

MAILED

AUG 25 2010

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

SEATTLE-OAH

IN THE MATTER OF:

██████████ SCHOOL DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2010-SE-0047X

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

*This is a Corrected Findings of Fact, Conclusions of Law, and Final Order. The corrections are in bold, italics and underlined in Finding of Fact 22 and Conclusion of Law 9.*

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in ██████████ Washington, on June 7, 2010. The Parent of the Student<sup>1</sup> whose education is at issue appeared and represented herself. The ██████████ School District (District) was represented by Carlos Chavez, attorney at law. Also present for the District was Martin Boyle, superintendent.

The record closed June 18, 2010, with the submission of written closing arguments. The due date for a written decision in the above matter is ten school days from completion of the due process hearing, which is **September 9, 2010.**<sup>2</sup>

### STATEMENT OF THE CASE

#### Procedural History

The Parent filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 10, 2010, which was assigned Cause No. 2010-SE-0047X. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. An Expedited Scheduling Notice was entered May 11, 2010. A prehearing conference was held by telephone May 18, 2010. A prehearing order was entered May 19, 2010. A due process hearing was held on June 7, 2010.

<sup>1</sup> In the interest of preserving the family's privacy, this decision does not name the parent or student. Instead, they are each identified as "Parent," "Mother", and "Student."

<sup>2</sup> As of the date of the due process hearing, the District had not adopted a final calendar for the 2010-2011 school year. The 2009-2010 District Calendar reflects the first school day for students as the Tuesday following the Labor Day holiday. Therefore, until a final district calendar was adopted, Tuesday, September 7, 2010, was considered the first day of school for the purpose of computing the due date for a written decision in the above matter. As of the entry of this Final Order, the District had adopted a final calendar for the 2010-2011 school year, confirming the first day of school as September 7, 2010.

## Evidence Relied Upon

Exhibits Admitted: Parent's Exhibit P1; District's Exhibits D1 - D10.

Witnesses Heard: the Parent; Arlis Clarke (special education teacher), Linda Tate (office manager/registrar), Martin Boyle (superintendent/principal), Joanie Hansen (general education teacher).

## **ISSUES**

As set forth in the Prehearing Order entered May 19, 2009, the issues for the due process hearing are:

- (1) Whether the District denied the Student a free appropriate public education (FAPE) from on or about January 19, 2010, through May 10, 2010, by improperly excluding the Student from his educational placement in violation of the Individuals With Disabilities Education Improvement Act (IDEA);
- (2) And, whether the Parent is entitled to her requested remedies:
  - i. The District shall complete any/all referrals necessary to place the Student at the Discovery School;
  - ii. The District shall provide the Student's transportation to and from the Discovery School;
  - iii. Or other equitable remedies, as appropriate.

## **FINDINGS OF FACT**

1. The Student first received special education and related services under an Individualized Education Program (IEP) during 2004 when he resided in [REDACTED], Washington. The Student's last IEP was developed when he attended the [REDACTED] through the Lake Stevens School District during the 2008-2009 school year. That IEP, however, was never implemented. The Student has had a behavior program (BP) or behavior intervention plan (BIP) since first grade. The Student also had a 504 plan during first grade.
2. The Parent has attended IEP meetings and meetings involving the Student's BP beginning in 2004. The Parent attended some of the meetings in person, and attended others via telephone conference calls. The Parent has attended at least twelve meetings since the Student began receiving special education and related services in 2004.
3. The Parent and the Student began residing within the District on July 1, 2009.

4. The District is a very small school district, with one elementary school and approximately thirty-five students total in the District for the 2009-2010 school year.
5. There is conflicting evidence of record regarding material facts at issue in this matter. The Parent's testimony conflicted with the testimony of District's witnesses Arlis Clarke, Linda Tate, Martin Boyle and Joanie Hansen on many alleged incidents and circumstances. In making the following Findings of Fact, the logical consistency, persuasiveness and plausibility of the witnesses' testimony has been carefully considered and weighed. To the extent a Finding of Fact reflects the testimony of one or more of the witnesses, that testimony is determined to be more credible than any conflicting testimony of record.
6. The Parent completed a District New Student Registration form on September 7, 2009. The Parent checked the "No" boxes in response to the questions "[h]as your child ever qualified for or been enrolled in a special ed program," and "[h]as your child ever qualified for or had a 504 plan." Exhibit D1.
7. At the time the Parent completed documentation to register the Student with the District, there was no discussion between any District staff and the Parent regarding any special education or related services for the Student.
8. The Student began the 2009-2010 school in a general education fifth-grade class in the District during September 2009. The District did not provide any special education or related services to the Student.
9. The District received the Student's educational records from his prior school district during the latter part of September 2009. Upon review of the Student's educational records, Arlis Clarke, the District's part-time special education teacher, found a 504 plan from the Student's first grade, along with other records which indicated to Ms. Clarke that the Student may have received services under an IEP the prior school year at the Discovery School. This was the first notice or knowledge the District had that the Student may have been or was eligible to receive special education and related services.
10. Ms. Clarke reviewed the district registration form completed by the Parent, but there was no indication on the form the Student had ever qualified for a 504 plan. Exhibit D1.
11. Ms. Clarke contacted the [REDACTED] School and learned the Student had received services under an IEP, that a new IEP was proposed during the 2008-2009 school year, but the Parent had never signed the proposed IEP.
12. On September 28, 2009, Ms. Clarke completed Invitation To Attend Meeting and Prior Written Notice forms, and had other District staff mail the forms to the Parent. Exhibit D3, pp. 1-3. The Parent received the forms.
13. The forms invited the Parent to attend a meeting with Ms. Clarke and Joanie Hansen, the Student's fifth-grade general education teacher, on October 5, 2009. The purpose of the meeting included discussion of evaluation/reevaluation results, and IEP development, review and

amendment. The Prior Written Notice informed the Parent that IEP records had arrived from the [REDACTED] but were unsigned, and the District and the Parent needed to review the IEP records and either revise them or implement the IEP.

14. The Parent met with Ms. Clarke and Ms. Hansen at the District on October 5, 2009. After review of the IEP developed at the [REDACTED] during May 2009, Ms. Clarke told the Parent that the District did not have the services or resources to implement the goals and objectives in the IEP. Ms. Clarke told the Parent that if she wanted the Student to receive the special education and related services identified in the IEP, the Student would have to receive those services in another school district under a contract between the District and the other school district.

15. During the course of the meeting, the Parent expressed her dissatisfaction with the Student's experience at the [REDACTED] the prior school year, including incidents where the Student was restrained by Discovery staff.

16. The Parent told Ms. Clarke and Ms. Hansen that she did not want the Student moved outside the District to receive the services in the IEP from the [REDACTED].

17. The Parent told Ms. Clarke and Ms. Hansen that she did not want the Student on an IEP so that he could remain in the District. Up to the time of this meeting, neither Ms. Hansen nor Ms. Clarke had observed any behaviors from the Student which they believed could not be handled in Ms. Hansen's general education classroom.

18. It was mutually understood and agreed at the meeting that the Student would not be placed on, or any IEP implemented for him in the District, that he would not receive any special education or related services, and that he would continue in Ms. Hansen's fifth-grade general education classroom. It was agreed the District would devise a behavior plan similar to the IEP developed at the Discovery School.

19. Ms. Clarke prepared a document memorializing the agreement. Ms. Clarke, the Parent and Ms. Hansen all signed the document. Exhibit D4.

20. Ms. Clarke provided the Parent a copy of the Notice of Procedural Safeguards from the Office of Superintendent of Public Instruction (OSPI) at the end of the meeting.

21. At no time did any District staff tell the Parent that the IEP developed for the Student at the [REDACTED] would be implemented by the District.

22. After the meeting on October 5, 2009, the Student continued in Ms. Hansen's general education classroom, where he was treated as a general education student. The Student did not receive any special education or related services from the District.

23. By early December, the Student began to exhibit discipline problems in Ms. Hansen's class.

24. The Student was placed on an emergency expulsion, and then returned to the District on or about January 11, 2010.

25. On January 15, 2010, the District suspended the Student for ten days, from January 19, 2010, through February 2, 2010.

26. The suspension was communicated to the Parent in a letter from the District's superintendent, Martin Boyle. The letter, however, contained a typographical error, stating "[the Student] is being placed on long term suspension beginning Tuesday January 19<sup>th</sup> and may return on Tuesday 2, 2010." Exhibit D5. The intent of the letter was to allow the Student to return from his long term suspension on February 2, 2010. The Parent did not seek any clarification regarding the length of the suspension from the District.

27. Superintendent Boyle's letter went on to state that as an alternative to the Student returning to the District at the end of his long term suspension, Mr. Boyle had contacted and negotiated with the Skykomish School District to accept the Student. Skykomish had an experienced male teacher with a style which might be compatible with the Student, small class size, a full-time administrator and a licensed counselor. Exhibit D5.

28. On January 25, 2010, the Parent enrolled the Student in the Skykomish School District. Exhibit D6.

29. Via letter dated February 5, 2010, the Skykomish School District informed the Parent that it had removed the Student from his school due to conduct issues.

30. Sometime later in February 2010, the Parent contacted Superintendent Boyle by telephone, and requested the Student be placed back at the [REDACTED] through the District.

31. On May 10, 2010, the Parent filed a Due Process Hearing Request form with the OSPI.

32. Upon receiving notice of the Parent's request for a due process hearing, the District attempted to obtain the Parent's consent to conduct an evaluation of the Student to determine any need for special education and related services. As of the due process hearing, the District has been unable to obtain the Parent's consent.

33. As of June 7, 2010, the date of the due process hearing, the Parent has not completed any documentation to re-enroll the Student in the District, or make any written request with the District to place the Student at the [REDACTED]

## CONCLUSIONS OF LAW

### Jurisdiction and Burden of Proof

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. §1401 *et. seq.* (Individuals with Disabilities Education Improvement Act IDEA, sometimes referred to as IDEA, formerly Education for All Handicapped Children Act 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 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 US 49 (2005). The party seeking relief in this case is the Parent. The Parent therefore has the burden of proof.

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

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

*Id.* at 458 U.S. at 207; 102 S. Ct. at 3051.

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

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

*Id.* at 458 U.S. at 188-189; 102 S. Ct. at 3041-3042.

5. The issue in this case is whether the District denied the Student FAPE by improperly excluding him from his educational placement in violation of the IDEA when it placed the student on long term suspension. Students who have been determined eligible for special education and related services are afforded protections under the IDEA which are not available to students who have not been determined eligible for special education. This is particularly true when students who have been determined eligible for special education and related services are subject to discipline, including suspension and expulsion. See, WAC 392-172A-05145, *et seq.* However, in order to be entitled

to the disciplinary protections, a student must be a special education student at the time the discipline is imposed, or the school district must have had knowledge that the student subject to discipline was a student eligible for special education. Neither of these two circumstances existed when the District decided to place the Student on long term suspension.

6. WAC 392-172A-0300 is applicable and provides in part;

**Parental consent for initial evaluations, initial services and reevaluations.**

...

(2)(e) If at any time after the initial provision of special education and related services, the parent revokes consent in writing for the continued provision of special education and related services, the school district:

(i) Must provide prior written notice to the parent in accordance with WAC 392-172A-05015 before ceasing to provide special education and related services and may not continue to provide special education and related services after the effective date of the prior written notice;

(ii) May not use mediation or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the student;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with further special education and related services; and

(iv) Is not required to convene an IEP team meeting or develop an IEP for the student for further provision of special education services.

By stating to District staff during the meeting on October 5, 2009, that she did not want the Student placed on an IEP, signing the written agreement with the District, and receiving the Procedural Safeguards Notice, the Parent revoked her consent for the District to provide any special education and related services to the Student. It is concluded that as of October 5, 2009, the Student was no longer a student determined eligible for special education and related services, and therefore was no longer eligible to receive the disciplinary protections under the IDEA.

7. The IDEA does, however, provide protections for students not determined eligible for special education and related services under limited conditions. WAC 392-172A-05170 provides that;

**Protections for students not determined eligible for special education and related services.**

(1) A student who has not been determined to be eligible for special education and related services under this chapter and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this chapter if the school district had knowledge as determined in accordance with subsection (2) of this section that the student was a student eligible for special education before the behavior that precipitated the disciplinary action occurred.

(2) Basis of knowledge. A school district must be deemed to have knowledge that a student is eligible for special education if before the behavior that precipitated the disciplinary action occurred:

(a) The parent of the student expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, that the student is in need of special education and related services;

(b) The parent of the student requested an evaluation of the student pursuant to WAC 392-172A-03005; or

(c) The teacher of the student, or other personnel of the school district, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or to other supervisory personnel of the school district.

**(3) A school district would not be deemed to have knowledge under subsection (2) of this section if:**

**(a) The parent of the student:**

(i) Has not allowed an evaluation of the student pursuant to WAC 392-172A-03000 through 392-172A-03080; or

**(ii) Has refused services under this chapter; or**

(b) The student has been evaluated in accordance with WAC 392-172A-03005 through 392-172A-03080 and determined to not be eligible for special education and related services under this part.

(4)(a) If a school district does not have knowledge that a student is eligible for special education prior to taking disciplinary measures against the student, the student may be disciplined using the same disciplinary measures applied to students without disabilities who engage in comparable behaviors consistent with (b) of this subsection.

(b)(i) If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under WAC 392-172A-05145, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the student remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the student is determined to be eligible for special education services, taking into consideration information from the evaluation conducted by the school district and information provided by the parents, the agency must provide special education and related services in accordance with this chapter and follow the discipline requirements, including the provision of a free appropriate public education for students suspended or expelled from school.

Emphasis added.

8. It is concluded that the District did not have knowledge that the Student was a student eligible for special education before the behavior that precipitated his long term suspension occurred because the Parent had refused services effective October 5, 2009, with her revocation of consent for the District to provide the Student special education services. WAC 392-172A-05170(3)(a)(ii), above.

9. As of the time the District determined to place the Student on long term suspension, the Student was not a student eligible for special education and the District cannot be deemed to have knowledge he was eligible for special education. Accordingly, the Student was not entitled to any of the disciplinary protections under the IDEA. The District was free to discipline the Student in the same manner and using the same procedures it would use with any general education student. It is concluded the District did not deny the Student FAPE at any time by placing the Student on long term suspension and excluding him from his placement in Ms. Jensen's general education classroom.


10. As of the date of the due process hearing in this matter, there is no evidence to find the Parent re-enrolled the Student in the District. Upon notice the Parent had filed a Due Process Hearing Request, the District attempted to obtain the consent of the Parent to conduct an evaluation of the Student. This is consistent with the District's obligations under child find. See, WAC 392-172A-02040. However, as of the due process hearing, the District has not received the Parent's consent for an evaluation of the Student.

11. 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.

**ORDER**

1. The [redacted] School District has not denied the Student a free appropriate public education and did not improperly exclude the Student from his educational placement from on or about January 19, 2010, through May 10, 2010.
2. The Parent is not entitled to her requested remedies.

Signed at Seattle, Washington on August 25, 2010.

  
for MATTHEW D. WACKER  
Administrative Law Judge  
Office of Administrative Hearings

Final Decision

**Further Appeal Rights: Information About Your Right To Bring A Petition For  
Reconsideration And Your Right To Bring A Civil Action**

**Reconsideration and Right To Bring A Civil Action Under The IDEA**

Issuance of this corrected decision does not change or extend the reconsideration or appeal rights set forth at the end of the August 20, 2010 decision in this matter.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. lan

[REDACTED]

Martin Boyle, Superintendent

[REDACTED]

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cc: Administrative Resource Services, OSPI  
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