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Superintendent of Public Instruction  
Administrative Resource Services

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

IN THE MATTER OF:

LAKE WASHINGTON SCHOOL  
DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2003-SE-0076

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

A hearing in the above-entitled matter was held before Administrative Law Judge Mattie Harvin-Woode in Redmond, Washington, on December 1, 2003 through December 12, 2003. The interested parents ("Parents")<sup>1</sup> were represented by Karen Mitterer, attorney at law. Lake Washington School District ("District" or "LWSD") was represented by James Dionne, attorney at law. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

**STATEMENT OF THE CASE**

On June 2, 2003, the Parents filed a request for due process hearing with the Office of Superintendent of Public Instruction. This appeal was assigned OAH docket number 2003-SE-0076. A pre-hearing conference was held on June 12, 2003, pursuant to notice mailed to the parties on June 3, 2003. On June 26, 2003, Parents filed a Motion to Amend Pleadings and Request for Continuance of Due Process Hearing. On July 16, 2003, a pre-hearing conference was held. The District had no objections to Parents' Motion and the ALJ granted the Motion. Parents' requested continuance of the hearing was granted and the hearing set for October 6 - 17, 2003. Pre-hearing conferences were held on September 4, 2003, and September 23, 2003. Parents requested a continuance due to the hospitalization of Parents' attorney. By order dated September 30, 2003, the undersigned continued the due process hearing date to begin on December 1, 2003. On November 4, 2003, Parents filed a Motion to Amend Pleadings. A pre-hearing conference was held on November 14, 2003. The District had no objection to Parents' motion. The ALJ granted the motion on November 14, 2003.

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

## FINDINGS OF FACT

1. Certain District witness provided testimony based solely upon review, and to a certain degree, interpretation of handwritten notes authored by another district employee who did not testify during the course of the hearing. Although this testimony has been admitted into the record, in determining the following findings of fact, the undersigned will only give limited weight to those portions of the witnesses' testimony.

### **I. Background**

2. is a 13 -year-old boy who had resided with his parents within the boundaries of the Lake Washington School District until June 2003. was adopted by his parents when he was two days old.

3. attended Evergreen Academy, a private school during the first, second, and third grades. While attending Evergreen Academy, received individualized instruction in a small group setting. He had to repeat the second grade however, due to academic, social and emotional difficulties. While he was in the second grade, was seen by Dr. Susan Flick, who did not find any evidence of Attention Deficient Hyperactivity Disorder (ADD/ADHD), though she did see a delay in of 18 months.

4. During his third grade year at Evergreen, teachers reported in his report card that he would often exhibit distracting, off-task, and unfocused behaviors. He would become easily frustrated with new tasks but with encouragement and practice he would become more relaxed and successful. All of his teachers however indicated that he made some progress in refraining from such behaviors. The Stanford Achievement Test conducted at the end of third grade at Evergreen Academy reflected his significantly below average achievement in the area of mathematics.

5. At the age of seven years Mother consulted pediatrician, Dr. Ruth Ann Parish, regarding his problems of "shutting down" and becoming "somewhat obstinate" and fatigue towards the end of the day. Around that time, began seeing a psychologist, Dr. Caroline Ballinger. Dr. Ballinger noted that IQ scores did not reflect his true ability. She observed that his ability to perform varied depending upon his environment. She diagnosed with anxiety, depression, and an attachment disorder stemming from his adoption. saw Dr. Ballinger two times per week and showed some progress. saw her off and on for some time.

As part of Dr. Salzer's evaluation, Ms. Dramer, completed the Behavior Assessment System for Children (BASC). Even though D.L. had only been in Ms. Dramer's class for less than one month at the time, she noticed his attention behavioral difficulties. In response to certain questions, Ms. Dramer indicated that D.L. "often": does not complete tests; makes careless errors; seeks attention while doing school work; is stubborn; changes moods quickly; has trouble concentrating; is easily upset; and refuses to join group activities. She also indicated in response to certain questions that D.L. "always": adjusts well to new teachers, gives up easily when learning something new, bothers other children while they are working; acts without thinking; has problems with mathematics, acts silly, and says he is not good at things. Her responses on the BASC placed D.L. in the "at risk" category for hyperactivity, attention problems, learning problems, adaptability, social skills and study skills. An "at risk" score meant that there was either a significant problem that may not be severe enough to require formal treatment, or a potential of developing a problem that needs careful monitoring.

12. In his report dated October 4, 2000, Dr. Salzer diagnosed D.L. with Attention Deficient Hyper Activity Disorder (ADHD), Dysthymic Disorder, Disruptive Behavior Disorder NOS, and Anxiety Disorder NOS. Mother spoke with Ms. Dramer about the evaluation with Dr. Salzer and told her that he had diagnosed D.L. with ADHD. Mother also mentioned D.L.'s ADHD diagnoses to Denise Phillips, the principal, and to Ms Dramer. Throughout all of D.L.'s fourth and fifth grade years at Wilder, Mother was in constant e-mail or telephone contact with Wilder Staff regarding D.L.'s medications, therapy, and behavior at school. However, Mother did not share Dr. Salzer's report with LWSD, and the district did not ask for it.

13. As a result of the evaluation in October 2000, Dr. Salzer recommended that D.L. take two medications, Concerta, which is a stimulant, and Zoloft, an antidepressant.

14. Dr. Ruth Ann Parish, D.L.'s pediatrician since infancy, also noted D.L.'s increasing emotional and psychological distress and began medication. In notes dated September 2000, Dr. Parish noted that D.L. had a "suicidal back flash depressive affect," and that he was having problems in school of a "social" nature. D.L. also would make statements such as he did not like himself and that he did not know how to get others to like him. Dr. Parish prescribed a stimulant (Concerta) and an anti-depressant (Sertraline) from November 2000 through November 2001.

15. During the school year, Mother was in close contact with Ms. Dramer regarding D.L.'s performance in the classroom. At some point during the year, Mother raised the issue of whether D.L. would need 504 accommodations. Ms. Dramer told Mother that she would handle all the modifications that D.L. would need. Ms. Dramer did adjust the curriculum for D.L., especially in math. But, according to her, this was something that she did for any of her students who may have needed their work adjusted to be harder or simpler. She believed that it was just part of being a good teacher.

environment interacting with their peers. They would meet on a voluntary basis with Mr. Wear at lunch time to develop those skills. Beginning in April 2001 through June 2001, D.L. attended "Lunch Bunch" a total of 15 sessions.

### III. Fifth Grade Year at Wilder Elementary

23. In the fall of his fifth grade year, D.L. began having more behavioral problems during unstructured times with his peers. His acting out in these times sometimes resulted in consequence slips or being sent to the principal's office. At the beginning of the fifth grade school year, when D.L. had problems at recess, \_\_\_\_\_, his teacher, would take him aside or in the hallway if he appeared angry or frustrated and he needed some cool down time.

24. In response to an incident on the bus and on the playground during recess, \_\_\_\_\_, the school counselor, and \_\_\_\_\_, the principal, met with Mother on September 12, 2001, to discuss his ADHD diagnosis and medications. They discussed the fact that a recess aide said to D.L., "if your life is so miserable, would you jump off a bridge?" Ms. Phillips suggested that Mother obtain outside counseling services for D.L.. Mother agreed to "tweak" his medications. Mr. Wear would limit his contact with D.L. and meet with him "mostly when things are going well with him." However, D.L. continued his participation in Lunch Bunch and met with the group 38 times during the 2001-2002 school year.

25. LWSD has established a Guidance Team in each school to coordinate referrals to additional services. A Guidance Team is made up of 5-15 members per building, and may include at any given time a nurse, a counselor, the LAP teacher, a special education teacher, a regular education teacher, and the building principal. LWSD trains the Guidance Team members each year in how and when to make referrals. The Guidance Team may try a broad spectrum of regular education supportive services before referring a child to special education. Collectively, LWSD refers to these programs as "safety net" programs.<sup>2</sup> Sometimes the District will include behavior plans as part of the "safety net" of services. They may offer these either formally as part of a 504 plan, or informally. The

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<sup>2</sup> For example, the District offers remedial reading programs that are provided by reading specialists who are not special education teachers. Title I programs provide extra services by targeting students on free and reduced lunches who are struggling in school. LAP programs target students who score in the lower 25<sup>th</sup> percentile on statewide ITBS academic testing for third graders and eighth graders. The District also provides local levy funds to hire a .5 FTE per building to "target literacy and math skills" for those students who need this additional help. The District also provides counselors to help students deal with the social-emotional impacts of school, itself, as well as normal developmental growth issues. The counselors provide both individual and group structured activities, such as "friendship groups," to help students develop friendships in school. The District also provides "peer tutoring" services and other supplemental supportive programs after school hours, both to accelerate learning and to remediate learning problems.

31. On September 11, 2001, the Guidance Team discussed a referral from Randy Wear due to D.L. having some recess problems in the first week of school and, apparently making comments such as, "I could kill myself." In a meeting with Mr. Wear on October 9, 2001, D.L. stated, "I hate my life, I want to die." Mr. Wear's notes reflect that he called Mother about D.L.'s statement. Mr. Wear's notes indicated that he called Mother about the comments. His notes also reflect that Mother was upset, stating that D.L. only makes these sort of statements to Mr. Wear. Mr. Wear nonetheless pursued his concerns about D.L.'s suicidal ideations further by writing an e-mail to another district employee regarding the development of a suicidal protocol for D.L. In asking for help, Mr. Wear cited his concern for "a very fragile 5<sup>th</sup> grader with a history of depression and suicidal thoughts." Though he was not aware of any incidents of self-harm, he recognized that, "the possibility exists." The employee sent Mr. Wear a copy of the school's suicide protocol. After developing a suicidal protocol, Mr. Wear then e-mailed Sheryl Coston, a district special services administrator, informing her of his suicidal protocol and requesting assistance regarding "what the district's protocol might be." The protocol was never utilized for D.L. as there is no evidence that D.L. made any more "suicidal" comments.

32. D.L.'s issues in school were discussed at a Guidance Team meeting on September 18, 2001. Parents were not notified of this meeting. The guidance team notes reflect the team's discussion of D.L.'s continuing problems at recess, mood swings, ADHD, medications, and alleged hospitalization for suicidal ideations, emotional instability, and inappropriate language at the lunch table. The mood swings were reported by Ms. Doherty. Meeting notes from the September 18, 2001 Guidance Team meeting reflect that Mother had stated that student had been "on suicide watch in a Fairfax-type setting." Fairfax Hospital is a hospital that specializes in psychiatric treatment. However, during the course of her testimony, Mother testified at hearing that student had never been in a "Fairfax like hospital" setting at the time this comment was made.

33. Parents again hired Ms. McKee, an educational consultant, in late September 2001 to help D.L. with his problems at school. As an educational consultant, Ms. McKee began working with D.L. on his "organizational skills and friendship skills" which he could then use to "improve his peer relationships." Over the course of the three sessions she spent with D.L., Ms. McKee expanded her goals for D.L. to include "conflict resolutions."

34. Throughout the fall of 2001, D.L. continued to have behavioral problems at school, mainly in unstructured times, which resulted in his frequent trips to the principal's office, counseling sessions with Mr. Wear, and several consequence slips. Because of the continued incidents with D.L. on the playground and during recess, Mother met with Ms. Phillips and Ms. Doherty in October 2001 to devise an alternate lunchtime recess schedule for D.L. According to the principal, this alternate schedule was worked out so that D.L. could be successful in the playground. The recess schedule allowed D.L. to spend alternate days working in the office or helping in the library. The

40. By February 2002 D.L.'s problems in \_\_\_\_\_ class worsened. On February 6, 2002, \_\_\_\_\_ e-mailed Mother informing her that D.L. was having a tough time with "anything academic for the past couple days." She also noted that his attitude towards any type of work had been negative and that he had been extremely argumentative with her all day long - to the point where she finally had to send him down to the principal's to cool down and work without disturbing others.

41. D.L. was also having difficulty completing and turning in his homework. Mother asked \_\_\_\_\_ a special education teacher, if D.L. could sit in the "resource room" to get some of his homework done. This request was denied.

42. A few days later Mother e-mailed \_\_\_\_\_ to notify her that D.L.'s medications were changed again due to increased anxiety and depression. Mother informed \_\_\_\_\_ that she believed that the change in D.L.'s medication should address some of the anxiety and depression which could lead to the "argumentative behavior that we've all seen." \_\_\_\_\_ was aware of the medication changes and as a result was more flexible with D.L.

43. On February 28, 2002, D.L. had a "meltdown" at recess resulting in his being sent down to the office and finally being sent home. D.L. perceived that he was being treated unfairly, and refused to go to school. Around that time Mother requested a meeting to discuss the incident and "some other type of structure that will have more positive and less long acting effect on D.L." On March 2, 2002, Parents met with Denise Phillips and Randy Wear to discuss D.L.'s problems at school. They agreed that \_\_\_\_\_ would schedule a Guidance Team meeting to discuss a 504 plan for D.L. to give him more behavioral accommodations and support. On March 5, 2002, Mike Moran, the school psychologist, wrote a letter to Dr. Parish, D.L.'s pediatrician, stating that D.L. was being evaluated for funding under the category of "health impaired" and requesting a documentation of D.L.'s health impairment as part of this process. Mother believed that the 504 accommodations were being considered and therefore signed a release of information on March 7, 2002.

44. At the March 5, 2002 meeting, Mother presented a list of consequences and accommodations that should be followed with D.L. in response to his behavior. During his testimony, Mr. Moran stated that none of Mother's suggested accommodations were reasonable. However, the Guidance Team did not discuss any of Mother's proposed accommodations with her during that meeting, or tell her that they thought her proposed accommodations to be unreasonable.

45. On March 11, 2002, Dr. Parish completed the form which was entitled "Lake Washington School District Special Services/Documentation of Health Impairment." Dr. Parish noted on the form that D.L.'s ADHD and anxiety affected his educational performance by "impairing his social skills, ability to monitor his own behavior in a group, and impairing his ability to 'let something go'." On March 13, 2002, Dr. Parish filled out a second form. On this form, Dr. Parish indicated that

50. D.L.'s behaviors in \_\_\_\_\_ class became progressively worse. Her last month with D.L. was very difficult. D.L.'s behaviors were getting worse in class at times while recess problems continued. She noted that he was more aggressive with her and with his peers, was more volatile and angry, and had issues keeping his hands to himself. This behavior occurred on and off, but not every day. At some point during the school year, she was sending D.L. to the hallway two to three times per month. \_\_\_\_\_ discussed D.L.'s behavior changes with Mother at the mid March parent conference, and at the end of the second report card rating period.

51. Although \_\_\_\_\_ testified that she was not aware of D.L. having problems in her class with "life skills, D.L.'s second trimester progress report indicates that D.L. was not at "standard" in any areas of "life skills" in the second trimester.

52. \_\_\_\_\_ testified that she made modifications and accommodations for all students in her class to meet their individual needs. For D.L., she remembered that she tried to be in his proximity; she helped him one-on-one with some of the work; she sometimes gave him more time to finish assignments; sometimes he needed "to be taken away" from his peers so that he would not be distracted; and, she sometimes changed the amount of work to make sure he was successful. Ms. Doherty stated that she "could read his body language" when D.L. needed her support. Based upon \_\_\_\_\_ testimony, it was typical for her to implement these and other instructional interventions and modifications to regular education students. To her, they did not indicate that D.L. needed special education or even a 504 plan.

53. According to \_\_\_\_\_ and as part of school policy, she would only make a referral to the Guidance Team if she has tried everything to help the child and it is not working. \_\_\_\_\_ testified that she would only refer a child to the Guidance Team if the child's behavior has affected his ability to learn and she cannot control those behaviors, or if the child's problems could not be handled by her in the classroom. \_\_\_\_\_ also testified that a student's problems with life skills would have to be "pretty extreme . . . such as trouble with police" for those problems to be sufficient for making a child eligible for special education services.

54. \_\_\_\_\_ went on maternity leave on March 27, 2002. Both parents and the district were aware of this and plans had been made at the March 19, 2002 Guidance Team meeting to inform D.L.'s new long-term substitute teacher \_\_\_\_\_ of the plan to handle D.L.'s recess behaviors. \_\_\_\_\_ went into labor two-weeks early, on the night of March 27, 2002. Therefore, \_\_\_\_\_ did not have time to work with \_\_\_\_\_ before she left, as they had planned. \_\_\_\_\_ replaced \_\_\_\_\_ on March 28, 2002. \_\_\_\_\_ picked \_\_\_\_\_ as her substitute because she believed she was a good teacher and because they shared a similar teaching style.

58. On May 02, 2002, \_\_\_\_\_ sent Mother an e-mail indicating that she had noticed an improvement in D.L.'s behavior in the classroom, but there still had been some problems, specifically with D.L. completing and turning in his homework. D.L. would often forget his assignments even though he was working on his homework at home with his parents.

59. On May 13, 2002, a parent contacted \_\_\_\_\_ requesting that her child be removed away from D.L. as he was continuing to swear at and bully her child, and give her "the finger" on a frequent basis. In an e-mail \_\_\_\_\_ told the principal that she agreed with the parent and that other parents have mentioned this same behavior by D.L. towards their children. \_\_\_\_\_ also informed the principal that the swearing had become continual and the more she told D.L. how inappropriate it was, the more he engaged in this behavior. Two days later, \_\_\_\_\_ received eight letters from students, who complained about D.L.'s behavior and asked that "something be done about him." In one of the notes, the student alleged that D.L. had told him or her that he would kill them. \_\_\_\_\_ gathered all the notes from the students and forwarded them to \_\_\_\_\_

60. On May 15, 2002, Ms Phillips, met with Mother about the complaints of parents and their requests to have their children removed away from D.L. as a result of his bad language and actions. Ms Phillips also discussed with Mother the eight or so notes written by D.L.'s class mates about his behavior.

61. The next day on May 16, 2002, two of D.L.'s classmates approached \_\_\_\_\_ and told her that they were afraid to go out to recess because D.L. had written a "death note" about them. These were girls who had earlier taunted D.L. and had written a letter to \_\_\_\_\_ Ms Hegge sent the girls out to recess with the rest of the class and told them to stay away from D.L. During recess, \_\_\_\_\_ searched D.L.'s desk. She found the note in his desk. She left a copy on the principal's desk as neither she nor \_\_\_\_\_ were in the building. When the students returned from recess, many were talking about the notes. Later in the day, another student gave \_\_\_\_\_ another "death note" he found which was drawn by D.L. Early the next morning, \_\_\_\_\_ searched D.L.'s desk again and found a third "death note." Both notes were given to the principal. In the notes, D.L. wrote things such as, "Die [ ]!, Die [ ]!, Die [ ]!, Die [ ]!" (naming four female students); "R.I.P.," "Death shall occur [sic]," "You will tell on me."

62. The King County Sheriff investigated the incident at the request of several parents who had called law enforcement. According to the police report, D.L. had drawn death threat pictures with the girls' names on them and the girls were scared and did not feel safe at school. The incident report further states that \_\_\_\_\_ called the parents of the students who were the subject of the notes and told them about the notes and that many students had written notes to her about D.L. in the previous days, and that she was uncomfortable with D.L. returning to the classroom because she had never handled this sort of situation before.

poor self esteem." The FBA identified the two problem behaviors that most interfered with D.L.'s functioning in school. They were failure to complete schoolwork, which happened at least one to two times per day, and aggression against peers, which occurred five to seven times weekly.

68. On May 28, 2002, the Guidance Team met with Mother and Krista McKee. During the course of the meeting, Mother asked whether D.L. should be on an IEP or a "focus of concern" for math. Ms. McKee also indicated that D.L. may need to be on an IEP. Mr. Moran disagreed, stating that he thought D.L. was still doing well academically, and that he did not see D.L.'s behaviors interfering with D.L. making academic progress.

69. On June 03, 2002, Parents retained an attorney who contacted LWSD's Superintendent about the district's disciplinary actions, alleged improper breach of confidentiality, and the district's failure to provide D.L. with appropriate special education services. Parents also requested that LWSD pursue placement for D.L. at Chrysalis School, a private school in Woodinville.

70. On June 04, 2002, Mr. Moran received an e-mail from Dan Phelan, the Acting Director of Special Services, inquiring about D.L.'s 504 Plan. Mr. Moran explained that while a 504 plan was "under consideration," one was not yet developed, and that D.L. was not eligible for special education:

[D.L.] has a diagnosis of ADD, but his national test scores, as well as his academic performance in the classroom, did not identify a negative impact on the acquisition of academic skills. In our most recent meeting with [Parents], and their advocate, Krista McKee, on Tuesday, June 04, discussion took place about his eligibility for an IEP due to the ADD diagnosis. I reviewed the eligibility criteria for a Health Impaired placement and they did not suggest that D.L. be made a focus of concern. Following the FBA, we implemented a behavior plan and have a small amount of data suggesting the success."

71. Two days later, Parents' attorney wrote Mr. Phalen, specifically referring D.L. for a special education evaluation. That same day, Mr. Phalen issued a letter to Parent informing them of D.L.'s referral for special education. On June 06, 2002, the district sent out the evaluation packet of documents to Parents. Parents gave written consent for the evaluation on June 09, 2002.

72. D.L.'s final grades were based upon his third reporting period which was from March 12, 2002, through June 21, 2002. D.L. attended school 34 out of 64 school days. By the end of his third trimester, D.L. was still not at standard in many of his subjects. He received the following grades: Writing C, Spelling B, Reading C, Science B (this grade was based upon work done at home with Mother), Social Studies B-, Math C-, Physical Education B, and Music C-.

neuropsychological evaluation. The District would review the results of Dr. Whiteside's evaluation, and conduct a re-evaluation of D.L. based upon any new information from Dr. Whiteside.

78. During this time, Parent's observed that D.L. felt ostracized by his peers and the community. They also observed that he became more emotionally fragile. Throughout July and August 2002, Dr. Ballinger noted that more of D.L.'s anger emerged. In order to help him through this difficult time and give him some positive experiences, Parents enrolled D.L. in Buck Creek Summer Camp. However, D.L. continued to have such significant behavioral difficulties, that he was asked to leave the summer camp early.

#### **V. August 19, 2002, IEP**

79. At Parents' request, Dr. Salzer, who saw D.L. four times during the Fall of 2000, wrote a letter to the District on July 24, 2002, with several recommendations. Dr. Salzer recommended an alternative placement to meet D.L.'s academic, psychological, and social needs, and provided a list of educational accommodations and strategies necessary to meet D.L.'s educational needs.

80. Dr. Parish, D.L.'s pediatrician since infancy, also wrote a letter to the District at Parents' request. In her letter dated July 22, 2002, Dr. Parish confirmed the diagnosis of ADHD of the hyperfocus-anxiety subtype, and described D.L.'s medication regimen.

81. Dr. Ballinger, D.L.'s therapist off and on since April 1998, also wrote a letter to the District at Parents' request. In her letter dated August 14, 2002, (and provided to the District at the August 19, 2002 IEP meeting) Dr. Ballinger described the event of the 2001-2002 school year (as told to her by Mother and D.L.) as humiliating and traumatizing for D.L. In Dr. Ballinger's opinion, with each failure at school, D.L. became overwhelmed, angry and isolated, which led to an increase in his agitation and discouragement about the ability to function at school. Dr. Ballinger wrote in her letter that D.L. would need several supports in the following school year: he should not return to Wilder, he should attend a small school with small classes, where he will be taught according to his learning style, he requires structure, supervision, much support from his teacher, no unstructured time with peers without direct supervision, a teacher who treats him fairly and with respect but with clear expectations and guidelines, a procedure for leaving an emotionally-charged situation to a place where he can calm down, then time with an adult he trusts and likes to talk things over with and to assist his transition back into the classroom. In Dr. Ballinger's opinion, D.L. would perform better in a quiet setting with one teacher than in a program with multiple transitions among teachers, places and programs. Dr. Ballinger informed the district in her letter that the individualized supports she recommended were necessary to reduce D.L.'s risk of becoming more unmanageable, socially isolated, anxious, and angry.

testified that she usually does not attend IEP meetings until the parent accepts the proposed placement in her program. LWSD administrators told Ms. Angell that they would call her if the Parents agreed to accept her program. Ms. Angell's understanding was that a child cannot have an IEP if it is only for behavior.

88. When she created the BIP Ms. Angell had very little information about D.L.. She did not do a classroom observation or talk to D.L.'s general education teacher because D.L. was not yet "a candidate for her program." She only spoke with Sheryl Coston, the Special Services Administrator, and she thinks she may have spoken with Mr. Moran. However, Ms. Angell did not actually review any of D.L.'s educational records until preparing for the due process hearing. Ms. Angell admitted that the BIP she drafted was not tailored to D.L.'s needs - that it was just a draft. Yet it was the same BIP attached to D.L.'s IEP in August 2002.

89. Although Ms. Angell testified in great detail about the behavioral intervention program at School, which she both developed and implemented, she did not attend the IEP meeting and this level of detail was not afforded to Parents when D.L.'s educational program was to be developed at the IEP meeting. Therefore, the undersigned gives little weight to Ms. Angell's description of the program as such description was not afforded to the Parents in crafting the IEP, and is certainly not detailed in the IEP. During the IEP meeting, the District offered Parents the opportunity to view the program before school started. However, Parents did not request to see the program.

90. As the Director of Special Services, Ms. Anderson had some knowledge of the behavioral program offered at Rockwell. However, she did not possess knowledge of intimate day to day details of the program and how D.L.'s needs would be served there. She could not describe the manner in which D.L. would be given the specially designed instruction at Rockwell, any supports in place to assist with transition between the two schools, and the manner in which D.L.'s behavior could be handled consistently while in the half-day behavioral program and in the general education environment. She did not possess any first-hand knowledge of D.L. and his particular needs, having never taught him. Likewise, Ms. Phillips, though she holds a general education certificate, was never D.L.'s teacher and not familiar with his academic needs and the day-to-day supports offered to him by his general education teacher. She had no knowledge regarding the general education program proposed for D.L. at , or the cooperation between the proposed placements and supports intended to assist D.L. in the general education classroom at his new school. During her testimony, Ms. Angell admitted that D.L. would not have her support every day in the general education classroom - it would be the general education teacher. She would only see D.L. "a couple of times per week," as she and her aide made their rounds to several different schools to check on the other students in the half-day program. The IEP made no provision for any special supports everyday with the general education teacher or to assist D.L. with transitions while he was in the general education environment.

B, and Math B+. In all unstructured settings, there were adults present, including a guidance counselor. D.L. was closely monitored by staff in these settings.

95. The primary concern of D.L.'s teachers at Chrysalis was his disorganization, impulsiveness, and inattention. In February 2003, Chrysalis staff developed four goals and objectives for D.L. in the area of on-task behavior, organizational skills, written assignments, and improvement of responses to oral questions/retrieval. D.L. received specially designed instruction in all of these areas.

96. D.L. also attended a social skills class sponsored by the Learning Disabilities Association of Washington (LDA) from January 7, 2003, to April 8, 2003 and completed the program. Areas addressed were Communication Skills, Personal Skills, Anger/Stress Management, Problem Solving, Decision Making, Learning Styles, and Peer Relations. D.L.'s scores, as rated by the trainers, increased in all of these areas to a small extent. He went from a "2" (Understands the Concept), to a "3" (Demonstrates the skill in class occasionally).

97. In October 2002, Dr. Ballinger refused to continue serving D.L. because Parents were unable to participate in family counseling to the extent that Dr. Ballinger wanted. Mother explained during her testimony that because of the location of Dr. Ballinger's office and the difficulties of shuttling D.L. back and forth between school and Dr. Ballinger's office, it was extremely difficult for them to have the family counseling and individual counseling at the frequency recommended by Dr. Ballinger. D.L. began psychotherapy with George Lynn after Dr. Ballinger discontinued her treatment. George Lynn started seeing D.L. from October 16, 2002, through March 25, 2003. D.L. did not see another counselor until the summer of 2003 when he began the ASCENT wilderness program.

## **VII. The District's reevaluation**

98. In October 2002, Dr. Douglas Whiteside conducted the independent educational neuropsychological evaluation which had been requested by Parents. Dr. Whiteside interviewed D.L. and Mother, administered several tests, and reviewed D.L. medical and school records. During the interview with Dr. Whiteside, Mother stated that D.L. when D.L. was not taking his medication, he would be aggressively violent toward Parents and exhibit psychotic-like behavior. He had also grabbed a knife or other object occasionally in a threatening manner, but would immediately release it when ordered to do so by his parents or an authority figure.

99. The neuropsychological assessment results indicated evidence of significant variability over time in general intellectual functioning, which Dr. Whiteside related to psychological issues, motivation, and attentional difficulties. The results of Dr. Whiteside's testing also indicated that

106. Dr. Golden's report included a recommendation that a single psychiatrist provide therapy and manage D.L.'s medications. He thought that information would be better coordinated instead of isolating it between different individual providers. He believed that D.L.'s needs demanded a high-level of skill to enhance successful treatment. Dr. Golden recommended that D.L. see a child psychiatrist who incorporates a comprehensive biopsychosocial understanding of D.L.'s difficulties, and that there be close communications between D.L.'s home, school, and psychotherapist.

107. Dr. Golden agreed with the academic placement and recommendations of Drs. Whiteside, and Ballinger that D.L. be taught in a small classroom with individual, positive emotional support. Dr. Golden concurred with Dr. Ballinger's recommendation that because personal feelings by both the Parents and the school personnel were unlikely to be overcome, D.L. should attend a new school. He also strongly recommended that for D.L.'s sake, all parties involved avoid animosity.

108. Dr. Golden disagreed with Dr. Whiteside in two areas. In Dr. Golden's opinion, a school program with limited exposure to other students, such as the one at Chrysalis, would not meet D.L.'s most important needs which are to develop the capacity to engage in normal, productive social interactions with his peers. According to Dr. Golden, teaching social skills needs to be both didactic in the form of individual and group social skills training, and informal and continuous in a classroom setting, allowing continuous interpretation and reinterpretation of response and counter response. Although Dr. Golden agreed that unpredictable transitions should be limited, he felt there was no need to place D.L. in a restrictive setting with the intent to maintain that setting throughout the remainder of his school years, and D.L. would benefit from a carefully planned transition back into a mainstream program, to minimize any long-term perception that he is different.

109. In November 2002, Parents took D.L. to see Dr. Syed Mustafa, a psychiatrist, for medication management. Dr. Mustafa diagnosed D.L. as having (ODD), ADHD, Dsthymic Disorder, and Anxiety Disorder. Dr. Mustafa recommended a combined treatment plan consisting of medication, outpatient therapy with George Lynn, and behavior modification for ODD behaviors. D.L. saw Dr. Mustafa approximately once per month between November 2002 and June 2003. However, over the seven months, D.L.'s condition worsened. His rages and melt-downs at home increased and became more violent in nature. By March 2003, Dr. Mustafa diagnosed D.L. with a "Mood Disorder NOS." which, according to the DSM-IV, is "characterized by a disturbance in mood as the predominate psychological feature."

### **VIII. January 30, 2003 IEP**

110. The District decided to conduct a reevaluation to incorporate Dr. Whiteside and Dr. Golden's evaluation results. The first mutually agreeable date was January 30, 2003, when the team met to

and hypomania. Straterra a medication for ADHD was discontinued after one month because it made D.L. irritable and interfered with his sleep. In March, George Lynn informed Parents that he could not help D.L. and that he was discontinuing therapy. At home D.L. continued to be violent and threatening.

#### **IX. April 3, 2003 IEP**

116. On April 3, 2003, an IEP meeting was held for the purpose of finalizing D.L.'s IEP. Parents had met with Mr. Surowiec and Mr. Peterson, the school psychologist at RHJH, in March to observe the program, and both Mr. Surowiec and Mr. Peterson attended the April 3, 2003 IEP meeting. Staff from \_\_\_\_\_ were invited but were unable to attend. They instead provided a report regarding D.L.'s progress at \_\_\_\_\_. At the meeting, the District included several of Parents' suggestions into the final IEP. The IEP included measurable goals and objectives in the area of math, written language, work completion rate, and social/emotion peer interaction. The IEP also included the same BIP.

117. As originally proposed by the District, the IEP was to provide 1000 minutes per week of special education and 60 minutes per week with a behavior specialist. A behavior specialist is a liaison between the program and the parent to discuss issues related to the behavioral aspect of the program, such as consistency of expectations at school and at home. Parents did not want the behavior specialist as they could work directly with the teacher, Sam Surowiec. The District changed the offered 1,000 minutes of special education, to 340 minutes of specially designed instruction because Parents wanted to keep D.L. in \_\_\_\_\_ School for a slower transition over to RHJH. However, the District never offered to include \_\_\_\_\_ as part of D.L.'s IEP and did not agree to fund the enrollment at \_\_\_\_\_. The District only offered flexible scheduling so that Parents could keep D.L. in \_\_\_\_\_ School as they desired, and have D.L. also attend RHJH.

118. Parents insisted that they would only agree to part-time enrollment at first. The IEP did not reflect any of the time D.L. spent at \_\_\_\_\_ since this was specifically not part of D.L.'s educational program being offered by the District. D.L. would attend RHJH Monday and Tuesday, and \_\_\_\_\_ School Wednesday, Thursday, and Friday. Parents' agreed only to the portion of the IEP relating to D.L.'s participation in the District's program but disagreed with the portion of the IEP denying the District's responsibility for Chrysalis.

119. As part of D.L.'s program, the District also added one period with Pat Brown, a special education teacher, for written language in the resource room. The behavior program teacher, Sam Surowiec was made responsible for the math and behavior goals and objectives. The District agreed to end the IEP on June 28, 2003, so the parties could lengthen the next year's program sooner than at the end of a one-year IEP. The District agreed with Parents to place D.L. in seventh grade at RHJH to try to remedy D.L.'s sensitivity to the retention issue.

124. At home, however, D.L. continued to have rages, and engage in threatening behavior toward Parents as he had since February. On April 30, 2003, D.L. threatened Mother with two knives. She had to call the police to come to talk with D.L. Dr. Mustafa increased D.L. medication, Luvox.

125. On May 2, 2003, D.L.'s IEP was amended, at Parents' request, so that he would receive 765 of specially designed instruction, and attend RHJH three days per week, Monday, Tuesday, and Friday. In June 2003, Mother indicated in her email communications that D.L. liked going to school and was "raring to go to school." D.L. continued to attend part-time by Parent choice.

126. On June 6, 2003, Mother wrote a letter to School indicating that because there were only two weeks left at school, and because D.L. only attends for three hours per week, she decided to have D.L. to stay at home until the end of the school year instead of going to In that letter, Mother also acknowledged that D.L. had some issues at with behavior. Mother also acknowledged that certain staff from believed that was not a good fit for D.L..

#### **X. D.L.'s Hospitalization at Overlake Hospital**

127. By March 2003, D.L.'s behavior became so oppositional that Mr. Lynn discontinued treatment and Parent searched for a therapist specializing in oppositional, defiant behavior. However, D.L. did not have any therapist after discontinuing treatment with Mr. Lynn. By the end of May 2003, D.L.'s rages at home became excessive with frequent rages that would sometimes last for hours.

128. On June 2, 2003, Parents filed their request for due process hearing.

129. Dr. Mustafa saw D.L. on June 4, 2003. He noted that D.L. had a lot of oppositionality and rages, was rude and aggressive. He started D.L. on a different medication for the raging and mood swings, and adjusted his other medication. Although Dr. Mustafa acknowledged that too many medications in a young person can cause side effects, he believed that D.L.'s apparent behavioral deterioration was not due to a change in medications. The medications were only adjusted after the behavior began to manifest itself.

130. On Saturday, June 14, 2003, D.L. became so enraged that he ran away from home for several hours, returning home at 1:00 a.m. only with the assistance of his father. On Sunday, June 15, 2003, D.L. became enraged again after Parents repeatedly asked him to empty the dishwasher. With a threatening posture, D.L. threatened to kill his mother. This was not the first time D.L. had threatened his parents. On a prior occasions, D.L. would grab a knife or any object that he could get his hands on. However, he would always drop the knife or object when directed to do so by his parent. On the evening of June 15, Father intervened and attempted to physically restrain D.L., by

Inpatient Program at Overlake on Saturday, June 21, 2003, two school days before the school year ended on June 24, 2003.

136. There is no evidence that Parents notified the District that D.L. would be removed from the state after being discharged from Overlake on Saturday, June 21, 2003. At the District's request, Parents signed release of information forms on Friday, June 20, 2003, so that the District could obtain the Overlake records.

137. On June 25, 2003, several days after D.L.'s discharge from Overlake Hospital, the District issued a request for a reevaluation of D.L., consisting of "a review of all pertinent medical, social, and provider records conducted by District staff." The District selected Dr. Michael Golden to review records and to evaluate D.L. upon his return to the area. The District also requested that Parents sign a packet of releases of information which include the information from Overlake.

138. On June 26, 2003, the Parent's attorney notified the District in writing of the Parent's unilateral placement of D.L. in residential therapeutic intervention program at public expense. On July 1, 2003, Parent's attorney notified the District's attorney that D.L. was not available for reevaluation pending his inpatient psychiatric treatment at NIBH. The District's attorney notified Parent's attorney in a letter dated July 3, 2003, the District will conduct those parts of a reevaluation that they could accomplish until D.L. returns. A re-evaluation has not been initiated by the District.

139. Based upon Dr. Golden's testimony, there were alternate placements in Washington where D.L. could have been placed on an interim basis if needed, including Children's Hospital, which would have allowed D.L. to stay in the state until LWSD was able to finish its reevaluation. However, there is no evidence that Parents explored other options of in-state treatment. Parents signed the enrollment forms for the ASCENT program on June 8, 2003, before the incident occurred at home on June 15, 2003.

## **XI. The ASCENT Program**

140. The ASCENT program is a therapeutic wilderness program which is located in Napes, Idaho. The program includes 20 hours a week of group and individual counseling. Two weeks are spent at base camp, the next two weeks on a wilderness hike, and the last two weeks back at the base camp for transition back home. The program was originally intended to last six weeks, but D.L. only remained in the program for seven days. During the last 36 hours at the camp, D.L. had refused to take his medications on a consistent basis. Throughout his attendance at the program, D.L. exhibited oppositional, aggressive, and manipulative behaviors requiring one-on-one support. During the time he was in the wilderness program, D.L.'s behaviors became so aggressive that he, at the request of the ASCENT program, had to be removed from the program after seven days, and no significant therapeutic progress was made.

in the educational records that D.L. was very slow to complete assignments in the classroom, was not putting forth his best effort, and his work pace and ability were below grade level.

146. By December 2003, D.L. continued to exhibit disorganized thought processes and anxiety interfering with his ability to maintain hygiene and perform independently in all environments without twenty-four hour support and redirection. At the time of the due process hearing, Linda Daggy and Dr. Ullrich anticipated Devis' gradual transition into Boulder Creek Academy by the beginning of 2004.

147. In Dr. Mustafa's opinion, D.L. needed a coordinated program of medication, therapy, and structured supports on a daily basis with consistent expectations both at home and at school. In his opinion, a punitive structure would further deteriorate the way D.L. feels about himself, sending the message that he is a "bad kid." In Dr. Mustafa's opinion, D.L. needs a support structure with reasonable consequences. Dr. Mustafa agreed with Dr. Bosenberg's recommendation of a residential treatment facility because they had tried "everything" to stabilize D.L. on an outpatient basis.

### CONCLUSIONS OF LAW

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

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

3. 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.

include written notification to all parents of students in the district's jurisdiction "regarding access to and the use of its child find system . . ." *Id.* Child find methods may also include "a systematic, intervention based, process within general education for determining the need for a special education referral." *Id.*

8. A child can be referred for special education by any source with knowledge of the child's suspected disability including a parent, school and district employees. WAC 392-172-102. Once a child suspected of having a disability is brought to the attention of school personnel by a written referral, the district must document the referral, notify the child's parent of the referral, collect information about the child and determine whether the child is a candidate for evaluation within twenty-five days after receipt of the referral. WAC 392-172-104. The district must provide written notice of the decision to the child's parents. *Id.*

9. A school district has an affirmative duty to locate, identify, and evaluate a child for IDEA eligibility. This affirmative duty is not dependent on any request by the parent for "special education" testing or referral or services. This duty is triggered when the district has reason to suspect a disability, and has reason to suspect that special education services may be needed to address that disability. *State of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190, 1194 (D. Haw. 2001). A school district "shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such services." 20 U.S.C. § 1415(k)(8)(3)(ii).

10. The undersigned notes that a school district only has to have a reasonable "suspicion" that the child has a disability and may be in need of special education services. As noted in *Cari Rae S.*, this threshold is relatively low and the inquiry is not whether the child actually has a disability or qualifies for special education services. This is a separate and subsequent inquiry. Rather, the initial inquiry is whether the child should be referred for an evaluation.

11. Knowledge of a disability may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation. *See* 20 U.S.C. § 1415(k)(8)(B)(i-iv). The child-find obligation is in no way absolute. *Wiesenberg v. Bd. of Educ.*, 181 F. Supp. 2d 1307 (D. Utah, January 24, 2002).

12. The issue here is not whether LWSD had such a child find method in place. There is no doubt that the District employed a wide array of interventions at different levels. The purpose of the Guidance Team was to regularly review the needs of students who were brought to its attention, and make recommendations for interventions. However, the issue here is whether and when the information available to LWSD triggered or should have triggered a reasonable "suspicion" that D.L. had a qualifying disability and a need for special education services.

interventions before referring a child for special education. However, there is no exhaustion requirement. Just as a child is not required to first attempt and fail at various programs offered by a district, *Seattle School District v. B.S.*, 82 F.3d 1493 (9<sup>th</sup> Cir. 1996), a child is not required to attempt and fail at all of a school district's general education interventions, before he or she is eligible to be evaluated for special education. General education interventions may be tried as needed but once a District has a reasonable suspicion, which is not based upon the failure of all other interventions first, they must refer a child for an evaluation. This is a balance that all school districts must seek to achieve. That said, the record must be examined as to when the LWSD should have suspected that D.L. had a disability and was in need of special education services.

#### **2000-2001 Fourth Grade Year**

16. Parents argue that based on a number of factors including D.L.'s educational performance, history of second grade retention, mathematics deficits, and inattentive and distracting behaviors, the District should have had reason to suspect that D.L. had disability which impacted his educational performance.

17. In D.L.'s fourth grade, Wilder staff knew that he had been evaluated by a psychologist, diagnosed with ADHD, and prescribed medications for this condition. His teacher knew he was diagnosed with ADHD and by her responses on the BASC in the Fall of 2000, noted that he had some behavior difficulties and she made some academic modifications in math. The school counselor and his teacher knew that D.L. had some difficulty in peer relationships and by the spring of 2001, he had joined the Lunch Bunch group on a regular basis. By the end of D.L.'s fourth grade year, D.L. was at standard or close to meeting standard in all academic areas. He had deficits in math, but according to his teacher, had made significant progress even though he was still below standard when he started in the fall. He was very close to meeting standard, as graded by his teacher, in the area of life skills and she indicated on his report card that he had made great academic gains and developed some friendships. In considering all of these circumstances, there is not sufficient evidence to conclude that the District suspected or should have suspected that D.L. had a disability and that he was in need of special education services. Therefore, there is no child find violation during D.L.'s fourth grade year.

#### **2001-2002 Fifth Grade Year**

18. The results of D.L.'s performance on the WASL, which the undersigned acknowledges is a difficult test, were well within, if not better, than his peers statewide. However, in the Fall of 2001 there were signs that D.L. was having serious difficulty. He was having problems at recess and on the bus, such that he was receiving consequence slips, going to the principal's office, and referred to the Guidance Team for discussion due to his behaviors. He regularly attended Lunch Bunch meetings. His teacher reported to the Guidance Team that he had mood swings. He had clearly

evaluation, the District decided to do a functional behavioral analysis (a function best left to an IEP team), and developed a behavioral intervention plan - all without making a special education referral - all without Parents being provided notice of their procedural safeguards.

22. Even when many of D.L.'s classmates wrote letters in May 2002, pleading with their teacher to "do something about him," no special education referral was made. Even when D.L. was suspended for two days for writing "death notes" about his classmates, and not allowed to return to school until after he had undergone an independent mental health assessment, the District failed to refer him for an evaluation. Even when the school counselor presented a functional behavioral assessment (FBA) on May 28, 2002, which reflected D.L.'s "inability to moderate behavior responses appropriate in the elementary school and environment and passive behavior in completing school assignments" and his inattention and lack of focus which affected his ability to perform in the classroom, and skill deficits in peer socialization and poor self esteem" the District still refused to refer D.L. for an evaluation. When Mother mentioned an IEP as a possibility, it was dismissed by the school counselor, the one who drafted the FBA, who stated that D.L. was still doing well academically, and that he did not see D.L.'s behaviors interfering with him making educational progress. However, that same FBA showed that D.L.'s inattention and lack of focus escalated when required to complete work in the classroom and his difficulties with peer interactions triggered his behavioral problems during unstructured times. It was not until Parents' attorney wrote a letter six days later after this final refusal by the District, that the District decided to evaluate D.L. and soon after, found him eligible for special education services. Based upon these facts, the undersigned concludes that the District clearly violated its child find obligations beginning in October 2001.

23. The District argues that factors such as D.L.'s relatively good results on the WASL, his grades, and his fifth grade teacher's testimony that D.L. did not appear to need special education, all point to the fact that D.L. was not in need of special education. "Educational benefit" is not just limited to a student's academic needs. Educational benefit also includes "the social and emotional needs that affect academic progress, school behavior, and socialization." *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458 (9<sup>th</sup> Cir.1996). The evidence was clear that not only did D.L. have academic difficulties in math, written instruction, and focus in the classroom, he was also having difficulty from the beginning of the fifth grade school year due to emotional problems and lack of social skills which affected his school behavior and socialization. Therefore, the factors that the District points to are not persuasive.

24. LWSD also argues that Mother and her educational advocate were well aware of special education services and either of them could have made a special education referral. This argument does not excuse the District's failure to timely refer and evaluate D.L. "Parents are not the professionals who can determine the need for special education, they can only provide the information they are privy to as parents." *Cumberland Valley Sch. Dist.*, 38 IDELR 277 (2003). Since child find is an affirmative duty of a school district, parents are not required to ask the school

be the "educational impact" of D.L.'s disabilities. Mr. Moran stated that he believed there was no academic impact but suggested that a functional behavioral assessment be initiated to determine the cause of D.L.'s in-school behaviors. Mr. Moran refused to refer D.L. for a special education evaluation despite the disagreement by Parents' educational consultant. During the May 28, 2003 meeting, after the results of the FBA clearly showed an impact on D.L.'s behaviors within the school environment, Mr. Moran, the school psychologist still refused to initiate a special education evaluation even though Mother questioned whether D.L. should be on an IEP for math. LWSD failed to give Parents any written notice of its refusal to evaluate D.L. for special education, nor any of the accompanying procedural safeguards. "Unless school systems appraise parents of their procedural protections, however, parental participation will rarely amount to anything more than parental acquiescence, because parents will presume they have no real say, and the participatory function envisioned by *Rowley* will go unfulfilled." *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (1985) citations omitted. Here, LWSD did not give Parents' their procedural safeguards when it decided, during the course of several Guidance Team meetings, not to refer D.L. for a special education evaluation.

### **August 19, 2002 IEP**

30. Parents assert that the August 19, 2002 IEP team was improperly constituted because neither the special education teacher nor the general education teacher from the proposed split-day placement attended the IEP meeting, and therefore, persons knowledgeable about the placement and program were not present at the IEP meeting.

31. The IDEA dictates the composition of the IEP team. The IEP team must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, or where appropriate, at least one special education provider of the child, a representative of the school district, an individual who can interpret evaluation results, other individuals who have knowledge or special expertise regarding the child, and if appropriate, the child. 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. §300.344; WAC 392-172-153. The diversity of the IEP team mandated by the IDEA ensures a well-informed discussion of the programs and placements available to the student in the development of the educational plan specially designed to meet the child's unique needs. Id.

32. The Districts asserts that the IEP team was properly constituted because Becky Anderson, the Director Special Services, is a certificated special education teacher knowledgeable about the behavioral program at Rockwell, and Denise Phillips, the principal of Wilder, is a certificated regular education teacher. However, their presence does not meet the requirements of the IDEA. If the child is to participate in the regular education environment, the IEP team must include at least one of the student's regular education teachers. In its interpretation of the regulations, the U.S. Department of

to the procedures required by the IDEA by failing to have both the special education and general education teacher from Rockwell and Redmond attend the IEP meeting.

35. LWSD did not comply with the procedural requirements of the Act because the IEP team was improperly constituted. As stated above, procedural flaws do not automatically require a finding of a denial of FAPE. Only procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE. *Id.* at 1484. <sup>5</sup> In *Target Range*, the court said:

When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district *may* have failed to provide a FAPE. (Emphasis added).

*Id.* at 1485 The next question is whether the District's procedural error resulted in the loss of educational opportunity to D.L. or seriously infringed upon the parents' opportunity to participate in the IEP formulation process

36. Parents allege that the failure of the District to have the special education teacher from Rockwell, and a general education teacher from Redmond infringed upon the Parents' opportunity to participate in the IEP formulation process. The ALJ agrees. Although Ms. Anderson was the Director of Special Services, she had never taught in the behavioral program being offered and did not possess the details of the proposed behavioral intervention program. She could not describe the manner in which D.L.'s behavior would be handled or supports in place to assist with transitions from his general education program at the home school to the behavior program at another school. Ms. Angell's testimony comes after the fact and was not available to Parents at the time the IEP was being developed. Parents were not afforded the detailed description of the program that only she or someone from the program could give, such that they could have an informed discussion in fashioning D.L.'s program.

37. Likewise, Ms. Phillips, who was the principal of Wilder school and had never taught D.L., could not describe the general education program at Redmond, a different elementary school. She could not describe for Parents, so they could make an informed choice, as to the cooperation between the two schools and how the supports outlined in the general education classroom would be

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<sup>5</sup> The *Target Range* court, however, was concerned primarily with the first part of the *Rowley* test because the school district had not completed an IEP and no services were actually provided to the student. Therefore, the court had to only look at the issue of procedural compliance and held that because the school district failed to develop the IEP according to the procedures required by the IDEA and state law (district failed to ensure that representative of child's private school attended IEP meeting), it did not have to reach the question of whether the proposed partial IEP was reasonably calculated to enable educational benefit.

tailored to D.L.'s needs." She did not review any records or observe him in classroom, nor did she speak with his general education teacher prior to drafting the BIP.

42. While the IEP places D.L. in the general education environment for a half-day, it makes inadequate provision for support in that environment. The IEP does not designate who will be responsible for D.L.'s academic goals and objectives (math, written language, work completion). Ms. Angell testified that D.L. would "probably" work on math in her classroom in the behavioral program or at his home school with a special education teacher or herself. She finally testified that if D.L.'s behavior was impeding his learning then she would be his IEP teacher for math. She is not sure because the IEP does not clearly designate this responsibility - except to say that there would be consultation with the service provider on adaptations in math and writing in the general education classroom.

43. The testimony of the Parents' and District's expert witnesses all agreed that D.L. needed to be taught in a small classroom environment with a great deal of structure, supervision and support. Even though Dr. Whiteside, and Dr. Golden's evaluations were not completed until after the August 19, 2002 IEP, the District had letters from D.L.'s pediatrician, therapist, and a psychologist, who all recommended such a program for D.L. Yet, D.L. was placed back in the general education environment, presumably with 20 or more students, for one-half day with little support except for modifications such as extended time on assignments and modified writing assignments, and *only* with the prior approval of the general education teacher. Therefore, in considering the totality of evidence, the ALJ concludes that the August 19, 2002, IEP was not designed to confer educational benefit and does not provide D.L. a FAPE.

#### **Parents' Right to Reimbursement for denial of FAPE**

44. Having determined that the IEP proposed by LWSD did not offer D.L. a FAPE, the issue turns to Parents request for reimbursement of tuition for Chrysalis School. Parents have an equitable right to reimbursement when the school district has failed to provide a FAPE and if the private school placement selected by the Parents is appropriate. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). The parental placement may be found appropriate even if it does not meet the state standards that apply to public school districts. *Id.* at 14; WAC 392-172-231(1).

45. Under state law, the cost of reimbursement may be reduced or denied if at the most recent IEP meeting prior to removal, the parents did not inform the team that they were rejecting the proposed placement, and stating their concerns and intent to enroll the student in a private school at public expense; or notify the school district of such intent within 10 business days prior to

appropriate and Parents are entitled to reimbursement for the costs of that placement from September 3, 2002, through April 3, 2003. Parents are also entitled to reimbursement for the class at LDA from January 2003 through April 2003. There is no evidence that Parents' actions were in any way unreasonable, such that reimbursement should be reduced.

### **January 30, 2003 IEP**

50. Like the August 19, 2002 IEP team, the January 30, 2003 IEP team was not properly constituted. The District again failed to include the special education teacher who would be teaching D.L., Sam Surowiec. Since D.L. would not be participating in the general education environment, as proposed by the IEP, it was paramount that the special education teacher from the proposed program be present, not only to explain the program in detail to Parents, but to help develop D.L.'s program and answer any questions as to how D.L. would receive the specially designed instruction. In this case, substitution of the Director of Special Services was not good enough. This was a procedural violation which like the August 19, 2002 IEP meeting, seriously infringed upon the Parents right to participate in the IEP development process. In addition, the January 30, 2003 IEP was not finalized on that day, as the Parents' proposed goals needed to be considered as well as information from Chrysalis School, who had not been invited to the meeting.

### **April 3, 2003 IEP**

51. The District proposed the final IEP at a meeting on April 3, 2003. This time, the IEP team was properly constituted and Mr. Surowiec, the special education teacher from RHJH, attended.

52. In order to satisfy the IDEA's requirement of a FAPE, an IEP must be "reasonably calculated to enable the child to receive educational benefit." *Rowley*, 458 U.S. at 207. The substantive test of *Rowley* does not require the absolutely best or potential-maximizing education for the individual child. The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child. *B.S.*, 82, F.3d at 1500, quoting from *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Circuit, 1994). "[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services. . . ." *B.S.* 82, F.3d at 1500; *Rowley*, 458 U.S. at 201. However, a FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 160 (4th Cir. 1991).

53. The IEP is the cornerstone of the provision of special education services under the IDEA. WAC 392-172-160 requires an IEP to contain: a statement of the student's present levels of performance; a statement of measurable annual goals and short-term objectives; a statement of the

57. Parents who unilaterally place their children, do so at their own financial risk. *Florence*, 510 U.S. 7 (1993). They are entitled to reimbursement only if: 1) the public placement violated the IDEA, and 2) the private school placement was proper under the Act. *Id.* Therefore, under the first prong of the analysis, D.L.'s Parents are only entitled to reimbursement for the placement at North Idaho Behavioral Health (NIBH) if LWSD failed to provide D.L. with a FAPE at the time of his unilateral enrollment. 34 C.F.R. § 300.403(c); WAC 392-172-231(1). In *J.S. v. Shoreline School District*, 220 F. Supp.2d 1175, 1190 (2002), the Court upheld the ALJ's finding that the school district provided the student with a FAPE prior to his unilateral enrollment. The court went on to state that, "the regulations support this interpretation by plainly providing that reimbursement is only available if the child is denied FAPE at the time of the withdrawal. . . ." (citing 34 CFR 300.103(a)). *Id.* at 34

58. Since the LWSD's program at RHJH provided D.L. with a FAPE through the end of the school year, and at the time he was unilaterally removed from the state<sup>6</sup>, the District does not owe reimbursement for either the ASCENT program or the NIBH program. Therefore, the ALJ need not address the appropriateness of the NIBH program.

59. In addition, it is undisputed that Parents did not provide ten days prior notice before removing D.L. from the District's RHJH placement. In fact, there is no evidence that Parents gave any advance written notice of their intent to unilaterally place D.L. Therefore, Parents have no right to reimbursement for those placements. WAC 392-172-231(2)(b).

60. Parents cannot be excused from the notice requirement because they have not shown, that "(c)ompliance with the notice requirements . . . would result in physical or serious emotional harm to the student." *Id.* The evidence establishes that there was ample opportunity for Parents to notify the District, especially since Mother had already been in contact with D.L.'s teacher by e-mail. Parents even delayed D.L.'s discharge from Overlake Hospital so that his acceptance into the ASCENT program could be moved up and he sent there directly from the hospital. There were alternatives in Washington where Student could have been placed on an interim basis, if needed, but Parents did not make any reasonable attempts to keep him in the state so that the district could evaluate him. Since Parents sent D.L. out of state without first giving the District notice and an opportunity to evaluate D.L., they are not eligible for reimbursement.

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<sup>6</sup> The District argues that D.L. was no longer a resident of LWSD when he was hospitalized in Overlake Hospital which is in Woodinville, Washington and outside of the boundaries of the District. For the purpose of this analysis, D.L.'s residency did not change until he was removed from the state and sent to the ASCENT program in Idaho on June 21, 2003, not when he was temporarily hospitalized at Overlake.

longer a resident, the District is not obligated to provide any services to him while he resides in Idaho.

### **Compensatory Education**

65. An award of compensatory education may be appropriate relief 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. *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991). Compensatory education 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." *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)).

66. Equitable considerations are relevant in fashioning relief, and the conduct of both parties must be reviewed to determine whether relief is appropriate. *Id.* at 374. See *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1485-6 (9th Cir. 1992). 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).

67. Here, the District failed to timely identify D.L. as IDEA eligible. Therefore, a claim for compensatory services is appropriate for that window of time beginning on the date on which services would have commenced had he been identified in a timely manner, and the date on which services in fact commenced. See *Corpus Christi Indep. Sch. Dist.*, 31 IDELR 41 (1999).

68. The District should have begun the evaluation process by October 11, 2001. Therefore, the evaluation should have been completed by December 6, 2001, 35 school days later. The IEP meeting should have been held by January 6, 2002, 30 calendar days later. An IEP was not developed for D.L. until August 19, 2002. Therefore, D.L. missed approximately 92 school days of an appropriate educational program due to the District's failure of its child find duties.

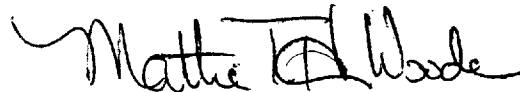
69. As early as October 2001, the principal of Wilder suggested that Mother obtain counseling services for D.L. due to his behaviors in school and suicidal ideations, which were occurring at school. As a result Parents began counseling again with Dr. Ballinger. Counseling services or services to address D.L.'s behavior should have been included in D.L.'s individual education program if he had been timely identified, evaluated and provided an appropriate special education program during the second half of his fifth grade year. Several experts including Dr. Ballinger, Dr. Whiteside, Dr. Golden, and Dr. Mustafa testified that D.L. needed individual counseling to address

F. As compensatory education for the District's failure to provide a FAPE to D.L. from September through April 3, 2003, the District is ordered to reimburse the Parents for tuition for the Learning Disabilities Association of Washington Social Skill Class taken from January 2003 to April 2003.

G. Parents are entitled to reimbursement for the costs of tuition and expenses at Chrysalis from September 3, 2002, through April 3, 2003, when the District proposed an appropriate program.

H. Parents' request for reimbursement for all fees and costs associated with D.L.'s participation in the residential therapeutic intervention program of North Idaho Behavioral Health during the 2003-2004 school year; and reimbursement of all fees and costs associated with the unilateral placement of D.L. in Boulder Creek Academy, residential therapeutic intervention school, beginning the 2003-2004 school year are denied.

Dated at Seattle, Washington this 18th day of March, 2004.



Mattie Harvin Woode  
Administrative Law Judge  
Office of Administrative Hearings