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

SEATTLE-OAH

IN THE MATTER OF:

LAKE WASHINGTON SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2011-SE-0020X

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

An expedited due process hearing was held before Administrative Law Judge (ALJ) Andrea Conklin on March 17 and 21, 2011. Oral closing arguments were heard on March 23, 2011. The Parents of the Student¹ appeared and were represented by Eric T. Krening. The Lake Washington District (District) was represented by Lance Andree. Lynette Baisch, an attorney with Mr. Andree's office, observed the closing arguments. A record of the March 17 and 21, 2011, hearing was made by Yamaguchi Reporters. Closing argument was recorded by the ALJ.

District exhibits D-1 through D-14, Parents' exhibits P-1 through P-8 and Court exhibit C-1 were admitted. P-9 was offered, but not admitted. D-15 was marked but not offered for admission. During closing argument, the District offered D-16. The Parents were given until March 25, 2011, to object to D-16. No objection was received and D-16 was admitted.

The Parents and the Student testified at the hearing. The Parents also called as witnesses Dr. Dianne Elise Sturgeon (licensed mental health counselor) and the Student's former girlfriend. The District called Wynn Spaulding (special education coordinator), Tim Hupperten (associate principal at Juanita High School (JHS)) and Gary Moed, (principal at JHS).

STATEMENT OF THE CASE

On February 24, 2011, the Office of Superintendent of Public Instruction received a request for an expedited due process hearing by the Parents. The request was forwarded to the Office of Administrative Hearings (OAH). On February 28, 2011, OAH issued a Scheduling Notice.

The Prehearing Conference was held by telephone as scheduled on March 9, 2011. A hearing was scheduled for March 18 and 21, 2011. At the March 9, 2011, conference, the ALJ ruled that a previous hearing officer's decision issued in the general education discipline matter regarding the Student was *res judicata* and would be adopted in this case. The ALJ also quashed the subpoena request for students to testify about the underlying facts in this case.

¹ In the interests of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parents," "Mother," "Father," and/or "Student."

A hearing on the District's motion for summary judgment was held on March 15, 2011. The District's motion was denied. Also, the Parents' motion to reconsider the ALJ's earlier ruling was denied.

The decision due date is ten (10) school days after the hearing concluded. The hearing concluded on March 21, 2011. Ten school days after March 21, 2011, is April 11, 2011. Therefore, the decision due date is due on or before April 11, 2011.

ISSUES

As outlined in prehearing orders in this case, the issues for hearing are as follows:

1. Whether the District violated the child find provisions of the Individuals with Disabilities Education Act (IDEA), including section 612(a)(3), by failing to identify the Student as a special needs student under IDEA;
2. Whether the District violated the evaluation requirements of IDEA, including Section 614(a)-(c), by failing to evaluate the Student after identifying the need to do so and obtaining parental consent in the fall of 2009;
3. Whether the District violated the Individualized Education Program (IEP) requirements of the IDEA, including sections 612(a) and 614(d) by failing to provide the Student with an IEP and in failing to meet the requirements of the IDEA that the District provide the Student with a behavioral intervention plan (BIP);
4. Whether the District violated the free appropriate public education (FAPE) requirements of the IDEA, including section 612(a)(1) by failing to provide any services, programming or placement that addressed the Student's needs related to his disability;
5. Whether the District violated the procedural requirements of the IDEA, including section 615(b), by failing to provide the Parents with the opportunity to examine all the records related to the Student, failing to provide prior written notice of refusal to initiate a change to the special education status, failure to offer mediation related to the refusal to identify the Student as a special education student or to provide services;
6. Whether the District violated the procedural safeguards of the IDEA, including section 615(d), by failing to offer the Parents a copy of their procedural safeguards;
7. Whether the District violated the procedural safeguards of the IDEA, including section 615(k), by suspending the Student for a time in excess of 10 days without first conducting a manifestation determination analysis or making any manifestation determination. Additionally, the alleged behavior was directly caused by and related to the Student's disability and school personnel believed this was the case prior to the suspension;

8. Whether the District violated IDEA, including section 615(k), by expelling the Student for an excess of 45 school days where the Student was not found to have carried a weapon, possessing a controlled substance or inflicting serious bodily injury;
9. Whether the District violated the IDEA, including section 615(k), by failing to offer the Parents their procedural safeguards as of the date of expulsion;
10. Whether the District violated the IDEA, including section 615(k), by failing to convene an IEP team to determine an interim alternative educational setting;
11. Whether the District violated the Student's rights by not only failing to enforce its anti-bullying policies, but by subjecting the Student to foreseeable bullying by failing to provide the Student with FAPE, an IEP and a BIP;
12. Whether the District violated the IDEA and its own policies by losing the audio tape of the expulsion hearing;
13. Whether the District violated the Student's rights by revoking tutoring after the suspension;
14. Whether the District violated the Student's rights by creating the very situation that led to its referral of the Student to law enforcement for prosecution;
15. And, whether the Parents are entitled to the requested remedies, or other equitable remedies, as appropriate. The Parents request creation of an IEP, programming and placement to provide FAPE in the least restrictive environment (LRE), creation of a BIP, compensatory education and behavioral services. The Parents also request that the District make various acknowledgements about the pending criminal matter for the Student. The Parents also seek monetary damages and attorney's fees.

FINDINGS OF FACT

1. At the time of the hearing, the Student was in the tenth grade enrolled at JHS within the District. JHS is from tenth grade to twelfth grade. The Student attended Rose Hill Junior High (Rose Hill) within the District. Rose Hill is from seventh grade to ninth grade.
2. The Student is a slight young man who has multicolored hair. He has been described as an "emo" student. The Student is one of seven children. Two of the Student's siblings qualify for special education.
3. The Student qualified for special education in his kindergarten year for speech apraxia. P-1, p. 6. The learning issues were resolved and the Student was exited from special education by first grade. There was no evidence the Parents objected to the Student being exited from special education or that the Student's termination from special education was inappropriate.
4. Prior to the Student's seventh grade year, he was removed from the home for allegations of inappropriate sexual behavior toward a sibling. The Student resided out of his

Parents home for a period of time. On February 26, 2008, during the Student's seventh grade year at Rose Hill, he was suspended for fighting. D-4, p.1.

5. On June 16, 2009, at the end of the Student's eight grade year, the Father wrote an email to the Student's Language Arts (LA) teacher at Rose Hill which contained the following:

We have spoken with his therapists and they are moving towards a diagnosis related to his childhood speech apraxia which he had until he was 4 ½ years old. Unfortunately during those years it was untreated: we were unaware of what it was until the very end and he missed a lot of early bi-directional communication that most kids get (for instance we could have used sign language, which we use with our younger daughter now who has the same thing and is doing much better.) We are trying to get him an official diagnosis that will qualify him for an IEP next year to get some accommodations for the problem.

P-1, p.6. The email does not refer to anxiety issues for the Student or issues with ADHD. Within the hour, the Student's LA's teacher sent an email to the Father stating:

I would definitely recommend a possible referral to get some testing for [the Student]. That way, he can be in a more personal and specific placement for the upcoming year, so that he can get the individual attention that perhaps he might need to succeed and overcome some of his obstacles.

P-1, p.5. There was no evidence the Student's LA teacher referred him for a special education evaluation. The District did not send the Parents a Notice of Procedural Safeguards at this time.

6. During the summer of 2009, the Parents took the Student to Dr. Berner, a psychologist. Dr. Berner prepared a note which the Parents gave to the District at the beginning of the Student's ninth grade in the 2009/2010 school year. The note states the Student had test anxiety. D-16.

7. The Student received some discipline on September 22, 2009 for "failed processing." D-4, p.1. There was no evidence presented as to the definition of this phrase.

8. Over the years, the Student has not passed several portions of Washington State's standardized testing known as the WASL. Therefore, he received a Learning Plan from the District dated October 28, 2009. P-2, p. 9. The plan states "follow-up on possible 504 related to anxiety issues." P-2, p.9.

9. When a student is having educational concerns, the District will form a guidance team. The team consists of District personnel and the parents. The group reviews the student's situation and determines if the student should be referred for a special education evaluation or if

the student should be considered for a 504 plan, or some other type of District educational plan to assist the student in his or her education.

10. On March 9, 2010, Rose Hill counselor, Lynn Hamilton, sent an email to the Father acknowledging the Student was failing two classes. P-1, p.3. In the email, Ms. Hamilton states that she tried to call the Father about a guidance team meeting but she did not hear from the Father. Ms. Hamilton did not state she sent a prior written notice to the Parents about the guidance team meeting. She asks the Parents if they are still interested in having a guidance team meeting. She encloses a Health Impairment form which needs to be filled out by Dr. Berner, the psychologist who diagnosed the Student with test anxiety.

11. Dr. Berner was not a doctor within the Parents' insurance plan and they could not afford to return to him. The Parents did not inform the District that they did not have the funds to pay for further information from Dr. Berner. The Parents understood the letter from Ms. Hamilton to mean that before the Student could be referred to special education, they needed to go to a psychologist to have the form completed. The District did not provide the Parents with a notice of procedural safeguards which would have explained that the District may have been required to pay for information from Dr. Berner.

12. While at Rose Hill, the Student felt that he was bullied. He was punched in the face and pushed around. School administration was informed of the punch in the face. Neither the Parents nor the Student told District personnel that the Student felt bullied.

13. On April 23, 2010, the Student was suspended at Rose Hill for threatening someone. D-4, p.1.

14. The Student attended summer school in 2010 before high school because of his poor performance in school. The Student met a young woman at summer school who became his girlfriend. The Student began high school at JHS in early September of 2010. The girlfriend's friends convinced her to breakup with him when school began. The Student was upset about the breakup. The Student felt as though his former girlfriend's friends were bullying him when they told him he needed to stay away from the former girlfriend. The Student did not report his feelings of being bullied to school administration or teachers.

15. On September 22, 2010, the Student was suspended from school for making threats to his former girlfriend's friends. Someone not employed by the District reported the incident to the police. One of the JHS students (student A) obtained a restraining order precluding the Student from being within 500 feet of her. The Student and student A have two classes together. The restraining order expires on October of 2011. As a practical matter, the Student would be in violation of the restraining order if he returned to JHS this school year.

16. A hearing was held by Dr. Kenneth D. Lyon on October 12, 2010, on the Student's general education discipline. Dr. Lyon is employed by the District. The Parents were represented at the hearing by Mr. Krening, the same attorney as in this case. Mr. Krening is very knowledgeable about the laws involving special education. Mr. Krening made it clear during the discipline proceedings the Parents objected to the hearing as they believed the

Student should be a special education student subject to the protections of the IDEA. During the hearing, the District acknowledged the Student should be referred for a special education evaluation.

17. On October 14, 2010, Dr. Lyon issued the following findings of fact:

1. [The Student] made direct threats of a serious nature to students at Juanita High School in violation of JHS and LWSD rules and policies.
2. [The Student] was aware of JHS and LWSD policies and consequences regarding harassment, intimidation, and threats as defined in the JHS Student/Parent Handbook.
3. The allegations regarding other weapons, explosives, and dangerous items are inconclusive; however, notebooks in [the Student's] possession at JHS, regardless of their origination, substantiate the validity of a concern regarding this preoccupation with violence and subjects of a violent nature. In addition, witnesses said that he has possessed a razor blade and pocket knife at school.
4. A variety of information presented supports the concern that [the Student] may do harm to himself and to others and poses a continuing danger to himself or others and a continuing threat of substantial disruption of the educational process at JHS.

P-4, pgs 27-28. The decision upheld the emergency expulsion. The decision conditions the expulsion:

... with the following modifications and possible reinstatement based on his actions and the following factors:

- a) [The Student] will be referred to Guidance Team at JHS immediately.
- b) The emergency expulsion will continue on the basis that the emergency situation continues due to the need for corrective action and assessment. The emergency expulsion will be reduced to a thirty (30)-day, long-term suspension if the following conditions are met:
 1. [The Student] must participate in a risk assessment and psychological evaluation as part of the Guidance Team referral. A consent form for release of information must be signed in order to exchange information between the service provider(s) and JHS, and [the Student] must comply with any and all recommendations that are stipulated as a result of the risk assessment and psychological evaluation.
 2. Within five (5) school business days of JHS receiving the completed risk assessment and psychological evaluation as stipulated in condition (1) above a meeting will be

conducted with JHS administration to review the reports and recommendations.

P-4, pgs 28 and 29. A risk assessment is a determination as to whether the Student is a danger to himself or others.

18. The Parents appealed the general education discipline decision in a timely fashion. The Parents requested a copy of the tape of the hearing. Dr. Lyon attempted to make a copy of the tape and discovered there was no actual recording. The recording system had malfunctioned. The Parents are very suspicious of the tape suddenly being lost. The Parents, who were represented by counsel, did not follow through with the appeal after they discovered the tape of the hearing did not exist.

19. The District scheduled a guidance team meeting for October 26, 2010, about the Student. The Parents were invited. It was the intent of the District to discuss a possible special education referral. No prior written notice was sent to the Parents regarding the meeting.

20. The Parents' lawyer was unable to attend the meeting on October 26, 2010. The Parents informed the District the night before the meeting that it needed to be canceled, and the Father came to the meeting in the morning to make sure everyone knew the meeting must be canceled because of the lawyer's inability to attend. On October 26, 2010, the District sent an email to the Parents requesting they give the District dates when the Parents and their attorney are available for a guidance team meeting. D-8, p.2. The email also notes the District will have their attorney present at the guidance team meeting. D-8, p.2.

21. The Father sent an email to the District stating that all future communication regarding the Student must go through his attorney. D-8, p1. There was no evidence the Parents or their attorney ever provided future dates for the guidance team meeting.

22. The District decided to refer to the Student to special education rather than have a guidance team meeting, as the District acknowledged they suspected he might have a disability. D-10, p.1. On October 29, 2010, the District provided the Parents with a form entitled "Consent for Initial Evaluation" for signature. D-10, p.2. The form asks that the Parents consent to allow the District to evaluate the Student in the area of "other." The next line defines other as a Neuropsychological Evaluation (Dr. Breiger at Children's Hospital), a Risk Assessment (Dr. Young at Interlake Psychiatric Associates) and a Psychiatric Evaluations (Dr. Golden at Interlake Psychiatric Associates). The District acknowledges that it should have, but did not, check the boxes on the form that it would evaluate the Student in the areas of academic, social/emotional/adaptive, observation and cognitive. The District again did not provide the Parents with their notice of procedural safeguards.

23. The Parents were represented by the same counsel when they received the consent to evaluate form. The Parents' assertion they were not aware the District would pay for the examinations outlined in the Consent for Initial Evaluation is not credible. Mr. Krening is very knowledgeable about special education and he knew the District would pay for the proposed evaluations. The Parents did not want to allow the Student to be evaluated by District's

evaluators because the Parents no longer trusted the District after the tape from the Student's discipline hearing was lost. The Parents did not want to use anyone in the same practice as the District's proposed evaluators, so it was difficult to find an appropriate evaluator.

24. The Student started to see Dr. Chris Sturgeon for some type of counseling. His wife, Dianne Sturgeon, Ph.D., had been a school psychologist. Therefore, the Parents decided to have her evaluate the Student.

25. Dr. Sturgeon is a licensed mental health counselor. She is working on becoming a licensed psychologist, but has not completed the requirements. She was the only mental health professional to testify at the hearing. She is qualified to administer the tests given to the Student.

26. Dr. Sturgeon's report states the date her assessment of the Student was November 20, 2010. There is no date on when the report was produced. The District did not receive the report until the end of February 2011 or the beginning of March 2011.

27. Dr. Sturgeon administered the following tests to the Student: Wechsler Intelligence Scale for Children – IV (WISC-IV), Woodcock Johnson III Test of Achievement Selected Scales (Woodcock Johnson), ADHD Questionnaire, Minnesota Multitphasic Personality Inventory-Adolescent Version (MMPI-A), Millon Adolescent Clinical Inventory (MACI), GAD Test for Generalized Anxiety Disorder, Australian Scale for Asperger Syndrome Adult Version, Structured Interview and Parent Interview. P-6, p. 38.

28. The Student has a full scale IQ of 116 on the WISC-IV, which is in the above average range. P-6, p.40. His verbal comprehension and perceptual reasoning were in the superior range on this test. P-6, p.40.

29. The Student's achievement test, the Woodcock Johnson, showed the Student was substantially below his grade level in math fluency at the 6.1 grade level. His math calculation was also low at the 8.8 grade level. The Student was in the tenth grade at the time of the testing. However, the Student was above his grade level in letter word identification. Dr. Sturgeon did not report the Student's standard scores on this test. P-6, p.40. Dr. Sturgeon was asked about the standard scores and said she could obtain them, but simply did not provide the scores.

30. Dr. Sturgeon diagnosed the Student with ADHD. This was the first time a professional has diagnosed the Student with ADHD. She opined the Student had impulsivity issues and this could have caused him to make the threatening comments to the other students at JHS in the fall of 2010. Dr. Sturgeon did not give the Student's tenth or ninth grade teachers the questionnaire regarding ADHD as the Student was out of school at the time of the testing. However, Dr. Sturgeon relied on computer generated comments by the Student's elementary school teachers from four and five years earlier to support her position that the Student had ADHD. P-6, p.41. Dr. Sturgeon's reliance on the Student's elementary school conduct to support her diagnosis of ADHD makes her ADHD diagnosis questionable, but not invalid.

31. Dr. Sturgeon also diagnosed the Student with Generalized Anxiety Disorder with depressed mood. P-6, p.43. She also opined he had some Asperger Disorder features. P-6, p.43. She did not diagnose the Student with Asperger Syndrome.

32. In her report, Dr. Sturgeon stated the Student would benefit from intense remediation in math skills. P-6, p.43. She also stated he would benefit from social coaching in friendship skills and how to handle people who bully him. P-6, p.43. She recommended therapy and some medication.

33. Dr. Sturgeon's report did not indicate that she performed a risk assessment of the Student. At the hearing, Dr. Sturgeon stated that was a mistake and she intended to report on her risk assessment. She opined that the Student was not a risk to himself or others.

34. Dr. Sturgeon is not an educator. Dr. Sturgeon's report did not recommend the delivery of educational instruction to the Student be different than any other general education student.

35. From November of 2010 to February 1, 2011, the District provided in-home tutoring for the Student for six hours a week, excluding holidays. This is approximately ten weeks at six hours a week or 60 hours of home tutoring. The tutoring was problematic as the Student's teachers did not always give work to the tutor. Also, teachers did not always correct the work performed by the Student. However, the Student made some progress in his general education classes as a result of the tutoring.

36. The Parents requested an expedited hearing on February 24, 2011. C-1. As a remedy, the Parents requested that the Student be transferred to BEST high school, which is a District school. There was no other evidence presented about why BEST would be appropriate. The Parents also request the ALJ order that an IEP team be formed and that the team fashion some type of compensatory education.

CONCLUSIONS OF LAW

IDEA Framework

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.* (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 392-172A 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, 126 S. Ct. 528, 163 L. Ed. 2d 387, 44 IDELR 150 (2005). As the Parents are the party seeking relief in this case, they have the burden of proof.

3. The (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.

4. 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.

Procedural violations

5. Procedural violations of the IDEA amount to a denial of FAPE only if the procedural inadequacies –

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child;
- or
- (III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii). See, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960

F.2d 1479, 1484, 18 IDELR 1019 (9th Cir. 1992); accord *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938, 48 IDELR 60 (9th Cir. 2007).

6. First, the District failed to give the Parents their notice of their procedural safeguards during this entire case. In June, 2009, when the Parents first mentioned special education for the Student, the District should have sent the Notice of Procedural Safeguards. WAC 392-172A-0501 and WAC 392-172A-05015. In March of 2010, when Ms. Hamilton discussed the guidance team referral with the Parents, she should have sent them the Notice of Procedural Safeguards. *Id.* The District should have sent the Parents the Notice of Procedural Safeguards in October of 2010 after the District discussed special educational referral during the general education discipline hearing. This is a substantial procedural violation. Had the Parents been informed of their rights under the IDEA, they may have made many different choices about evaluating the Student. They would have realized they could have asked the District to pay for Dr. Berner's information. Failure to provide the procedural safeguards significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a FAPE. Parents are an important part of the educational process under the IDEA. A parent who is not informed of their rights under the IDEA cannot participate in the decision making process.

7. Second, the Parents argue the District committed a procedural violation by failing to send a prior written notice of the guidance committee meeting in October, 2010. The guidance committee does not always refer to special education. It can refer a student for a 504 plan or other District education interventions. According to regulatory evaluation procedures, parents are to be given notice of evaluation meetings so they have an opportunity to participate. WAC 392-172A-05000(2). The notice shall be provided so parents have an opportunity to attend, and shall, in part, include the purpose, time and location of the meeting, and who will be in attendance. WAC 392-172A-05000, 392-172A-03100(3). Notice is not required for informal or unscheduled conversations, or conversations on teaching methodology, lesson plans or coordination of service provision. WAC 392-172A-05000(2). Nor is it required for the preparatory activities the District engages in to develop a proposal or response to a parent request that will be discussed at a later meeting. *Id.* In this case, the District intended to discuss a special education referral. Therefore, the District should have sent the Parents a prior written notice with a copy of the procedural safeguards. WAC 392-172A-05010. However, the Parents knew about the meeting in October of 2010 as they were able to timely cancel the meeting. This procedural violation does not constitute a denial of FAPE.

8. Third, the Consent to Evaluate form did not outline all the testing the District thought was appropriate for the Student. The District must obtain prior written consent before it can evaluate the Student. WAC 392-172A-03000. The consent must be sufficient so the Parents understand the proposed evaluation. WAC 392-172A-05010(2). The District acknowledged during the hearing that the consent for evaluation was deficient. This is a procedural violation. Although the Parents were not going to allow the District to perform the psychological evaluations proposed, they may have allowed the District to perform other evaluations if proposed correctly. Failure to provide the Parents with a proper notice of evaluation significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the Student.

Substantive Violation

9. The District has an obligation to find every child within the district that may be in need of special education. WAC 392-172A-02040. The District was on notice as of June 2009, the Parents believed the Student may be in need of special education. The Student's LA teacher, at the end of his eighth grade year, agreed she would recommend the Student for testing. P-1, p.5. The Student's teacher suspected that he had a disability. The District violated its child find obligations when the teacher did not refer the Student to be considered for special education in June of 2009.

10. Similarly, Ms. Hamilton, the Student's counselor in his ninth grade year, knew or should have known the Student may have a learning disability and he should have been evaluated as to whether or not he qualified for special education. Again, this is a violation of the District's child find duties.

11. Finally, during the expulsion hearing in October of 2010, the District indicated that it believed the Student should be evaluated. The District sent notice to the Parents of the intent to evaluate. However, the Parents refused to consent to the proposed evaluation as the Parents no longer trusted the District because it "lost" the tape of the discipline hearing. The District was not under an obligation to file a due process hearing to override the Parents' refusal to consent to the evaluation. According to WAC 392-172A-03000, once the Parents refused to consent to the evaluation, the District was no longer in violation of its child find and evaluation obligations. Therefore, the District was in violation of its child find obligations from June 16, 2009 to October 29, 2010.

Disciplinary Exclusion

12. The IDEA identifies specific procedural requirements for discipline of a Student receiving special education services. WAC 392-172A-05140 – WAC 392-172A-05175. In this case, the Student had not yet qualified for special education. For those students, WAC 392-172A-05170(1) provides:

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.

13. The Student had been exited from special education years earlier and therefore was not eligible for the IDEA's protections in September of 2010. Thus, according to WAC 392-172A-05170(1), the Student can only receive the IDEA protections regarding discipline if the District had knowledge the Student was a student eligible for special education before the September 22, 2010, incident occurred.

14. Recently, the Legislature passed specific regulations on when a district has knowledge that a student is eligible for special education. This is different than the District's child find obligations outlined above. WAC 392-172A-05170(2) and (3) establishes when the District had knowledge as follows:

(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.

15. The June 16, 2009, note from the Father states the Parents are speaking with a therapist about the Student's speech apraxia and hoping to obtain an IEP for the Student based on this disability. This was the same disability the Student had previously qualified for special education earlier in his school career but was exited as he no longer needed the services. WAC 392-172A-03030 requires a District evaluate a student before he is exited from special education. Therefore, the District must have evaluated the Student for speech apraxia and determined he no longer needed special education service before exiting him. Based on WAC 392-172A-05170(3)(b), the June 16, 2009, email cannot be a basis for District knowledge the Student may qualify for special education as he has been evaluated for speech apraxia and determined no longer eligible for special education.

16. Similarly, the Parents did not establish knowledge based on the other provisions of WAC 392-172A-05170(2). The Parents did not establish by a preponderance of the evidence they requested an evaluation of the Student prior to the September 2010 discipline for a disability other than speech apraxia. In addition, the Parents did not establish that a 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. Lynn Hamilton is a counselor, not a teacher nor is she a supervisory personnel.

17. As the District does not have knowledge the 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 all general education students without disabilities. WAC 392-172A-05170(4).

18. The District correctly requested an evaluation of the Student based on the information the District discovered when the Student was disciplined. During the evaluation process, the Student may remain in the placement, which can include the expulsion. WAC 392-172A-05170(4)(b).

Qualify for Special Education

19. The next question is whether the Student qualifies for special education. WAC 392-172A-0135(1)(a) provides that:

Child with a disability or as used in this chapter, a student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: . . . an emotional behavioral disability, . . . an other health impairment, a specific learning disability, . . . and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services.

20. The Parents provided sufficient evidence to establish that the Student is substantially below his grade level in math and that he has ADHD and anxiety disorder. Each possible qualifying category will be examined separately.

21. First, to establish a specific learning disability (SLD), there must be a severe discrepancy between intellectual ability and achievement. WAC 392-172A-03045. The regulations require school districts to use the discrepancy tables published by OSPI in determining SLD. WAC 392-172A-03065. The regulation also requires that districts use standard scores on the achievement tests. *Id.* The grade level scores on the Woodcock Johnson provided by the Parents are not sufficient to establish the Student qualifies for special education under the category of SLD. It is very likely if the standard scores were provided for the Student's math skills, he would have qualified. However, the Parents did not establish by a preponderance of the evidence that the Student qualified for special education under the category of SLD.

22. There is no question that the Student's ADHD and anxiety disorder are qualifying categories and that these conditions adversely impacted the Student's education. However, the

Parents failed to establish by a preponderance of the evidence that the Student was in need of specially designed instruction. WAC 392-172-A-01175(3) provides:

Specially designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction:

(i) To address the unique needs of the student that result from the student's disability; and

(ii) To ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students.

23. The Parents provided evidence of the accommodations needed by the Student such as longer time on tests and a place to go when he was stressed, but the Parents did not establish, by a preponderance of the evidence, the specially designed instruction needed by the Student. Therefore, the Parents did not establish that the Student qualified for special education.

Compensatory Education

24. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* At 523-524.

25. Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

26. The District argues that the Student is not entitled to compensatory education as the Parents failed to establish the Student qualifies for special education. However, in an unpublished decision, Judge James Robart of District Court for the Western District of Washington, in *Mercer Island School District v. D.M and L.M, CO-03-3952JLR (2004)*, awarded compensatory education in a case in which the district had violated its child find duties and the student did not qualify for special education. In that case, the court awarded reimbursement to the parents for the cost of neuropsychological evaluation and for tutoring. The court reasoned that the parents may not have paid for these educational tools for the student if the district had met its child find obligations.

27. The reasoning in the *Mercer Island* is applicable in this case. Thus, as compensatory education, the District must reimburse the Parents for the cost of Dr. Sturgeon's evaluation. If the District had fulfilled its child find duties and/or sent out the appropriate notices of procedural safeguards at the end of the Student's eighth grade year or during his ninth grade year, the Parents may not have incurred the expense to evaluate the Student. They trusted the District at that time and may have allowed the District to evaluate the Student.

28. The Student is also entitled to tutoring, but the Parents provided no evidence as to the amount of tutoring that would be appropriate. Therefore, the Parents did not meet their burden of proof to establish that tutoring was an appropriate remedy. Even if they did meet their burden, the District paid for sixty hours of tutoring after the Student was expelled when the District was not required to provide tutoring. This tutoring would have been offset against any award.

29. The Parents request that an order be entered requiring an IEP team be formed and that the team determine an appropriate compensatory education award. First, the Parents failed to establish the Student qualified for special education. Therefore, the ALJ has no authority to order the formation of an IEP team. Even if the ALJ had authority, the court in *Reid v. District of Columbia*, 401 F.3d 516, 522, 43 IDELR 32 (D.C. Cir. 2005) precluded an ALJ from delegating the authority for determination of a compensatory education award to an IEP team.

30. The District was not required to comply with the discipline provisions of the IDEA. The District was not required under the IDEA to pay for a home tutor for the Student. Therefore, the District could revoke the tutor in February of 2011.

31. The District is not required to create an IEP or a BIP. The District is not required to have a manifestation meeting. The ALJ has no authority to determine if the District is in violation of any general education requirements regarding bullying, losing the hearing tape or failing to disclose records. Similarly, the ALJ does not have any authority over the District's conduct regarding criminal matters relating to the Student.

32. The Parents also request the Student be placed at BEST school. However, no evidence was presented as to the appropriateness of this placement. So, even if the Student did qualify for special education, the Parents failed to meet their burden of proof to establish BEST is an appropriate placement.

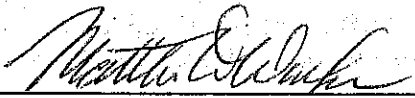
33. This is a case in which there is a student who is in crisis and who needs evaluations and services from the District and the Parents. The parties need to figure out a way to agree on how best to return this Student to school as soon as possible. It is very possible, that with an appropriate evaluation, this Student will qualify for services and will be able to access his education appropriately.

DECISION

1. The District committed a procedural violation of the IDEA by failing to provide the Parents with their notice of procedural safeguards.
2. The District violated the child find and evaluation provisions of the IDEA by failing to identify the Student as a special needs student.
3. The Parents failed to establish that the Student qualifies for special education under the IDEA. Therefore, the Student is not eligible at this time for an IEP or a BIP.

4. The District did not have knowledge, as that term is defined in the disciplinary section of the IDEA, that the Student was a special education student. Therefore, the Student was not entitled to the safeguards of the IDEA when he was expelled in September of 2010.
5. The District must reimburse the Parents for the cost of Dr. Sturgeon's evaluation. The Parents must present the District with a bill from Dr. Sturgeon for her evaluation. The District must pay the bill within 30 days of receipt.

Signed at Seattle, Washington on April 1, 2011.

for 
Andrea Conklin
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

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

Reconsideration

This is a final administrative 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 his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), 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. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this ninety-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 state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

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*

Parents



Paul Vine, Director, Special Services
Lake Washington School District
16250 NE 74th Street
PO Box 97039
Redmond, WA 98073

Eric T. Krening, Attorney at Law
Law Office of Eric T. Krening
523 North "D" Street
Tacoma, WA 98403

Lance Andree, Attorney at Law
Lynette Meachum Baisch, Attorney at Law
Dionne & Rorick
900 Two Union Square / 601 Union St
Seattle, WA 98101

cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Sr. ALJ, OAH/OSPI Caseload Coordinator