 SY. The record is clear, however, that the Parents oppose a special education placement, and do not place any trust in the School District's actions. The fact that the education provided by the School

District appears to have so benefitted the Student, but that the Parents are left feeling so mistrustful of the School District underscores what Congress and the Washington Legislature have contemplated in passing the special education laws we deal with here. The informed involvement of the Parents is a critical component of a special education student's education.

22. There is no evidence to support a determination that the Student was in need of ESY services. ESY is not intended for students to make additional gains over the summer, but to avoid excessive regression over the summer where recoupment would take too long. Failure by the School District to provide ESY was not an error, in the absence of evidence that the Student would lose ground, regress, and take an inordinate amount of time to recoup what was lost.

<u>Remedies</u>.

23. According to the U. S. Supreme Court:

> [I]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ...demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP.

Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

24. Not all procedural violations constitute a denial of IDEA rights, of a school district's obligation to provide a FAPE. However, procedural errors that result in the loss of educational opportunity, or that seriously infringe upon the parents' opportunity to participate in the IEP formulation process warrant relief, according to the *Ninth Circuit in*

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W.G. v. Target Range School District No. 23 Board of Trustees, 960 F.2d 1479 (9th Cir. 1992). In essence, a procedural violation may be so great in importance that it must be addressed.

25. Leaving aside the issue of whether the Student experienced a loss of educational opportunity (there is no evidence to support a determination that she did), examination of the Parents' participation shows they were orally informed of the process the School District intended to follow from the first day or so of the 01-02 SY, the Parents agreed to the steps taken, and ultimately signed a second IEP in Spring, 2002, which left the Student in special education. However, from September 10 through October 18, 2001, the Parents were basically observers of the School District's transparent process, rather than active, informed team participants. The Parents were lacking a fundamental bit of information - they were initially unaware that the School District's process was leading toward a special education determination and placement. The School District committed procedural violations from the beginning of the school year (September 10, 2001) when it failed to provide the Parents with the Notice of Procedural Safeguards, through the time of the October 18, 2001, IEP, which was convened without adequate notice to the Parents. The procedural violations ended when the Parents finally received a copy of the procedural safeguards October 18, 2001, and then, when offered an IEP meeting to discuss the Student's placement, chose to postpone the meeting.

26. The Parents allege in their post-hearing brief that since the special education identification, evaluation and IEP processes were not begun correctly, the entire subsequent activity has been tainted, and the Student should not have been found eligible, therefore is not eligible for the protections of the entire scheme of IDEA laws and protections. Parents' Post-Hearing Memorandum, Page 13. This assertion is not adopted. While the process was, indeed, incorrectly commenced, the Parents have ratified it, after October 18, 2001, by failing to participate in scheduling a second IEP meeting shortly after

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the October 18, 2001 IEP meeting, as offered by the School District, and by agreeing to a new IEP in the Spring of 2002, after fully-compliant notice was provided to the Parents.

27. Based upon the results of the testing conducted by the School District - which the Parents have not disagreed with - the School District was substantively correct, and the Student was, and is, eligible for special education services under the eligibility category of specific learning disability. WAC 392-172-126. The protections of Federal and State special education laws apply to her and to her family.

28. Parents may only obtain tuition reimbursement for a child needing special education services in a private school setting where the school district's placement has been found to be inappropriate and the private placement is proper under IDEA. WAC 392-172-231. The Student's placement and program have not been found to be inappropriate, and the Parents did not provide prior notice to the School District of their intent to privately place the Student. Therefore, reimbursement of the summer school program at Sylvan is not appropriate and is not ordered.

29. Because the initial evaluation was conducted without benefit of appropriate notice to the Parents, and because there was some lingering question of the existence of a neurological problem, it is appropriate to require the School District to provide an independent neurological examination at public expense.

30. The School District is not required to reimburse the Sylvan evaluation, since that evaluation was essentially part of ESY services the Student was not entitled to, and not the missing portion of the initial evaluation - the neurological evaluation. Parents may privately arrange for and pay for any number of evaluations and private instruction for their children - the question is whether the School District can be made to pay for those expenses. It is not appropriate to require the School District to pay the Sylvan expenses.

31. The Student's placement is pursuant to the March, 2002, IEP. If the parties seek to change that program and/or placement, they need to return to an IEP meeting to discuss and effect such a change.

ORDER

1. The Student is eligible for special education services as a disabled student with specific learning disabilities (reading, written language, math).

2. The Student's current program and placement are pursuant to the March, 2002 IEP.

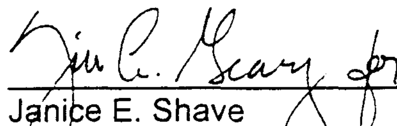
3. The School District committed various procedural violations stemming from its failure to provide the Parents notice of their procedural safeguards, the effect of which significantly impaired the Parents' participation in the evaluation and IEP formulation process during the period September 10 through October 18, 2001.

4. There is no evidence the Student was substantively denied a FAPE, as she made excellent progress during the 01-02 school year.

5. The School District shall provide the Student with a neurological evaluation at public expense forthwith.

6. Reimbursement for the Parents's Sylvan expenses incurred during the Summer of 2002 is denied.

Dated at Seattle, Washington on the date stamped above.



Janice E. Shave
Administrative Law Judge
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