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April 15, 2002



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In re: **Clover Park School District - Special Education Cause No. 2002-SE-0036**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order the file will be closed and returned to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact OSPI Legal Services at (360) 753-2298.

Sincerely,

A handwritten signature in cursive script that reads "Robert P. Kingsley".

Robert P. Kingsley
Administrative Law Judge

c: Legal Services, OSPI
Deputy Chief ALJ Jan Grant, OAH
Jill Geary, OAH/OSPI Coordinator

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-0036

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

A hearing in the above-entitled matter was held before Administrative Law Judge Robert P. Kingsley in Lakewood, Washington, on March 26, 2002. The interested parents appeared on their own behalf. Clover Park School District (District) was represented by William Coats, attorney at law. The administrative law judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

The parent filed a request for due process hearing with the Office of the Superintendent of Public Instruction (OSPI) on March 1, 2002. The parties were served with a copy of a Notice of Hearing setting this matter for hearing. A prehearing conference was convened on March 15, 2002. The hearing was convened as originally scheduled. These proceedings have been expedited as required under 34 CFR §300.52 and §300.525. They have been reported by Roger Flygare with Alliance Reporting.

ISSUE

The issues for hearing, defined in the parent's request for hearing and at the prehearing conference, is

- a. Whether the student was emergency expelled and subsequently suspended in violation of the IDEA in that his conduct was allegedly a manifestation of his disability; and
- b. Whether the District has failed to provide appropriate services while the student was expelled warranting an award of compensatory education.

FINDINGS OF FACT

1. The student is [REDACTED] years old and has been attending [REDACTED] School since September, 1999. He has been receiving special education and related services under the eligibility category Specific Learning Disability.

2. The student first qualified for services after an evaluation in 1992. He has been reevaluated in 1995 and 1998. In 1995, the school psychologist noted that staff in 1992 observed very significant behavioral concerns with poor academics, intellectuality, attention, impulse control, anger control, and excess resistance. In his 1995 reevaluation, the school psychologist observed the student answer questions correctly by shouting the answer. He said vocabulary with the rest of the class, sat in his chair listening to lessons and doodling. He was a very poor reader when reading out loud. The multidisciplinary team (MDT) exercised professional judgment and determined that the student continued to qualify for services because of his broad written language skills, reading comprehension, and applied problems. The student's eligibility was continued unchanged after the 1998 reevaluation.

3. The student entered [REDACTED] during the 1999/00 school year with services according to an IEP completed on May 6, 1999. He participated in general education classes with pull out services for language arts and reading. Goals and objectives were identified in reading, writing, and pre-algebra, or applied problems.

4. The student was involved with an academic study skills during the 1999/00 school year. The group met on a weekly basis during the last four months of the school year. The teacher collected progress reports each week and discussed strategies for greater success in the classroom.

5. During the 2000/01 school year, the student participated in an [REDACTED] group led by the student intervention specialist. The group met for most of the year. Most students join the group after a referral from a staff member. Meetings consisted of a review of each member's week, discussion of issues in his or her life, and problem solving by the group. Some of the topics addressed by the group were identification of [REDACTED] triggers, physical reaction to [REDACTED], personal motivation for changing [REDACTED], control strategies, constructive expression of [REDACTED] and crisis management.

6. The IEP was reviewed in April, 2000. A checklist of instructional modifications was included. Modifications were noted in the areas of presentation of subject matter, assignments, evaluation, organization/reinforcement, and behavior. The behavior modifications were: (1) positive/concrete reinforcement; (2) defined limits/expectations; (3)

modeling appropriate behaviors. The student's placement, services, and areas of goals and objectives remained unchanged.

7. The most recent IEP review occurred in April, 2001. In the Statement of Present Levels of Performance, the IEP team noted that the student had many behavior issues that have prevented him from performing to his full potential. Special education services included intensive reading instruction to read for important information and recognize verbal cues, and modification of instructional materials to a fifth grade level. Supplementary aids and services were added, consisting of extended time to finish tests and assignments, use of the study skills class as needed, use of a tape recorder to take notes, preferential seating to address sleeping in class or talking to friends, and use of manipulatives and hands on materials to understand content.

8. The 2001 IEP included a behavior intervention plan (BIP). It expressed a goal that the student maintain appropriate behavior as defined by classroom rules, school rules, and district policy. Objectives included following staff directions without argument 90% of the time, cooperatively work with all staff 90% of the time, and accumulating no more than two referrals per quarter for disciplinary action. Management consisted of progressive consequences from positive reinforcement to systematic exclusion from school, and allowing the student to call his mother or visit an assigned teacher for assistance in de-escalating. The strategies are commonly employed for students in regular education.

9. The parent was invited to attend the 2000 and 2001 IEP meetings but did not respond. The mother acknowledges that she was provided copies of IEPs and invitations to attend the meetings. The parents did not propose services directed at the student's behavior.

10. The student's [REDACTED] discipline history reflects a steady stream of referrals for disruptive behavior and minor acts of defiance. There were [REDACTED] referrals during the 1999/00 school year, [REDACTED] referrals during 2000/01, and [REDACTED] referrals from September, 2001 to early February, 2002.

11. The student did not attend the [REDACTED] group during the 2001/02 school year. The parent did not formally request it as a part of his IEP. District staff do not recall the parent requesting [REDACTED] classes. One of the teachers provided a written statement according to which the mother suggested once that she wanted the student to attend "the group that did those weekly progress reports" during the current school year. The teacher to whom she spoke indicated that he was no longer involved in academic support groups but offered to meet with the student and review weekly progress reports. The student stopped attending [REDACTED] School shortly after the conversation.

12. The student's behavior during 2001/02 was not meeting the goals of the BIP but the referrals were generally less severe than those of previous years. The earliest referral

involved defiant behavior with a teacher. The student refused to show his hall pass to a teacher, talked back to her, and began to swing at her telling her to leave him alone. The vice principal was unable to verify an attempt to swing at the teacher and resolved the incident with counseling.

13. There were no referrals during October and three referrals during November. Examples of the behavior were hiding keys from the gym teacher, shining a laser light into bus driver's mirror, and lying. In January, the student was referred for truancy during one class. On February 4, the student was referred for leaving a class ten minutes early without permission. The only incident requiring discipline more severe than counseling involved the laser light. The student was generally popular with other students and participated on the basketball team.

14. On February 7, the student entered the gym while a class was in progress. The student was not enrolled in the class but had joined it on previous occasions. He had been sent to his own class in the past. He wandered among ongoing games and participated in one game, creating an advantage for one side over the other.

15. One of the players complained to the gym teacher, and she instructed the student to leave. He began speaking tauntingly about the other student "crying" about losing. The teacher became concerned that the situation would escalate if the other student heard the student's comments.

16. The teacher had spoken with the student previously. She attempted to keep the counseling lighthearted, and at one point stated that he should "shut up and go in..." She then placed her hand on his shoulder as he passed her. The touch was designed to guide and console. The student responded by swinging at the teacher's arm, striking it away. He also told her not to tell him to shut up. The teacher was shocked by the response, and left the gym. The blow left a red mark on the teacher's arm.

17. The student was expelled from school on an emergency basis by letter issued on February 8. The parents met with the vice principal on that date, and a meeting of a multi-disciplinary team was scheduled for February 13, 2002. The parents were invited to the meeting and advised of their right to appeal the expulsion according to Chapter 180-40 Washington Administrative Code (WAC).

18. The parents requested a hearing to appeal the expulsion on February 12, 2002. The MDT meeting was convened as scheduled and included the parents, a regular education teacher, the special education teacher, the vice principal responsible for discipline, the director of special education, the school psychologist, and the student.

19. The MDT considered the student's IEP, history of discipline, evaluations, services, ability to understand the impact and consequences of his action, and his ability to control his behavior. The BIP was available to the MDT. The MDT did not note consideration of the BIP in its report of the meeting. See Exhibit 311.

20. The student expressed an understanding of the school's rules and an understanding that the conduct was wrong. He also was aware of the consequences of the behavior.

21. A factor noted in his ability to control behavior was a pattern of escalating confrontation with adults. Regarding the conduct, the MDT noted that the student's behavior escalated from directions to leave the gym, and was consistent with behavior from a minority of students without disabilities.

22. The MDT and the parent determined that, after consideration of the disability, the student was able to conform to the school's code of conduct. It also determined that the student's conduct was not a manifestation of his disability.

23. The parent had not noticed the BIP prior to the meeting. She subsequently amended her response and argued that the student had not received appropriate services directed to his behavior. The parent acknowledges that the student's disability does not interfere with his ability to recognize and control his behavior.

24. The District determined an appropriate penalty for the student's conduct was suspension until the end of the school year. The student's conduct was considered an assault. The District maintains a strict policy prohibiting assault. It considered his disciplinary history and the potential impacts on the student population, including the potential for further assaultive behavior if the student was not removed. The parent's appeal hearing was convened on February 14. In a written decision dated February 25, 2002, the hearing officer determined that the evidence supported the District's proposed discipline.

25. The District officially notified the parents of the suspension by letter dated February 26. According to the terms of the suspension, the student is excluded from school classes and activities, and is barred from any school campus. The letter also notified the parents of the District's intent to discuss with them how appropriate services would be provided.

26. The student has been placed at an [REDACTED] school. Part of its program is designed for students excluded from regular education for weapons violations or assaultive behavior. There are approximately two hundred students, and fifteen students per class. The student's IEP shall be reviewed and adapted to the new structure, and instruction will be available in his regular curriculum. Students work daily on behavior redirection

strategies. The parent agrees that this is currently an appropriate placement for him. She is concerned about his ability to transfer back to a general education [REDACTED] school setting.

27. The student's parents requested homework for the student beginning on February 13. They did not request access to his locker when they met with the vice principal on February 8, and the student did not bring his books home before the expulsion.

28. District administrators directed the student's teachers to provide homework assignments. The parent went to the school on February 15. Only one of the teachers had provided assignments as requested. The administrator apologized for the difficulty and took responsibility for obtaining the assignments as requested.

29. School was not in session between February 18 and February 22. Assignments were made available to the student on February 25, the first day after the break. The student was unable to complete the work because he did not have his books. The books were made available on February 27.

30. On March 1, the parent was called regarding additional assignments. She was unable to go to the school at that time. The parent returned the student's work on March 5, and asked for additional work. There was none available at that time.

31. The parent and staff from the District are in the process of conducting a functional behavioral analysis (FBA). The parties entered into a mediation agreement on March 14, 2002. The special education director agreed to request approval for the student's participation in a Boys and Girls Club function at one of the district campuses. The parties agreed to the alternative school placement, commencing on March 18, 2002. The District offered to provide compensatory education based on the period of time between February 26, 2002, and March 11, 2002, during which time the student received no interim services. The parties also agreed that teachers at [REDACTED] School would be instructed regarding appropriate intervention techniques with the student. Teachers from his last placement would be contacted to determine if work handed in from February 7 to March 11 would be sufficient for a grade.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-171 WAC (or Chapter 392-172 WAC for cases arising after November 11, 1995).

2. The 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" (FAPE) consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

3. In an administrative hearing, the District bears the burden of proving compliance with the procedural requirements of the IDEA. *Clyde K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994). Generally, only procedural flaws which result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process, will result in a denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985).

Findings of Fact, Conclusions of Law and Order

Disciplinary Exclusion

4. The IDEA identifies specific procedural requirements for discipline of a student receiving special education services. School District personnel have authority to remove a student from his placement for up to ten consecutive school days for any reasons applicable to a student in the general education population. 34 CFR §300.520. Within those ten school days, District personnel are responsible for convening a meeting of the IEP team to determine whether the behavior for which the student is being disciplined is a manifestation of the student's disability. 34 CFR §300.523.

5. In conducting the manifestation determination, the IEP team shall consider, in terms of the behavior subject to disciplinary action, all relevant information, including evaluation and diagnostic results, the results or other relevant information supplied by the parents of the child, observations of the child, and the child's IEP and placement. Behavior may be considered not a manifestation of the student's disability if the IEP determines:

(i) In relationship to the behavior subject to disciplinary action, the student's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the student's IEP and placement;

(ii) The student's disability did not impair the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The student's disability did not impair the ability of the student to control the behavior subject to disciplinary action.

If the IEP team and other qualified personnel determine that any of these standards were not met, the behavior must be considered a manifestation of the child's disability. 34 CFR §300.523

6. If the IEP team determines that the behavior was not a manifestation of the disability, the student may be removed from his placement to the same extent as a general education student under similar circumstances. District personnel shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action. 34 CFR §300.524

7. After the initial ten days has passed, the District is responsible for convening an IEP meeting to develop a plan for conducting a Functional Behavioral Assessment (BFA), and developing a Behavioral Intervention Plan (BIP). If these steps have taken place before occurrence of the behavior involved in the discipline, the IEP team shall review the BIP and

Findings of Fact, Conclusions of Law and Order

its implementation, and modify it and the implementation as necessary, to address the behavior. 34 CFR §300.520(b).

8. The evidence shows that the student was not denied FAPE as a result of the District's disciplinary action. There were no prejudicial procedural errors. It imposed its discipline according to rules applicable to all students. The hearing officer was advised of the student's special education status and affirmed the District's decision according to factors applicable to students without disabilities.

9. The District convened a meeting of the IEP team which correctly determined that the student's conduct was not a manifestation of his disability. The student had been receiving services based on evaluations identifying a Specific Learning Disability. The disability did not affect the student's comprehension of the nature and consequences of behavior or his ability to control his behavior.

10. The student's placement and services under the IEP were appropriate. The student's behavior had been recognized as a factor interfering with his ability to benefit from educational service. The evidence does not reveal that his high school behavior was sufficiently significant to be considered disabling. The District employed behavioral intervention strategies appropriate to the general education population. The student participated in, and apparently benefitted from, [REDACTED] classes during his second year.

11. The parent argues that the District's behavioral intervention strategies were inadequate and that it should have reevaluated the services before the incident occurred. The evidence does not support this position. Behavior was improving and problems during the current school year were generally less severe than previous years. The parent had not participated in the April, 2001, IEP meeting. She had not notified the District of behavior issues warranting additional services or a more restrictive placement. Her suggestion to staff shortly before the expulsion regarding the [REDACTED] group was not sufficiently clear to indicate a review of the IEP was appropriate. The gym teacher had previously dealt with the student and the severity of his response was unanticipated. Where the student did not have a disabling condition related to behavior, the District's level of service prior to February 7 was appropriate.

FAPE For a Suspended Student/Compensatory Education

12. The District has a continuing obligation to provide FAPE to a suspended student whose behavior was not a manifestation of his disability. This obligation consists of providing services to the extent necessary to enable him to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP. 34 CFR §300.121(d).

13. Compensatory education is an award of educational services or reimbursement that may be ordered where a student has been denied FAPE. Compensatory education is a remedy to compensate a student for a violation of statutory rights while he or she was entitled to those rights, and is an appropriate relief in the context of the IDEA because such an order "merely requires [the defendants] to belatedly pay expenses that [they] should have paid all along." *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991); *Miener v. State of Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (citing *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985)). Equitable considerations are relevant in fashioning relief. *School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. at 374 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. See *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d at 1485-6. The IDEA imposes no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994).

14. The parties agree that the student's placement in the alternative [REDACTED] school provides the structure he needs to benefit from instruction in both substantive and behavioral areas. The parties are participating in an FBA and may reconsider the BIP after the analysis. Efforts will be made to coordinate behavior intervention strategies with all members of the staff at [REDACTED] School upon the student's return next year. The District has acknowledged that services were not provided for the period of time between February 26 and March 11, and has agreed to provide compensatory education. The administrative law judge concludes that this agreement is supported by the evidence and is consistent with the above principles. It should be incorporated into an order and implemented through the structure of the IEP process.

15. The parent has expressed concern about the student's eventual transition back to the general education population. This concern should be considered in future IEP meetings.

16. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

IT IS HEREBY ORDERED that:

1. The District did not deny the student's right to a free and appropriate public education in its disciplinary exclusion of the student. The student's behavior for which he was disciplined was not a manifestation of his disability. The student has been disciplined to the same extent as a student without disabilities.


Findings of Fact, Conclusions of Law and Order

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2. The student's current placement is appropriate. The District shall continue to convene meetings for review and modification of the IEP to accommodate the change of placement. It shall complete the FBA and reconsider the BIP.

3. The District failed to provide appropriate services from February 26, 2002, to March 11, 2002. The District shall provide compensatory services as offered in its mediation agreement. The nature and extent of the services shall be determined by the IEP team. Disputes arising during this process shall be reviewable by request for a due process hearing.

Dated at Seattle, Washington this ²⁴15 day of April, 2002.


ROBERT P. KINGSLEY
Administrative Law Judge
Office of Administrative Hearings

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 U.S.C. 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.

CERTIFICATION OF MAILING

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 4/15/02, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:



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