

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

IN THE MATTER OF:

Spokane School District

SPECIAL EDUCATION
CAUSE NO. 2003-SE-0131X

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

A hearing in the above-entitled matter was held before Administrative Law Judge Wynne O'Brien Persons in Spokane, Washington on November 17-19, 2003. Appellants, parents of the Student (Parents), were present at hearing and represented by Mary McKnew, Attorney at Law. The Spokane School District (District), was present through Michael Ainsworth, Director of Special Education for the District, and represented by Gregory Stevens, 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 Parents, through counsel, filed a request for due process hearing with the Office of Superintendent of Public Instruction on October 10, 2003. The Office of Administrative Hearings ("OAH") mailed to the parties a Notice of Prehearing Conference and Notice of Hearing on October 14, 2003 with an assigned docket number of 2003-SE-0131X. Prehearing conferences were held on October 22, 2003 and November 4, 2003. The forty-five day deadline could not be extended from November 24, 2003 because this case had been classified as expedited due to the change of placement occurring at the same time as a disciplinary suspension. The parties did not contest the case classification.

ISSUES

The issues were identified as follows in the November 4, 2003 prehearing order:

a. Whether the District properly implemented the Student's IEP. See Letter to Brian Bencel, District Superintendent, from Ms. McKnew, dated October 13, 2003, as reference.

b. Whether the IEP adequately incorporates functional behavioral intervention strategies suggested by Jill Wright. See Functional Behavioral Strategies memorandum from Jill Wright dated March 28, 2003.

c. Whether the District failed to follow appropriate procedural protections in revising the Student's IEP.

d. Whether the District failed to follow appropriate procedural protections related to the suspension and discipline of the Student.

e. If the District failed to follow appropriate procedural protections in revising the Student's IEP, was the Student denied FAPE.

f. If the District failed to follow appropriate procedural protections related to the suspension and discipline of the Student, was the Student denied FAPE.

g. If FAPE was denied, what is the appropriate remedy.

The prehearing issues were expanded in the Parent's prehearing brief. The parties agreed to allow the additional issues to be addressed at hearing if the District was provided with additional information. The parties complied with the agreement.

EXHIBITS AND WITNESSES

Witnesses for the Parent were the Parents; _____, OTR/L, BCP; Dr. Ilene Schwartz, Ph.D., Licensed Psychologist at University of Washington; and Jill Madsen Kelly, Psychologist.

Witnesses for the District were _____, Special Ed/Regular Ed teacher at _____; _____, Education Specialist, _____; _____, Instructional Assistant, _____, Special Education teacher at _____, Ph.D., Intervention Specialist; _____, Instructional Assistant, _____; _____, School Psychologist, _____, Principal, _____; _____, Director/Special Education, _____, Regular Ed teacher, _____, Special Education teacher, _____, Occupation Therapist, _____; _____, Regular Education teacher, _____; and _____, Regular Education teacher,

The following exhibits were admitted:

District exhibits 103-105, 110, 112-120, 122-124, 126, 130, and 134.

Parent exhibits 8, 9A, 11, 17, 19, 25, 30, 31, 33, 35, 37, 41, 42, 43, 45 (E-F, I, J, K, M, O, S, V-X, Z-BB, CC, EE, FF, HH, II), 48 N-P, 50, 52, and 55.

FINDINGS OF FACT

1. The Student was born on August 7, 1996. He resides with his Parents and one sister in Spokane, Washington, within the Spokane School District (District) boundaries. At the time of the hearing the Student was 7 years old.
2. The family moved to Spokane when the Student was 3.5 years old. The Student had been diagnosed with Sensory Integration Dysfunction prior to arrival in Spokane.
3. The Student began working with _____, Occupational Therapist, upon arrival in Spokane. Ms. Mann focused on sensory integration and proprioceptive/vestibular issues.
4. The Student began exhibiting difficult tantrums. His behavior created difficulties in taking him out of the house. The Student was diagnosed by his pediatrician with Autism Spectrum Disorder.
5. Children with autism need predictability and time to process auditory information.
6. The Parents began working with a behavioral therapist to learn techniques in how to diffuse the Student's tantrums. The Parents were taught the techniques of choices, prompts, schedules, and positive reinforcement that they successfully used to significantly diminish the Student's tantrums. The Parents still successfully use these techniques at home.
7. The Parents enrolled the Student in the private _____ program in the Winter, 2001. The Parents hired a behavioral specialist, Jill Wright, to work with the staff in utilizing behavior techniques with the Student to minimize tantrums. These techniques included prompting, positive reinforcement, picture schedule, headphones, and a rocking chair where the Student could retreat for sensory integration therapy but still see the class. The _____ staff would call _____ when needed for help with the Student. The Parents feel that this arrangement was successful.
8. Jill Wright developed a Functional Behavioral Assessment of the Student in March,

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2003 after observing the Student in his placement. The report included a list of Behaviors of Concern, Antecedents of Behaviors of Concern, Functions of Behaviors of Concern, Alternative Behaviors to teach and reinforce, and Possible Reinforcers and Responses to Behaviors of Concern. (Exhibit 17).

9. The Parents desired that the Student be educated in the public schools with his peers. The Parents enrolled the Student in first grade at Elementary School within the District for the last six weeks of Spring, 2003. The Parents hoped that such an experience would minimize the Student's transition to a new school and provide the District with an opportunity to get to know the Student.

10. Functional Behavioral Assessment was presented to the District prior to any decision regarding the Student's placement or educational program. The Assessment was reviewed by Dr. Liz Pechous, Intervention Specialist for the District, who specializes in autism. Dr. Pechous discussed the assessment with Ms. Wright and agreed with most of the report. Dr. Pechous included some of behavioral strategies in the Student's proposed Individualized Education Program (IEP).

11. The District held an IEP meeting for the Student on May 6, 2003. The Parents wanted the Student to be mainstreamed with a one-to-one instructional assistant (aide).

12. A second IEP meeting was held on May 15, 2003. Present at the meeting were the Parents, An IEP was developed that mainstreamed the Student with a one-one aide and provided for 60 minutes/day resource room pullout. (Exhibits 35/104). The behavioral issues of the Student were discussed prior to finalization of the IEP. The Student's IEP behavioral goal was to become independent in the classroom. The short term behavioral goals included that the Student will follow transition directions through a schedule and prompts, that the Student will independently go to a quiet place and/or use headphones when over stimulated or frustrated, and demonstrate appropriate social skills as measured by teacher observations and data collection. These short term goals included some of the behavioral strategies of. An instructional assistant would be available in the classroom as needed. The Parents agreed with the May 15, 2003 IEP. This IEP was to be reviewed in six months rather than the standard year.

13. The Student began attending the general education first grade classroom of on approximately May 15, 2003 and continued through the remaining five weeks of school. was the Student's original aide. was unable to handle the Student's behavior and was replaced with

14. The Student's school experience in the Spring, 2003 did not go well. The Student escalated and engaged in behaviors which included prolonged yelling and screaming that

could be heard throughout the school. The Student was noncompliant. The District reduced the academic demands on the Student. This did not result in any significant improvement in the Student's behavior. Dr. Pechous observed the Student and provided staff with additional training techniques for handling the Student's behaviors.

15. Additional behavioral strategies, the Student's "Do's List," were developed by Dr. Pechous on May 30, 2003. (Exhibits 37/112). The list was reviewed with the Parents on June 2, 2003. The Parents expressed no objection. The list was an incorporation of observations of the Student and collection of data sheets by Dr. Pechous, Dr. Pechous' expertise in dealing with autistic children, and Functional Behavioral Assessment. Dr. Pechous continued to observe and train staff on the techniques identified in the Do's List throughout the remainder of the Spring, 2003, school year.

16. During the Summer, 2003, _____, Psychologist, began attending to the Student. The Student engaged in eight playgroup sessions overseen by _____ during the Summer. The playgroups had 3-4 students with several adults. _____ successfully experimented with different behavioral techniques with the Student during these playgroup sessions with the goal to help the Student avoid escalations. _____ taped portions of these sessions for further review.

17. The Parents met with Liz Pechous and the IEP team on August 29, 2003, prior to the start of school. The Do's List was reviewed and strategies discussed about how to handle the Student's behaviors. The Do's List included the following:

1. Writing down the Student's schedule and alerting the Student to any changes.
2. Reviewing the Schedule, social stories, and the Student's rules every morning.
3. Reminding the Student of rules throughout the day.
4. Practicing correct skills with the Student when he is relaxed and calm.
5. Offering the Student choices when he escalates.
6. Using behavior tally sheets to document positive and negative daily behaviors.
7. Documenting aggressive, loud behaviors, and running away on the ABC form.
8. Reminding the Student about reinforcers and rewards for good behavior.
9. Allowing the Student flexibility, choices, when he says "No, no, no...."
10. Telling the Student what he can, not what he cannot, do.
11. Monitoring the Student's anxiety and stress levels. Offer choices to reduce.
12. Generating data sheets and ABC forms daily to send home with the Student.
13. Communicating with Parents regarding aggressive incidents the day they occur.

18. The May 15, 2003 IEP was still in effect at the start of school in the Fall, 2003. The May 15, 2003 IEP required that the Student receive 20 minutes of occupational

therapy/week. The Student did not receive occupational therapy in the first week due to scheduling issues. The Student did not receive occupational therapy the next two weeks because the Student was engaged in an outburst at the time of the scheduled therapy. The Student did receive therapy on the fourth week of school.

19. Upon return to school on September 2, 2003, the Student was assigned to his previous classroom and first grade teacher, _____ to reduce the transition for the Student.

20. A new aide, _____, was assigned to work with the Student beginning the first day of school. _____ had past experience in working with autistic adults and children at Lakeland Village, a training facility for individuals with developmental disabilities operated by the Washington State Division of Developmental Disabilities, Department of Social and Health Services. _____ has eight years of experience working for the District with both behavioral and learning disabled students. _____ received initial instruction from Ms. Pechous about implementation of the Student's Do's List, completion of the observation form to be used in documenting the Student's behavior each day, and completion of the Antecedent-Behavior-Consequence (ABC) form that also had to be completed daily.

21. _____ was with the Student constantly throughout each day, except for short breaks, beginning with his arrival at school in the Fall, 2003. _____ completed the data and ABC sheets for the Student daily, documenting each negative incident. (Exhibits 114 through 118). _____ was assisted by Geri Wilder, the District's Intervention Specialist, on the first day of class but did not receive any direct training from Dr. Pechous until after September 10, 2003. Ms. Pechous spent approximately 40 hours of time with _____ between September 10 and October 1, 2003 instructing _____ on implementation of the Do's List strategies.

22. The Student had a positive day on September 2. Ms. Wilder was present to work with _____ on September 2. (Exhibit 114). The Student had a negative day on September 3 during which significant number of yelling episodes (outbursts) occurred. These outbursts lasted anywhere from 3 minutes to 35 minutes. The outbursts occurred within the regular education classroom and disrupted the teaching when it occurred. _____. _____ would remove the Student to the resource room but had to transfer the Student down the hallway, up a flight of stairs, and down another hallway to the resource room, disrupting the classrooms along the way.

23. September 4 and 5 were uneventful. However, the Student's outbursts began escalating the week of September 8, 2003, increasing in frequency as the week progressed. (Exhibit 115). Many of the outbursts occurred when the Student was transitioning from one activity to another.

24. The regular education teacher, _____, observed _____ speaking positively and calmly to the Student on a daily basis despite the Student's negative behaviors. The Student was negatively impacting the safe and secure environment that _____ was trying to maintain in her first grade classroom. The other students in the class were becoming fearful of the Student.

25. The academic requirements for the Student were all but eliminated due to the interference in learning by the Student's behaviors.

26. Dr. Pechous had scheduling conflicts the first week of school and was not readily available to _____ for help. (Exhibit 45Q).

27. Dr. Pechous emailed _____ and _____ late in the evening of September 9 asking about the Student's progress. (Exhibit 45Q).

_____ responded on September 10 that the IEP team had held a meeting regarding the Student and had decided to do a Functional Behavioral Assessment on the Student.

_____ acknowledged that the Student had engaged in one major outburst each day and that the other students were beginning to act negatively toward the Student. _____

_____ also indicated that the resource room teacher, _____ was spending a great deal of time with the Student when _____ went on break and when the Student had been removed to the resource room during an outburst.

28. Dr. Pechous emailed _____ and _____ on September 10 asking how things were with the Student and identifying the need for predictability.

29. _____ observed the interactions between _____ and the Student on a daily basis. _____ observed _____ speaking positively and calmly to the Student despite the Student's negative behaviors. _____ was aware of the Student's Do's List and saw _____ implementing strategies from that list.

30. Dr. Pechous chose not to draft a Functional Behavioral Assessment (FBA) because there was a recent FBA from Jill Wright and because Dr. Pechous was still gathering data on the Student through the data sheets and ABC forms.

31. Dr. Pechous began appearing at _____ on a more regular basis beginning September 10, 2003 to assist in the training of _____ and to observe the Student's behaviors.

32. _____ contacted Dr. Pechous by email and _____ in person on September 12, 2003 asking for help. The Student's behavior was preventing _____

from working with the other resource room students because it was necessary for her to spend all her time with the Student when he was there. The Student was often there for removal reason beyond his allotted 60 minutes/day.

33. The purpose of the resource room is to provide students with learning disabilities extra help with their academic needs. The resource room is not structured to deal with a student's behavioral issues.

34. [redacted] emailed Dr. Pechous, [redacted] and [redacted] on September 12 requesting that a meeting be held on September 15 to discuss the Student. (Exhibit 45S). [redacted] was concerned about the Student running for the door and the aide having to grab him without having the adequate training to do so. [redacted] indicated that the other students in the class were becoming fearful of the Student. The outbursts were distracting the Student's classroom as well as other classrooms in the vicinity due to their loud and protracted nature.

35. There were a limited number of outbursts from the Student on September 15, 2003. (Exhibit 116). The Student's behavior significantly escalated on September 16 and 17. The Student hit [redacted] several times on September 16 and was removed to the resource room. Other children in the regular education room were beginning to cry during his outbursts. The Student also threw a chair on September 18. Again, many of the outbursts occurred when the Student was transitioning from one activity to another.

36. It is unclear whether a meeting was held with District staff on September 15 or any time prior to September 19, 2003 to discuss the Student. [redacted] did discuss with [redacted] and other staff how to handle concerns he had been receiving from parents about the Student's behavior and its effect on their children at the September 16, 2003 Open House. (Exhibit 45V). The Parents were not consulted for input about this situation.

37. The Parents were contacted by Dr. Pechous on Tuesday, September 16 and asked to appear at a meeting on Friday, September 19, 2003 to discuss the Student's behaviors.

38. Jill Madsen-Kelly conducted an observation of the Student at [redacted] on September 19, 2003. Ms. Madsen-Kelly arrived at the school between 9:15-9:30 am, and entered the Student's classroom. The Student was working alone with [redacted] apart from the rest of the class. A fire drill occurred. The Student complied with what was expected. The class returned to their room after about 10 minutes. The Student sat down. [redacted] told the Student that it was time to go to the resource room. The Student complied. Ms. Madsen-Kelly accompanied them. [redacted] gave the Student social praise while walking to the resource room. Upon entering the resource room, the Student and [redacted] began working on "touch" math at a table with Ms. Madsen-Kelly observing

at the table as well. The Student began to escalate when it was time to work on his "6's." [redacted] looked at [redacted] who intervened, trying to negotiate with the Student. The Student escalated. [redacted] came over and unsuccessfully tried to intervene with stickers. The Student began looking at his Pooh books. [redacted] was eventually able to redirect the Student back to math, agreeing not to do the 6's and allowing the Student to play on the computer when done.

39. While on the computer [redacted] and [redacted] spoke about how to handle the Student. From comments made by [redacted] concluded that [redacted] was frustrated in dealing with the Student and felt that the Student was choosing to act as he did. This concerned [redacted] since she believed that autistic children do not engage in intentional behavior but rather behavior in an attempt to get a need met.

40. At 10:30, [redacted] warned the Student that it was time to turn off the computer. [redacted] returned a short time later, again informed the Student that it was time to turn off the computer and did so for the Student. [redacted] expected an escalation from the Student that did not happen.

41. [redacted] left the school at approximately 10:30am, after having been there a little over an hour.

42. A meeting with the District staff and the Parents occurred on September 19, 2003. Present at the meeting were the Parents, [redacted] and [redacted]. The District expressed concern at the meeting that the number of transitions in the regular education classroom were too stressful for the Student, that the Student was not succeeding either academically or non-academically, and that the Student might best be served in a self-contained behavioral intervention (BI) classroom located at Hamblen Elementary School. The District indicated that they had suggested such a change to the District's behavior intervention team who was scheduled to meet on September 24. The Parents were invited to observe the BI classroom and to attend the September 24 meeting.

43. The Student had uneventful days at school on September 22 and 23, 2003. (Exhibit 117). The Student again escalated significantly on Wednesday, September 24 and had several outbursts on September 25 and 26, 2003. The outbursts occurred when the Student was transitioning from one activity to another.

44. The Parents observed the BI classroom on September 23, 2003. The children in the class were leaving for recess. One child remained in the class for a time out as the Parents talked to the special education teacher, [redacted] who was in charge of the class.

45. [redacted] has several years of experience working in group homes for autistic adults and 5-6 years experience teaching autistic children in his BI classroom.

46. The BI classroom is a Kindergarten to third grade self-contained class for children whose behavior interferes with their social and academic success. The primary focus of the BI classroom is on learning academics with instruction on social skills as needed. The classroom is limited to a total of 10 children. had 7 children at the time of the Parents' visit, one in fourth grade, one in second grade, and the rest in third grade. currently has two autistic children and children performing at the first grade level. There is also an isolation area in the room which the children may choose to enter as needed. works with one full-time aide and one part-time aide. educational philosophy is that all children are giving their best effort but may need to be taught how to behave appropriately through peer modeling and self regulation.

47. The Parents spoke to after observing the BI room. The Parents were concerned that the children in the BI room were older, that the Student may learn inappropriate behaviors from these students, and that removal from a complex social setting may result in further social withdrawal. The Parents wanted to keep the Student in the regular education classroom with his age-identical peers and explore more options in making that happen before agreeing to the BI classroom.

48. The Parents called Dr. Pechous on September 23, asking that the Student be taken off the agenda for the behavior intervention team meeting of September 24. Dr. Pechous relayed the information by email to and late in the evening of September 23, 2003. (Exhibit 45X). The Parents assumed that the Student would be taken off the agenda so they did not attend the September 24, 2003 meeting.

49. The Student was discussed at the September 24, 2003 meeting. A District Level Intervention and Placement Referral Document was presented at the meeting which summarized the District's impressions of the Student. (Exhibit 105). It is unclear who requested or drafted this document.

50. The behavior intervention team concluded that there was room for the Student in the BI classroom at and that such a placement would be appropriate for the Student.

51. The Student had some outbursts on September 29 and 30, 2003. (Exhibit 118). The Student escalated throughout the morning of October 1, 2003. The Student ran away twice from school staff out of the classroom, swung his arms and fists at adults who were trying to de-escalate him, and threw a chair 3-4 feet for the second time.

52. decided to suspend the Student for four days beginning October 1, 2003 after learning of his behavior. called the Student's father and requested that he come to pick up the Student. The Student's father arrived within 25 minutes, at which time the Student had calmed. told the father that he and

59. The Parents and _____ disagreed with the placement at Hamblen. The Parents and _____ wanted the Student to continue with the resource room and mainstreaming at _____. The Parents and _____ did not feel that the District was using appropriate behavioral strategies with the Student and wanted to pursue other options. The Student's mother suggested that the Parents would pay for a specialist to train staff. This suggestion was rejected by the District during the October 3, 2003 meeting.

60. Prior written notice regarding the change of placement was sent by David Greaves to the Parents on October 6, 2003. (Exhibit 42). This notice included the basis for the decision and why other options were rejected.

61. The Parents received a telephone message from David Greaves on October 6, 2003 stating that the Student would be returning to school at _____ rather than _____ effective October 13, 2003.

62. The Student was not returned to _____ following the October 1, 2003 suspension.

63. The Parents filed for Due Process Hearing on October 10, 2003. The Parents requested Stay Put. The Student would have been welcomed back to _____ for Stay Put. The District, however, refused to specifically implement the intervention strategies as developed by Jill Wright as they had been written in her report. The Parents decided to keep the Student out of school until the hearing.

64. A second IEP meeting was held on October 21, 2003. A draft IEP was prepared prior to the meeting and distributed at the meeting. The draft IEP again indicated _____ as the Student's placement.

65. Present at the October 21, 2003 were the Parents.

_____. Also present were the resource room teacher _____ and the general education teacher _____ (Exhibits 43/120). Portions of the IEP were discussed with the majority of the goals remaining the same as those in the May 15, 2003 and October 3 IEPs. Placement was then discussed. The Parents again argued that the Student and the school staff had not been given adequate time to adjust and that the behavior strategies were not being properly implemented by the District. The Parents again wanted placement to remain at _____ primarily to engage the Student in social peer interaction and to protect the Student from learning the negative behaviors in which the students in the BI may engage. The District disagreed, finding that the Student was significantly stressed due to the number of transitions that occur throughout the Student's day at _____, resulting in the Student's negative behaviors.

66. The Parents received written notification of the District's decision after the October 21, 2003 IEP meeting.

67. The cost of mainstreaming this Student is more costly than placing the Student in the BI classroom.

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 U.S.C. Section 1401 *et. seq.* (Individuals with Disabilities Education Act (IDEA)), Chapter 284.155 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 Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, *et. seq.*, at the Due Process Hearing. *Seattle School District v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996); *Clyde K. Ex rel. Ryan K. v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Cir. 1994). Burden of proof is the duty of affirmatively proving a fact in dispute. District has the burden of proving, by a preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education (FAPE) to Student.

3. 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.

DISCUSSION

4. The fundamental issue in this case, from which all the other issues arise, is whether the Student was denied FAPE during the 2003-2004 school year. It must first be determined whether the District offered the Student FAPE. The analysis surrounding the offering of FAPE must focus on the adequacy of the District's program. *Gregory K v. Longview Sch. Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314. If the District's proposed program would have addressed the Student's unique needs, provided him some educational benefit, and comported with his IEP, then the District offered FAPE, even if the parents prefer another program and even if the parents' preferred program would likely result in greater educational benefit. *Rowley*, supra, 458 U.S. at 207-208; *Gregory K*, supra, 811 F.2 d at 1314.

5. Under the IDEA and *Rowley*, in determining whether Student has been offered FAPE, it must first be determined if procedural violations have occurred, and if so, did those violations result in a loss of educational opportunity to Student or seriously infringe on his parents' participation in the IEP process.

PROCEDURAL VIOLATIONS

6. The alleged procedural violations were whether the District failed to follow appropriate procedural protections in revising the Student's IEP and whether the District failed to follow the proper procedural protections related to the suspension and discipline of the Student.

7. Procedural violations do not per se deny a student FAPE. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). Denial of FAPE occurs when the procedural inadequacies result in loss of educational opportunity or seriously infringe on the Parents' opportunity to participate in the IEP process. *M.L. v. Federal Way School District*, 341 F.3d 1052 (9th Cir. 2003), citing *W.G. v Board of Trustees of Target Range District No.23*, 960 F.2d 1479, 1984 (9th Cir. 1992).

8. A reevaluation is the process used to determine the special education students' continuing eligibility and need for special education and related services. WAC 392-172-040. "Reevaluation shall also be used to determine the appropriateness of the services being provided to the special education student." *Id.* The Student's IEP meeting held on October 3, 2003 was a reevaluation. The Student had already been declared eligible for specially designed instruction. The purpose of the October 3 meeting was to determine the appropriateness of services being provided to the Student.

9. The notice requirement for reevaluations apply. See WAC 392-172-302. The District is required to give prior written notice to the Parents within a reasonable time before

the District proposes a change in educational placement. Id. The written notice shall include a description of the action proposed, an explanation of the reasons why the action is proposed, an explanation why other options were rejected, and a description of the report relied upon by the District in making their decision. WAC 392-172-306.

It is concluded that the IEP notice scheduling the IEP meeting of October 3, 2003 initially met the notice requirements of WAC 392-172-306. It is concluded that at the time the notice was sent to the Parents the Student had not been suspended and that a change in placement was not yet being proposed by the District. The District had been investigating the possibility of a change of placement with no final recommendation.

The purpose of the October 3, 2003 IEP meeting was expanded after the Student was suspended on October 1, 2003. A notice of suspension was sent to the Parents on October 2, 2003 notifying the Parents that the October 3 IEP meeting would be used to discuss the Student's discipline as well as the reevaluation. No mention was made in either notice that a change of placement would be considered although such a change was included in the draft IEP for the meeting.

The Parents arrived at the October 3 meeting unprepared to discuss a change in placement. The Parents reasonably believed that the Student's discipline would be discussed at the meeting as well as reevaluation of the Student's educational needs. The Parents also believed that a change of placement was no longer being considered since they had asked that the Student be taken off the September 24, 2003 behavioral intervention review agenda and had heard nothing further from the District regarding placement.

The District failed to provide adequate prior written notice to the Parents regarding the proposed change in placement to be discussed at the October 3, 2003 meeting. There was no description in either the meeting notice or the suspension notice of the proposed placement change by the District. There was no explanation in either notice why the District would propose such a change. There was no description in either notice what other options were considered and the reasons they were rejected.

Does this procedural violation deny the Student FAPE? No. The purpose of the prior written notice is to provide the Parents with an adequate opportunity to prepare for the proposed IEP changes, in this case, placement. Although the Parents had not received adequate prior written notice to the October 3 meeting, placement was discussed at that meeting, putting the Parents on notice of the District's position and the reasons for its position. The Parents were informed of the District's decision regarding placement by phone on October 6, 2003 and the reasons for the decision in a subsequent letter received prior to the October 21, 2003 meeting.

A second IEP meeting was held on October 21, 2003 that corrected any procedural flaws. See *Target Range*, 960 F.2d at 1484. The Parents were aware that the change in placement would be discussed at this meeting. It is concluded that the District's procedural violations did not significantly interfere with the Parents' opportunity to fully participate in the change in placement decision. It is acknowledged that the Parents disagreed with the District's decision. Such a difference in position does not mean that the Parents'

opportunity to fully participate was denied. Participation does not mean agreement. There has not been a denial of FAPE based upon this procedural violation.

10. "The general education teacher of a special education student (or preschool education provider), as a member of the individualized education program team, must, to the extent appropriate, participate in the development, review, and revision of the student's individualized education program..." WAC 392-172-15700.

The purpose of having the participation of the general education teacher at the Student's IEP is to have a person present who has the most knowledge of the Student in their educational program. See *Target Range*, 960 F.2d at 1484. The District developed an IEP for the Student on October 3, 2003, without the presence of the regular education teacher. This resulted in a procedural violation. However, this violation was corrected when a second IEP meeting was held on October 21, 2003 that included the general education teacher. The October 21, 2003 IEP occurred close enough in time to the meeting of October 3, to result in de minimus interference with the Student's educational benefit. There has not been a denial of FAPE based upon this procedural violation.

11. If a change in placement occurs due to behavior by the student that is substantially likely to result in injury to the student or to others, or other behavior that violates any rule or code of conduct that applies to all students, a manifestation determination review must be held within 10 days after the date on which the decision to remove the student is made to determine the relationship between the student's disability and the behavior subject to the disciplinary action. WAC 392-172-38300.

It is concluded that the change in placement in this case occurred due to behavior by the Student that was substantially likely to result in injury to the student or to others, and that violated the rules or code of conduct that applies to all students. As such, a manifestation determination review must be held within 10 days after the date on which the decision to remove the student is made. The District had discussed their desire to remove the Student on October 3, 2003. The final decision to remove the Student occurred on October 6, 2003. There was no manifestation determination held by the District within 10 days from the date of that decision, resulting in a procedural violation. However, again, it is determined that the harm from this procedural violation was de minimus. There had been no question at the October 3, 2003 meeting that the Student's actions were the result of his disability. The procedural violation occurs because the connection between the Student's actions and his disability was made before the final decision for removal occurred on October 6, 2003. The purpose of the manifestation determination review is to establish a connection between the disability and the behavior. That had already occurred by the date of the removal decision, making it unnecessary to hold a manifestation determination review again within 10 days from the date of the removal decision. Further, it is unclear what remedy the Parents seek for this procedural violation. There has not been a denial of FAPE based upon this procedural violation.

SUBSTANTIVE VIOLATIONS

12. The alleged substantive violations can be summarized as follows: 1) Was the Student's May 15, 2003 IEP appropriate and, if so, was the May 15, 2003 IEP being properly implemented in the Fall, 2003, and 2) is the change of placement proposed in the October 21, 2003 IEP appropriate?

13. The Student's May 15, 2003 IEP was appropriate. In developing, reviewing and revising each student's individualized education program, the team shall consider the strengths of the student and the concerns of the parents for enhancing the education of their student, the results of the initial or most recent evaluation of the student, and the results of the student's performance on any general state or district-wide assessment programs, if appropriate. WAC 392-172-159.

"The individualized education program team also shall:

(a) In the case of a student whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior...."

Id. at (2).

Appropriate behavioral strategies were included in the May 15, 2003 IEP. The behavioral issues of the Student were discussed prior to finalization of the IEP. The Parents presented a Functional Behavioral Assessment (FBA) written by Jill Wright to the IEP prior to finalization. Dr. Pechous, the District's autism expert, discussed the FBA and the Student with [redacted] prior to the finalization of the IEP. The Student's IEP behavioral goal was to become independent in the classroom. The short term behavioral goals included that the Student will follow transition directions through a schedule and prompts, that the Student will independently go to a quiet place and/or use headphones when over stimulated or frustrated, and demonstrate appropriate social skills as measured by teacher observations and data collection. These short term goals included some of the behavioral strategies of [redacted]. An instructional assistant would be available in the classroom as needed. The Parents agreed with the May 15, 2003 IEP. Further, additional behavioral strategies, the "Do's List," were developed by Dr. Pechous on May 30, 2003 which further incorporated the behavioral strategies of [redacted].

14. The May 15, 2003 IEP was properly implemented in the Fall, 2003. The District had an obligation to implement the May 15, 2003 IEP in the Fall, 2003. The "Do's List" had been updated and revised with the Parents' agreement prior to the start of school. Parents argue that the new instructional aide should have received a copy of Ms. Wright's FBA in addition to the "Do's List." The FBA was not part of the IEP that the Parents had agreed to on May 15, 2003. It had been incorporated but not adopted verbatim. The District had

gone to great lengths to specifically identify some of the strategies suggested by Ms. Wright as well as those suggested by the District's expert after observation and collection of data regarding the Student's behavior. The District's observations occurred in the classroom setting, unlike the observations of Ms. Wright which occurred in the Montessori setting. The District is required to consider positive behavioral interventions and strategies to address behavior. WAC 392-172-159. The District is not required to adopt specific interventions and strategies.

The instructional aide, [REDACTED] received adequate training after September 10, 2003. It is acknowledged that little training occurred prior to that date. This failure of the District to train prior to September 10, 2003 may have created some behavioral barriers between the Student and the instructional aide but the existence of these barriers has not been specifically identified nor has any evidence been presented that these barriers continued to interfere with the interactions between the Student and [REDACTED] following September 10, 2003. [REDACTED] received 40 hours of hands-on training in the presence of Liz Pechous between September 10 and October 1, 2003. The majority of the first-hand testimony regarding the interaction between the Student and [REDACTED] attested to the their positive relationship and the positive interactions between the two. This testimony included that of Dr. Pechous, the autism expert and drafter of the Student's "Do's List". Dr. Pechous observed the interaction of the Student and [REDACTED] on a regular basis in her training of [REDACTED] and felt that [REDACTED] was properly applying the strategies found in the "Do's List." The only source of disagreement was [REDACTED] who had only observed the interaction between the Student and [REDACTED] for one hour on September 19, 2003.

A violation of FAPE did not occur when the District failed to provide all of the occupational therapy required under the IEP during the first three weeks of school. The May 15, 2003 IEP required that the Student receive 20 minutes of occupational therapy/week. The Student did not receive therapy for the first three weeks of school. The District agrees that they are responsible for the failure to provide therapy during the first week and are willing to provide all therapy missed in the first three weeks. There has been no evidence presented that the Student was harmed by the lack of therapy during the first three weeks.

15. The change of placement in the October 21, 2003 IEP is appropriate. Each public agency shall ensure that the parents of each special education student are afforded the opportunity to be members of any team that makes decisions on the educational placement of their student. WAC 392-172-15705. The Parents did not feel that they were part of the team in making the decision about the Student's placement primarily because the District felt that the least restrictive environment (LRE) for the Student was the BI classroom at [REDACTED] and that there were no other placement options. However, the Parents were included in every IEP meeting and given an opportunity to participate, despite disagreement.

16. The Student's placement in the general education environment at _____ is not appropriate. An appropriate program for a student with a disability must be reasonably calculated to enable the child to receive meaningful educational benefits. *Rowley*, 458 U.S. at 192. In addition, the recommended program must be offered in the least restrictive environment for the child. 20 U.S.C. §1412 [a][5][A]; 34 C.F.R. §300.550[b]; WAC 392-172-172. However, "the IDEA's preference for mainstreaming is not an absolute commandment." *M.L. v Federal Way School District*, 341 F.3d 1052, 1068; citing *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995). "In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment." *Id.* at 1068.

A four factor balancing test must be applied in determining the most appropriate placement in the least restrictive environment. *Id.* at 1068, citing *Sacramento City Unified Sch. Dist. Bd. Of Educ. V. Rachel H. ex rel Holland*, 14 F.3d 1398 (9th Cir. 1994). The four factors are 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect on the teacher and children in the regular class; and 4) the costs of mainstreaming the student.

There has been little, if any, educational benefit and no academic benefit to the Student in the regular education classroom at this time. The Student's behaviors have required the District to all but eliminate any academic demands on the Student.

The non-academic benefits the Student is currently receiving from the regular education classroom are minimal and may even be negative. It is understandable that the Parents desire the Student to be with his peers to learn social skills. However, the Student's current behaviors are prohibiting the Student from forming any peer bonds. Placement in the BI room would hopefully assist the Student in overcoming the current behaviors so that when the Student returns to the regular education classroom, the Student will be able to derive non-academic social benefit from being among his peers.

The Student's behaviors are having a significant detrimental effect on the teacher and the other students. To be considered is whether there is a detriment because the child is disruptive, distracting or unruly, and whether the child is taking up so much of the teacher's time that the other students would suffer from lack of attention. *Rachel H.*, 14 F.3d at 1401. The Student's outbursts are disruptive and distracting. The outbursts require a great deal of the attention from all classroom adults; the aide, the general education teacher, and the resource room teacher. As the resource room teacher testified, she can assist no other student when the Student is present in her room because he required so much of her attention.

Lastly, but not determinative, the cost of mainstreaming this Student is more costly than placing the Student in the BI classroom.

17. The Student's placement in the BI classroom at _____ is appropriate. The primary educational objective is to limit the Student's outbursts so that the Student can

receive academic and non-academic benefit in the educational setting. This objective could not be accomplished in the regular education setting at [redacted]. One of the primary triggers for the Student's outbursts are transitions. Temporarily reducing these triggers might enable the Student to first learn better strategies in monitoring his behavior so that he would be better able to handle these triggers in the future. The BI classroom provides an environment in which these triggers may be reduced, allowing the Student to learn better strategies and gain academic benefit from his educational placement.

The Parents are concerned that the Student may learn more disruptive or negative behaviors if he is placed with other behaviorally challenged students. While this is possible, it has not been shown that the negative behaviors of the students in the BI classroom would be significantly different than the negative behaviors of the students in the regular education classroom.

The Parents are concerned that the Student would not be educated with other first graders in the BI classroom. It is true that none of the other students in the BI classroom are currently first graders. The ages of the children in the BI room range from the age of a typical second grader (7-8 years of age) to the age of a typical fourth grader (9-10 years of age). WAC 392-172-180 makes reference to educating children in age-appropriate classrooms. It is concluded that it would be age-appropriate to educate the Student, who is seven years old, with other students who are close in age.


Lastly, the special education teacher in the BI classroom has experience in working with autistic children such as the Student. Also, the placement at [redacted] would provide the Student with the ongoing opportunity to mainstream into the general education classroom at [redacted].

18. As an aside, it is noted that the District could have done more to communicate effectively with the Parents, possibly eliminating the need for a due process hearing.

ORDER

The District provided a free and appropriate public education to the Student in the development and implementation of the Student's May 15, 2003 and October 21, 2003 Individualized Educational Programs, and appropriately determined that the Student should be placed in the Behavioral Intervention classroom at _____ Elementary School.

Filed on the date of mailing.



Wynne O'Brien Persons
Administrative Law Judge
Office of Administrative Hearings