

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

RECEIVED

FEB 08 2005

IN THE MATTER OF:

OMAK SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2004-SE-0161X

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

An expedited due process hearing was held before Administrative Law Judge Johnette Sullivan on Monday, January 24, 2005, in Omak, Washington. The Parents of the Student appeared and represented themselves. The Omak School District (District) was represented by Gregory L. Stevens, Attorney. A record of the proceedings was made by Wenatchee Deposition Reporters.

STATEMENT OF THE CASE

On December 17, 2004, the Office of Superintendent of Public Instruction received a request for due process hearing by the Parents. The request was forwarded to the Office of Administrative Hearings, which on December 20, 2004 issued a Notice of Hearing and a Notice of Prehearing Conference.

The Prehearing Conference was held by telephone as scheduled on Monday, January 3, 2005. The Parents appeared and represented themselves, and the District was represented by counsel as well as by the Director of Special Services, the Superintendent, and the Principal and Assistant Principal of the high school. The issues identified for hearing were:

1. Whether the Student's emergency expulsion on December 3, 2004, for violation of school policies regarding marijuana on school grounds was a manifestation of the Student's disability?
2. Whether the Student's November 22, 2004 Individualized Education Program (IEP) is appropriate?
3. Whether the Student's November 22, 2004 IEP was properly implemented?
And,

4. Whether the Administrative Law Judge has authority to decide whether the violation occurred? The Parents deny that the Student smoked marijuana and have appealed the expulsion. A disciplinary hearing is to be scheduled to hear that appeal. The Parents seek to disprove the allegations at this due process hearing, as well as at the disciplinary hearing. The District contends that the due process hearing is solely for the review of whether the actions were a manifestation of the Student's disability, and that the Administrative Law Judge has no authority to decide whether the violation actually occurred.

The due process hearing was originally scheduled for Thursday, January 13, 2005, but at the prehearing conference the parties agreed to continue the hearing to Monday, January 24, 2005. The District's request to continue the hearing and extend the deadline for decision beyond the 45-day limit was denied. WAC 392-172-38415. The 45 day due-date is counted from filing on December 17, 2004, and is January 31, 2005.

EVIDENCE CONSIDERED

The evidence considered consisted of witness testimony and written exhibits. Witness testimony was received from the Student's father, and from six District employees: the High School Principal, Assistant Principal, Psychologist, Counselor, Special Education teacher and Salish teacher. The written exhibits received into evidence were Parents' Exhibits P1, P2, P3, P5 and P6 and District's Exhibits D1, D2 and D4. The jurisdictional file documents admitted into evidence at hearing were Exhibits C1, C2, C3 and C4. Exhibit C5 was added post-hearing (see below).

The Student's mother and the District's attorney offered both oral opening and closing statements at hearing, which were considered as persuasive argument but which were not considered as evidence to support the Findings below.

Post-Hearing Procedure

On January 25, 2005, the Student's mother filed a motion seeking permission to re-open the evidentiary record. An Order denying the motion was mailed to the parties the same day, holding that the evidence proffered was more properly suited for the disciplinary hearing and appeal of the hearing officer's decision regarding the factual basis for the expulsion. The Order with attached motion was marked Exhibit C5.

The Administrative Law Judge having sworn the witnesses, heard testimony, and considered the admitted exhibits of the parties, hereby enters the following:

FINDINGS OF FACT

The Student

1. The Student is 15 years of age, and resides with his parents in the District. The Student is a tenth grade student at the District's high school. The Student participates in the general education classroom and is above grade level in the areas of reading and writing. The student receives pull-out special education services because there is a severe discrepancy between his intellectual ability and academic achievement in the area of math. About ten years ago, his pediatrician or other medical provider diagnosed Attention Deficit Hyperactivity Disorder (ADHD).

2. The Student had been prescribed various medications, some of which worked for a time and then became ineffective, and others which did not work. He stopped use of medications a year or more ago, in part due to a concern about stunted growth.

3. The Student has grown and increased his height by about one foot in the last year. He has many friends. His parents love him and care about him very much. They strive to lead by example, and not simply by words. His parents do not use alcohol or drugs. His father has been alcohol and drug free for about twenty years. He has taught his son about the consequences of alcohol and drug use, using his own experiences as a Vietnam veteran and the experiences of his native Coville people.

4. A District employee holds the title of Prevention Specialist. The Student's school records include a report to the Prevention Specialist, that the Student satisfactorily completed a four (4) hour Youth Alcohol and other Drug Class on November 19, 2004.

Development and adoption of current IEP

5. The Student's mother and school staff met several times in fall 2004 leading up to a final IEP meeting on November 22, 2004. The IEP team consisted of the Student's mother, special education teacher, general education teacher, and Assistant Vice Principal.

6. To develop the IEP, the team considered the October 22, 2002 current evaluations, teacher and parent input, and classroom and school records. They reached agreement. The IEP describes the Student's behavior in the classroom and in the resource room as positive a majority of the time. Misbehavior at school was rare, often in the form of covertly throwing objects across the classroom. Nevertheless, in both 2003-04 and 2004-05, his included a Behavior Intervention Plan (BIP).

7. The Student had developed a very good relationship with the Assistant Vice Principal, who was selected as the person to whom the Student would be referred for any discipline. The Assistant Vice Principal has observed the Student's disposition and mood were generally "up". The Student had fun with his friends, and had the ability to form long-term friendships. The Assistant Vice Principal had no concerns the Student suffered from any serious emotional or behavioral disorder based on his own observations, and anecdotal reports from teachers and parents.

8. The BIP described the following behaviors of concern:

Impulsive, unsafe behaviors during unstructured times (i.e., passing time, science labs, lunch, etc.).
Defiance towards teachers/staff when trying to redirect him, and lack of respect and civility towards others.

The goal of the BIP was for the Student to reduce the number of classroom disruptions that result in discipline referrals. The BIP describes for the Student, the teachers, and the parents the responsibility of each to implement the BIP. None of the plan provisions focused on drug abuse, because there was no concern in that regard.

9. The parents had become concerned during fall 2004 regarding the Student's pacing during the night, which resulted in lack of sleep and numerous reports of tardiness at school. They also observed unpredictable outbursts. The parents observed behavior which shows the Student wants so much to be like everyone else that he goes overboard. They know their son is real conscientious about his image in school and does not want to be seen as different. The parents are not mental health experts themselves, but are educated persons who have some personal experience with counselors. They wonder if their son might be suffering from something else besides ADHD. They wonder about change in the Student's mood and demeanor. They notice the Student can be very nice, or can be the opposite, depending on the person with whom he's interacting.

10. The mother shared the parents concerns with the IEP team. The District responded by offering to refer the Student for counseling. The District itself doesn't provide medical services, or mental health counseling.

Post-IEP events

11. The parents were reluctant to accept a referral for counseling through Indian Health Services, because of the lack of anonymity in a low population area where everyone knows everyone else. They were concerned about confidentiality, and were very sensitive to their son's desire to be seen as normal, like every other teen.

12. The parents made an appointment with the Student's pediatrician, who saw the Student on November 23, 2004. She recommended a new prescription drug, which she anticipated would be available to the Student immediately. Unfortunately, Indian Health Services declined coverage, but offered to reconsider if an alternative approved drug proved ineffective in 90 days. The pediatrician learned this development on or about December 3, 2004, when she wrote a new prescription for the drug approved for coverage by Indian Health Services. She did not expect, based on past observation and treatment of the Student, that the new drug would be effective.

13. The Student has begun to take the alternative prescription, but when his doctor saw him again on January 12, 2005, he had not significantly improved. She has strongly recommended that Indian Health Services reconsider coverage of her preferred drug of choice.

14. Following the IEP, the District has no unusual concerns about the Student and it appeared Student and teachers and staff were implementing the IEP without any difficulty.

December 3, 2004

15. On December 3, 2004, the Assistant Vice Principal learned that a teacher suspected three students of smoking marijuana. The Student was one of the three.

16. On December 3, 2004, the Assistant Vice Principal interviewed the Student, at least two other students, and school staff. The Student denied the allegation of marijuana use, when questioned by the Assistant Vice Principal. The Assistant Vice Principal could not smell marijuana on the Student's breath or person, but nevertheless believed statements made by other students and school staff that the Student had brought the marijuana and packed the pipe, and had shared in the smoking of the pipe.

17. The Assistant Vice Principal decided the Student had smoked marijuana on school grounds, behavior which violates the standards in the school handbook. For that reason alone, he decided expulsion was mandated by the disciplinary rules. The Assistant Vice Principal made a decision under the school's regular discipline policy, to enforce an emergency 90 day expulsion of the Student.

18. Ordinarily, the expulsion would have been immediate. However, the Assistant Vice Principal had participated in the development and implementation of the Student's IEP and BIP. Since he was knowledgeable about the Student's unique needs, he decided to allow the Student to return to class without informing him of the expulsion. He informed the Student's parents, and arranged for a parent to come to the school at

the mid-day break. He planned to inform the Student of the expulsion with the aid of a parent. He hoped to avoid embarrassing the Student, to avoid the Student being singled out, and to avoid confrontation.

19. The Student's father picked him up from school mid-day. The District then prepared a Written Statement of Emergency Expulsion, which was personally delivered to the Student's mother when she met with the Assistant Vice Principal on the afternoon of December 3, 2004. The Infraction was identified as:

[The Student] is being suspended out-of-school for smoking marijuana behind the High School. He also threatened several staff members as well as throwing a rock and hitting the Omak High School Principal.

This letter is to notify you that [the Student] is suspended from school for 90 days name. Drug use or possession is considered exceptional misconduct as stated in the Omak High student handbook.

20. The Written Statement of Emergency Expulsion notified of the right to appeal the expulsion by requesting a hearing with the school district's hearing officer, and explained the appeal process. Because the student is a special education student with an IEP, the Written Statement of Emergency Expulsion also stated an IEP team would be meeting to review the IEP.

21. The mother asked the Assistant Vice Principal if her son smelled of marijuana, and the Assistant Vice Principal told her he had smelled the Student's breath but could not detect the odor of marijuana. The parent misunderstood, and thought that meant the District had no proof of marijuana use by her son. The primary focus of the discussion thereafter was on the behavior that occurred later that day. The parents mistakenly believed the Student was expelled on account of misbehavior that occurred at or near the time the Student exited the school and left with his father, because they thought the District has no proof of drug use.

Functional Behavioral Assessment

22. On December 10, 2004, there was a meeting held to conduct a Functional Behavioral Assessment. The purpose was to determine the relationship among the precipitating conditions, the behavior, its consequences, and the function of the behavior. The behavior at issue was smoking marijuana in school. No precipitating conditions were noted. The consequences was, typically, removal from class. In this case, the consequence was emergency expulsion. The function of the behavior was felt to be defiance of the rules. Several factors were excluded as a function of the behavior (escape/avoidance, expression of anger, vengeance, intimidation, relief of fear/anxiety,

gaining attention, frustration, seeking power/control, and sensory stimulation). The District considered the student had learning disability in math, had excessive tardies/absences, had disruptive/aggressive behavior, and was defiant of authority.

IEP Meeting for Manifestation Determination

23. On December 16, 2004, the IEP team met to consider whether the student's disability caused the misbehavior. The meeting was attending by the Student, his Parents, the school Psychologist, Counselor, Assistant Vice Principal, Superintendent, and general and special education teachers. The Parents were surprised when the behavior described considered only the allegation of smoking marijuana on campus. The mother thought that allegation had been dropped, and both parents didn't realize the Student's behavior mid-day was post-expulsion.

24. The Student impressed the District employees with his clear statements to the effect that he understood the school rules, and that he understood that smoking marijuana was wrong and against school rules.

25. The IEP team reviewed a "Manifestation Determination Checklist", on which there was agreement on most points. The District staff unanimously held the opinion that the behavioral interventions were being provided consistent with the IEP and placement, and that the Student's disability did not impair his ability to understand the impact and consequences of smoking marijuana on campus. They also were of the opinion that the Student's disability did not impair his ability to control his behavior, as it regarded the decision to smoke marijuana at school.

26. The parents did not agree that the behavioral interventions were provided mid-day on December 3, consistent with the IEP and placement, particularly regarding the manner in which other staff and the Principal related to the Student at or near the time his father met him at school. They strongly felt the Student's disability impaired his ability to understand the impact and consequences of his behavior, or to control his behavior, regarding the outburst and confrontation mid-day on December 3, 2004. They did not believe that their son had smoked any marijuana, and did not believe the school had proof that their son smoked marijuana. Accordingly, when they answered the Checklist questions about impairment and ability to understand and control, more probably than not they did not reply with the issue of marijuana in mind. They responded with the other behavioral issues in mind.

27. The outcome of the December 16, 2004 manifestation determination was that the majority of the team, consisting of District employees, decided the act of smoking marijuana was not a manifestation of the Student's disability. Instead, they felt the

behavior was defiant social misconduct. They were of the opinion the Student was fully capable of understanding and controlling this type of behavior on campus.

28. The parents were provided a written Notice of Action, following the meeting on December 16, 2004. The District refused to change the IEP, as it felt the drug use was not a part of the disability. The Parents argued there was no proof of drug use in school, which allegations they were challenging through the disciplinary hearing process.

29. The parents have repeatedly received a full explanation of their procedural safeguards at various stages of participating in IEP meetings, including the November 22 and December 16, 2004 meetings at issue herein.

30. Without acknowledging the Student smoked marijuana, the Student's father thinks it is important to consider how much his son wants to appear normal, be treated as other teens, and the lengths to which his son will go to fit in with his peers. The Student's parents believe it is important to consider the student's sensitivity to peer pressure, to his strong need to avoid being singled out. Those factors, along with his impulsivity, should be taken into consideration to decide whether his behavior on December 3, 2004 was caused by his disability or whether his ability to control his actions was impaired on account of his disability. The Student has not been diagnosed by a medical doctor or other mental health provider, but his parents nevertheless wonder if perhaps he shows symptoms of oppositional defiant disorder, or schizophrenia, or some other mental disorder.

31. The Student, Parents and District are rightly concerned about the events which occurred at or near the time the Student exited the school and left in the care of his father. However, the events would not have resulted in an emergency 90-day expulsion and in fact occurred after the expulsion decision was made by the Assistant Vice Principle. Accordingly, post-expulsion behavior is not considered regarding the manifestation determination at issue in this hearing. This is not to suggest these concerns are misplaced or unimportant. To the contrary, these concerns are valid and will probably be addressed at future IEP team meetings, and perhaps even be the basis of addition or modification to the Student's BIP.

32. The parents also have some concerns about the actions of school staff, including the Principal, on December 3, 2004, as well as on other unspecified dates earlier in the academic year. They believe some staff have developed a habit of watching or following their son, or that staff not familiar with the IEP and BIP have interacted with their son, in a manner which triggers or invites reaction and results in misbehavior by the Student. Their concerns regarding whether the IEP and BIP were implemented on December 3, 2004 should be the focus of an IEP team meeting, or could

even be the focus of a separate due process hearing request. However, those valid concerns are not relevant to the manifestation determination at issue in this hearing.

Remedy and Proposed Solution

33. On December 17, 2004, the Parents filed a request for due process hearing. In the section for proposed Solution, they wrote:

[The Student] needs an appropriate diagnoses, and the school needs to provide appropriate services to ensure the goals and objectives on the IEP are met. Proof of "drug use" was never provided. The two other students were admitted to "using" are already back in school. Numerous students have said most teachers "target [the Student]" . . . due to his ADHD and behaviors of "excessive talking", not thinking for acting, hypersensitivity to touch and noise, etc. He is a high needs child. He looks perfectly normal, but exhibits behaviors similar to a mild form of autism or bipolar. I would like to see the allegations of smoking marijuana on campus dropped! I would like to have the school work with us to exploit his strengths, which are rarely mentioned in his 8 inch thick file.

CONCLUSIONS OF LAW

IDEA Framework

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 Disability Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 *et seq.*, and Chapter 392-172 WAC.

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and conditions 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 Student 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. 103 S. Ct. at 3051.

A "free appropriate public education" (FAPE) 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 educational instruction specifically designed to meet the unique needs of the handicapped Student, supported by such services as are necessary to permit the Student '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 Student's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the Student to benefit from the instruction, and the other items of the definitional checklist are satisfied, the Student is receiving a 'free appropriate public education' as defined by the Act.

Id. at 103 S. Ct. at 3041, 3042.

Disciplinary Exclusion

3. The IDEA identifies specific procedural requirements for discipline of a Student receiving special education services. School District personnel have authority to remove a Student from his placement for up to ten consecutive school days for any reasons applicable to a Student in the general education population. 34 CFR §300.520, WAC 392-172-37500. Within those ten school days, District personnel are responsible for convening a meeting of the IEP team to determine whether the behavior for which the Student is being disciplined is a manifestation of the Student's disability. 34 CFR §300.523, WAC 392-172-38300.

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

- (a) In relationship to the behavior subject to disciplinary action, the Student's individualized education program and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the Student's individualized education program and placement;
- (b) The Student's disability did not impair the ability of the Student to understand the impact and consequences of the behavior subject to disciplinary action; and
- (c) The Student's disability did not impair the ability of the Student to control the behavior subject to disciplinary action.

If the IEP and other qualified personnel determine that any of these standards were not met, the behavior must be considered a manifestation of the Student's disability. 34 CFR §300.523, WAC 392-172-38305.

5. After the initial ten days has passed, if the Student was removed for weapons, drugs or dangerous behavior, the District is responsible for convening an IEP meeting to develop a plan for conducting a Functional Behavioral Assessment (BFA), and developing a Behavioral Intervention Plan (BIP). If these steps have taken place before occurrence of the behavior involved in the discipline, the IEP team shall review the BIP and its implementation, and modify it and the implementation as necessary, to address the behavior. 34 CFR §300.520(b), WAC 392-172-377.

6. If the IEP team determines that the behavior was not a manifestation of the disability, a Student may be removed from his placement to the same extent as a general education Student under similar circumstances. District personnel shall ensure that the special education and disciplinary records of the Student with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action. 34 CFR §300.524, WAC 392-172-38310.

7. If a Student's behavior was not a manifestation of the Student's disability, the District has a continuing obligation to provide FAPE to the Student during the expulsion. This obligation consists of providing services to the extent necessary to enable a Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in a Student's IEP. 34 CFR §300.121(d), WAC 392-172-38310.

8. If the Student's behavior was a manifestation of the Student's disability, then a change of placement may only occur to an interim alternative educational setting (IAES), if the Student committed a drug or weapon violation. 34 CFR §300.520(a)(2), WAC 392-172-3750. The District may not otherwise change the Student's placement for disciplinary purposes, without requesting a due process hearing. WAC 392-172-379. A District must also immediately review the Student's IEP for deficiencies in light of the behavior, and address any that exist.

9. A hearing officer may place a Student in an IAES, for no more than 45 days, if pursuant to a hearing, the hearing officer does the following: (1) determines that the District has shown that maintaining the current placement of the Student is substantially likely to result in injury to the Student or others; (2) considers the appropriateness of the current placement (3) considers whether the District has made reasonable efforts to minimize the risk of harm in the current placement; and (4) determines that the IAES will allow the Student to make progress on the IEP goals and objectives. 34 CFR §300.521, WAC 392-172-379.

Did He Do It?

10. In the context of this IDEA hearing under chapter 392-172 WAC, at issue is whether there is authority or jurisdiction to determine whether the misbehavior actually occurred. There is no Washington case or Ninth Circuit case found that is precedential. There is no published U.S. federal district court case which provides guidance. No federal statute or rule, or comparable state special education rule, addresses this issue.

11. The Office for Civil Rights, Western Division, issued an opinion letter on March 5, 1999, regarding the *Tustin California Unified School District*, 31 IDELR 139, 31 LRP 5848. OCR relied upon the findings of the Orange County superior court to the effect that the student did smoke marijuana. The opinion does not address the action that should have been taken had the court not made a ruling.

12. Only one case has been found in which the impartial hearing officer heard the evidence regarding the contested allegation, and made findings that the student had, indeed, participated in the distribution of prescribed medication. *Mount Horeb Area School Dist.*, 36 IDELR 227, 102 LRP 9491, involving a decision out of Wisconsin in April 2002. However, the district found the behavior was a manifestation of the student's disability and did not suspend or expel the student. The district ordered a 45-day interim alternative educational setting (IAES) for the student, from which the parents appealed. It was within the context of an IAES challenge under IDEA that the hearing officer considered the contested allegation. Thus, that case is not applicable to our analysis and provides no guidance in this case.

13. On the other hand, there are state rules which do specifically address the authority of local school boards and school districts to mete out punishment pursuant to established rules and disciplinary procedures applicable to all students. State law requires the school boards to adopt rules and procedures for discipline, including for due process appeals to challenge suspensions and expulsions. RCW 28A.305.160, RCW 28A.600.010 and 020, and RCW 28A.600.460.

14. The Parents of this Student were informed of the local rules adopted by the local school board, and did request a disciplinary hearing. They have appeal rights regarding any decision by the hearing officer, to the school board and even to superior court. The District's argument that discipline is inherently a local issue involving state law has merit. Generally, discipline is a state and local issue, not a federal issue.

15. It is concluded that in the context of this IDEA hearing under chapter 392-172 WAC, that there is no authority or jurisdiction to determine whether the misbehavior actually occurred.

16. The parent's request that the allegation of marijuana use "be dropped" or expunged or removed from his record is not the type of remedy that may be ordered in this forum. The proper forum in which to make that request, and to challenge the factual basis of the allegation regarding smoking marijuana at school, is the state disciplinary hearing.

17. For the analysis required by federal and state law when a special education student is expelled for 90 days, the judge need not accept the allegations as true. The judge in this case need only determine whether the alleged marijuana use was caused by the student's disability.

Analysis

18. The primary question to be analyzed in this case is whether the District complied with the IDEA discipline procedures in connection with the expulsion of the Student from school for 90 days.

19. All procedural steps were followed by the District. All required written notices and statements advising of procedural rights were complete and timely provided to the Parents. There were no procedural errors.

20. The Parents' argument that the Student's behavior was caused in part by his disability was addressed, and found lacking, by the Ninth Circuit Court of Appeals, in *Doe v. Maher*, 793 F.2d 1470, 1480 (9th Cir 1986), *aff'd sub nom. Honig v. Doe*, 484

U.S. 305, 98 L.Ed. 2d 686, 108 S. Ct. 592 (1988). In a footnote, the Court discusses the definition of "handicap-related misconduct," and says in pertinent part:

Although this definition may, depending on the circumstances, include the conduct of handicapped children who possess the raw capacity to conform their behavior to prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain the attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.

21. The courts have specifically rejected the argument that alleged smoking of marijuana at school is caused by the Student's disability, when the act is undertaken by a disabled student in order to fit in or to win the approval of his peers, or to avoid being considered different.

22. In conducting a manifestation determination, if any of the relevant factors of WAC 392-172-38305 are not met, then the District must determine that the Student's actions were a manifestation of his disability. The first factor is whether the Student's IEP was appropriate. WAC 392-172-38305(2)(a). In the context of this case, absent other diagnoses and without the benefit of the results of a mental health evaluation that is scheduled to take place in February 2005, the IEP is determined appropriate.

23. The next factor is whether the Student's disabilities impaired the Student's ability to understand the impact and consequences of the alleged decision to smoke marijuana at school. WAC 392-172-38305(2)(b). The Student's Parents have taught him right from wrong, particularly by example regarding drug use. The Student had completed a Youth Alcohol and other Drug Class just weeks before the alleged incident. The Student clearly expressed his understanding of the rules, and that smoking marijuana was against the rules and was wrong. Accordingly, the Student's ability to understand the impact and consequences of the alleged smoking of marijuana was not impaired by his disabilities.

24. The final factor to consider is whether the Student's disabilities impaired the ability of the Student to control his behavior as it related to the alleged smoking of marijuana. WAC 392-172-38305(2)(c). This factor was correctly answered in the

negative, as the Student is able to control his behavior as it regards consumption of marijuana despite his learning disability and ADHD.

25. The District was aware a referral for counseling was being made, and was aware of the Parents' concerns regarding unusual night time pacing and lack of sleep. It is unknown if those factors are symptoms of a disability. However, even without a specific diagnosis, there is no evidence to support a conclusion that alleged smoking of marijuana on school grounds is a manifestation of those factors.

26. The Parents' relief began with a request that the Student "needs an appropriate diagnosis". The issue of reevaluation is not part of the issues for this hearing. However, the District may determine that "conditions warrant" a reevaluation of the Student pursuant to WAC 392-172-182, based on the parent and pediatrician's reports of recent developments and/or any future reports received following any psychological diagnosis.

27. The issue of whether the District has met its continuing obligation to provide FAPE to the Student during the expulsion pursuant to WAC 392-172-38310 is not an issue for this hearing. Any concerns in that regard must necessarily be the focus of the IEP team or a separate request for due process hearing.

ORDER

The Student's November 22, 2004 IEP was appropriate. The District complied with the IDEA discipline procedures when it expelled the Student from school, and during the period thereafter when it scheduled a Functional Behavioral Assessment and an IEP meeting for a Manifestation Determination. The alleged smoking of marijuana on school grounds is determined not to be a manifestation of the Student's disabilities.

Dated at Yakima, Washington on this 28th day of January, 2005.



Johnette Sullivan
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a **petition for reconsideration** filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (i) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The **Petition for Judicial Review** of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

Certificate of Mailing

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

Parents

Gregory L. Stevens
Attorney at Law
421 W Riverside AVE, Ste 1575
Spokane WA 99201