



STATE OF WASHINGTON  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
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**MAILED**  
 AUG 13 2015  
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August 13, 2015

Parent  
 [REDACTED]  
 Mica, WA 99023

Jody Fay Sweeney, Special Education Director and  
 School Psychologist  
 Freeman School District  
 15001 S Jackson Road  
 Rockford, WA 99030-9755

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**In re: Freeman School District**  
**OSPI Cause No. 2015-SE-0036X**  
**OAH Docket No. 04-2015-OSPI-00066**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

David G. Hansen  
 Administrative Law Judge

**RECEIVED**

AUG 17 2015

SUPERINTENDENT OF PUBLIC INSTRUCTION  
 ADMINISTRATIVE RESOURCE SERVICES

cc: Administrative Resource Services, OSPI  
 Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

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

MAILED  
AUG 13 2015  
SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2015-SE-0036X

OAH DOCKET NO. 04-2015-OSPI-00066

FREEMAN SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) David G. Hansen in Rockford, Washington, on June 24, 25, 26, and 30, 2015. The Mother of the Student whose education is at issue<sup>1</sup> appeared and represented herself. Advocate Alicia Finn accompanied and advised Parent. The Freeman School District (District) was represented by Gregory L. Stevens, Attorney at Law. The following is hereby entered:

**STATEMENT OF THE CASE**

The Mother filed a due process hearing request (complaint) on April 23, 2015. The Mother filed an amended complaint on May 13, 2015. Prehearing conferences were held on May 6, 15, 19, and on June 10, 2015. Prehearing orders were issued on May 15, June 3, June 12, and on June 15, 2015.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to requests for extension made by both parties. The hearing record closed with the filing of post-hearing briefs on July 14, 2015. Thirty days thereafter is August 13, 2015. The due date for the written decision is therefore August 13, 2015.

**EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Parent's Exhibits:

P-1, pages 1 through 11; P-7; P-8; P-14; P-18; P-18A, pages 3 through 6; P-26; P-27; P-31; P-32, page 1; P-35; P-38, pages 3 through 12; P-40; P-41, page 5; P-42, page 1; P-42A, pages 2 through 10; P-44; P-46; P-66; P-70; P-75; P-77; P-78; P-82; P-89; P-90; P-92; P-100; P-102; P-107; P-110; P-113; and, P-116.

<sup>1</sup> In the interest 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."

District's Exhibits:

D-2 through D-16; D-19; D-21; D-23 through D-26; D-31, page 1; D-32, page 1; and, D-36 through D-40.

The following witnesses testified under oath. They are listed in order of their appearance:

Katherine Hawley, District special education teacher;  
Ann Romey, District general education teacher;  
Susan LaBarre, District occupational therapist;  
Phyllis Norman, District secretary;  
Erin Honeycutt, former District paraprofessional;  
Jody Sweeney, District special education director and school psychologist;  
Ben Ferney, District middle school principal;  
Tabatha Booth, special education teacher, Post Falls School District, Idaho;  
Randy Russell, District superintendent;  
Student;  
Student's Father;  
Melinda Poindexter, District general education teacher;  
Student's Mother;  
Denise Briggs, District general education teacher; and  
Denise Conrad, District school counselor.

**ISSUES**

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

- a. Failing to provide physical education to the Student since February 9, 2015;
- b. Failing to implement the following portions of the Student's individualized education program (IEP): 98% placement in general education, social skills instruction, typing instruction, organizational skills instruction, and the reinforcement schedule;
- c. Failing to implement the following portions of the Student's behavior intervention plan (BIP): the check-in, check-out system and the procedure for dealing with escalated behavior;
- d. Conducting a functional behavioral assessment (FBA) without obtaining parental consent or input;
- e. Changing the Student's placement in February 2015 without doing any of the following: obtaining parental input and agreement; amending the Student's IEP; providing prior written notice of the change of placement; or providing the Parent with a copy of the IDEA Notice of Procedural Safeguards;
- f. Placing the Student in a self-contained classroom with no direct instruction from general education teachers except in Science;
- g. Failing to hold a manifestation determination meeting after 10 days of suspension;
- h. Marking days of suspension as excused absences in the Student's attendance record;
- i. Failing to consistently send work to the Student while he was suspended, and failing to send him general education work while he was in a self-contained class;

- j. Failing to provide the Parent with quarterly IEP progress reports during the 2013-2014 and 2014-2015 school years;
- k. Failing to reevaluate the Student despite a lack of progress on his IEP goals, which goals were the same for three years;
- l. Failing to provide the Student with direct instruction by highly qualified teachers in Math, Social Studies, PE and Leadership;
- m. Failing to provide positive behavioral supports for the Student;
- n. Denying the Parent access to the Student's educational records;
- o. Failing to provide paraeducator support for the Student as requested by the Parent in October 2014 and February 2015;

Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate:

- a. Provision of a full-time paraeducator for the Student;
- b. Provision of behavior replacement therapy for the Student;
- c. Proper implementation of the Student's IEP and BIP; and
- d. Compensatory education in the following forms, including transportation to and from the compensatory education sites: 125 hours of tutoring; and three months of gym membership at District expense.

#### **FINDINGS OF FACT**

1. In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence.

2. The Student was enrolled in 7<sup>th</sup> grade at the District's middle school during the 2014-2015 school year. He has been enrolled in the District since his kindergarten year. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and was determined eligible for special education services in the category of other health impairment.

3. In February 2014, during the Student's 6<sup>th</sup> grade year, the District proposed to develop an annual IEP. This followed the completion of a three-year reevaluation. The IEP team met on February 17, 2014: P-40. The team consisted of both Parents, the Student's general education teacher, his special education teacher, and the special education director/school psychologist. The Parents were provided prior written notice (PWN) of the meeting. P-40, pages 1 and 2. They were provided a copy of the Notice of Procedural Safeguards for Special Education Students and Their Families (procedural safeguards). P-40, page 3.

4. The IEP noted that the Student would argue and raise his voice when redirected by his general education teacher. The IEP also noted that when frustrated or angry, the Student would raise his voice or leave the classroom without permission. The IEP included goals for Student to increase his behavior management in these areas. A goal of increasing the Student's typing skills was included to assist him with written expression. To increase the Student's organizational skills, in order to timely complete and turn in assignments, the IEP required

increased use of a daily planner by the Student. The next IEP review was scheduled for February 16, 2015.

5. The District's term for a behavioral intervention plan is Behavior Support Plan (Plan). Katherine Hawley, the Student's special education teacher, developed a Behavior Support Plan for the Student's 6<sup>th</sup> grade year (6<sup>th</sup> Grade Plan). D-2. Although unclear from the record, it appears to have been developed at or near the beginning of the 6<sup>th</sup> grade school year. The 6<sup>th</sup> Grade Plan contained a requirement that the Student carry a "Check In/Check Out" form throughout the school day and have it filled out at appropriate times. At or about the beginning of the 2014-2015 school year, Ms. Hawley met with the Parents; Jody Sweeny, the District's special education director; Ben Ferney, the middle school principal; and Melinda Poindexter, the general education math teacher. The purpose of the meeting was to prepare another behavioral intervention plan (7<sup>th</sup> Grade Plan). D-3. Ms. Hawley noted that the Student did not consistently follow the Check In/Check Out plan or sometimes simply refused. Rather than escalate the matter and have a confrontation with the Student, Ms. Hawley would simply let the matter pass. Additionally, the Student was coming from 6<sup>th</sup> grade, where all his classes were primarily with one teacher in the same classroom to the 7<sup>th</sup> grade where teachers and classrooms changed for each subject. For these reasons, the IEP team removed the Check In/Check Out procedure from the 7<sup>th</sup> Grade Plan.

6. At the commencement of the 2014-2015 school year and until February 9, 2015, the Student received special education services according to his IEP in the general education classroom for five of his six classes. Those five were physical education (PE), leadership, science, math, and history. These classes generally consisted of approximately 25 students and a teacher. His language arts class was in the District's self-contained classroom. The self-contained classroom generally has 10 to 12 special education students, a teacher, and a paraeducator.

7. Since kindergarten, the Student's behavior had at times been an issue. However, beginning in January 2015, District staff began to notice a considerable increase in troublesome behavior by the Student. As of the date of the Mother's request for a due process hearing in April 2015, the Student had been in what the District called an "out of school suspension" for a total of four and a half days during the 2014-2015 year. On September 17, 2014, he was suspended one day following an altercation with another student. On January 23, 2015, he was suspended for half a day for pushing a fellow student several times during PE class. On February 6, 2015, the Student, again during PE, verbally threatened physical harm to a fellow student, yelled at five staff members, and slammed an office door. He went to the multipurpose room where he was observed crying and kicking a post. The Parents were called and the Student was picked up at lunch time. The District did not consider this to be a suspension because the Parents were not specifically told to take the Student home.

8. The following Monday morning, February 9, 2015, at approximately 10:00 a.m., the Student was called into Principal Ferney's office. School Counselor Denise Conrad was also present. The Father was present, having been notified of the meeting at approximately 7:30 a.m. that morning. The Student was advised that, because of his behavior the prior Friday, his class schedule was going to change from five classes in a general education classroom setting and one class in a self-contained classroom, setting to five classes in a self-contained class and one class in general education classroom. The Parents were notified of this change in schedule

that morning. The Student became extremely upset. Ms. Sweeney, special education director and school psychologist, and Ms. Hawley, special education teacher, were called into the office. The Student continued to yell, scream, and cry. At one point he pushed a tissue box across the table.

9. During this meeting, Ms. Sweeney began to record verbal observations of those in attendance regarding various aspects of the Student's inappropriate behavior. Ms. Sweeney used a form entitled *Efficient Functional Behavior Assessment Checklist for Teachers and Staff* to record those observations. P-42A. This form is referred to as a functional behavioral assessment. No standardized testing of the Student was performed, only the collection and recording of the attendees' observations of the Student's behavior. The Father took the Student home before the end of the school day. This was not considered a suspension by the District because the Father was not asked to take the Student home. The Student's absences on February 6 and 9, 2015, were not included in the four and a half days of suspension as of April 2015.

10. On Tuesday, February 10, 2015, Mr. Ferney, Ms. Conrad, Ms. Sweeney, and Ms. Hawley met with the Student to again go over his new schedule. When the Student began yelling, the Parents were called and the Student was suspended that day. The Father picked the Student up from school. On February 17, 2015, the District emailed the Parents an Invitation to Attend Meeting, dated February 16, 2015. The invitation was to a meeting on February 23, 2015, for the purpose of "IEP Development/Review." P-14.

11. Beginning February 10, 2015, Ms. Hawley prepared four Behavior Support Plans, the final one dated March 2, 2015 (7<sup>th</sup> Grade Plan II). D-3, D-5, D-7, and D-8. Each of the four was essentially the same, with minor changes and edits. Copies of each were provided to the Parents. Under 7<sup>th</sup> Grade Plan II, the Student received special education instruction in only one general education class; science. The remainder of the Student's education services would be provided in the self-contained classroom. Work and assignments would be collected from the general education teacher and delivered to the Student in the self-contained classroom. The 7<sup>th</sup> Grade Plan II provided means by which the Student could, through measured appropriate behavior, gradually integrate himself back into the former general education classrooms he had attended. If the Student demonstrated appropriate behavior in class, did not escalate, and was productive on five consecutive days, he would be able to return to a general education class.

12. Additionally, the 7<sup>th</sup> Grade Plan II identified several precursors that produced the Student's behavior; examples of how his behavior would manifest itself; reported the adverse impact the behavior had on the Student's education; provided for preferred activities when working productively; strategies such as positive praise when he is attempting or completing assignments; identified adjustments to assignments as long as he understood the primary notion of the subject being taught; and, consequences for inappropriate behavior.

13. On February 17, 2015, the District gave the Parents a PWN. D-14. Along with the PWN, the District provided the Parents the procedural safeguards notice. Parents were well aware of their procedural protections having received several such forms over the years that the Student qualified for special education services. The PWN advised the Parents that the District was proposing to initiate an IEP. The PWN could have advised the Parents that the District was proposing a change in placement for disciplinary reasons. The PWN did not so advise the

Parents.

14. Pursuant to the PWN, an IEP meeting was held February 23, 2015. Present were the Parents, the special education teacher, two general education teachers, the middle school principal, the special education director/school psychologist, and the school counselor. The IEP developed at the meeting contained measurable annual goals in behavior management, written expression, and organizational skills. P-44. The IEP did not contain a goal for typing. Typing goals were replaced with written expression goals for sentence composition and paragraphs. Under the section entitled "Points to Consider," the IEP stated that the Student is to be placed in "general education setting" 98% of the time and in the self-contained classroom 40 minutes per week. P-44, page 9. This was not changed to reflect the Student's new schedule because the District intended the change to be temporary. Ms. Hawley expected the Student to "earn" his general education classes back within one to two months. The Parents were given their procedural safeguards notice. P-44, page 1. Ms. Hawley completed an IEP Addendum on March 30, 2015. P-46.

15. In the period following the Student's February 9, 2015, schedule change, the Parents and the IEP team did not meet to review all information relevant to the Student in order to determine if the Student's conduct was caused by had a direct and substantial relationship to the Student's disability. The District was of the opinion that the placement in the self-contained classroom was temporary in nature and therefore no manifestation determination was necessary.

16. In October 2014 and again in February 2015, the Parents requested that the Student have a paraeducator assigned to him on a one-to-one basis. The District declined. The Parents' witness, a special education teacher with experience dealing with children with ADHD, believed that a paraeducator assigned to the Student could help deal with the Student's behavioral issues. This witness has never observed or met the Student. The District's special education director/school psychologist, special education teacher, and general education teacher credibly testified, and the undersigned finds as fact, that a one-to-one paraeducator would not be of assistance in dealing with the Student's behavioral issues and might possibly be counterproductive. A one-to-one paraeducator would bring the attention of his peers to the Student and cause the Student to be embarrassed and resentful.

17. The IEPs in place during the Student's 6<sup>th</sup> and 7<sup>th</sup> grade school years required that the Parents be provided quarterly progress reports. P-44, page 7, P-40, page 9. The IEPs do not specify the method of delivering the quarterly progress report to the Parents. Ms. Hawley prepared these quarterly progress reports. D-13, pages 1 through 4. She placed them in the Student's binder to take home to the Parents. Parents contend they never received them. At or about the time of the request for a due process hearing, Mother related to Ms. Hawley that she was not receiving the progress reports, whereupon Ms. Hawley started emailing the reports to Parents.

18. During the two-year period prior to the filing of the complaint, multiple District staff worked with the Student in the development of appropriate social skills. The general education teachers, the special education teacher, the school counselor, the middle school principal, and the special education director routinely worked with the Student on improvement of social skills. The staff made themselves available to the Student. Ms. Sweeney purchased and utilized a

social skills curriculum with the Student. She and others used role-playing strategies and discussed social awareness with the Student. Ms. Hawley discussed with the Student various issues he had in class, and what led up to the situation as well as how he reacted.

19. The District provided the Student with positive educational supports during the period at issue. Staff met frequently to discuss the Student's situation. These meetings frequently included the Parents. He was regularly given praise and encouragement by staff. Staff was well versed in what triggers the Student's behavior, as well as methods of deescalating the behavior. He was given considerable access to the school counselor, and often ate lunch with Ms. Hawley. Staff acquainted themselves with the Student's outside interests and hobbies. Staff frequently discussed and encouraged the Student in his areas of interest outside of school. He was provided preferred activities as a reward for completion of assignments. In the Student's science class he was the only student to be allowed to assist in labs. In addition to the social skills curriculum provided to the Student by Ms. Sweeney, the Student's science teacher, Ms. Poindexter, utilized a social skills and relationship building curriculum with the Student. The Student was the only student in the District to use this curriculum. The Student was allowed to sometimes pace in the classroom, or go for walks if he felt it necessary to help him calm down.

20. During the 2013-2014 school year and until February 2015, the improvement of typing skills was a goal in the Student's IEPs. During this time the Student was allowed to type in the general education classes as well as two times per week for 15 to 20 minutes in the self-contained classroom. Parents contend that the Student's typing skills did not improve during this period. On March 19, 2015, after typing improvement was no longer a goal in the Student's IEP, he logged into a computer program aimed at typing skills. P-26, page 2. The program reported Student's gross typing speed at 19 and his net typing speed as 15 words per minute. No other evidence of the Student's typing skills was presented.

21. In an attempt to improve the Student's organizational skills, he was given shortened assignments and additional time for completion. Teachers routinely discussed with the Student his schedule and asked for missing assignments. The Student was instructed by his 6<sup>th</sup> grade teacher, Ms. Romey, in the use of a day planner. These accommodations continued after the February 2015, IEP was implemented. Other accommodations included providing the Student with rewards for positive performance. 7<sup>th</sup> Grade Plan II provided that teachers could provide the Student with an option to engage in a preferred activity as a break or a reward. Those preferred activities were identified as drawing, reading, and listening to his iPod. P-44, page 14.

22. Beginning February 10, 2015, while the Student was in the self-contained classroom, the special education teacher, Ms. Hawley, routinely received assignments, work sheets, and educational material from the Student's general education teachers. During this time the Student was given access to math tutorials online by his math teacher, Denise Briggs. These were the same tutorials Ms. Briggs used in her 7<sup>th</sup> grade math class. Ms. Hawley met with the Student's general education teachers weekly to discuss the Student's education. Additionally, both Ms. Hawley and Ms. Poindexter sent work home for the Student days he was suspended.

23. After February 10, 2015, the Student was provided PE in the self-contained classroom by means of an exercise video called T25. Additionally, he was permitted outside the school to exercise as needed but accompanied by a District staff member.



24. Ms. Sweeney reviewed several standardized academic assessments of the Student. Specifically, the Woodcock-Johnson IV Tests of Cognitive Abilities and the Woodcock-Johnson IV Tests of Achievement Form A and Extended were administered to the Student on May 4 and 6, 2015. D-39. The assessment results reported that the Student was performing academically on average, or slightly below, with his peers and at grade level. Ms. Sweeney found these results to be consistent with standardized assessments performed on the Student in the past reevaluations, namely he was performing academically at grade level and with same age peers. Additionally, progress reports by Ms. Hawley indicated that the Student was acquiring or had acquired the skills necessary to meet his IEP goals. D-13.

25. The District's policy is to consider absences from school due to suspension as excused absences. The reason is to allow a suspended student to make up the school work missed.

26. The District provided Parents with access to all the Student's educational records. When reviewing the records a District staff member accompanied the Parents. This is a policy of the District and applies to all District parents. Ms. Sweeney credibly testified that all documentation relating to the Student was available to the Parents at the various IEP meetings and other meetings between the Parents and District staff.

27. No evidence was offered by the Parents at hearing regarding the qualifications of the District's staff who provided either special education or general education services to the Student.

28. The Student eventually "earned" his way back into the general education classrooms he had attended until February 9, 2015. Ms. Hawley kept track of the days that counted towards the Student earning his way back into the general education classrooms. D-39. He returned to the general education classrooms as follows: leadership on March 2, 2015; math on March 13, 2015; history class on March 23, 2015; and PE class on May 1, 2015. Between February 9 and May 1, 2015, there were numerous emails and phone conversations between the Parents and District staff. There were also approximately eight in-person meetings between the Parents and staff, including an IEP team meeting, IEP Addendum meetings, and a resolution meeting during the same period.

29. From February 9, 2015, through the end of the school year the Student was in the self-contained classroom for leadership instruction 275 minutes. He was in the self-contained classroom for math instruction 533 minutes, for history 808 minutes and for PE 2171 minutes.

30. After the filing of the complaint in April 2015, the Student responded on occasion to District staff in angry outbursts. On more than one occasion, he told staff something to the effect that he did not have to listen to staff because his Mother had told him the District was violating his IEP.

31. 6<sup>th</sup> grade students in the District have scheduled recesses. Beginning in the 7<sup>th</sup> grade such recesses are not included in the students' day.

## CONCLUSIONS OF LAW

### The IDEA

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), 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) Part 300, 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. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Accordingly, in this case the Parent bears the burden of presenting sufficient evidence to support a conclusion the District violated the IDEA and denied the Student FAPE with respect to all issues raised in this case.

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 *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, has 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.

*Rowley, supra*, 458 U.S. at 206-207 (footnotes omitted).

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

[A] "free appropriate public education" consists of educational instruction specially 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 general 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 on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

*Rowley*, 458 U.S. at 188-189.

5. For a school district to provide FAPE, it is not required to provide a “potential-maximizing” education, but rather a “basic floor of opportunity.” *Rowley*, 458 U.S. at 200 - 201. An IEP must be “reasonably calculated to enable the child to receive educational benefits.” *Id.*, 458 U.S. at 207. “Under the 1997 amendments to the IDEA, a school must provide a student with a ‘meaningful benefit’ in order to satisfy the substantive [FAPE] requirement [.]” *M.M. v. Lafayette School Dist.*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 18979 (9<sup>th</sup> Cir. 2014) (internal citation and quotation marks omitted).

### **Procedural Compliance with the IDEA**

6. Procedural safeguards are essential under the IDEA:

Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

*Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9<sup>th</sup> Cir. 2001).

7. Procedural violations of the IDEA amount to a denial of FAPE only if they:

- (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 WAC 392-172A-05105(2).

### **Substantive Compliance with the IDEA**

8. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

“[S]pecial education and related services” need only be provided “*in conformity with*” the IEP. [20 USC §1401(9)] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.

*Van Duyn, supra*, 502 F.3d at 821 and 822 (italics in original).

9. The IDEA requires that parents be given the opportunity to actively participate in their child's education, both in the formulation and review of the student's IEP. WAC 392-172A-03040, -03050, -03095, -03100, and -03115. The appendix to the Federal Regulations gives further definition to the parents' role in the process:

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

64 Federal Register 12406, 12473 (Appendix A)(1999).

10. The importance of parental participation in the special education process was discussed at length by the Ninth Circuit Court of Appeals in *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9<sup>th</sup> Cir. 2001). The Court of Appeals stated:

Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. In *Target Range*, for example we held that the Target Range School District "failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act. Because Target Range had developed the IEP without the involvement of the child's parents, his teacher, or the school in violation of 20 U.S.C. '1401(a)(19), its decision to place the child in its special education class did not take into consideration the recommendations from those who best knew the child. We therefore held that Target Range's refusal to include the child's parents in the IEP process denied the child a FAPE and that his parents were entitled to reimbursement for the cost of providing an appropriate education.

*Id.* at 892. (internal citations omitted). In *Amanda J.*, the Court of Appeals ultimately determined that the school district's failure to provide the parents with information on the student's previously unknown diagnosis of autism resulted in a denial of FAPE because it infringed upon the parents' ability to meaningfully participate in the IEP process. *Id.* at 892-894.

## Issues

*Failing to provide physical education to the Student since February 9, 2015.*

11. "Physical education services... must be made available to every student receiving FAPE." WAC 392-172A-02030. Ms. Hawley's credible testimony was that PE was provided by means of a workout video and opportunities to go outside with staff. Because the Student's negative behavior was frequently exhibited in PE, the District had a legitimate interest in offering PE in this setting. The Parents have not established that PE was not made available to the Student and therefore have not established the IDEA was violated.

*Failing to implement the following portions of the Student's individualized education program (IEP): 98% placement in general education, social skills instruction, typing instruction, organizational skills instruction, and the reinforcement schedule.*

12. The February 23, 2015, IEP, taken together with the 7<sup>th</sup> Grade Plan II, makes it clear that the intent of the IEP was not to place the Student in the general education setting 98% of the day. The 98% requirement was not changed and remained in the IEP because the District staff on the IEP Team intended the change in placement to be short term. This requirement of the IEP was never intended to be implemented until the Student was able to return to all his general education classrooms. Regarding the allegation that the District failed to implement the social skills goals, the credible evidence indicates that District staff went to considerable and significant effort to provide the Student with positive behavioral supports. Multiple strategies were utilized by District staff with the Student, all with the intended purpose of providing the Student with positive behavioral supports. The District did not implement a typing skills goal because it was no longer a goal of the IEP. Adjustments continued to be made in assisting the Student to reach the IEP's organizational skills goals. Rewards in the way of preferred activities continued to be provided to the Student. There has been no failure to implement the February IEP and the IDEA was not violated.

*Failing to implement the following portions of the Student's behavior intervention plan (BIP): the check-in, check-out system and the procedure for dealing with escalated behavior.*

13. The Check In/Check Out procedure used in the 6<sup>th</sup> Grade Plan was removed from the Student's 7<sup>th</sup> Grade Plan following a meeting of the IEP team, which included the Parents. It was removed upon sound reasoning, namely the procedure was ineffective and created the possibility of a confrontation with the Student. Additionally, the procedure would be more difficult and cumbersome given the Student's class schedule change from 6<sup>th</sup> grade to 7<sup>th</sup> grade. Both the Student's 7<sup>th</sup> Grade Plan and the 7<sup>th</sup> Grade Plan II contained numerous de-escalation strategies. District staff credibly testified that the strategies were employed when the Student showed signs of escalation. The IDEA was not violated.

*Conducting a functional behavioral assessment (FBA) without obtaining parental consent or input.*

14. The record clearly establishes that Ms. Sweeney did not conduct an FBA on February 9, 2015. Parental consent is required before a district can perform an FBA. WAC 392-172A-03000. Ms. Sweeney merely collected information and thoughts from those present at the

meeting and recorded that on a form entitled Efficient Functional Behavior Assessment. There was no evaluation or assessment of the Student at that meeting and therefore no need for the District to obtain prior consent from the Parents. The IDEA was not violated.

*Changing the Student's placement in February 2015 without doing any of the following: obtaining parental input and agreement; amending the Student's IEP; providing prior written notice of the change of placement; or providing the Parent with a copy of the IDEA Notice of Procedural Safeguards.*

15. The removal of a student eligible for special education from the student's current educational placement for disciplinary reasons for more than 10 consecutive days is considered a change in placement. WAC 392-172A-05155(1)(a). Such is the case at hand. The District's action on February 9, 2015, in changing the Student's schedule from five classes in a general education classroom and one class in a self-contained classroom to five classes in a self-contained classroom and one classroom in general education for more than 10 consecutive school days was for reasons of discipline, and was a change in educational placement of the Student. It was a significant change in educational placement to a far more restrictive placement. This procedural requirement does not only apply when the student is suspended from school as argued by the District. In making educational placements a district is required to include parents in the group of individuals making the determination. WAC 392-172A-02060(1). When a district proposes to initiate or change the educational placement of a student, the district is required to provide parents with PWN. WAC 392-172A-05010(1)(a). The PWN must include specific information regarding a district's proposed actions. WAC 392-172A-05010(2). The District in this case did not provide the Parents with PWN and in so doing did not offer the Parents an opportunity to participate in the placement decision being made for the Student. The District's failure to provide the Parents PWN was a procedural violation of the IDEA. Parents' agreement with the educational placement is not required and therefore not a violation of the IDEA. The Parents were provided the necessary procedural safeguards by the District and there was no violation of the IDEA in that regard. The Parents should have been given proper notice and involved in the meeting.

*Placing the Student in a self-contained class with no direct instruction from general education teachers except in Science.*

16. While in the self-contained classroom, the Student received instruction in his general education subjects from his special education teacher, Ms. Hawley. Ms. Hawley received the general education curriculum from the Student's general education teachers. Given the Student was in the self-contained classroom, it would have been impractical if not impossible for the general education instruction to be given by the individual general education teachers. The IDEA was not violated. Further, Parents contend that general education curriculum was not delivered to the self-contained classroom. The credible testimony of the District's staff establishes the general education curriculum was indeed provided in the self-contained classroom by the special education staff. The IDEA was not violated.

*Failing to hold a manifestation determination meeting after 10 days of suspension.*

17. Within ten school days of a district's decision to change the placement of a student eligible for special education because of the student's violation of a code of student conduct "the

school district, the parent, and relevant members of the student's IEP team... must review all relevant information in the student's file" for the purpose of determining whether the "conduct in question was caused by, or had a direct and substantial relationship to, the student's disability...." WAC 392-172A-05145(2)(a). As of February 9, 2015, the District had not suspended the Student for ten days. However, the Student's placement changed on February 9, 2015, and the District was aware that the change would be for more than ten school days. The change was because of his behavior. This triggered the need for a manifestation determination review. The change in educational placement need not be ten days of suspension as argued by the District. The District's failure to conduct a manifestation determination review was a procedural violation of the IDEA.

*Marking days of suspension as excused absences in the Student's attendance record.*

18. There was no evidence or legal authority presented by the Parents regarding how or in what way the District's policy of recording days of suspension as excused absences had any impact on the District's ability to count total consecutive days or series of removals totaling 10 days. Therefore the Parents have failed to carry their burden of proof on this issue. The Parents have not proven the IDEA was violated.

*Failing to consistently send work to the Student while he was suspended, and failing to send him general education work while he was in a self-contained class.*

19. The District did send educational assignments to the Student while in suspension. Parents presented no evidence to the contrary. As stated above in Conclusion of Law 12, general education material and instruction was provided to the Student while in the self-contained classroom. The IDEA was not violated.

*Failing to provide the Parent with quarterly IEP progress reports during the 2013-2014 and 2014-2015 school years.*

20. Regarding the Parent's failure to receive quarterly progress reports, the District initially relied on the Student to take the reports home to the Parents. The District promptly resolved the situation when made aware the Parents were not receiving them. While the regulations require that the IEP shall state when the District "will provide periodic reports on the progress of the student" but is silent to the method the District is to use to provide the reports to the Parents. WAC 392-172A-03090(1)(c)(ii). No legal authority was cited by the Parents in regard to the means the District is to use to "provide" the quarterly progress reports to the Parents. Perhaps the District misplaced its' confidence in the Student to get the quarterly progress reports to the Parents, but quarterly progress reports were completed and made available to the Parents. The undersigned has no authority to impose or require more of the District. The IDEA was not violated.

*Failing to reevaluate the Student despite a lack of progress on his IEP goals, which goals were the same for three years.*

21. The evidence established that the Student did show progress toward meeting his IEP goals and that he improved in academic areas. The Woodcock-Johnson test administered to the Student in May 2015, demonstrated that he was performing academically at or about grade

level and along with his peers. The credible testimony of the Student's special education teacher indicates that the Student had either acquired, or was in the process of acquiring the skills necessary to meet the IEP goals. A reevaluation of a student will be performed if a district determines that, among other things, a student needs to improve academic achievement, or if a parent or teacher requests a reevaluation. WAC 392-172A-03015. The District appropriately determined that the Student was making progress toward his IEP goals and a reevaluation was therefore not necessary. The IDEA was not violated.

*Failing to provide the Student with direct instruction by highly qualified teachers in Math, Social Studies, PE and Leadership.*

22. The Parents presented no evidence upon which the undersigned could base a conclusion that the District teachers were not properly credentialed and qualified as required by the statutes and regulations. The Parents have failed to carry their burden of proof on this allegation and have not proven the IDEA was violated.

*Failing to provide positive behavioral supports for the Student.*

23. The record contains numerous examples of District staff providing the Student with positive behavioral supports. This included such things as District staff being versed in antecedent events to the Student's behavior and strategies for preventing that behavior. District staff acquainted themselves with the Student's outside interests and discussed them with the Student. He was provided special accommodations in the classroom. Social skills curriculum was provided the Student. The Parents have not established that the District failed to provide positive behavioral supports for the Student and therefore have not proven a violation of the IDEA.

*Denying the Parent access to the Student's educational records.*

24. The parents of a special education eligible student "must be afforded an opportunity to inspect and review all education records." WAC 392-172A-05000(1). Insofar as the Parents allege the District has denied them access to the Student's educational records, the credible evidence indicates that the District made all the Student's educational records available to the Parents at each of the IEP meetings as well as other meetings between District staff and the Parents. The IDEA was not violated.

*Failing to provide paraeducator support for the Student as requested by the Parent in October 2014 and February 2015.*

25. The Parents request a full-time paraeducator as support for the Student. Members of the IEP team considered those requests and decided against a full-time paraeducator. The record will simply not support Parent's contention that such a paraeducator would effectively deal with the Student's behavioral issues or was required in order for the Student to obtain FAPE. The credible testimony of the District's staff was logical and persuasive, namely a 14 year old male would be embarrassed and resentful with a full-time paraeducator following him about during the school day. District staff has several years of observing and dealing with the Student in a classroom or school setting. The IDEA was not violated.



26. Having found that the District was procedurally deficient in the disciplinary change of educational placement of the Student without PWN to the Parents, and having failed to conduct a manifestation determination review, it must be determined if these two procedural violations of the IDEA resulted in a denial of FAPE to the Student. The criteria for making this determination are set forth above in Conclusion of Law 7. The period of time the Student was removed was relatively short. By March 23, 2015, the Student was back in four of his five general education classrooms and back in all his general education classrooms by May 1, 2015. The Parents and the District were in frequent communication with each other regarding the Student. Even though the Parents disagreed with the District's plans, they were made well aware of what the District was implementing. The Student received instruction in the general education curriculum while in the self-contained classroom, from which the evidence shows he benefited. Most importantly, the District's actions were successful because the Student demonstrated appropriate behavior in class, did not escalate, and was productive on five consecutive days which resulted in his return to the general education classroom. For these reasons, the undersigned concludes that the District's procedural errors did not impede the Student's right to a FAPE nor did the errors significantly impede the Parents' opportunity to be involved in the decision making process.

27. All arguments raised by the parties have been carefully considered. Any arguments not expressly discussed or addressed herein were determined to be without legal merit.

#### ORDER

The District has not violated the Individuals with Disabilities Education Act and has not denied the Student a free appropriate public education.

The Parent's requested remedies are denied.

Signed at Seattle, Washington on August 13, 2015.



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David G. Hansen  
Administrative Law Judge  
Office of Administrative Hearings

#### 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. 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. *Jan*

Parent  
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cc: Administrative Resource Services, OSPI  
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