

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

MAILED
SHS - SEATTLE

NOV 24 2004

IN THE MATTER OF:

CLOVER PARK SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2004-SE-0014 & ADMINISTRATIVE HEARINGS
2004-SE-0104

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Mattie Harvin Woode in Lakewood, Washington, on October 12, 2004. The interested Parent, ¹ was represented by herself. Parent was assisted by Vanessa Lewis, PAVE Advocate. Clover Park School District (District) was represented by William Coats, Attorney at Law. The ALJ, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

The Parent filed a request for due process hearing on February 13, 2004. A prehearing conference was scheduled for February 24, 2004 and an initial hearing was scheduled for April 1, 2004. At the February 24, 2004 prehearing conference, the parties agreed to strike the initial hearing date so that Mother would have additional time to receive and review an independent educational evaluation report (IEE). A hearing was scheduled for June 15, 2004. The hearing was later continued to June 28, 2004 for the same reason. At a June 15, 2004 prehearing conference, the hearing was continued again to August 10, 2004 for the same reason. The hearing was continued to September 15, 2004 for the same reason.

On July 26, 2004, ALJ Andrea Conklin ordered the District to pay for the Parent to meet with the independent evaluator, Dr. Christina Rasmussen, for Parent to ask questions to ensure that the report was factually correct. The ALJ also ordered Dr. Rasmussen to provide her report to the Parent and the District within 10 calendar days of the date she meets with the Parent. During the course of the August 17, 2004 prehearing conference, Parent indicated her disagreement with some of the statements contained in the IEE.

On September 1, 2004, in response to Parent's August 31, 2004 request for another IEE, the District filed a request for due process hearing to show the appropriateness of its reevaluation dated March 16, 2004.

¹In 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."

A prehearing telephone conference was held before ALJ Andrea Conklin, on September 1, 2004. The matter under cause no. 2004-SE-0014 was reassigned to ALJ Mattie Harvin Woode and consolidated with cause no. 2004-SE-0104.

At the prehearing conference held on September 30, 2004, the parties indicated they were ready to proceed to hearing. Mother renewed her request to have Dr. Rasmussen's report expunged from the Student's education records and excluded from evidence during the due process hearing because Mother believes the report to contain factual inaccuracies. The request to remove the report from the Student's education records was denied due to lack of jurisdiction. The evidentiary request to exclude the report from evidence was also denied.

After the hearing, the record remained open for the parties to provide written closing arguments no later than October 22, 2004. The District provided written closing argument on October 22, 2004. Parent submitted written closing argument on Monday, October 25, 2004. Although Parent's post-hearing submissions were late, the ALJ will accept and consider them. The record, therefore, closed October 25, 2004. The decision is due 30 days after close of the record which is November 24, 2004.

EVIDENCE RELIED UPON

Exhibits Admitted: Court exhibits C1 through C4; Parent's exhibits P1 through P9; and District exhibits D1 through D48.

Witnesses Heard: Robert Kirschenbaum (school psychologist), Heather Walter (special education resource room teacher), Debra Billingsly (general education teacher), Christina Rasmussen, Ph.D. (licensed clinical psychologist), Douglas James (special education teacher), Phyllis Gamas (special education teacher), and (Parent).

ISSUES

The issues for hearing under cause no. 2004-SE-0014 are:

- a. Whether the District provided the Student with a Free Appropriate Public Education (FAPE) during the 2003-2004 school year, specifically as to whether the Student's unique needs were addressed in his Individual Education Program (IEP) and his Behavioral Intervention Plan (BIP);
- b. And, if there has been a denial of FAPE, whether the Student is entitled to compensatory education including, but not limited to, tutoring services.

The issues for hearing under cause no. 2004-SE-0104 are:

- a. Whether the School District has appropriately evaluated the Student in the suspected areas of disability;

- b. And, whether the Parent is entitled to her requested remedy, which includes the provision of an independent educational evaluation (IEE) at public expense.

See Prehearing Order dated September 3, 2004.

FINDINGS OF FACT

1. The Student's date of birth is _____ 1993. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in kindergarten when he was placed on medication. He was initially determined to be eligible for special education under the category of specific learning disability (SLD). That was later changed to the category of health impaired (HI). He receives specialized academic instruction and has a behavior management plan.
2. During the 2002-2003 school year, the family moved to _____ where the Student attended school for his fourth grade year. In February 2003 his family moved back into the District and he attended _____ Elementary for the remainder of his fourth grade year. During the 2003-2004 school year, the Student attended _____ Elementary for his fifth grade year. The school psychologist, Dr. Robert Kirschenbaum, conducted a records review as part of the District's efforts to place the Student in a program. The District gave Parent notice that it would continue the Student's educational program (which he had in _____) which consisted of three hours of specialized instruction per day, with one hour of specialized instruction in the resource room and two hours in the regular classroom.

The November 7, 2003 IEP

3. The District convened an IEP meeting on November 7, 2003. Mother participated in the meeting. At the conclusion of the meeting, Mother signed the IEP but indicated that she did not agree with it. Mother did not give the District any specific reasons as to why she disagreed with the IEP.
4. The District proposed an IEP which set annual goals and objectives in the areas of written language, math, and behavioral skills. Under the IEP, the Student received *30 minutes daily* in the resource room with a special education teacher for math, and another *30 minutes* with a small group for written language. The entire class was split into groups according to reading ability, and the Student was instructed by Heather Walter who worked with him in his small reading group.
5. Under the present levels of performance, the IEP documents the Student's difficulties with written expression, math skills, and behavior. Specifically, the present levels of performance document that the Student's overall written expression skills are significantly below average: he was unable to spell phonetically regular vocabulary words, spell phonetically irregular words and multi-syllabic words, write a simple sentence, and write a detailed sentence. He can spell basic sight words. His math skills range from a 2.2 grade level to 3.5 grade level. Overall, his math skills are in the low average range.
6. The present levels of performance document that the Student has problems with impulse control, anger control, response to authority, incomplete assignments, high anxiety of failing, acting out for attention, leaving his seat, and shutting down. The present levels of performance does not

numerically quantify the number of times per day that the Student engages in this type behavior. However, the present levels of performance give an adequate baseline to determine his problem behaviors as of the time the IEP was written.

7. The IEP identifies goals and objectives in the area of written language skills, math, and behavior. In the area written language, the goal addresses sentence writing, spelling, punctuation and paragraph writing. In the area of math skills, the goal is for the Student to improve his math skills by one grade level by the next annual review. The objectives specify that given problems involving addition, subtraction, multiplication and division, the Student will solve problems with 80 percent accuracy, and word problems with regrouping and multiple steps with 80 percent accuracy.

8. In the area of behavior, the goal is for the Student to increase behavior skills which will facilitate learning. Specifically, the objectives measure his completion and turn-in rate for assignments, his ability to stay in his seat or stand by his desk with fewer reminders from the teacher; and that when he is presented with a situation which challenges or frustrates him, he will ask for assistance and or attempt the assignment in accordance with class rules.

9. The IEP also identifies the special education services necessary for the Student to meet the annual goals: small group and 1 on 1 specialized instruction to learn new skills; direct instruction to learn new writing and math skills with firm expectations. To assist him in the general education classroom, the IEP identifies the following aids or services for the Student: he should sit as close to the teacher as possible, directions should be repeated and explained, a teacher should get eye contact with the Student when giving verbal instruction, a teacher should give him "lots of encouragement", frequent breaks, and extra time to complete work. These interventions are identified as the services to be provided to help the Student meet all of his goals.

10. The IEP provides for periodic progress reports to Mother on the Student's attainment of his IEP goals. The Student's special education teacher and other District personnel completed these progress reports. In her written closing statement Mother, for the first time, asserts that she did not receive these IEP progress reports. Mother did not offer any testimony to support this assertion. Therefore, there is insufficient evidence to find that Parent did not receive periodic IEP progress reports.

11. The IEP also includes a BIP. The problem behavior identified is the Student's failure to complete or turn in his assignments, and his inability to stay in his desk area. The interventions proposed in the BIP are that the Student will complete assignments with no more than five reminders per class period, will ask for assistance when frustrated, and he will stay in his desk area without wandering around the classroom. These however appear to be just a restatement of the Student's behavioral goals and objectives.

12. The BIP does not address any specific interventions that the District will take when the Student engages in the behaviors identified in his BIP (incompletion of assignments, acting out when frustrated, not staying in desk area). However, according to Dr. Kirschenbaum, the BIP does not stand alone, but is employed in addition to the school's own discipline plan which is applied to all students. In his opinion, the school-wide discipline program, which applies to all students, is sufficient to meet the Student's behavioral needs. Of note however, the BIP does not state that the school discipline program will be employed with the Student. The ALJ, however, accepts the testimony of Ms. Billingsly and Dr. Kirschenbaum that the school-wide discipline program, *with*

appropriate modifications and flexibility, along with the IEP goals, is sufficient to address the Student's behaviors. This modified discipline program should have been clearly identified on the Student's BIP as one of the interventions used to address the Student's behavior.

13. Elementary employs a multi-tiered disciplinary program called "Make The Day Count," a self-discipline system which applies to all students. The plan involves four steps to address student behaviors. The first step requires the student to sit in a chair facing away from the class or group to think about his or her behavior. If the child shows that they are calm and ready to come out of Step 1, they are permitted rejoin the class or group. If not, and the child's behavior instead escalates, the child would be moved to Step 2 which simply involves the teacher walking over to the child and whispering "Step 2" to the child. If the child's behavior then de-escalates, he or she would return back to Step 1. If the child's behavior continues to escalate, he or she would move to Step 3. In Step 3, the child is moved to the solutions room. The child is given the rules to read or may be required to call the parent to come in for a conference. If the child progresses to Step 4, the child is removed from the classroom, taken to the "solutions room" or a teacher buddy room, and is not allowed to return to the classroom until the parent arrives for a conference. The child can earn his or her way back down the respective steps based upon his or her behavior.

14. The Student's fifth grade teacher, Debra Billingsly, applied the school disciplinary plan to the Student's behavior but allowed flexibility so that he did not automatically move to the next step when he misbehaved but was given several opportunities before he progressed to Step 1 or to the next step - an accommodation not afforded to other students. On some occasions, the Student moved to Step 2 or Step 3. His disciplinary records reveal that on six occasions during the 2003-2004 school year, the Student reached Step 4 which resulted in a conference with Parent. However, most of these Step 4 referrals occurred in the fall prior to the time Ms. Walter began working with him.² In Ms. Billingsly's opinion, the Student did well under this program and his behavior improved during the school year.

15. Parent was aware of the school-wide discipline policy and that it would apply to the Student. She signed a form indicating her awareness of the policy, though she indicated that the Student was on an IEP and that the discipline policy would have to be adjusted "as needed."³

Educational Progress under the IEP

16. In January 2004, Heather Walter became the resource room special education teacher at Elementary to replace another teacher who went on medical leave. During that time period, the whole school was on a reading program and 90 minutes were devoted each day for reading. During that time, Ms. Walter worked with the Student 30 minutes per day in his small reading group within his general education classroom on his written language goals. She also worked with him 1:1 30 minutes per day on his math goals.

² The Student's disciplinary record (Exhibit D37) reveals that he had less disciplinary action during the second half of the school year.

³ Exhibit D42.

17. Ms. Walter completed two IEP progress reports, in February 2004 and April 2004 before she left for maternity leave. Ms. Walter's determination of the Student's progress was based on her review of his work, her observations, and her discussions with Ms. Billingsly. The Student made some progress on his written language and math goals, but did not quite meet all of the objectives for each goal. The Student made some progress on his behavior goals. He made no progress on the objective of completing and turning in his assignments. He did, however, make progress in staying in his seat and asking for assistance when frustrated with his work.

18. Ms. Walter also completed progress reports on the Student's behavioral goals. She observed that his behaviors "started out rocky in January 2004", but she attributes some of that to the fact that she was new to the Student and he didn't know her. Once, he was used to her, she noted his behavior improved. However, she also noted that his behavior was somewhat dependent on which student he sat near - his behavior was better if he sat with a student who modeled good behavior.

19. The Student made some progress in asking for assistance. Ms. Billingsly observed that his asking gradually increased as the school year went on so that most of the time the Student would ask for assistance when he was frustrated with his work. He learned that he didn't have to act out to get her to help him.

The District's Reevaluation

20. By letter dated December 12, 2003, Mother indicated that she disagreed with the November 7, 2003 IEP and asked for an independent educational evaluation (IEE) for the Student addressing cognitive, academic, social and emotional areas. She also asked for a functional behavioral assessment. Instead, the District notified Mother that it would reevaluate the Student.

21. On December 22, 2003, the District issued prior written notice to Parent that it was refusing to agree to an IEE on the basis that the District had completed an appropriate evaluation. Mother signed a consent for reevaluation on January 27, 2004. On that same date, Dr. Robert Kirschenbaum, the school psychologist conducting the reevaluation, gave Mother the BASC Parent rating scale to complete.

22. As part of the reevaluation, Dr. Kirschenbaum reviewed the Student's special education records, his performance on class assignments, tests and grades, prior parent observations,⁴ current teacher observations, and Mr. Kirschenbaum's classroom observations of the Student. He also reviewed two prior psychological evaluations: an October 26, 2000 evaluation by Dr. Audrey Don, and a January 28, 2003 evaluation conducted while the Student lived in

23. According to Dr. Audrey Don's October 2000 assessment, the Student's cognitive ability was in the low average range (IQ of 89 on the Stanford Binet Intelligence Scale, and 85 on the Cognitive Assessment System) (Exhibit D28). The Student's academic performance was in the low average to average range for math, and in the borderline range for reading. Dr. Don also found that the Student had significant emotional issues and was experiencing high levels of anxiety.

⁴ Mother was asked to complete and return the BASC Parent Rating Scale but declined to do so.

24. According to the January 2003 educational evaluation by _____ School District, the Student's overall reading and math skills were in the low average range, and he had low grade level performance in overall written language skills. He had weak attending skills, a tendency to "shut down," difficulty following instructions in classwork, and elevated feelings of anxiety.

25. Debra Billingsly, the Student's fifth grade teacher, provided information as part of the reevaluation. She completed an individual documentation of assessment results form. According to Ms. Billingsly, the Student's behavior in class was off task and he had to be redirected 80 percent of the time. She also noted that he was easily distracted by any external movement around the room, was often out of his seat without knowing why, frequently shouted out, raised his hand in discussions but did not have relevant comments to make and was usually on another subject. She also indicated that he did not often return homework and therefore, had below average to failing grades in math review activities. She also noted that his math and reading were significantly below grade level, and he often needed help reading/decoding during social studies or science. Because of these difficulties, the Student would read with a partner, and in a group situation for in-class math activities, science, and social studies activities. As provided by his IEP, he also had help with reading and math in a pull-out resource situation.

26. As part of the reevaluation, Ms. Billingsly also completed the Behavior Assessment Scale for Children (BASC). On the BASC completed by Ms. Billingsly, the Student was rated as having significant problems in the areas of externalizing problems, school problems, and overall behavioral symptoms. He was also rated as having significant problems in the area of hyperactivity, aggressions, conduct problems, attention problems, atypicality, and adaptability. Dr. Kirschenbaum incorporated Ms. Billingsly's comments on the assessment form and the overall findings from her rating scale into the reevaluation report.

27. The Student's academic skills were tested by Ms. Walter who utilized the Woodcock-Johnson Psycho-Educational Battery-Revised. The grade equivalent scores were: reading skills, 3.5; reading comprehension, 3.3; math calculation, 3.3; math reasoning, 3.3; and broad written language, 2.8. Ms. Walter concluded that the Student's greatest areas of weakness were in math calculation and written language. At the time, the Student was in fifth grade.

28. In summary, the reevaluation found that the Student should continue to be classified as a student with a health impairment because he demonstrates the characteristics usually associated with this classification; he is diagnosed with ADHD. The evaluation results, along with then-current observations and discipline reports, indicated the Student's medical condition is associated with behavioral and learning difficulties which significantly impact his educational achievement in a detrimental manner. The reevaluation found that the Student's disability has an adverse educational effect that will cause him excessive difficulties in doing the academic work that is assigned to the class, and that specially designed instruction which takes into account the Student's emotional and behavioral difficulties, particularly as they affect academic performance, is necessary for the Student to receive a FAPE. Specifically, the reevaluation found that Student has:

excessive difficulty in doing the following: reading unfamiliar material and understanding it, reading quickly enough to keep up with assignments in the regular classroom, following complex and/or multi-step directions, analyzing text in subjects such as social studies and science, following written directions, spelling words correctly, composing text, using capitalization in

writing, using basic math operations, solving word problems, applying math skills in subject areas such as science and social studies, staying on task, completing assignments independently.

29. The reevaluation report made the following recommendations to assist in the development of the IEP:

Continuation of the same eligibility classification; continuation of the current academic and behavioral goals in his IEP; opportunities for student questioning and interest development that promotes the Student's search for meaning and relevance in school subjects, involvement in learning, and desire to communicate ideas; help the Student become calm when he is upset about schoolwork or a conflict with peers; continued use of the "Make Your Day Count" discipline program.

30. In a letter dated February 12, 2004, Dr. Kirschenbaum informed Mother that he wanted to meet with her in early March to review the results of the reevaluation. On March 3, 2004, the District issued an invitation to Mother to attend a meeting on March 16, 2004, to review the results of the reevaluation. The meeting was held as scheduled. Dr. Kirschenbaum, the school psychologist, Ms. Walter, special education teacher, Ms. Billingsly, general education teacher, Ann Jones Almlie, the District's special education director, and Jim Robertson, the school principal attended the meeting. Mother did not attend. The team reviewed the results of the reevaluation and determined that the results did not deviate from prior evaluation results and did not require a change in the Student's IEP. Mother was given a copy of the reevaluation report.

31. The District did not have an IEP meeting following the reevaluation meeting because, according to Dr. Kirschenbaum, the reevaluation did not deviate from the findings in prior evaluations and did not recommend a change in services or eligibility. None of the reevaluation team members recommended a change in the Student's IEP. The reevaluation results correspond to the behavior and performance levels of the Student, already documented in the IEP.

32. On March 16, 2004, the District issued prior written notice upon review of the reevaluation, that it was proposing to maintain the Student's current educational placement, eligibility category, and IEP. The reason given by the District for its decision was the Student continued to demonstrate the characteristics of a health impaired student and the current program seemed to be appropriate for meeting his individual needs for specially designed instruction.

Independent Educational Evaluation

33. Sometime after the March 16, 2004 IEP meeting, the District agreed to provide Mother with an independent educational evaluation (IEE) at public cost. Parent requested that the IEE be conducted by either the Art Institute of Learning, Dr. Christina Rasmussen, or Dr. H. Bartlett Vincent Jr., M.D.. At Mother's request, the District selected Dr. Rasmussen, and on May 8, 2004, Mother signed an authorization for release of records to Dr. Rasmussen.

34. Dr. Rasmussen is a licensed clinical psychologist with a general practice. She evaluated the Student on June 14, 2004. As part of her evaluation, she interviewed the Student and Mother, and administered three tests: the Wide Range Achievement Test-Third Edition (WRAT-3), the Wechsler

Intelligence Scale for Children-Third Edition (WISC-III), and the Vineland Adaptive Behavior Scale which was administered to Mother.

35. The purpose of the evaluation was to provide the District with information regarding the Student's functional limitations and to provide a clinical diagnosis. Dr. Rasmussen noted that when the WISC-III was administered to the Student, he appeared to withdraw and "become apathetic." Because of his poor attitude while taking the WISC-III, Dr. Rasmussen opined that his scores, which placed him in the deficient range of intellectual functioning, were likely an under-representation of his intellectual functioning and therefore, not valid.⁵ According to Dr. Rasmussen, the Student's anxiety symptoms could have impacted his responses on the WISC.

36. The Student's responses on the WRAT-3, a more academic test, were better and he did not show the same type of noncooperative behavior as he had during the administration of the WISC. He scored at the beginning third grade level in areas measuring reading, at the second grade level in areas measuring spelling, and middle third grade level in areas measuring arithmetic. These scores correspond with the Student's scores on the WC/J-3 as part of the District's reevaluation.

37. Dr. Rasmussen credibly testified that the intelligence testing portions of the evaluation was invalid because the Student clearly made a poor effort on this test. In her opinion, his uncooperative behavior may have been due to anxiety. However, according to Dr. Rasmussen, even when comparing the Student's scores on the WISC-3 and the WRAT-3, there was no indication that the Student had a learning disability.

38. Mother's responses on the Vineland Scale indicated that the Student was functioning at the moderately low level in areas measuring communication skills, and at the adequate level in areas measuring social skills and daily living skills. His adaptive behavior composite was in the moderately low range.

39. Based upon her evaluation of the Student, which included all of the testing and interviews, Dr. Rasmussen determined that the Student does not have a diagnosable learning disability as his measured level of achievement and ability are congruous. Even though his intellectual functioning was measured to be in the deficit range, that measurement was impacted by the Student's test-taking attitude.

40. Dr. Rasmussen recommended that the Student continue to obtain assistance in school as determined by his teachers and academic specialists. Dr. Rasmussen diagnosed the Student as having a generalized anxiety disorder. This diagnosis was based upon Parent's report of past traumatic events. Dr. Rasmussen recommended that the Student receive psychotherapy to improve his anxiety symptoms. According to Dr. Rasmussen, it was possible that his symptoms such as irritability, restlessness, and difficulties maintaining focus and concentration could be related to anxiety instead of ADHD. She observed that during testing, the Student seemed withdrawn and irritated, but once the testing was over, he became polite and friendly.

⁵ The Student had received cognitive testing during the October 2000 evaluation by Dr. Audrey Don. The cognitive testing indicated that the Student was of normal intelligence.

41. Mother asserts that Dr. Rasmussen's report should be excluded because she believes it contains numerous factual inaccuracies. Mother was given an opportunity to sit down with Dr. Rasmussen, at District expense, to discuss her concerns with Dr. Rasmussen, who refused to change her report. The ALJ has considered Mother's specific assertions regarding Dr. Rasmussen's report. Most of the facts pointed out by Mother to be inaccurate in Dr. Rasmussen's report, are by way of background history and do not affect the ultimate conclusions and recommendations made by Dr. Rasmussen. Therefore, the ALJ will give Dr. Rasmussen's report due weight.

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), formerly Education for All Handicapped Children Act], Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) 300 *et. seq.*, and Chapter 392-172 Washington Administrative Code (WAC).

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

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 458 U.S. at 207; 103 S. Ct. at 3051.

3. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

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

the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

Id. at 458 U.S. at 188-189; 103 S. Ct. at 3041-3042.

4. An inquiry must first be made into whether a school district has met the "rigorous procedural requirements of the IDEA" and any "State standards that impose a greater duty." *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures in the IDEA and state education laws, the question of whether its proposed program meets the substantive benefit test need not be addressed. *W.G. v. Target Range Sch. Dist. No. 23, Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992).

The November 7, 2003 IEP

5. To determine whether a child's IEP complies with the requirements of the IDEA, the court must determine whether there has been procedural compliance with the IDEA, and whether the IEP was reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 206-07. This has been interpreted to mean that the school district must provide "instruction and support services sufficient 'to permit the child to benefit educationally from that instruction.'" *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990) (quoting *Rowley*, 458 U.S. at 203).

6. An IEP is required to list a statement of the student's present levels of educational performance including how the student's disability affects the student's involvement and progress in the general curriculum. WAC 392-172-160(1)(a).

7. Parent asserts the Student's IEP does not meet the Student's unique needs. Specifically, Parent asserts the present levels of performance are insufficient because they do not have any baselines to start with the development of the goals and objectives. Parent's argument is not persuasive. The Student's IEP gives an adequate description of his present levels in all areas affected by his disability. His problem behaviors which affect his involvement and progress in the general curriculum are adequately described. Though an exact frequency of each problem behavior is not enumerated, a sufficient description exists so that his present levels are clearly known.

8. Parent next asserts the IEP is deficient because the BIP does not address certain behaviors of the Student. Parent specifically asserts, the District "ignored the Student's behaviors instead of developing a successful plan for the Student," and the District should have amended the BIP after the reevaluation to "address the specifics of the Student's behaviors." ⁶ Parent, however, has not provided any testimony to rebut the assertions of the District witnesses that the school-wide discipline program, as modified and along with the behavior goals on the IEP, were sufficient to meet the Student's behavioral needs. The evidence establishes that the supports and interventions used by the District were sufficient to address the Student's behavioral issues.

9. Parent asserts that the BIP should reflect the Student's behaviors identified by Ms. Billingsly in her responses on the BASC teacher rating scales as part of the reevaluation. Again, Parent's argument is not persuasive. First, the IEP was proposed and implemented before Parent asked for

⁶ Parent Proposed Findings and Conclusions p.4.

a reevaluation. Also, Parent is not specific as to which behaviors should be listed or identified in the BIP. A review of the District's evaluation shows that the Student's problem behaviors were well documented in his present levels of performance and addressed by his behavioral goals and objectives. The behavioral intervention plan addresses the Student's failure to turn in assignments and stay in his desk area. These behaviors encompass several of the problem behaviors mentioned in his present levels of performance.

10. Of note is the fact that the BIP fails to mention the specific interventions which will be used to address the Student's problem behaviors. The IDEA requires an IEP team to "consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 30 CFR §300.346; WAC 392-172-159(2)(a). Here, the BIP does not identify appropriate positive behavioral interventions to be used with the Student. The section of the BIP which lists the specific interventions simply restates the problem behaviors identified in the goals and objections portion of the IEP. Therefore, the BIP does not meet the substantive requirements of the IDEA.

11. Having determined that the BIP does not list sufficient interventions to be used with the Student, the next issue is whether this substantive deficiency is a denial of FAPE. In order to make that determination, a review of the Student's IEP, of which the BIP is a part, is required. As previously stated, to provide a FAPE, an IEP must be "reasonably calculated to enable the child to receive educational benefits" and a child must make progress toward the goals set forth in his IEP. *Rowley*, 458 U.S. at 206-07.

12. "An 'appropriate' public education does not mean the absolutely best or 'potentially-maximizing' education for the 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.'" *Union School Dist. v. Smith*, 15 F.3d 1519 (1994) quoting *Rowley*, 458 U.S. at 201.

13. The IEP is reasonably calculated for the Student to receive educational benefit. The IEP has several services which are meant to not only assist the Student academically, but also to address his behavior: "sit as close to the teacher as possible", "directions repeated and explained", "lots of encouragement", and frequent breaks. The Student continued to receive educational benefit because even though the BIP did not list the interventions with specificity, the District applied the interventions to the Student and these interventions worked to improve the Student's behavior. IEP Progress reports and testimony of the District confirm this. As recommended in the reevaluation, the District also used the school-wide discipline program with the Student, and, with some modifications and flexibility, this program was sufficient and indeed worked for him. Therefore, the Student was provided with the services needed as relates to his discipline and made progress on the behavioral goals.

14. Therefore, the ALJ concludes that the program developed by the District was reasonably calculated to enable the Student to receive educational benefit and make progress. Based upon the progress of the Student on his behavioral goals, it is clear that the Student received meaningful educational benefit from the program and made progress. Therefore, there has been no denial of FAPE. However, the District has to amend the BIP to clearly reflect that the interventions used will be the school-wide discipline program with some flexibility, and any other intervention that will be used with the Student.

15. Even if the District's failure to correctly annotate the BIP is viewed as a procedural error, it would still not be a denial of FAPE. All procedural flaws do not automatically require a finding of a denial of a FAPE. Only those procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, result in the denial of a FAPE. *Target Range, Id.; Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

16. Although the District failed to adequately document the specific interventions, it certainly used the interventions with the Student so there was no loss of educational opportunity. Parent's opportunity to participate in the IEP formulation process was not infringed. Parent was present at the IEP meeting and was made aware of the interventions the District planned to use for the Student. Parent was aware of the school-wide discipline policy and that it would apply to the Student. She was also aware that the District would use other "supports" with the Student which would reduce the level of his frustration and assist overall with his behavior (sit as close to the teacher as possible, directions repeated and explained, "lots of encouragement", frequent breaks, and extra time to complete work). Therefore, even if the failure to document the interventions appropriately is viewed as a procedural error, there has been no denial of FAPE.

The District's Reevaluation

17. Each school district is required to ensure that a reevaluation of each special education student is conducted in accordance with the evaluation and reevaluation procedures contained within Chapter 392-172 WAC if conditions warrant a reevaluation, or if a special education student's parents or teacher requests a reevaluation, but at least once every three years. WAC 392-172-182. The reevaluation team must include the same individuals as an IEP team, and "other qualified professionals" as appropriate. See, WAC 392-172-186(1) and WAC 392-172-153.

18. A reevaluation team must review existing data on the student, and identify what, if any, additional data are needed to determine: whether the student continues to be a special education student and continues to need special education and any necessary related services; the present levels of performance and educational needs of the student; and if any additions or modifications to the special education and related services are needed to enable the student to meet the annual goals and objectives set out in the student's IEP and to participate, as appropriate, in the general curriculum. WAC 392-172-186.

19. Mother asserts the District's reevaluation was not appropriate and therefore, she is entitled to an independent educational evaluation at public expense. However, the evidence does not support this. The District conducted a full evaluation of the Student who was assessed in all areas related to his suspected disabilities. The reevaluation was comprehensive enough to identify all of the Student's special education and related services needs. Academic testing was administered by a qualified examiner and recent cognitive testing was reviewed. The reevaluation recommendations were based upon test results, review of prior evaluations, observations by the school psychologist, observations by the Student's teachers, the Student's self-rating, and Parent's input from prior evaluations. Therefore, in considering all of the evidence, the District has met its burden of proof and has shown that its proposed evaluation was appropriate and meets all of the state and federal requirements for educational evaluations.

20. Mother asserts the District should have incorporated some of the specific findings in the reevaluation report, into the Present Levels of Performance section of the Student's IEP. However, the reevaluation results correspond to the behavior and performance levels of the Student, already documented in the IEP.

Review of IEP after reevaluation

21. The results of any reevaluation must be considered by an IEP team "when reviewing and as appropriate revising the IEP." WAC 392-172-182(3). Within ten school days after the completion of a reevaluation, a school district must notify the parent whether or not the student continues to be eligible and in need of special education services. If the student continues to be eligible and in need of special education services, the district must address the student's present levels of performance and educational needs and whether any modifications to the special education program are needed to enable the student to meet his IEP goals and participate in the general education environment. WAC 392-172-190. "If the evaluation report recommends changes, an individualized education program team meeting shall be convened. . . ." WAC 392-172-190. (emphasis added)

22. Parent asserts that the District denied the Student a FAPE because it failed to convene an IEP meeting to consider the results of the District's reevaluation, and specifically, because it did not amend the Student's IEP to incorporate specific wording from the reevaluation report and specific wording from the behavior rating scale completed by the general education teacher.

23. Here, the District's reevaluation did not make any recommendations for changes to the Student's IEP. In fact, the reevaluation report specifically recommended continuation of "the same eligibility classification; continuation of the current academic and behavioral goals in his IEP . . . and continued use of the "Make Your Day Count" discipline program. All of the District personnel involved in the reevaluation review meeting agreed the reevaluation results were consistent with the Student's current programming, and no changes were needed to his IEP.⁷ Parent was invited to the reevaluation team meeting but did not attend. After the meeting, she was given a copy of the reevaluation report, but did not ask for an IEP meeting to review the IEP in light of the reevaluation. Therefore, because neither the reevaluation report nor reevaluation team recommended a change to the IEP, an IEP meeting was not required.

The Independent Educational Evaluation

24. Parents of a special education student have a right to obtain an independent educational evaluation (IEE)⁸ at public expense if the parent disagrees with the school district's evaluation. WAC 392-172-150. However, if a parent requests an IEE at public expense, the district must either initiate a hearing within 15 days to show that its evaluation is appropriate or ensure that the parent receives an IEE at public expense. If the district initiates a hearing and its evaluation

⁷ As noted above however, the BIP should specify that the Student's program would continue to use the "Make Your Day Count" discipline program with flexibility, as this program is noted in the reevaluation as being used with the Student.

⁸ An independent educational evaluation is defined as "an evaluation conducted by a qualified examiner who is not employed by the school district." WAC 392-172-150(3)(a).

is found appropriate, the parent still has a right to an IEE but not at public expense. WAC 392-172-150(5)-(6). If the parent obtains an IEE at public or private expense, the district must consider the results of the evaluation in any decision it make regarding the provision of FAPE to the student, and such evaluation may be presented as evidence at a due process hearing. *Id.*

25. Parent asserts Dr. Rasmussen's report is invalid and the District should provide another IEE at public expense. As stated above, a parent is only entitled to an IEE at public expense if the school district's evaluation is found to be inappropriate. The District's reevaluation was appropriate. However, even if the District's evaluation was found not appropriate, the Parent has already been granted her remedy provided by law for an inappropriate evaluation: an independent educational evaluation. Mother gave the District a list of evaluators that she would agree to. The District selected Dr. Rasmussen, who was one of the evaluators on Mother's list. The IEE was appropriate and assessed the Student academically. Despite Parent's claim of factual inaccuracies, and the Student's own uncooperative behavior during certain parts of the testing, the evaluator produced an appropriate assessment. Mother cannot now demand a second IEE because she is unhappy with a few statements made by the independent evaluator in her report. None of the background information, which Mother asserts is incorrect, affects the test results, opinions, and conclusions in Dr. Rasmussen's report or testimony. Therefore, since Mother has already received a IEE, she is not entitled to a second one.

26. Finally, Parent raises the issue of whether Dr. Rasmussen's report should be removed from the Student's record. This is a matter which falls under the Family Educational Rights and Privacy Act, and state educational records regulations, specifically, WAC 392-172-418. The ALJ does not have jurisdiction to hear this issue and it is not appropriate for resolution at due process hearing. Therefore, Parent must follow other administrative procedures to address these concerns.

Parent's Requested Remedies

27. Parent requests compensatory education in the form of another IEE, nine months of tutoring at Sylvan Learning Center three times per week with transportation, and to remove Dr. Rasmussen's report from the Student's files within the District. The issue of another IEE and removal of Dr. Rasmussen's report have already been addressed. The remaining issue is Parent's request for tutoring services at Sylvan.

28. Compensatory education is an award of education services or reimbursement that may be ordered where a student has been denied FAPE. Compensatory education is a remedy to compensate a student for violation of statutory rights while he was entitled to those rights and is an appropriate relief in the context of the IDEA because such an order "merely requires [the defendants] to belatedly pay expenses that [they] should have paid all along." *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *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)).

29. Compensatory education, which can take the form of tutoring or other educational services, is only awarded when there has been a denial of FAPE. Here, there has been no denial of FAPE by the District in either the IEP (and attached BIP), or the District's reevaluation. Although the District erred in failing to use more specificity in the BIP, such an error does not

arise to the level of a denial of FAPE. Therefore, since there has been no denial of FAPE by the District, the Parent is not entitled to compensatory education.

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

ORDER

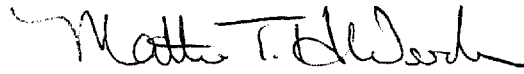
A. The Clover Park School District provided the Student with a free appropriate public education during the 2003-2004 school year.

B. The Student's November 7, 2003 IEP is appropriate. The Student's IEP team is directed to review the Student's BIP, and list the specific interventions to be used with the Student.

C. The District's March 16, 2003 reevaluation is appropriate. Parent has already received an IEE at public expense. Parent is not entitled to another IEE.

D. Because there has been no denial of FAPE, the Parent's request for compensatory education is denied.

Dated at Seattle, Washington on the date stamped above.



Mattie Harvin Woode
Administrative Law Judge
Office of Administrative Hearings

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