

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

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OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

CLOVER PARK SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2004-SE-0072X

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

A hearing was held before Administrative Law Judge (ALJ) Janice E. Shave at Lakewood, Washington, on June 30 and July 2, 2004. The parent of the student whose education is at issue in this proceeding, and the student (hereinafter the Parent or the Mother and the Student) appeared. They were assisted by parent support person Vanessa Lewis of PAVE (Parents Are Vital In Education). The Clover Park School District (hereinafter the School District) was represented by William Coats, attorney at law. Also appearing on behalf of the School District was Leslie Weaver, supervisor of middle school special education.

Parent Exhibits P 1 through P 19 were admitted. School District Exhibits D 64, D 72 and D 95 were admitted.

Testimony was taken from _____ special education coordinator at _____ Middle School (hereinafter _____ Penny Holmes, Ph.D., School District school psychologist and former school counselor; _____ dean of students at _____ and _____ (by telephone), co-principals at _____ W _____, school counselor at _____ 8th grade special education teacher; the Mother and the Student.

Following review of the pleadings, the offered and admitted exhibits, and testimony and argument, the following Order is hereby entered:

STATEMENT OF THE CASE

On May 28, 2004, the Parent filed an appeal with the Office of Superintendent of Public Instruction (OSPI), requesting a hearing and seeking the award of compensatory education due to disciplinary suspensions in excess of ten school days during the 2003-2004 school year. The matter was assigned to ALJ Andrea Conklin and a prehearing conference was scheduled to be held June 9, 2004, with the due process hearing to follow on June 15, 2004. On June 4, 2004, the Parent requested reassignment of the matter to a different ALJ. On that same day the matter was reassigned to ALJ Shave. The matter was then scheduled for a prehearing conference to be held June 10, 2004, and the due process hearing to follow on June 29, 2004. The hearing took place as scheduled, along with an additional day of testimony, July 2, necessary to complete the testimony.

The 45 day due date was not extended, and the written decision is due July 12, 2004.

ISSUES

The issues for the hearing were set forth in a Prehearing Order issued June 10, 2004 as follows:

Whether the School District has denied the Student a free appropriate public education by disciplinary exclusions from the classroom for more than ten school days without provision of his special education services at an alternate educational location;

Whether the Student is in need of extended school year services over the Summer of 2004 to prevent excessive regression of learning requiring excessive time spent to recoup lost learning;

And, whether the Parent is entitled to the requested remedies, or other equitable remedies, as appropriate. The Parent requests compensatory education for those days in excess of a total of ten during which the Student was excluded from class for disciplinary purposes, and requests an ESY program.

The Parent previously filed one or more other hearing requests relating to this Student, and relating to at least one of the disciplinary actions (out-of-school suspension) imposed by the School District against this Student. This matter is limited to the issues stated above, specifically focusing on the appropriate remedy, if any, for the Student being excluded from his normal classroom for a period in excess of ten days during the school year, and to the issue of the Student's need for ESY. This decision does not address the appropriateness of the disciplinary action taken by the School District.

At the hearing, the Parent raised for the first time an allegation that the School District committed a procedural error by failing to provide the Parent with appropriate notice of a meeting which took place at the end of March, 2004. This was not identified as an issue for the hearing, therefore no conclusion will be issued relating to it.

FINDINGS OF FACT

1. During the 2003-2004 school year, the Student attended [redacted] as an eighth grade student. He also attended [redacted] in the sixth grade, then moved with his family to Louisiana for seventh grade. In the early primary grades he was determined to be eligible for special education as seriously behaviorally disabled (SBD) (which is now referred to as emotionally/behaviorally disabled, or EBD). In an Evaluation Report dated October 16, 2003, the School District quoted an earlier unidentified evaluation which described the Student as having difficulty "using self-control in less structured situations" delinquent behaviors and interpersonal relationship difficulties. Exhibit P 5, page 1. He has been diagnosed with attention deficit/hyperactivity disorder (AD/HD) and oppositional defiant disorder (ODD), as well as learning disabilities.

2. The Student was exited from special education services in fifth grade. The Parent requested an independent educational evaluation (IEE) in August of 2000. That IEE determined the Student had significant academic difficulties in reading and

math, and he was again found eligible for special education, this time under the Specific Learning Disability (SLD) category. He has been eligible for special education continuously since third grade as a Student with specific learning disorders. However, he continues to have significant behavioral issues.

3. The Student's schedule for the 2003-2004 school year included a first period elective course, which was Tech. Ed. at least during the Spring term. He then had four core academic subjects in special education teacher self-contained special education class (language arts, science, math and social studies) followed by physical education (P.E.).

4. In Fall of 2003, after the Student returned to the School District from Louisiana, the School District completed a reevaluation of the Student at the Mother's request. The Parent and the School District met to discuss the Evaluation Report on or about October 16, 2003, the date the reevaluation report was completed. Exhibit P 5. The reevaluation consisted of cognitive, social, emotional and academic testing. His intellectual skills were found to be in the average range; his non-verbal performance was much better than his verbal performance. Exhibit P 5, p. 2. The reevaluation included the Burke's Behavioral Rating Test (hereinafter Burke's), which was administered October 7, 2003. He was also observed in the classroom on October 9, 2003.

5. The Student's behaviors were rated on the Burke's as very significant in the following areas: poor academics, poor intellectuality, poor attention, and excessive resistance. His behaviors were rated as significant in the following areas: poor ego strength, poor impulse control, excessive aggressiveness and poor social conformity. He was noted to have difficulty paying attention in class, be easily distracted, lack continuity of effort and lack perseverance. Even in a small, quiet room, the Student's weakest skill was screening out distractions. He had significant difficulty in school-related behaviors such as completing homework, following academic

instructions, and staying in a calm student-like mode. He did well in one-to-one situations, but even in small groups (three students and above) his behavior was unpredictable. He was sometimes very disrespectful, and aggressive toward other students. At times his frequent verbal comments were disruptive to other students and to classroom instructions. However, at other times, he was able to work appropriately for 20-30 minutes. Exhibit P 5.

6. The Student demonstrated significant problems with tardiness throughout the 2003-2004 school year. He was chronically late to 1st period, and 5th period, which was the first period after lunch. His teachers, and the school counselor, worked with the Student almost throughout the school year in an effort to assist him to improve his attendance and behavior. He was reminded of class starting times, and given warnings a minute or two before classes were to start, when he was seen out in the hall in between classes. His tardiness was worse than any other student in

7. On October 16, 2003, the School District drafted a proposed Behavior Intervention Plan (BIP) for the Student. The purpose of the BIP was to reduce undesired behaviors and increase desirable, appropriate behaviors. Exhibit P 3. The targeted behavior was "Follow Staff's directions, exhibit appropriate behavior (non-disruptive) respectful [sic] toward staff and students." There was a progressive level of intervention including two verbal warnings; then a five minute time-out, during which the Student was to complete a BIP-specified form; next, referral to the Office of the Dean of Students; phone call home by teacher; and finally a detention assignment. The School District obtained a daily behavior monitoring sheet on which to chart the Student's behavior. Exhibit P 3, p. 2. That daily monitor sheet was to be completed daily by the teachers, and sent to the Mother. The Student was to receive positive reinforcement by earning the job of assisting designated teachers for each school week he went without a

negative behavior mark on his behavior form and was to receive candy awards for individual days without negative behavior noted by checks on his daily behavior monitoring sheet. The behavior plan was to be re-evaluated in one to two months.

8. When the School District seeks to schedule a meeting with the Parent related to the Student, the practice it follows is to notify the Mother in writing of three possible dates. The Parent then is to choose one of the suggested dates that works for her schedule. That was the system utilized by the School District to schedule a meeting to draft a new individualized educational program (IEP) for the Student for October 29, 2004. The Mother generally attends school meetings related to the Student.

9. The Mother was notified and agreed to attend an IEP meeting October 29, 2003, but did not appear at the appointed time. The meeting proceeded without the Parent, and the School District adopted a new IEP dated October 29, 2003. Exhibit P 1. It contains academic goals and behavioral goals. The draft Behavior Intervention Plan (BIP) dated October 16, 2003, was attached to the October 2003 IEP. Exhibit P 1 p. 7. The Student's behavior was to be monitored daily, and a sample daily monitor sheet was also attached to the IEP. Because the Parent did not attend the IEP meeting, no discussion of the draft BIP took place between the Parent and the School District staff prior to inclusion of the BIP in the October 2003 IEP.

10. The October 2003 IEP provides the following statement of present educational performance regarding the Student's behavior:

The Burke's Behavior Rating Scale which was completed by two of [the Student]'s present teachers showed very significant behaviors in the areas of poor attention, excessive resistance and poor academics, and significant behaviors in poor ego strength, poor impulse control, excessive aggressiveness, and poor social conformity. Teachers have observed that [the Student] has difficulty with paying attention and remaining on task, working quietly on assignments without disruption, and acting respectfully towards adults and/or staff members.

11. On October 29, 2003, the Mother was provided with a copy of the October 2003 IEP when she showed up at _____ hour late for the IEP meeting, which had already been concluded by the School District. The School District offered to reconvene the IEP meeting on a different day, at the option of the Mother. She chose to review the IEP before requesting a new meeting. She did not express any specific disagreement to the School District with the terms of the IEP or BIP after review of the document.

12. The Student did well, but not perfectly, during the Fall 2003 school term, which was also football season. He played on the football team. Remaining on the football team was an important goal of his. The Student's behavior worsened after football season ended.

13. The Student's behavior was still problematic, even during football season. On October 16, 2003, a meeting was scheduled to take place between the School District and the Parent to discuss the Student's behavior, and to draft a new behavior contract. However, despite notice to and agreement from the Parent, she did not attend the meeting. Exhibit P 14 p. 64.

14. During the 2003-2004 school year, the School District issued several short-term, out-of-school suspensions, which resulted in the Student being excluded from his class for a total of 19.5 school days.

15. On November 20, 2003, the School District issued a Notice of Short-Term Suspension to the Parent advising her the Student was being suspended out of school for a period of 3.5 days from November 21 through November 26, 2003. Exhibit P 14, p. 59. He was allowed to return to school December 1, 2003. The reason for the out-of-school suspension was violation of School District Policy 3300-P-1, Exceptional Misconduct. The specific misconduct was the Student pushed another student, pulled the other student and ripped the other student's coat. In addition, the

Student used abusive language directed toward another student and was defiant to a staff member. Exhibit P 14, p. 59.

16. On December 10, 2003, the School District issued a Notice of Short-Term Suspension to the Parent, advising her the Student was placed in out-of-school short-term suspension for a period of three days. Exhibit P 14, p. 50. He was not allowed to attend school from December 10 through December 12, and was allowed to return December 15, 2003. The reason stated was violation of School District Policy 3300-P-1, Exceptional Misconduct, and specifically, the Student used abusive language directed toward his classroom teacher. Exhibit P 14, p. 50.

17. On January 23, 2004, the School District issued a Notice of Short-Term Suspension to the Parent, advising her the Student was placed in out-of-school, short-term suspension for a period of one day. Exhibit P 14, p. 42. He was not allowed to attend class January 26, but allowed to return to school January 27, 2004. The reason stated was a violation of School District Policy No. 3300-P-1, Exceptional Misconduct, and specifically, he had committed his fifth offense for sagging pants on January 23, 2004. (This is a fashion of sagging the pants below the underwear line, and is forbidden by policy.)

18. On March 4, 2004, the School District issued a Notice of Short-Term Suspension to the Parent, advising her the Student had been placed in out-of-school, short-term suspension for a period of one day and was not allowed to attend school March 9, 2004. The reason stated was using an obscene gesture and failure to follow staff direction. Exhibit P 14, p. 37.

19. On April 27, 2004, the School District issued a Notice of Short-Term Suspension to the Parent, advising her the Student had been placed in out-of-school, short-term suspension for a period of three days and was not allowed to attend school from April 28 through April 30, 2004, but was allowed to return to school May 3, 2004.

Exhibit P 14, p. 28. The reason stated was violation of School District Policy No. 3300-P-1, Exceptional Misconduct, and specifically, on Tuesday, April 27, 2004, the Student was truant, violated the closed campus rule, was defiant in the office and was removed from in-school suspension (ISS) for disruptive behavior. Exhibit P 14, p. 28.

20. On May 26, 2004, the School District issued a Notice of Short-Term Suspension to the Parent advising her the Student was placed in out-of-school, short-term suspension for a period of four days, and was not allowed to attend school from May 27 through June 2, 2004. He was allowed to return to school June 3, 2004. The reason stated was violation of School District Policy No. 3300-P-1, Exceptional Misconduct, and specifically, on May 26, 2004, the Student committed multiple school violations and was removed from ISS for disrespect toward staff and using abusive language toward a staff member. Exhibit P 14, p. 15.

21. Each of the out-of-school suspensions imposed upon the Student by the School District was the same sort and degree of discipline which the School District would have imposed upon non-disabled students for similar behavior.

22. The total number of days of out-of-school suspensions for the Student during the 2003-2004 school year was 19.5. In addition to out-of-school suspensions, the School District utilized detentions, both during the lunch hour and after school, and time in ISS, for discipline purposes. The detentions did not result in a loss of education, since they were served either during the lunch hour or for one hour after school. Detentions serve to restrict a student's social contact with peers.

23. In-school-suspension (ISS) is served in the school, but in a separate classroom with a special education instructional aide (IA), not a certificated teacher. When a student has an ISS, the teachers prepare a packet of materials from their lesson plan, and that packet of materials is delivered to the ISS supervisor, the IA. There are generally four to seven students in ISS.

24. According to the Student, when he was sent to ISS, his classroom teacher sent along a work packet. When he had questions about the work, he was to ask the IA, who called the special education teacher for instructions for dealing with the inquiry. The procedure for ISS is that a Student whose behavior is in violation of school policy on day one is required to attend ISS for a certain number of days (generally one) to begin the following day.

25. School records show the Student was sent to ISS for three full days during the 2003-2004 school year. School records regarding ISS are generated by the classroom teacher, and those teachers do not always provide accurate information to the school office about students in ISS. Therefore, it is not possible to state with certainty how many days the Student was in ISS, but it was at least three full days.

26. The Student does not like the ISS room IA. He feels that IA tries to get him in trouble. The Student also does not like the IA assigned to special education classroom. The Student feels IA also tries to get the Student in trouble. As corroboration of this, the Student notes he gets in trouble each time there is a substitute teacher. However, the Student's suspensions do not generally correspond to times when there was a substitute teacher in class.

27. The other discipline tool utilized by the District is out-of-school suspension. Prior to or contemporaneous with an out-of-school suspension, a student's parents are notified in writing of the planned discipline. In cases involving special education students whose discipline will result in exclusion for the classroom for more than 10 days in any school year, the teachers prepare a packet of work for the number of days the student will be out of school, and send it home with the student. The teachers do not send home work for the first 10 days' worth of out-of-school suspensions.

28. In this Student's case, after the first 10 days of out-of-school suspension, the teachers prepared packets and gave the Student written information about contacting them for help with the packet of work. The written information included the teacher's name, telephone number, and the best time to reach the teacher.

29. The Student completed at least one assignment from his 1st period elective course teacher, and did well on that project. He maintained a grade of "B" in his Tech. Ed. class. However, he did not call his special education teacher for 2nd through 5th periods, and did not turn in the work. His grade suffered significantly as a result. The Student asserts he was told he could work on the assignments in class after his return.

30. For the 6th class period, the Student was given a physical activity sheet from the P.E. teacher. He was to record his physical activity for each day (such as type and duration of activity). He would then have obtained P.E. credit. The Student did not return the completed P.E. form and therefore did not get credit for the days he was out of school. The Student asserts he was told by the P.E. teacher that it did not matter that he did not complete the activity sheets. This testimony is found not to be credible, since the Student's grade and comments indicate the missing work was noted by the teacher and counted down in grading. He did not pass the P.E. class.

31. No in-home teaching or tutoring services were provided by the School District to the Student during the time he was in out-of-school suspension. School personnel, including the Student's special education teacher, believed the Student could have successfully completed the home work packets, if he had applied himself to the work. As evidence of this, they note the Student did complete the Tech. Ed. packet. The assignments were appropriate for the Student's academic achievement level and were consistent with his IEP goals.

32. The School District asserts it would not have been possible to provide instruction to the Student for the days he was in out-of-school suspension, because the

days were unpredictable and scattered. They note that by the time the School District could have found an individual to do tutoring, the Student would have long-since completed serving his three or four day suspension.

33. The School District drafted an updated, annotated BIP for discussion at the proposed IEP meeting to be held January 29, 2004. The meeting was not held until February 4, 2004, in order to accommodate the Parent's schedule. Annotations were made to the BIP at the February 4, 2004, meeting. Exhibit P 4.

34. The School District completed a Documentation of IEP Revision on February 4, 2004, noting the October 2003 IEP was being amended to revise the BIP to add specific behaviors and interventions, positive reinforcement and the daily monitoring sheet. Exhibit P 6.

35. On February 10, 2004, there was a report by a student that the Student had marijuana with him at school that day. The Student was called into the administrative offices and asked about the allegation. The Student offered to demonstrate that he had no contraband on him, and emptied his pockets. The Student was asked to display the contents of his backpack, and was asked to remove his shoes and socks, which he did. The Parent believes the Student was illegally and inappropriately searched. The incident upset both the Student and the Parent.

36. In January 2004, the School District determined it needed to do a Functional Behavioral Analysis (FBA) to get more information about why and when the Student was engaging in bad behaviors. The District did the FBA in late January 2004, and drafted changes to the BIP for a planned January 27, 2004, meeting. However, that meeting did not take place until February 24, 2004, due to the Parent's schedule. The Parent was present at that IEP meeting where the draft amendments to the BIP were discussed.

37. The discipline of the Student in the 2003-2004 school year was consistent with school policy, and was consistent with the disciplinary measures for other students.

38. According to _____ the Student's extreme tardiness was discussed at the February 4, 2004, IEP revision meeting.

39. The School District, through _____ special education supervisor, _____, and the Student's special education teacher, _____, drafted an undated Tardy Plan for the Student. Exhibit P 10. It appears the Tardy Plan may have been drafted after February 4, 2004, but on or before February 6, 2004, since no mention of tardiness appears on the daily monitoring sheet form for February 4, but it does appear beginning February 6 and thereafter. However, it is also possible that the daily monitoring form was altered to monitor the Student's tardiness, but the Tardy Plan, with its consequences, was not drafted or utilized until later. The School District witnesses were unable to provide an exact date for the drafting of the Tardy Plan.

40. The Student continued to have extremely poor timeliness in attending the 1st and 5th class periods in late Winter of the 2003-2004 school year. The tardies were to be marked on the Student's daily monitor sheet, and the special education teacher was to determine the level of consequence, if any, the Student received. The reward for no tardies in a given day was 15 extra minutes of free time on the computer in special education class on the following day. The first tardy was to result in an automatic lunch detention (one-half hour). The second tardy in the same day was to result in a one-hour after school detention. A third tardy in the same day was to result in ISS for the following school day, and the fourth tardy in the same day was to result in referral to _____, the Dean of students.

41. The Student did not receive any out-of-school suspensions for tardiness. The Parent did receive an ISS on or about April 26, to be served April 27, for

excessive tardiness and an obscene gesture to a teacher. However, the Student did not serve the one day of ISS at that time, because he received an out-of-school suspension for three days due to defiant behavior and truancy on April 27, 2004.

42. provided credible testimony that the topic of tardiness was first discussed February 4, 2004, but the Tardy Plan did not come into existence until March 31, 2004, the IEP meeting which the Parent did not attend. The parties first discussed the issue of tardiness on February 4, 2004, and decided that two teachers would complete the daily monitoring sheet and would pay special attention to tardiness. The teachers were to speak to the Student and remind him of the importance of being to class on time. However, no special or additional consequences were assigned to the Student for being tardy until the March 31, 2004 meeting, when the Tardy Plan first came into existence and use. It was clear that having teachers merely speaking to the Student, without assigning consequences, was not successful.

43. The Parent denies receipt of any written notice of the March 31, 2004 IEP meeting. Exhibit D 95. In general, the Parent has a good history of attending IEP meetings, with a few exceptions. For instance, she did not attend an October 2003 meeting to discuss a behavior contract, and she did not attend the October, 2003 IEP meeting, because she was mistaken about the time of the meeting, and appeared an hour late, after the meeting was concluded. The School District went ahead with the March 31, 2004, IEP meeting when the Parent did not appear at the scheduled time. The School District implemented the amended IEP (the Amendment was that the Tardy Plan was added). The Parent did not attend the March 31, 2004, IEP meeting, and did not participate in drafting the Tardy Plan. She did not provide the School District with comments after the March 31, 2004, IEP meeting and behavior revisions. The IEP revision would have been mailed to the Parent, even if she did not attend the meeting.

44. The Tardy Plan, which was the sole change made in the March 2004 IEP amendment, did not result in out-of-school discipline of the Student. It resulted in the Student being sent one time to ISS, as discussed above.

45. Regarding ESY, the Parent did not submit evidence that the Student experiences significant regression over the Summer vacation in excess of that experienced by other students, except for language contained within Exhibit P 7, at pages 2, 4 and 5, an Academic Evaluation Report dated August 28, 2001. That report notes the Student's test scores in August 2001 were lower than they had been earlier and posits the theory that the Student might have lost a significant amount of academic skills over the Summer, which is common, and is especially a problem for a student with specific learning disabilities, since their grasp of newly learned material may be shaky and more susceptible to loss without practice to consolidate learning. That report suggests the Student be evaluated for ESY services. There was no evidence the Student had been evaluated for ESY services by the School District or by Louisiana, where he attended school for the 2002-2003 school year.

46. No evidence was presented that the Student needs an exceptional amount of time in order to recoup whatever regression does occur over the Summer.

did not know what amount of regression occurred over the Summer of 2003, since he was not the Student's teacher in the 2002-2003 school year, and the records from Louisiana were apparently not sufficiently clear for to make that determination. did not note the Student regressed significantly, or more than other students, over shorter breaks such as Winter and Spring breaks. It is clear the Parent would like the Student to make more progress and get caught up in his grade equivalency levels.

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 United States Code (USC) Section 1401 *et seq.* (Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children (EHA)), 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 of the 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.

103 S. Ct. at 3051.

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

According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also

requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

103 S. Ct. at 3041, 3042.

4. An inquiry must 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).

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, *Roland M.*, 910 F.2d at 994; *Hall*, 774 F.2d at 635, clearly result in the denial of a FAPE.

6. During the course of the hearing, the Parent alleged she had not been provided notice of the March 31, 2004, meeting at which the Tardy Plan was added to the IEP. Ordinarily, such a fundamental procedural error, the failure to provide written notice to a parent of a meeting to discuss an amendment to an IEP, would be a *per se* denial of FAPE. However, the inquiry here is limited by the statement of issues, and is focused on an alleged denial of FAPE due to discipline and failure to provide ESY services. These are the issues which the School District was notified about in writing, in the form of various prehearing orders, as the issues which would be addressed and decided.

7. It is not appropriate to address this new issue in this Order, because the concept of fundamental fairness and due process in the hearing runs to both the School District and the Parent. It is not fair to require a party to defend against an issue that was not identified. The Parent did not place the ALJ or the School District upon notice prior to the hearing that she would be alleging a serious procedural violation. Although the new issue was identified during the hearing, it was not added as an issue for determination. It is noted that in light of the fact that violation of the Tardy Plan did not result in any of the Student's out-of-school discipline actions, even if the merits of the issue were reached in this Order, it would unlikely have resulted in a denial of a FAPE. The subject will not be addressed further in this Order.

8. Disciplinary exclusions of special education students are addressed at WAC 392-172-370 through -385. The purpose of those sections of the WAC is to ensure that special education students are not being improperly excluded from school for disciplinary reasons. Each school district or other public agency serving special education students is required to take steps to ensure that each employee, contractor, and other agent of the district who is responsible for education or care of a special education student is knowledgeable about the disciplinary provisions for special education students. WAC 392-172-370.

9. For purposes of removal of a special education student from the student's current educational placement under WAC 392-172-370 through -38410, a change of the student's IEP placement occurs if (1) the removal is for more than ten consecutive school days or (2) the student is subjected to a series of removals that constitute a pattern because they cumulate to more than ten school days in a school year, and because of factors such as the length of each removal, the total amount of the time the student is removed, and the proximity of the removals to one another. WAC 392-172-373.

10. However, to the extent removal would be applied to students without disabilities, school personnel may order the removal of a special education student from the student's current placement for not more than ten consecutive school days for any violation of school rules, and additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement under WAC 392-172-373(2).

11. In the present case, the Student was removed from school for a period in excess of ten days; however, he was not removed for ten or more consecutive days. The removals were for a variety of unacceptable behaviors, and not for any one particular type of behavior. The removals were spread out over the school year, beginning after football season and continuing with increasing frequency as the school year drew to a close. The types of violations committed by the Student would have resulted in removal of a student without disabilities from the class. It is concluded that the disciplinary removals September 2003 through June 2004 did not constitute a pattern and did not rise to the level of a change of placement.

12. A public agency, including a school district, need not provide services during periods of removal under WAC 392-172-37500 (removals for ten days or less) to a special education student who has been removed from his or her current placement for ten school days or fewer in that school year, if services are not provided to a student without disabilities who has been similarly removed. However, in the case of a special education student who has been removed from his current placement for more than ten school days (cumulative) in that school year, for the remainder of the removals the school district is required to provide services to the extent necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP. WAC 392-172-37505.

13. Thus the School District acted in compliance with the law when it did not provide education to the Student for the first ten days of out-of-school suspensions, as it did not provide such services to non-disabled peers. After ten days, however, the School District was required to provide services to the extent necessary to enable the Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the Student's IEP.

14. When there is no change of placement, as in the present case, school personnel shall, in consultation with the Student's special education teacher, determine the extent to which services are necessary to enable the Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the Student's IEP. WAC 392-172-37505.

15. The Student was removed from class for a period of 19.5 days for out-of-school suspensions, which was 9.5 days in excess of 10 days. Thus, it is necessary to determine whether the School District provided services to the extent necessary to enable the Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the Student's IEP for the 9.5 days in excess of 10 days. The WAC calls for that evaluation to be done by school personnel, not by the IEP Team, and to be done in consultation with the student's special education teacher. It appears that was done in this case, but it still remains to be determined whether the services which were provided were those which were necessary to enable the Student to appropriately progress.

16. The Student did not appropriately progress in the general curriculum (P.E.) and did not advance toward achieving the goals set out in his IEP during the times he was in out-of-school suspension. He completed some of the assigned work for Tech Ed. class, and his grade reflects that completed work. He did not complete the other work assigned, and his grades suffered as a result. However, the test of appropriateness is not whether

the Student actually progressed, but whether the services were provided appropriately enabling him to progress. Actual progress would be a type of evidence of appropriate services. Lack of progress is suggestive of inappropriate services, but not determinative.

17. To determine appropriateness in this case, the Student's ability to self-motivate to complete the assigned work while on out-of-school suspension must be considered, not only his academic ability to complete the work. A review of the October 2003 IEP indicates within the present levels of performance section that even where the Student was academically capable of completing work, he had significant emotional and behavioral difficulties that would make it difficult for him to complete several days' worth of assignments at home. His behavior was rated as very significant in the areas of poor attention, excessive resistance and poor academics. He had significantly poor ego strength and poor impulse control. Given that, it seems unlikely that he could be expected to apply himself to make up three or four days of assignments from classes he missed. He had a sufficiently difficult time keeping on task even when in class with teachers monitoring him all day long. To expect him to be self-motivated on home assignments was not appropriate. The fact that the School District would have found it difficult to find a tutor for the occasional hours the Student needed to receive appropriate services is not determinative of the appropriateness of the services provided. If a service is impossible to deliver, it might well be inappropriate to provide. There was no evidence that the occasional tutoring would have been impossible to provide, however. It was not attempted. The services provided to the Student during the 9.5 days he was out of school were inappropriate, and resulted in a denial of the provision of a free appropriate public education for that amount of time.

18. In the present case, the time the Student spent in ISS did not constitute a change of placement or a removal from the educational placement without adequate support to enable the Student to appropriately advance toward achieving the goals in his

IEP. The ISS room was supervised by a special education IA working under the direction of certificated special education teachers. The IA consulted the Student's special education teacher at each occasion the Student asked for assistance in ISS.

19. Regarding the Mother's assertion that the ISS IA was inappropriate, a special education student has the right to receive specially designed instruction from appropriately qualified or supervised personnel. WAC 392-172-045. In meeting this requirement, school districts retain control over hiring decisions. There is no authority in the IDEA, regulations or case law, to accord a parent the right to make personnel choices for a district. See *Los Altos Elem. Sch. Dist.*, 38 IDELR 111 (CA SEA, 2002). Although the Student does not like the IA, there is no right for a special education student or family to choose School District personnel. The School District's choice of IA was not a denial of FAPE.

20. It must next be determined what remedy, if any, is appropriate to provide educational compensation for the 9.5 days of denial of FAPE.

21. If a violation of the IDEA is found either procedurally or substantively, the court (the ALJ in this matter) shall grant such relief as [it] deems appropriate. 20 USC. 33 §1415(i)(2)(B)(iii) and *Hacienda La Puente School v. Honig*, 976 F.2d 487 (9th Cir. (CA) 1992). Compensatory education and reimbursement for parentally supplied educational services are remedies provided to a parent and student when a district has failed to offer and/or provide a student with a FAPE. See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cr. 1990), cert. denied, 111 S.Ct. 1317 (1991), and *Burlington Sch. Comm. v. Massachusetts Dept. Of Ed.*, 471 U.S. 359, 369 (1985).

22. The appropriate award of compensatory education is not automatically a day-for-day calculation for educational time spent in an inappropriate placement. *Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d at 1489 (9th Cir. 1994). In the present case, it is appropriate to require the School District to provide compensatory education at

the rate of two hours of tutoring per day for each of the 9.5 days the Student was denied a FAPE due to disciplinary action, a total of 19 hours of tutoring, to be delivered during the Summer of 2004. This is not an hour-for-hour award. Much of the time spent in school is spent starting class, getting settled in, dealing with other students, and preparing to transition to the next class or activity. The two hours of tutoring per class day lost will provide the Student with an appropriate amount of concentrated academic time.

23. The Parent next alleges the Student was inappropriately denied ESY. General education students do not attend school during the Summer. Special education students are not entitled to a longer school year than are general education students in order to make extra progress. Instead, ESY services should be provided when determined appropriate by the IEP team. WAC 392-172-163. In the 9th Circuit, ESY is defined as "educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months." *Hoelt v. Tuscon Unified School Dist.*, 967 F.2d 1298, 1301 (9th Cir. 1992), *citing Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022, 1027-28 (10th Cir. 1990). All students are expected to regress somewhat over lengthy breaks, such as Summer break. It is necessary to review the amount of expected regression, and whether a student will be able to recoup lost skills within a reasonable amount of time. The evidence did not support such a determination in this case.

24. All arguments made by the parties have been considered. 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. Specifically, the issue of searching the Student's backpack, which the Student offered, did not result in discipline of the Student or a denial of a FAPE, although it clearly upset the Student and Parent. It is not a special education issue.

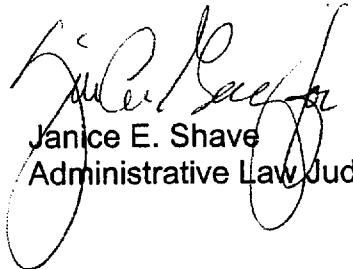
ORDER

1. The Student was denied a FAPE when the School District excluded him from school for 9.5 days in excess of the permissible ten day maximum, without providing appropriate educational services to enable the Student to progress in the general education curriculum and make progress toward his IEP goals. The School District shall provide 19 hours of one-on-one tutoring as compensatory education. This is to be provided during the Summer of 2004, so as not to further delay delivery of the educational services, and not to interfere with the Student's educational time during the 2004-2005 school year.

2. The Student was not denied a FAPE during the time he spent in ISS during the 2003-2004 school year.

3. The Student was not denied a FAPE by the School District's failure to find him eligible for, or provide, ESY services for Summer 2004.

Entered in Seattle, Washington, on the date stamped above.


Janice E. Shave
Administrative Law Judge

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