

JUN 16 2005

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

OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

KENT SCHOOL DISTRICT

SPECIAL EDUCATION

CAUSE NO. 2005-SE-0004X

RECEIVED

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

JUN 20 2005

Superintendent of Public Instruction
Administrative Resource Services

Andrea Conklin, Administrative Law Judge (ALJ), held a hearing on May 16, 17, and 18, 2005. The Kent School District (District) was represented by David Hokit, attorney at law. The Parent represented herself and the Student at the hearing. District's Exhibits D101 through D136, D138, and Parent's Exhibits P202 through P214, P216 through P228, P230, P232 through P237, and P256 through P274 were admitted. Parent's Exhibit P237- P255 and District's Exhibit D137 were offered during the hearing, but not admitted.

After the hearing, Parent submitted a letter dated May 20, 2005, from Pete Weiss, counselor. The document was marked as P275. The District objected to the admittance of this exhibit as it was not disclosed, or prepared, five days prior to the hearing as required by WAC 392-172-354. The Parent did not explain why she failed to have the document prepared prior to the hearing and why she could not have submitted it earlier. Therefore, the District's objection to P275 is sustained and P275 shall not be admitted.

The following witnesses testified at the hearing: Janice Tornow (director special education), (special education teacher), Gaynell Walker (principal Elementary), Jann Swartz (school psychologist), Steve Owens (social worker), (educational assistance), (tutor and special education teacher), Adrienne Woody (Parent friend), and the Parent.

STATEMENT OF THE CASE

Parent filed a hearing request on January 7, 2005, with Office of the Superintendent of Public Instruction (OSPI). C-1. A prehearing conference was scheduled for January 19, 2005, and a hearing was scheduled for February 2 and 3, 2005. District's counsel was not available on January 19, 2005. By agreement, the prehearing conference was rescheduled and held on January 20, 2005. At the prehearing conference the Parent requested the hearing be continued for additional time to seek legal counsel. The District did not object to the continuance. The parties agreed the Student was no longer the subject of the discipline and there was no need for the matter to be expedited.

On February 2, 2005, the Parent contacted the Office of Administrative Hearings (OAH) indicating she was ill and could not participate in the prehearing conference scheduled for that day. The District had no objection to a continuance, and the matter was continued to February 17, 2005. At the February 17, 2005, prehearing conference the Parent stated she would be represented by an advocate. A due process hearing was scheduled for March 28, 29, 30, and 31, 2005, and a

prehearing conference was scheduled for March 16, 2005. During the February 17, 2005, prehearing conference it was difficult to determine what the issues were for the hearing. The Parent agreed she would send the ALJ a letter, on or before February 24, 2005, outlining the issues. The prehearing order entered on February 17, 2005, stated the 45-day due date would be extended to 30 days after the close of the record.

The Parent sent a letter outlining her issues on February 24, 2005. It was still difficult for the ALJ to determine the issues based on this letter. An order was entered on February 24, 2005, which outlined the issues the ALJ could determine were relevant based upon the Parent's letter. The February 24, 2005 order provides the Parent had ten days to object or the order would control the proceedings. The order also states "if the issues as outlined above are not correct, the Parent must submit an objection to the issues as outlined. If an objection is received, a prehearing conference will be held to try to determine the issues." The Parent did not object to the issues as outlined in the February 24, 2005, order.

The advocate did not agree to represent the Parent. Another prehearing conference was held on March 16, 2005, pursuant to the February 18, 2005 order. As a result of the prehearing conference, an order was entered scheduling the hearing for May 16 through 19, 2005, and a prehearing conference was scheduled for April 28, 2005. The prehearing order dated March 17, 2005, again outlined the issues as written in the February 24, 2005 order.

A readiness conference was held on April 28, 2005. The parties indicated they were ready to proceed to hearing.

On the first day of the hearing, the Parent stated she did not realize the hearing would take all day and she made a doctor's appointment for the afternoon. The hearing was adjourned at 12:00 p.m.

On the second day of hearing the Parent requested the issues be amended to allow the additional question of whether the incident that occurred on April 2, 2004, was a manifestation of the Student's disability. The District objected to the amendment on the basis it would be prejudiced as it was not ready to proceed on that issue. The District's counsel had spoken with the Parent prior to the hearing and asked what the issues were to be and the District understood the manifestation determination was not an issue for the hearing. The Parent's motion to amend was denied because the ALJ spent an extensive amount of time with the Parent trying to determine the issues and simply could not do so. Also, the District would be prejudiced by the amendment since it did not have time to prepare for the issue. The Parent was informed she could raise the issue in a later hearing request.

At the conclusion of the hearing, the parties requested additional time to file closing briefs. The request was granted and the briefs were due on June 15, 2005.

After the hearing the Parent made a written request that the record be reopened to allow additional testimony by her experts. The reason given for the Parent not calling the experts during the hearing was she did not realize she could have the experts appear by telephone. The District objected noting the rules required the Parent disclose her experts five days in advance and at the hearing the Parent did not state she intended to call these additional experts. The District

argued they would be prejudiced by the reopening of the record as they would have to call additional witnesses. The motion was denied on June 1, 2005. The reasoning for the denial will be explained in this decision.

Based on the previous prehearing orders, the written decision is due 30 days after close of the record. The record closed on June 15, 2005. The written decision is due on July 15, 2005.

ISSUES

The issues for hearing as outlined in the February 24, 2005, and March 17, 2005, prehearing order are as follows:

1. Whether the Kent School District (District) denied the Student a Free and Appropriate Public Education (FAPE) as follows:

a. By violating WAC 392-172-38305 by allegedly failing to consider relevant information about the Student when it conducted a manifestation determination in the Spring of 2004 regarding a discipline of the Student.

b. By violating WAC 392-172-37505 by allegedly failing to provide the required tutorial services to the Student in the Spring of 2004 and thus the Student did not allegedly make progress on his Individualized Education Program (IEP) goals. The services that were provided were not appropriate because the tutors did not have the current IEP.

c. Allegedly failing to have goals and objectives for social services in the June 2003 IEP.

d. Allegedly failing to provide notice to the Parent of her right to a fair hearing after a manifestation determination in the Spring of 2004.¹

2. Whether the Parent is entitled to the requested remedies, or other equitable remedies, as appropriate.

FINDINGS OF FACT

1. The Student was born on 1992. The Student was initially referred for special education when he was seven years old in the first grade while in the public school system. A psychological report was prepared on the Student noting he was unable to identify what good or bad behaviors were and could not express the reasons why he was getting in trouble.

¹In the prehearing orders the date was Spring 2003. However, it was determined at the hearing it was a typographical error and it should be 2004.

D102 and P202 p. 4. The Student qualified for special education at that time under the category of emotional behavioral disability (EBD).

2. The Student transferred to the District in January 2001. D103. He was placed in the School adjustment program, which is a self-contained program for students with emotional behavioral disabilities.

3. A reevaluation of the Student was performed on January 5, 2002, while he was in the fourth grade. The team agreed there was enough data gathered to support that the Student continues to exhibit severe aggressive/impulsive behavior which adversely affects his educational performance and his behavior interferes with his learning and the learning of others and occurs across settings and throughout the day. D105 p. 1. The Student continued to qualify for special education under the category of EBD.

June 2003 IEP and amendments

4. An IEP meeting regarding the Student was held on June 4, 2003, at which an IEP was prepared. Present at the meeting were the Parent, (special education teacher), Gaynell Walker (principal), Tom O'Keefe (assistant principal and educational assistant), and Steve Owen (social worker). D109. Math, reading, writing and behavior goals and objectives were prepared. The behavior goal was:

[Student] will develop the appropriate behavior for learning and interacting.

Under that particular goal the following objectives were set forth:

[Student] will follow oral directions within two cues.

[Student] will recognize when he is getting angry and take the appropriate steps towards calming himself down (take a break, or asking for adult help) instead of becoming verbally or physically aggressive.

[Student] will accept personal responsibility and problem solve to achieve a positive outcome (within a group or on his own).

D109 pgs 5, 6 and 7.

5. On April 2, 2004, the June 4, 2003 IEP was amended to include a social service goal. The added goal was:

[Student] will improve his ability to regulate his emotions and respond to challenging situations by employing positive alternative behavior strategies on a daily basis with 60 percent consistency.

D109 pgs. 16, 17, 18 and 19. Under this goal the objectives were:

With instruction and feedback, [Student] will develop a list of challenging situations/demands on him that he consistently has had trouble responding to in a positive/adaptive manner.

With instruction feedback, [Student] will identify and develop a list of positive behavior strategies for use in some challenging situations and/or when demands are made of him.

With instruction and feedback, [Student] will practice using positive alternative behavior strategies in small-group or one-to-one practice sessions.

With instruction feedback, [Student] will generalize his use of positive alternative behavior strategies to the general school environment.

6. These goals and objective were added on April 2, 2004, to outline the behavior strategies the District has been using in the past with the Student. The goal and objectives were also added to allow the District to bill Medicaid for services that were already being provided at the school. The incident that resulted in the discipline in this matter also occurred on April 2, 2004. However, there is no correlation to the amendment of the IEP and to the incident in question.

7. Between January 2004 and April 2004, the Student visited during the school day with Mr. O'Keefe, the assistant principal and educational assistant. The Student went to Mr. O'Keefe's office as a reward, because he enjoyed being with Mr. O'Keefe. In addition, the Student went to Mr. O'Keefe's office when he was disciplined. While in Mr. O'Keefe's office, the Student often asked what the consequences would be if he did something. For example, the Student asked if he picked up a box and threw it, will he get in trouble?

Disciplinary Action

8. At noon on April 2, 2004, the Student was asked to correct three reading questions. D111. He corrected two out of the three, then asked the aide if he had to finish the last one prior to free choice time. The aide said she would have to check. The Student asked another person if he could have free choice time. Another aide said the Student could have free choice time when he finished his work. The Student threw a book on the floor, stood up and threw the rest of the materials and supplies on his desk. The teacher cleared the other students from the classroom. The Student cleared the two aides' desk, went through the teacher's desk pulling out different things and throwing them across the room. The Student threw papers, erased the board and wrote "fuck you bitch" and "ass hoe" on the board. D111. The Student grabbed markers off the white board and threw them at the adults in the classroom. The Student pulled books off of the bookshelf and flipped student desks. The Student picked up notebooks and documents and threw them across the room. The Student tried to get into the book closet, but a teacher was standing in front of it. The Student pushed the teacher trying to move her but moved on to the time-out room where he slammed the door repeatedly. The Student placed himself in the time-out room. The Student moved to the game closet and art closet throwing games and art supplies around the room. The Student took two large boxes of crayons and markers and threw them across the room. He then took the markers and crayons and threw them over the wall into the primary classroom.

9. At 12:35 p.m. the Student found the cleaner under the sink and sprayed it all over the classroom, soaking books and walls. The Student removed the fire extinguisher from the wall threatening to throw it. He grabbed the fire alarm and threatened to pull it. He then asked "what will you do if I pull it." The Student continued to pick up chairs and throw them around the room. He flipped chairs and desks. At 12:45 p.m. the Student picked up books off of the floor and said "Do I have to pay for these if I break them?" He took the first aid kit and started pulling it apart asking what would happen if he broke it. Constantly, he looked to adults for approval or reaction, wondering what would happen if he broke or destroyed things. The Student went to the primary classroom and dumped a student's desk. He then moved into the hallway and pulled coats and backpacks off of the wall, pulling drawers out of dressers in the hallway. The Student tried to go to the kindergarten classroom but was stopped by Mr. O'Keefe. The Student picked up a chair in the hallway and threw it down the hall. He tried to walk into the library supply closet. The Student was warned the items in there were very expensive and he would have to pay for them if they were damaged. He walked back into the hallway and grabbed his backpack and coat and said he wasn't coming back. Mr. O'Keefe followed the Student.

10. On April 2, 2004, a letter was sent to the Mother that the Student was emergency expelled for taking records without permission from the classroom, threatening the staff (verbally and physically), destructive behavior, and destruction of property. P112 p. 1. Included in the letter to the Mother was a copy of a pamphlet entitled Notice of Procedural Safeguard. D112 p. 2. *See also* D138.

11. On April 8, 2004, the school principal had a conversation with the Mother regarding alternative placements for the Student and a psychological evaluation of the Student. The Mother declined alternative placements and an evaluation of the Student, thinking there was only two months left in school and it was not reasonable to move the Student. D115.

12. School was out for Spring break between April 12 and 16, 2004. A manifestation meeting was held April 21, 2004 (eight school days after the April 2, 2004, incident.) Present at the manifestation meeting were (special education teacher), Jann Swartz (school psychologist), Gaynell Walker (principal and administrative designee), and Thomas O'Keefe (educational assistant). D125 p. 2. The Parent and her advocate were invited to the meeting. The advocate could not attend and therefore, the Mother did not attend the meeting.

13. The manifestation determination team completed a review checklist regarding the Student's behavior. D125 p. 1 -3. The manifestation determination team considered the evaluations of the Student, observations of the Student, the Student's IEP, placement and the behavior plan. The behavior plan and IEP in place indicated the issues for the Student were aggression, anger management, academic skills, and "STRIDES" program.

14. The manifestation team determined the IEP goals and objectives were appropriate, the Student was a special education student, and the supplementary aides and services specified in the Student's IEP were delivered. The team also determined a functional behavioral assessment (FBA) was conducted in the classroom and, based on the FBA, a behavior intervention plan (BIP) was in place and the BIP had been modified in a timely manner.

15. The manifestation determination team decided the Student's understanding of the impact and consequences of the behavior subject to the disciplinary action was not impaired by the Student's disability. In addition, the manifestation determination team found the Student's ability to control the behavior subject to the disciplinary action was not impaired by his disability. Both of these determinations were based upon the fact the Student had not exhibited this behavior before. The behavior that had not been exhibited previously was the picking up of an item, asking how much it would cost if it was broken, if he had to pay for it and if it was too much, the Student would place it back. Mr. O'Keefe did not share with the other members of the manifestation determination team that he had seen this behavior before in his office between January and April 2004. Both Ms. Swartz (school psychologist) and [redacted] (special education teacher) stated during the due process hearing this information regarding the Student's behavior in Mr. O'Keefe's office would be important information for the manifestation determination team to have considered.

16. An IEP meeting was held at the same time as the manifestation determination meeting. The Student's IEP was amended to change his placement to home instruction. D125 p. 4 -7, D109 p. 20. The IEP team determined the Student should receive home instruction for his social goals for 90 minutes, three times a week, beginning April 26, 2004, and tutoring on his academic goals for 90 minutes for three times a week beginning April 5, 2004. D109 p. 20.

17. On April 26, 2004, the manifestation determination team reconvened so the Mother could participate. The meeting was held in the cabana of the Mother's apartment. The Mother requested [redacted], the Student's special education teacher, not participate in the meeting. The individuals who attended the meeting were Jann Swartz (school psychologist), Gaynell Walker (principal), Tom O'Keefe (educational assistant) and the Mother. The team still determined the April 2, 2004, incident was not a manifestation of the Student's disability. The Mother wrote on the manifestation determination form that she disagreed with the manifestation determination. D125 p. 3.

18. On April 26, 2004, the IEP team reviewed with the Mother the proposed options for the Student's placement. The first option was keeping the Student at school, second was having the Student at an out of district placement at Fairfax or Overlake Hospital, and the third was home instruction. The District discussed with the Parent having the Student evaluated by a psychologist and then placing him at either Fairfax or Overlake. The Mother believed Fairfax and Overlake were "mental institutions" and she did not want to place her Student in a mental institution. Therefore, she agreed to the home instruction.

19. On April 30, 2004, [redacted] wrote an e-mail to Ms. Tornow (director of special education) regarding the April 26, 2004 manifestation meeting. [redacted] noted the Mother was given her Notice of Procedural Safeguards at the manifestation meeting. D131 p. 1.

20. Initially, the District scheduled [redacted] to provide home instruction on the Student's academic goals beginning April 19, 2004. D117. After contacting the Mother's home, [redacted] determined she did not want to provide the services. Therefore, the home instruction for academics was to be provided by Mr. O'Keefe, who volunteered to do the work.

21. Mr. Owens, a social worker for the District, agreed to provide home instruction at the cabana for the Student to work on his behavior goals. Mr. Owens had been working with the Student previously on his behavior goals. Mr. Owens worked with the Student for 30 minutes on the

following days: April 28, May 7, May 12, May 20, May 28, June 4, June 11, and June 18, 2004. Therefore, Mr. Owens worked with the Student for eight days, 30 minutes a day or 240 minutes. The Student made progress on his behavior and social service goals with Mr. Owens.

22. Based on the IEP, Mr. Owens was to provide 90 minutes three times a week or 270 minutes beginning April 26, 2004. There were nine weeks between April 26, 2004, and June 22, 2004, when school ended. Therefore, Mr. Owens was to provide 2,430 (90 min. x 3 times a week x 9 weeks) minutes of services pursuant to the IEP. Mr. Owens provided 240 minutes of services during the period. D120. Therefore, the Student did not receive 2,190 minutes of services or 36.5 hours of tutoring for behavior skills.

23. Mr. O'Keefe began providing services to the Student on May 12, 2004. Mr. O'Keefe provided 60 minutes of tutoring for the following days: May 12, 13, 14, 18, 19, 24, 25, 27, June 2, 3, 7, 8, 9, 14, 15, and 16, 2004. The Student made progress on his academic goals with Mr. O'Keefe. Mr. O'Keefe provided tutoring on the Student's academic goals for 16 days for 60 minutes a day or 960 minutes. Mr. O'Keefe stopped providing services on June 16, 2004. While he was providing services, he was working on the Student's academic goals and objectives based on the June 2003 IEP. Mr. O'Keefe was not to work over the summer.

24. The District hired _____ to provide tutoring to the Student over the summer. _____ has been a certified special education teacher for more than 20 years. However, she was not informed by the District that the Student qualified for special education. After a couple of sessions, _____ guessed the Student was in special education. The Mother informed _____ after a couple more sessions the Student was in special education. _____ never accessed the Student's IEP on paper or on line through the District. _____ never looked at the IEP to determine the Student's goals and objectives. _____ acknowledged the Student did not make any progress in math or writing during her tutoring. _____ believes the Student may have made some progress in reading, but not much.

25. _____ provided the following tutoring services on the following days:

Date	Time
June 30, 2004	1 hour
July 7, 2004	1 hour
July 14, 2004	1.5 hours
July 15, 2004	1.5 hours
July 16, 2004	1.5 hours
July 19, 2004	1.5 hours
July 20, 2004	1.5 hours
July 21, 2004	1.0 hours
Total	10.5 hours or 630 minutes

26. Combining Mr. O'Keefe and _____ hours, the Student received 1,590 minutes of tutoring services on academics. Based on the amended IEP, the Student was to receive academic tutoring for 90 minutes three times a week or 270 minutes from April 5, 2004, through the end of the school year. There are eleven school weeks between April 5, 2004, and June 22, 2004, when school ended. D136. Therefore, the Student was to receive 2,970 minutes of tutoring. The Student did not receive 1,380 (2,970 - 1,590) minutes (23 hours) of academic tutoring as required by the IEP.

27. At the April 26, 2004, manifestation determination meeting, the Mother received a copy of the Notice of Procedural Safeguards. The Parent, in her testimony at the due hearing, asserted she did not receive a copy of the procedural safeguards. However, during her testimony, the Parent read the following statement:

1. Why did I refuse to sign the manifestation hearing findings?
Because I totally disagreed with the findings.
2. Why didn't I contact the OSPI at that time?
I did not have my rights fully explained to me and didn't know any option for resolution was open to me. I was just "handed a booklet of rights."

P 274 p. 2.

28. The Parent asserts she was not handed the Notice of Procedural Safeguards booklet until a manifestation determination hearing regarding the Student in November 2004. However, the Parent's statement that this was the only time she received the Notice of Procedural Safeguards is not credible based on the statement above. The only time the Parent refused to sign the manifestation hearing findings was in April 2004. Therefore, based on her statement, the Parent received the Notice of Procedural Safeguards. The District personnel did not go through the procedural safeguards with the Parent to explain them to her orally.

29. In October of 2004 Ms. Tornow, special education director, offered to provide additional tutorial services to the Student to make up for the tutoring time he was to have received between April 2004 and the start of the 2004-2005 school year. C-1 p. 8. The Mother declined the tutorial services both at that time and at the due process hearing. As the Student is currently at Overlake, a day facility for children with emotional behavior disabilities, the Parent believes if the Student participated in tutoring, it would be extremely difficult for him. He does not do well with new people and she believes it would not be helpful for the Student.

30. The Parent filed a due process hearing request on January 5, 2005. C1.

CONCLUSIONS OF LAW

1. OAH 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).

Motion to Reopen Record

2. On May 20, 2005, the Parent moved to reopen the record to introduce testimony from the Student's physician, Dr. Pew, regarding changes in his medication and the Student's counselor, Mr. Weiss, regarding his treatment and diagnosis. The Parent did not request these individuals testify earlier because she did not know they could appear by telephone. The Parent discovered she could request telephone testimony during the hearing when the ALJ requested witnesses return to the stand for additional testimony and the ALJ allowed the witnesses to testify by telephone.

3. The Parent did not list Dr. Pew as a witness for the hearing. WAC 392-172-354 clearly provides that a list of the names of all the witnesses to be called at the hearing is to be provided to the other side at least five business days prior to the hearing. This requirement was outlined in the prehearing orders. The Parent rested her case without indicating she would like to call Dr. Pew as a witness. Based on the regulations requiring disclosure in advance of the hearing, and the Parent's actions, she may not call Dr. Pew as a witness after the hearing has concluded.

4. The Parent did list Mr. Weiss on her witness list. However, she did not call Mr. Weiss at the hearing or indicate the need to call him by telephone. The Parent may not, at this late date, introduce the evidence. As will be indicated later in the decision, Dr. Pew and Mr. Weiss' information can be provided to the manifestation determination team once they reconvene. Therefore, there is no need to introduce the evidence at this time.

IDEA

5. The IDEA 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 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. 103 S. Ct. at 3051.

6. 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 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 103 S. Ct. at 3041, 3042.

Social Service Goals

7. Parent argues the June 2003 IEP denied the Student a FAPE because it did not include social service goals and objectives. The District argues the June 2003 IEP included behavior goals to address the Student's disability. These goals were implemented by the special education teacher and the social worker, Mr. Owens. The District argues the social service goal that was added on April 2, 2004, is essentially the same as the behavior goals in the June 2003 IEP. The goal and objectives were rewritten to allow the District to seek reimbursement from the Federal government for the services rendered.

8. An IEP must contain a statement of measurable annual goals, including benchmarks or short-term objectives. WAC 392-172-160(b). The goals and objectives must be related to meeting a student's needs that result from his disability to enable him to be involved in and progress in the general curriculum. WAC 392-172-160(b). In addition, the goals and objectives must meet a student's other educational needs that result from his disability. WAC 392-172-160(b).

9. Development of the annual goals and objectives is discussed at length in the appendix to the federal regulations. See Appendix A to Part 300, Sec. 1, *Present Levels of Performance*: Measurable Annual Goals, including Benchmarks or Short-term objectives. The appendix states in relevant part:

Measurable annual goals, including benchmarks or short-term objectives, are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team (1) can develop strategies that will be most effective in realizing those goals and (2) must develop either measurable intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students, and educators to monitor progress during the year, and if appropriate, to revise the IEP consistent with the student's instructional needs.

* * *

As noted above, each annual goal must include either short-term objectives or benchmarks. The purpose of both is to enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP, to gauge, at intermediate times during the year, how well the child is

progressing toward achievement of the annual goal. IEP teams may continue to develop short-term instructional objectives, that generally break the skills described in the annual goal down into discrete components. The revised statute and regulations also provide that, as an alternative, IEP teams may develop benchmarks, which can be thought of as describing the amount of progress the child is expected to make within specified segments of the year. Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress toward achieving the annual goals. An IEP team may use either short term objectives or benchmarks or a combination of the two depending on the nature of the annual goals and the needs of the child.

Fed. Reg. Vol. 64. No. 48, pg. 12471 (3/12/99).

10. In this case, the behavior goal in the June 2003 IEP is working on the same behavior as the social service goals in the April 2004 amendment. The objectives are directed toward ways to modify the Student's behavior to allow him to make progress on his academics. There was no evidence presented which additional goals or objectives involving social services should have been included in the June 2003 IEP. The behavior goals in the June 2003 were appropriate and there was no need to have social services goals added earlier.

Disciplinary Exclusion

11. 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. If the Student is removed for more than ten school days for disciplinary reasons, 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.

Procedural Requirements

12. WAC 392-172-38300(1) and (2) provides:

(1) Not later than the date on which the decision to remove the student is made, the parents must be notified of that decision and provided the procedural safeguards notice described under this chapter; and

(2) Immediately, if possible, but in no case later than ten school days after the date on which the decision to remove the student is made, a review must be conducted of the relationship between the student's disability and the behavior subject to the disciplinary action.

(Emphasis added)

13. The Student was expelled on April 2, 2004. The manifestation determination meeting was held by April 21, 2004. School was out for Spring break from April 12, 2004 through April 16, 2004. Therefore, the manifestation determination meeting was held within ten school days of the expulsion.

14. The Parent was provided with copies of the Notice of Procedural Safeguards with the Notice of Discipline and at the manifestation meeting. The Notice included an explanation that the Parent could file a hearing request if she disagreed with the manifestation determination. The District is not required to orally explain each right outlined in the pamphlet to the Parent. The District did not deny the Student a FAPE as it did provide the Parent with notice of her right to file a due process hearing request.

15. 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 child, observations of the child, and the child's IEP and placement. WAC 392-172-38305(1). The IEP team did not consider the important information Mr. O'Keefe had in his possession. Mr. O'Keefe knew the Student had previously exhibited the behavior of asking what would be the consequences if he did inappropriate behavior. If the consequence was severe enough, the Student would not do the inappropriate behavior. Both _____ and _____ agree this would have been important information for the manifestation determination team to consider in making his decision. Therefore, the team did not consider all of the relevant information regarding the Student to make their manifestation determination.

16. The manifestation team shall meet again and consider the information from Mr. O'Keefe that the Student exhibited similar behavior during the four months prior to the April 2, 2004, incident. The Parent, after the hearing, requested two experts be allowed to testify regarding the Student's medication and his behavior at the time of the April 2, 2004, incident. Such information may be relevant to the determination as to whether the Student's actions were a manifestation of his disability. The Parent can provide the information to the manifestation team once they reconvene.

Tutorial Services

17. The District admitted it violated WAC 392-172-3705 as it did not provide the tutorial services to the Student as required by the IEP. The District did not provide the Student with 2,190 minutes or 36.5 hours of tutoring services required in the 2003-2004 IEP regarding the Student's behavior. The District did not provide the Student with 1380 minutes (23 hours) required in the 2003-2004 IEP for academics.

18. As to the services actually provided, Mr. Owen's tutoring provided meaningful educational benefit to the Student as he made progress on his goals and objectives. Mr. O'Keefe's tutoring also provided educational benefit as the Student made progress on his academic goals and objectives.

19. _____, the summer tutor, acknowledged she did not review the Student's IEP and did not work on his goals and objectives. _____ also acknowledged the Student made little, if any, progress on his academics. Therefore, the District did not provide a FAPE for the 630 minutes provided tutoring services.

20. The District failed to provide a total of 2,190 minutes of behavior tutoring and 2,010 minutes of academic tutoring (1,380 not provided and 630 provided by) as required by the IEP in place for the Student.

Compensatory Education

21. Compensatory education is an award of educational 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 the student 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), Cert. Den., 111 S.ct. 1317 (1991), *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)).

22. Equitable considerations are relevant in fashioning relief. *School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. at 374 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. See *Target Range*, 960 F.2d at 1485-6. The IDEA imposes no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure the student is appropriately educated within the meaning of the IDEA. *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994).

23. The District denied the Student a FAPE by failing to provide the tutorial services required in the IEP and by providing inappropriate summer tutorial services. The appropriate remedy for such a violation is tutorial services for the Student to allow him to make up the academic and behavior services lost. The Mother, in October of 2004 and at the hearing, declined tutorial services. However, her actions, alone, do not preclude an award of such an appropriate remedy. An award of compensatory education is based on equity. *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994). It would not be equitable in this case to deny the Student tutoring, which he needs to progress on his goals, because the Parent is unwilling to allow such tutoring.

24. Although the IDEA does not impose an obligation to provide day-for-day compensation for time missed, it is appropriate in this case. The District gave no reason for failing to provide most of the tutoring services. As to the services from , there was no reason given for the District's failure to provide the tutor with the IEP. The District simply failed in its obligations and the Student should receive the services he needs. The District shall provide 2,190 minutes (36.5 hours) of tutoring regarding behavior from a social worker and 2,010 minutes (33.5) on the Student's academic goals.

ORDER

1. The District failed to provide the Student with a FAPE when it violated WAC 392-172-38305 by failing to consider the relevant information in the possession of Mr. O'Keefe regarding the Student's conduct. The manifestation determination team shall reconvene within 20 school days from the date of this order and make a determination whether, given the additional information, the Student's actions of April 2, 2004, were a manifestation of his disability. It is understood there may not be 20 school days remaining in the 2004-2005 school year. Therefore, the manifestation determination team may have to meet in September of 2005. The Mother can submit to the

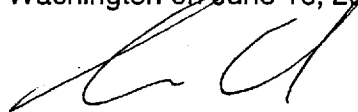
manifestation determination team the additional information from her two experts regarding the Student's behavior. The team shall consider such information. If the Mother disagrees with the manifestation determination, she may request a hearing. The law in effect in April 2004 shall apply to the determination as to whether the Student's actions were a manifestation of his disability.

2. The District violated WAC 392-172-37505 by failing to provide the Student with some tutorial services required by the IEP. The District shall provide to the Student 36.5 hours of one-to-one tutoring regarding behavior from a social worker and 33.5 hours on the Student's academic goals. The IEP shall meet on or before September 30, 2005, to determine when the Student is capable of benefitting from the tutoring services. As the Student is currently at Overlake, it is understood the IEP team may decide to defer the tutoring services until the Student's placement has changed. However, the IEP team may not reduce the number of hours of tutoring to which the Student is entitled.

3. The District's June 2003 IEP contained the appropriate behavior and social service goals for the Student.

4. The District provided notice to the Parent of her right to a fair hearing after a manifestation determination in the Spring of 2004.

Signed at Seattle, Washington on June 16, 2005.



Andrea Conklin
Administrative Law Judge
Office of Administrative Hearings

Reconsideration

This is a final decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A Petition for reconsideration must be filed with the ALJ at her address and served on each party to the proceeding. A copy of the petition must be provided to OSPI, Administrative Resources Section. An order denying reconsideration is not subject to judicial review. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA that allow for the filing of a civil action.

Right to Bring a Civil Action

Pursuant to 20 U.S.C. § 1415(i)(c) of the IDEA, any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. *See also* WAC 392-172-360. The civil action must be filed in court and served on all parties of record within thirty days after the ALJ has mailed the final decision to the parties. If a petition for reconsideration is filed, this thirty-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local and state or federal rules of civil procedure. The Superintendent of Public Instruction must also be served with a copy of the civil action.

CERTIFICATE OF MAILING

This certifies that a copy of the above Order was served upon the parties or their representatives on June 16, 2005, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following.

Parent

Kent WA 98030

Janice Tornow, Director Special Education
Kent School District
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Kent, WA 98030-6643

David Hokit, Attorney at Law
PO Box 140
Kent WA 98035-0140

cc: Administrative Resource Services, OSPI
Barb Cleveland, Executive Assistant, OAH
Janice E. Shave, ALJ, OAH/OSPI Hearing Coordinator