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

IN THE MATTER OF: Spokane Public Schools, District No. 81	SPECIAL EDUCATION CAUSE NO. 2002-SE-0082X **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Pursuant to due and proper notice, a hearing in the above-entitled matter was held before Senior Administrative Law Judge, David G. Hansen in Spokane, Washington, on August 20, 21, and 22, 2002. The parents (Parents herein) of the child (Student herein) who is the subject matter of this proceeding were present and represented by the Parent. Spokane Public Schools, District No. 81, (District herein) were present and represented by Gregory L. Stevens, Attorney at Law. At the conclusion of the hearing the record was held open for the submission of post-hearing memoranda, and the record closed on September 27, 2002. The Administrative Law Judge, having sworn the witnesses, heard the testimony, and considered the admitted exhibits, briefs, and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

By letter received by the Office of the Superintendent of Public Instruction on June 13, 2002, the Parents requested a due process hearing regarding special education services for the Student.

A prehearing conference was held on June 26, 2002. A Prehearing Order was issued on that date, which in part, continued the original hearing date to August 20, 2002, and set forth the issues for hearing.

By motion dated July 31, 2002, the District moved for an Order holding that the undersigned lacked jurisdiction to rule upon the issue of "Whether the District was required but failed to implement the Student's May 1, 2002, Temporary Behavior Plan." By Prehearing Order dated August 8, 2002, the undersigned concluded that there was insufficient evidence in the record at that time and therefore denied the District's Motion to Dismiss.

On Motion of the District, a prehearing conference was held on August 8, 2002. On that same date, the undersigned issued a Prehearing Order holding that the District

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need not formally depose one of the Parent's witnesses; that the Parent had the right to be present during the informal discussions with the witness; and, that any objection to the Prehearing Order would be filed by the close of business on August 14, 2002. No objection was filed.

ISSUES

As set forth in the Prehearing Order entered in this matter on June 26, 2002, the issue for hearing is whether the Student was denied a free appropriate public education (FAPE herein), in the 2001-2002 school year. More specifically, the issues are limited to the following:

A. Whether the District acted in a timely manner, and complied with the timeliness requirements of the IDEA and implementing federal and state special education regulations, when it conducted the Student's 2002 evaluation and developed the June 2002 IEP?

B. Whether the District was required, but failed to timely implement the Student's May 1, 2002, temporary behavior plan?

C. Whether the District complied with the disciplinary exclusion regulations, WAC 392-172-370, through -385, when it suspended the Student in June 2002? This includes, but is not limited to, whether the District knew or should have known the Student was an eligible special education student, and, if other relevant criteria are met, whether the team's 'manifestation determination' was appropriate?

D. Whether, if the District erred, did the District deny the Student a FAPE;

E. Whether the Parents are entitled to their requested remedies: an adjudication of District errors; an order requiring the District to comply with the IDEA and implementing federal and state regulations; and, compensatory education for the Student for lost time and services; and Whether the Parents are entitled to other equitable remedies, as appropriate.

FINDINGS OF FACT

I.

While enrolled in the District's Elementary School, in the third grade during the 1996-1997 academic school year, the Student's classroom teacher made a special education referral to the appropriate District staff in order to determine whether the

Student was in need of special education services. In general terms the teacher described the reason for the referral as that the Student was experiencing "a difficult time completing his school work, following school rules, and working cooperatively with other children." (Exhibit P-203). The District delivered a Notice of Referral to the Parents and obtained the requisite permission for evaluation from the Parents. Additionally, the District provided the Parents with their "Summary of Safeguards and Due Process." Subsequent to the referral and prior to the completion of the special education assessment the Student was diagnosed by his physician as having Attention Deficit Hyperactivity Disorder (ADHD herein) and began taking medication for the condition.

II.

The multi-disciplinary team members who conducted the evaluation issued their summary analysis on April 1, 1997. (Exhibit P-203). The summary analysis concluded that the Student was not eligible for special education. This was due in part to the class room teachers observation that since the Student began taking medication for his ADHD condition, his work completion and behavior had shown significant improvement. Notification of the results of the evaluation were provided to the Parents, along with an explanation of the Parents' rights and procedural safeguards, on or about April 2, 1997. The Parents, at that time, did not dispute the District's determination that the Student was not eligible for special education services.

III.

The Student, while in the fifth grade at . Elementary, discontinued the ADHD medication he had been prescribed. Upon so doing, the Student's grades and behavior began to deteriorate in the fifth and sixth grade. That deterioration continued when the Student enrolled in the 2000-2001 academic school year at the District's Middle School as a seventh grader.

IV.

The Student continued to experience academic difficulties, as well as involvement in disciplinary matters at . Because of this, in May 2001, the Parents took the Student to see W. Craig Hall, Ph.D., a licensed psychologist in the State of Washington. Dr. Hall initially saw the Student on two occasions in May 2001, and then again on 13 occasions between October 2001 and March 2002. Dr. Hall was seeing Student because of behavioral problems at school, anger management, inappropriate responses to peers and school personnel, and what Dr. Hall described as a lack of self-esteem. On October 4, 2001, Dr. Hall wrote to . . , the Assistant Principal Middle School. (District's Exhibit 1). In the letter Dr. Hall proposed an intervention plan which he believed

might reduce the Student's risk of further suspensions from school for disciplinary matters. Dr. Hall expressed no opinion in his letter as to whether or not the Student should be evaluated for special education services. Dr. Hall conducted two medical evaluations of the Student, one on September 27, 2001 and the second on February 26, 2002. His diagnosis was that the Student has ADHD, Combined Type. Combined Type denotes characteristics of both impulsiveness and the inattentiveness.

V.

On October 4, 2001, the Student received a long-term suspension, 65 days, from Middle School, for a violation of the District's policies. On October 8, 2001, the Parent requested an appeal of the suspension. A hearing was held and on October 25, 2001, the suspension was upheld. The Parent pursued the matter with the District's Superintendent, and on November 14, 2001, the long-term suspension was again upheld. There is no evidence that the conduct of the Student that resulted in this suspension was a manifestation of his ADHD condition.

VI.

The Parents were able to enroll the Student at the District's Middle School effective October 10, 2001. While at Middle School the Student's academic performance and disciplinary problems continued. On February 26, 2002, the Parent made a written request of the District that the Student be referred for a Special Education Evaluation. (Exhibit P-211).

VII.

The Student left Middle School and returned to Middle School March 14, 2002.

VIII.

Between February 26, 2002, and March 28, 2002, the appropriate District personnel collected and reviewed information regarding the Student in order to determine whether to formally evaluate the Student to determine if he is in need of Special Education Services. Middle School's Child Study Team met with the Student and the Parents on March 27, 2002. (Exhibit P-216). The Child Study Team determined at that time that no recommendation for formal assessment would be made until additional information was gathered. The Child Study Team did decide to meet again on April 17, 2002, with the Parents and reconsider their recommendation. On March 28, 2002, the

District issued to the Parents its Notice of Decision Not to Evaluate. (District's Exhibit 10). The notice advised the Parents in part, as follows:

> This letter is to inform you that upon examination of existing school, medical, and other records in the possession of the School District it has been determined at this time that there is insufficient reason to believe that [the Student] is a candidate for evaluation. However, this decision will be reconsidered on 4/17/02.

(District's Exhibit 10).

The Notice of Decision Not to Evaluate went on to advise the Parents of the reasons for not recommending a formal evaluation as follows:

> A special education referral had been made while he was at his previous school Middle School. Teacher reports indicates that [the Student] experienced a number of difficulties at including failing classes, refusing to work, being disrespectful, not taking responsibility for his behavior, and being off-task. As of 3/26/02 he had missed 237 class periods. Of these absences, 141 were due to suspension. [The Student] registered at Middle School on 3/14/02; he is currently being served by a tutor.
>
> A review of [the Student's] nationally normed standardized test scores indicate that [the Student] has a history of scoring in the average range or above. He was evaluated for special education services and was determined to be not eligible on 4/1/97. It was noted that he performed better when he was tested while taking medication than while he was not taking medication. Parents reports (Date: 3/27/02) indicate that medication was discontinued when [the Student] was in the 5th grade. Overall [the Student's] school history suggests that he has a great deal of academic potential and teacher reports suggest that he is not putting forth the effort to meet that potential. However, it is believed that more information is needed to determine whether [the Student] should be evaluated for special education eligibility and that information will be gathered prior to 4/17/02.

(District's Exhibit 10).

The Notice of Decision Not to Evaluate concluded by advising the Parents that District personnel would conduct the following activities prior to April 17, 2002:

> School personnel will talk with [the Student] about his school performance. For example, school personnel are interested in learning about [the

Student's] perspective as to why he refuses to complete much of his school work. [The District's psychologist] will contact [the Student's] psychiatrist, Dr. Craig Hall, to learn about [the Student's] diagnosis and any implications for educational planning. By 4/17/02 [the Student] will have had more time to work with the tutor; the team will therefore have more information regarding the effectiveness of this intervention.

(District's Exhibit 10).

IX.

The Parents met with the District as scheduled on April 17, 2002. At that time the District made a recommendation that the Student may be eligible to receive special education services and requested permission of the Parents to conduct an evaluation of the Student in order to determine if the Student was indeed eligible for such services. The Parent granted permission to conduct the evaluation. (District's Exhibit 11).

X.

On or about May 2, 2002, District personnel and the Parents met and prepared a Functional Behavioral Assessment and Behavioral Intervention Plan. (Exhibit P-219). The behaviors of the Student that were of concern to those participating were as follows: arguing, teasing, not completing work, and refusal to follow teacher requests or demands. Portions of the Behavioral Intervention Plan were in fact implemented, but others were not. The Behavioral Intervention Plan concluded with the following statement: "This plan will be reviewed when the results of [the Student's] special education evaluation are reviewed no later than 6/4/02." (Exhibit P-219).

XI.

The appropriate personnel from the District conducted an evaluation of the Student and on June 4, 2002, issued an Evaluation Report concluding that the Student is a student with a health impairment due to ADHD and therefore eligible for special education services as being Health Impaired pursuant to WAC 392-172-124. (District's Exhibit 13). An Individualized Education Program (IEP herein) was developed and signed by the appropriate individuals on June 4, 2002. (District's Exhibit 14). The Evaluation Report was in fact prepared and ready on May 28, 2002. However, at the Parent's request, a meeting to discuss the Evaluation Report and sign off on the IEP was delayed until June 4, 2002.

XII.

On or about June 5, 2002, the Student was suspended from school for eight days, June 5, 2002, through June 14, 2002. (Exhibit 15). This the 2001/2002 academic school year ended on June 14, 2002. (Exhibit P-224). The short term suspension was because the Student took official disciplinary citations from a box in the school's office. He then called the students who were subjects of the disciplinary citations. He advised those students that if they paid him money he would destroy the disciplinary citations, and if they did not, he would turn them back in to the school office.

XIII.

At the request of the Parents, the District's IEP Team met with the Parents on June 10, 2002, to discuss the suspension. At that meeting the District determined that the Student's conduct in attempting to extort money from other students was not a manifestation of his ADHD condition. (District's Exhibit 16).

CONCLUSIONS OF LAW

I.

The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et.seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et.seq., and Chapter 392-172 WAC.

II.

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.

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.

Issue A.

Whether the District acted in a timely manner, and complied with the timeliness requirements of the IDEA and the implementing federal and state special education regulations, when it conducted the Student's 2002 evaluation and developed the June 2002 IEP?

III.

The District is required to conduct "child find activities that apply to students ages birth through twenty-one for the purpose of locating, evaluating, and identifying students with suspected disability, regardless of the severity of their disability, who are residing within the boundaries of the district. . . . ." WAC 392-172-100(1). Referrals of students suspected of having a learning disability "may be initiated by any source in writing . . . including but not limited to parents, medical personnel, school district, or other public agency personnel, community agencies, civil authorities, through district screening procedures and by other interested persons." WAC 391-172-102. Once the District has received such a referral, it is required to "make a determination whether or not the student is a candidate for evaluation." WAC 391-172-104(1)(d). That determination must be made within twenty-five school days. In the case at hand, the referral was made by the Parents

on February 28, 2002, thereby giving the district until April 10, 2002, to make a determination on whether or not to refer the Student for evaluation. The District made that determination on March 28, 2002, by deciding not to evaluate the Student. After review of additional information, on April 17, 2002, the District formally decided to assess the Student for special education services and obtained parental permission to do so.

IV.

Once a student is identified as a candidate for special education evaluation and it has obtained written consent from a parent to conduct said evaluation, a District has thirty-five school days from the date of the written consent to conduct the evaluation. WAC 392-172-104(2)(a). In this case, the District completed the special education evaluation of the student and developed an IEP within the thirty-five school day requirement. It is accordingly the undersigned's conclusion that the District complied with the regulations and timely determined whether or not the Student was a candidate for special education evaluation and that once that determination was made, the District timely completed the evaluation and development of an IEP.

V.

It is however the Parent's contention that while the District may have technically complied with the special education regulations, the District knew or should have known at an earlier date that the Student was in need of referral for a determination as to whether or not the Student was a candidate for evaluation and if so whether he was in need of special education services. The statutes and the regulations are silent on the issue of when a District knew or should have known that a student should be referred due to a suspected disabling condition for a determination of whether the student should be assessed for special education services. A standard that can be applied in making this determination is well stated at Clay T. v. Walton County Sch. Dist., 26 IDELR 409 (U.S. District Court, Middle District of Georgia, 1997). In that case, the parents of a student argued that a District had failed to meets its obligation to refer Clay T. for evaluation. The Court stated in part, as follows: ". . . in order to establish that the school violated the identification requirements of IDEA, Plaintiff must show that the school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate. . ." Clay T., 25 IDELR at 412.

VI.

Applying the Clay T. standard to the case at hand, the undersigned concludes that the District neither knew nor should have known prior to the Parent's referral on February 28, 2002, that the Student was a candidate for special education evaluation. There existed in this case no "clear signs of disability" and the District presented logical

and rational reasons for not referring the Student. The fact that the Student was diagnosed with ADHD does not, in and of itself, require referral. Likewise, poor academic performance alone is not sufficient to constitute a basis of knowledge in the District that the Student is in need of referral for special education services. Sonoma Valley Unified School District, 31 IDELR 153 (1999). The record is replete with evidence that the Student's poor classroom performance was a result of his failure and/or refusal to perform his assignments, as well as frequent disciplinary suspensions resulting in missed classes. There is no indication that his poor academic performance was a result of any inability to comprehend or understand the academic material presented. The Student's own psychologist did not suggest to the District that the Student was in need of evaluation for special education services until February 2002. In correspondence with the District prior to that date, the psychologist made no referral. The Student was referred for special education evaluation with the consent of the Parents, during his third grade year. It was determined at that time that he was not in need of special education services. At all times the Parents, were apprised of their parental rights in regard to special education matters. The Parents made a referral for special educations evaluation in February 2002, at which time the District fulfilled its obligations as required by the regulations.

VII.

The District, in its post-hearing brief, refers the undersigned to WAC 392-172-38410, which deals with disciplinary expulsions of students, as a useful guide in determining when a school district knew or should have known that a student is in need of referral for a determination to evaluate for special education services. The regulation provides a four-part test in determining whether a school district knew or should have known that a student was in need of special education services at the time of implementation of disciplinary actions against the student. That test is as follows:

(a) The parent of the student has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational or other public agency that the student is in need of special education and related services;

(b) The behavior or performance of the student demonstrates the need for these services in accordance with this chapter;

(c) The parent of the student has requested an evaluation of the student pursuant to this chapter; or

(d) The teacher of the student, or other personnel of the district or other public agency, has expressed concern about the behavior or

performance of the student to the director of special education of the district or other public agency or to other personnel of the district or other public agency in accordance with the established child find or special education referral system.

WAC 392-172-38410(1).

VIII.

Applying the above specified criteria to the case at hand, the undersigned reaches the same conclusion. The academic and behavioral difficulties the Student was demonstrating did not indicate to the District's professional staff that the Student was in need of referral. Poor academic performance and behavioral difficulties does not in and of itself equate to a need for a district to evaluate a Student for possible special education services. District testimony, as well as assessments performed on the Student, indicate that the Student has above average intelligence, and that his academic problems are the result of his refusal to perform the work. Therefore, the undersigned concludes that the District did act in a timely manner, and complied with the timeliness requirements of the IDEA and implemented Federal and State special education regulations.

Issue B.

Whether the District was required, but failed to timely implement the Student's May 1, 2002, Temporary Behavior Plan?

IX.

The Student herein was not identified as eligible for special education services until June 4, 2002. On that date the Student's IEP was developed. Therefore, the Temporary Behavior Plan was not part of the special education program and the undersigned lacks jurisdiction to consider whether or not the District failed to implement the May 1, 2002, Temporary Behavior Plan.

Issue C.

Whether the District complied with the disciplinary exclusion regulations, WAC 392-172-370, through -385, when it suspended the Student in June 2002?

X.

The above cited regulations deal with disciplinary exclusion and are intended to insure that special education student are not improperly excluded from school for

disciplinary reasons. WAC 392-172-370. The Student herein was suspended from school for eight days in June 2002. Removals from school are addressed at WAC 392-172-37500 as follows:

> To the extent removal would be applied to students without disabilities, school personnel may order the removal of a special education student from a student's current placement for not more than ten consecutive school days for any violation of school rules and additional removal of not more than ten consecutive school days in the same school year for separate incidents of misconduct as long as those removals do not constitute a change in placement under WAC 392-172-373(2).
>
> A "change in placement" for a disciplinary issue occurs if: . .
>
> (1) The removal is for more than ten consecutive school days; or
>
> (2) The student is subject to a series of removals that constitute a pattern because they accumulate to more than ten school days in a school year, and because of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another.

WAC 392-172-373.

XI.

On the occasion in question, the Student herein was not removed from the classroom for more than ten consecutive school days. Additionally, the Student was not identified as a special education student until June 4, 2002, and therefore his suspension cannot be considered to constitute a pattern of removals as contemplated by WAC 392-172-373(2). Accordingly, there being no change in the Student's placement as a result of the June 2002, suspension, there is no need on the part of the District to conduct a "manifestation determination" hearing as required by WAC 392-172-38300. Because the June 2002, disciplinary suspension was not for ten or more days or as a result of a pattern of exclusion, it is irrelevant whether the District knew or should have known that the Student was eligible for special education services at the time of the suspension. We further note, as stated above, in Conclusions of Law VI and VIII, where the facts and circumstances of this issue to be adjudicated under the provisions of WAC 392-172-38410 the conclusion would be the same, namely, that the District would not be deemed to have knowledge that the Student should be referred for consideration of special education services.

Issues D and E.

Did the District deny the Student a FAPE, and are the Parents are entitled to their requested remedies?

XII.

In view of the undersigned's conclusions on Issues A, B, and C, the District did not deny the Student a FAPE; and, the Parents are not entitled to their requested remedies.

ORDER

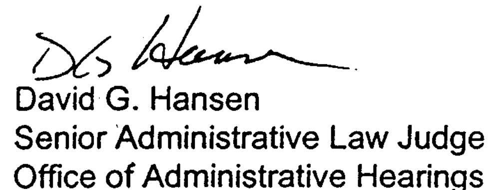
1. The District acted in a timely manner, and complied with the timeliness requirements of the IDEA and implementing federal and state special education regulations, when it conducted the Student's 2002 evaluation and developed the June 2002 IEP.

2. The undersigned lacks jurisdiction to consider the issue of whether the District failed to implement timely implement the Student's May 1, 2002, Temporary Behavior Plan.

3. The disciplinary regulations at WAC 392-172-370 through -385 are not applicable to the Student's June 5, 2002, suspension.

4. The District did not deny the Student a FAPE, and the Parents are not entitled to their requested remedies.

Dated at Seattle, Washington this 24th day of October 2002.



David G. Hansen
Senior Administrative Law Judge
Office of Administrative Hearings