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COUNTY OF SNOHOMISH

No. 35353-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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IN THE MATTER OF  
Sumner School District,

Appellant,

v.

A.D., a Minor Special Education Student, by and through  
his Mother and Legal Guardian, L.D.,

Respondent.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

This case involves the provision of extended school year services to a special education student who resides in the Sumner School District (the “District”). Some special education students need school services beyond the typical school year in order to receive a free appropriate public education (“FAPE”) under the IDEA. The issue in this matter is whether the District was required to provide such “extended school year” (“ESY”) services to a special education student (“A.D.”) during the summer of 2005.

The District had determined that A.D. was not entitled to receive ESY services during the summer of 2005. The parents of A.D. (“Parents”)<sup>1</sup> requested a “due process” hearing to challenge the District’s decision, and a hearing was held before ALJ Janice E. Shave<sup>2</sup> on November 17 and December 16, 2005 and on January 19, 2006.<sup>3</sup> In her Findings of Fact, Conclusions of Law, and Order (“ALJ’s Order”), the ALJ concluded that procedural violations had occurred that

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<sup>1</sup> Both A.D.’s mother and father requested the due process hearing, but the parents were represented at the hearing through only the mother. CP 27, ALJ’s Order at 1. The mother is the parent representative in the current case and will be referred to herein as “Parents.”

<sup>2</sup> Special education “due process” hearings are held, pursuant to Washington’s Office of the Superintendent of Public Instruction, before the Office of Administrative Hearings. WAC 392-101-010(2).

<sup>3</sup> Special Education Cause No. 2005-SE-0092

prevented the Parents from participating in the IEP process and thus amounted to a denial of FAPE. The ALJ incorrectly applied state and federal laws and regulations and issued an order that is not supported by substantial evidence in the record. The District filed a Petition for Judicial Review with the Pierce County Superior Court on March 15, 2006, seeking review of the ALJ's Order. On August 17, 2006, the superior court affirmed the ALJ's Order and dismissed the District's petition for review ("Final Order"). The District now seeks review of the Superior Court's Final Order.

## II. ASSIGNMENTS OF ERROR and ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The superior court erred in affirming the Findings of Fact, Conclusions of Law, and Order entered by the Office of Administrative Hearings for the Superintendent of Public Instruction in Cause No. 2005-SE-0092.

The issues related to the assignments of error are: (1) Should the trial court's Final Order, which affirmed the ALJ's Order, be reversed? (2) Did the ALJ erroneously interpret or apply the law, fail to follow prescribed procedures, or otherwise act arbitrarily or capriciously, when: (a) the ALJ failed to address the burden of proof responsibilities of the Parents and failed to consider that the Parents did not meet their

burden of proving a denial of FAPE; (b) the ALJ concluded that the District committed procedural violations of state and federal law; (c) the ALJ concluded that procedural violations interfered with the Parents' ability to participate in the development of A.D.'s individualized education program ("IEP") to a degree that constituted a denial of FAPE; (d) the ALJ's findings of fact were contrary to or not supported by the record and failed to support the conclusion that the District committed a procedural violation; and (e) the ALJ ordered the District to provide A.D. with compensatory services. The District's position is that the superior court's Final Order on appeal should be reversed, as should the ALJ's Order.

### III. STATEMENT OF THE CASE<sup>4</sup>

#### A. Overview of Special Education Law

State and federal special education laws are intended to provide that a certain category of students (those with disabilities who require specially designed instruction) receive a "free appropriate public education" (commonly referred to as "FAPE"). Applicable state and federal statutes and regulations contain both procedural and substantive

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<sup>4</sup> The certified administrative record is cited by page number and line(s) as "CP \_\_: \_\_." Exhibits from the certified administrative record are cited by page number as "CP \_\_\_" and by exhibit number as "Ex. \_\_\_."

requirements. A brief introduction to the relevant standards and procedures will thus be helpful here.

A school district's duty is to provide FAPE to eligible students with disabilities.<sup>5</sup> A student receives FAPE if his program is "reasonably calculated" to provide him with *some* educational benefit.<sup>6</sup> The goal in special education law is that a child should progress, not that he or she should catch up with non-disabled peers.

Parents are involved in many steps of the process of special education. They participate actively in the evaluation process when students are first identified as possibly eligible for special education services.<sup>7</sup> The details of each eligible student's special education program and placement are determined on an individualized basis and are recorded in a document known as an Individualized Education Plan, or "IEP."<sup>8</sup> A special education student's IEP is discussed and developed each year at what is known as an IEP meeting, conducted by an IEP

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<sup>5</sup> 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.13; WAC 392-172-030(1).

<sup>6</sup> *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

<sup>7</sup> 20 U.S.C. § 1414(a)-(c) (describing evaluation procedures); 34 C.F.R. § 300.345; WAC 392-172-105(1).

<sup>8</sup> See WAC 392-172-153 through 392-172-166.

team that includes the child's parents, teachers, and other professionals.<sup>9</sup> The IEP created at these annual meetings contains descriptions of, among other things, the student's current levels of performance and educational needs, the type of classroom and program he or she will be served in, goals for the coming school year, and a summary of the instruction and related services that will be provided to help him or her make progress towards those goals.<sup>10</sup>

The specific special education services at issue in this case are known as extended school year (ESY) services. Some special education students require ESY services beyond the typical school year in order to obtain FAPE. In the Ninth Circuit, ESY is defined as "educational programming which extends instruction beyond the conventional school year to prevent *serious* regression over the summer months."<sup>11</sup> The District submits that in this case, there is no current evidence to indicate that A.D. needs ESY services.

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<sup>9</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.343 – .344; WAC 392-172-153(1).

<sup>10</sup> 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; WAC 392-172-160.

<sup>11</sup> *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1301 (9th Cir. 1992) (citing *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1027-28 (10th Cir. 1990)) (emphasis added); *see also* 34 C.F.R. § 300.309(b)(1)(i); WAC 392-172-163(4)(a)(i).

B. Statement of Facts

1. Procedural History.

L.D. is the mother of A.D., a special education student who resides within the boundaries of the District.<sup>12</sup> In July 2005, A.D.'s mother requested a "due process" hearing. Following the hearing, on February 16, 2006, the ALJ issued the ALJ's Order.<sup>13</sup> The District appealed the ALJ's Order to the Pierce County Superior Court.<sup>14</sup> The Superior Court affirmed the ALJ's Order by written order dated March 17, 2006, and the District filed a timely Notice of Appeal to this Court on September 14, 2006.

2. A.D.'s Eligibility for Special Education and ESY Services in California.

A.D. was fifteen years old at the time of the due process hearing.<sup>15</sup> Before moving to Washington in the summer of 2004, he had resided in California and had attended school at the Ramona Unified School District ("Ramona").<sup>16</sup> Ramona found A.D. to be eligible for special education services beginning in preschool and continuing until he

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<sup>12</sup> CP 789:25 – 790:1; 790:12-15.

<sup>13</sup> CP 27-44 ("ALJ's Order").

<sup>14</sup> CP 1-5.

<sup>15</sup> CP 468, District Ex. 8 at 1 (listing A.D.'s birth date in 1990).

<sup>16</sup> CP 791:6-8.

moved to Washington.<sup>17</sup> A.D.'s eligibility for special education is not in dispute in this case.

Ramona offered ESY services to A.D. beginning in second grade and apparently continuing in each summer break<sup>18</sup> thereafter until the summer of 2004, when the family moved to Sumner, Washington.<sup>19</sup> Ramona's ESY program consisted of summer school classes for a period of four to six weeks each summer.<sup>20</sup> A.D. did not attend Ramona's summer program during the summer of 2004.<sup>21</sup>

3. A.D. Enrolls in the Sumner School District.

A.D.'s family moved from California to Washington during the summer of 2004.<sup>22</sup> A.D. was enrolled in the District for the 2004-2005 school year.<sup>23</sup> The District asked Ramona to forward all of A.D.'s educational records, and a complete set of A.D.'s records was provided.<sup>24</sup>

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<sup>17</sup> CP 792:4-6; CP 220, Petitioner's Ex. 6.

<sup>18</sup> *See, e.g.*, CP 225, Petitioner's Ex. 8 (A.D.'s 2003 IEP from Ramona, indicating ESY services were to be provided); CP 233, Petitioner's Ex. 9 (A.D.'s 2004 IEP from Ramona, same notation about ESY); *see also* CP 724:21 - 725:1.

<sup>19</sup> CP 791:9-14.

<sup>20</sup> CP 727:6-13.

<sup>21</sup> CP 798:16-22.

<sup>22</sup> CP 791:9-14.

<sup>23</sup> CP 791:15-24; 836:7-10.

<sup>24</sup> CP 730:2-16.

The Parents and the District disagreed about A.D.'s placement and program for the 2004-2005 school year.<sup>25</sup> They participated in mediation in December 2004 and reached a settlement agreement.<sup>26</sup> The agreement provided in part that the District would pay A.D.'s tuition at a private school in Renton called New Horizon for the remainder of the 2004-2005 school year.<sup>27</sup> The District also agreed to conduct a comprehensive reevaluation of A.D. during the 2004-2005 school year, in order to prepare for the 2005-2006 school year.<sup>28</sup> A.D. attended New Horizon full time starting in January 2005, and did not receive any direct services from the District from January to June 2005.<sup>29</sup>

#### 4. The District's Evaluation of A.D.

In February 2005, the District's psychologist, Cher Collins, conducted the reevaluation required by the settlement agreement.<sup>30</sup> New Horizon staff provided current academic testing to Ms. Collins,<sup>31</sup> who summarized her findings in an Evaluation Report in March 2005.<sup>32</sup> She

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<sup>25</sup> CP 829:6-24.

<sup>26</sup> CP 244, Petitioner's Ex. 11; CP 831:18 – 832:3.

<sup>27</sup> CP 244, Petitioner's Ex. 11.

<sup>28</sup> CP 244, Petitioner's Ex. 11.

<sup>29</sup> CP 799:23 – 800:7; 831:15 – 832:3.

<sup>30</sup> CP 859:8-12.

<sup>31</sup> CP 854:13-19.

<sup>32</sup> CP 267, Petitioner's Ex. 15.

concluded that A.D. continued to meet eligibility criteria for emotional/behavioral disturbance and specific learning disability, and also for the category of health impaired because of an ADHD diagnosis.<sup>33</sup>

One specific section of the evaluation report addressed ESY services. The District stated in that section “There is no current data indicating a need for ESY services at this time.”<sup>34</sup> District staff had found no information in any of the documents they reviewed from Ramona or in any reports received from New Horizon that suggested that A.D. would regress significantly over the summer and/or be unable to recoup within a reasonable period of time.<sup>35</sup> District staff stated that the statement in the evaluation report reflected the fact that there was no data provided at that time to support a finding that A.D. needed ESY services.<sup>36</sup>

The evaluation report was signed by the Mother, Ms. Collins, Betsy Minor Reid (the District’s Director of Special Services), Roger Smith (the District’s Assistant Director of Special Services), Diane

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<sup>33</sup> CP 267, Petitioner’s Ex. 15 at 11.

<sup>34</sup> CP 267, Petitioner’s Ex. 15 at 13.

<sup>35</sup> CP 862:19 – 863:7; 637:19 – 640:21.

<sup>36</sup> CP 864:12–21 (“...it is talking about data needed or data for ESY and that there was no current data available at that time.”)

Baxter (a District special education teacher), Elena Tsaregorodtseva (a general education teacher at New Horizon), and Marla Veliz (the CEO of New Horizon).<sup>37</sup>

5. There Was No Data to Support A.D.'s Need for ESY.

The individuals listed above met to review the evaluation in a meeting held on March 14, 2005.<sup>38</sup> A.D.'s mother actively participated in the meeting and expressed her disagreement with the conclusion that data to support a determination that A.D. required ESY services did not exist.<sup>39</sup> District staff agreed to change the statement about ESY to the following: "This will be looked at further during an IEP meeting."<sup>40</sup>

On April 6, 2005, an IEP meeting was held. In attendance were the Mother; various related service providers from the District (an occupational therapist, a psychologist, and speech language pathologists); Ms. Baxter, Mr. Smith, Ms. Minor Reid, Ms. Conrad, and Ms. Hart from the District; and Ms. Tsaregorodtseva and Ms. Veliz from New Horizon.<sup>41</sup> The subject of ESY was discussed and A.D.'s

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<sup>37</sup> CP 267, Petitioner's Ex. 15 at 14.

<sup>38</sup> *Id.* (listing attendees).

<sup>39</sup> CP 817:1-8, 23-25.

<sup>40</sup> CP 844:3 - 846:7. *See* CP 503, District Ex. 15 at 14; CP 533, District Ex. 20; and CP 865:16 - 866:6.

<sup>41</sup> CP 324, Petitioner's Ex. 21 (listing attendees)

mother fully participated. New Horizon staff members present expressed their “belief” that A.D. should have ESY services, and recommended the New Horizon summer school.<sup>42</sup> However, the District members of the IEP team concluded that neither Ramona nor the staff at New Horizon had provided any data that indicated that A.D. would regress and fail to recoup in a reasonable amount of time after the summer.<sup>43</sup>

The District explained to New Horizon staff that in order to make an informed decision about whether A.D. needed ESY services, the District would need to have some data that showed that A.D. met the required criteria for eligibility for ESY: significant regression over extended breaks and recoupment of skills that was so slow as to effectively prevent progress from occurring.<sup>44</sup> The District was not seeking any new data or asking that any special testing be done. Instead, one of the District’s special education teachers, Kathy Hart, asked New Horizon to provide data that A.D.’s New Horizon teachers should already have been keeping on a regular basis: grades, curriculum-based

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<sup>42</sup> CP 630:25 – 631:11.

<sup>43</sup> CP 847:8 – 848:17.

<sup>44</sup> CP 783:2 – 785:4; 871:17 – 873:5; 894:18–24; 610:6–20; 644:14 – 645:4; 663:22 – 665:2.

data, unit tests, chapter tests, scored writing samples, math assessments, etc.<sup>45</sup>

District staff uniformly testified that they made it clear that New Horizon was being asked to provide the data it already had (or at least should have had), not to gather new data or to do any extra work or assessments.<sup>46</sup> Under the terms of the service contract between New Horizon and the District, New Horizon was required to keep, compile, and provide data and information about A.D. to the District,<sup>47</sup> and Ms. Tsaregorodtseva told the District that she recorded data about A.D. on a regular basis.<sup>48</sup> Ms. Hart testified at the hearing that New Horizon staff responded to her request with reluctance, acting as if it would be impossible to provide the requested information because they did not have the data or did not have the time to collect it.<sup>49</sup> Ms. Hart also testified that New Horizon staff should have had ample data readily at hand given the commercially-available curriculum it was using, which

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<sup>45</sup> CP 894:25 – 895:7.

<sup>46</sup> CP 895:8-13; 915:11-22; 593:6 – 595:17; 627:6 – 628:4; 645:1-15.

<sup>47</sup> CP 464, District Ex. 7 at 4; CP 785:5-12.

<sup>48</sup> CP 646:10 – 647:14.

<sup>49</sup> CP 895:14-18.

required daily graded exercises, a skills assessment every 10 lessons, and a placement test.<sup>50</sup>

In the absence of any useful regression/recoupment information from New Horizon staff, the IEP team agreed to postpone any decision about ESY until June.<sup>51</sup> The New Horizon staff drafted an IEP noting that ESY was “To be determined in June, 2005, *based on progress from Jan. thru June 10, 2005 at New Horizon.*”<sup>52</sup> Everyone attending the April 6 IEP meeting appears to have understood that the ESY issue would remain undecided until a June meeting. In June, the IEP team would consider whatever information New Horizon staff were able to produce, as New Horizon provided A.D.’s instruction.<sup>53</sup> In the period between the April and June IEP meetings, New Horizon staff did not supply the District with any data sheets, grade reports, or other records that it supposedly was routinely keeping about A.D.’s progress.

On June 28, 2005, the IEP meeting to make a determination regarding ESY services was held.<sup>54</sup> The meeting was attended by the

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<sup>50</sup> CP 896:14 – 898:16.

<sup>51</sup> CP 816:11-19.

<sup>52</sup> CP 414, District Ex. 1 at 7 (emphasis added).

<sup>53</sup> CP 414, District Ex.-1 at 7; CP 902:3-9; 581:1-14; 610:21 – 611:1; 647:15 – 649:17, 650:15 – 651:5.

<sup>54</sup> CP 817:1-3.

Mother; Christopher Evans (A.D.'s New Horizon counselor); Ms. Tsaregorodtseva and John Jarrett from New Horizon; Ms. Collins, Ms. Conrad, Ms. Baxter, Ms. Minor Reid, Mr. Smith, Kathy Hart (an intervention specialist), Connie Haines (a speech therapist), Joanne Streeck (an occupational therapist), and Denise Bowers (a psychologist) from the District; and the Parents' and District's attorneys.<sup>55</sup>

At that meeting, New Horizon staff did not present any information that showed significant regression or failure to recoup in a reasonable amount of time. Instead, New Horizon staff provided glowing, positive reports about A.D.'s progress under their tutelage.<sup>56</sup> With the Mother not agreeing and the New Horizon staff continuing to express the "belief" (with no supporting data) that A.D. should attend the New Horizon summer program, the District members of the IEP Team concluded that A.D. was not in need of ESY services for the summer of 2005.<sup>57</sup>

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<sup>55</sup> CP 444, District Ex. 5; *see also* CP 751:5 – 753:33 (describing involvement in drafting New Horizon IEP).

<sup>56</sup> CP 581:25 – 582:16; 611:22 – 612:22; 628:8–14; 652:9–24.

<sup>57</sup> CP 873:13 – 876:25; 902: 20 – 903:11; 582:17 – 583:20; 611:7–17; 612:23 – 613:14; 653:9–25; CP 481, District Ex. 11 and CP 348, Petitioner's Ex. 23 (District's Notice of Action dated June 29, 2005, confirming IEP Team's decision not to provide ESY services to A.D.).

The District members of the IEP team had made it clear to A.D.'s mother and to New Horizon staff that if there were any information to support A.D.'s need for ESY services for the summer of 2005, it would need to come from those who were currently teaching him. At the end of the June 28 IEP meeting, Ms. Minor Reid told New Horizon staff that if they had any additional information that might be helpful, they could send it to the District the next day. Ms. Tsaregorodtseva, one of A.D.'s general education teachers at New Horizon, said that she would send a copy of her grade book.

The day after the meeting, Ms. Tsaregorodtseva faxed District staff a copy of a graph she had prepared that showed A.D.'s scores for a few days before spring break and a slight dip after returning from the break, with a return to near his pre-break scores within two weeks.<sup>58</sup> The District's special education teacher, Ms. Hart, and its occupational therapist, Joanne Streeck, testified that the graph did not indicate a significant regression and failure to recoup,<sup>59</sup> and their testimony on this

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<sup>58</sup> CP 370, Petitioner's Ex. 26; CP 655:9 – 658:16; 760:13 – 762:9; 762:24 – 764:6.

<sup>59</sup> CP 898:18 – 899:25; 613:15 – 614:7.

point was uncontradicted. Ms. Tsaregorodtseva never provided the District with a copy of her grade book.<sup>60</sup>

At the hearing before the ALJ, the District offered copies of A.D.'s grade reports from the quarters before and after his spring break in 2005, which showed that he improved his grades in several subjects, went down only very slightly (an 80 to a 76) in one course, and maintained roughly the same grade in other courses.<sup>61</sup> The District also offered into evidence a copy of A.D.'s September 22, 2005, progress report from New Horizon,<sup>62</sup> reflecting A.D.'s grades after a long summer break away from school. This report also showed no significant regression from his performance at the end of the prior school year.<sup>63</sup> Ms. Hart also testified about the September 2005 progress report indicating that A.D. was making progress during his first month back at school after the summer vacation.<sup>64</sup>

#### IV. ARGUMENT

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<sup>60</sup> ALJ's Order at ¶ 31.

<sup>61</sup> CP 486, District Ex. 14 at 1; 658:17 – 660:3.

<sup>62</sup> CP 525, District Ex. 16.

<sup>63</sup> CP 660:4 – 661:9.

<sup>64</sup> CP 900:12 – 902:2 (discussing District Ex. 16).

A. Standard of Review

This Court sits in the same position as the superior court when reviewing agency decisions. In *North Kitsap School District v. K.W.*,<sup>65</sup> the Court of Appeals discussed the scope of review in a special education case in the following terms:

An appellate court reviews a trial court’s factual findings “for clear error even when they are based on the written record of administrative proceedings.” [Citation omitted.] A clear error is “when the evidence in the record supports the finding but ‘the reviewing court is left with a definite and firm conviction that a mistake has been committed.’ [Citations omitted.]

But both trial and appellate courts review de novo whether a school district provided the disabled student a FAPE. [Citation omitted.]

130 Wn. App. at 360. Thus the Court of Appeals conducts an essentially de novo review, particularly as to any findings or conclusions regarding FAPE.

In conducting what is essentially a de novo review, the Court of Appeals may nonetheless give “due weight” to the decision of the ALJ.<sup>66</sup> The court in that case went on to make two points that are potentially applicable in the present case. The court noted that “the amount of deference accorded the hearing officer’s findings increases where they

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<sup>65</sup> *North Kitsap School District v. K.W.*, 130 Wn. App. 347 (Div. II, 2005).

<sup>66</sup> *Id.*, 130 Wn. App. at 360.

are ‘thorough and careful.’”<sup>67</sup> Second, the court stated that “courts are generally required to defer to the ALJ’s expertise in educational policy matters.”<sup>68</sup> While the court did not provide a great deal of guidance about what decisions are within that expertise, the court cited *Gregory K. v. Longview School District*<sup>69</sup> on the following point:

[W]e must also decide whether the placement proposed by the District later that year was “appropriate” . . . . This issue more than most others in the case involves educational policy.

Cited at 130 Wn. App. at 368, where the court stated: “. . . the court’s appropriateness inquiry requires deference to the ALJ’s determination given the important education policy concerns . . . .” Thus in order for this concept of “deference” to be applicable at all, the ALJ in the present case must have made a determination regarding appropriateness of the educational program defined by the District for A.D. – which in this case did not include ESY services for the summer of 2005. In fact, the ALJ made no such findings or conclusions.

The Parents have the burden of proof in this case. They did not prove that an appropriate program for A.D. included ESY services for the summer of 2005, and the ALJ made no finding or conclusion on this

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 361.

<sup>69</sup> 811 F.2d 1307, 1314 (9<sup>th</sup> Cir. 1987).

subject. However, the evidence is compelling that such services would not have been part of an appropriate program for A.D. for the summer of 2005 because there was, plain and simply, no evidence to support such findings or conclusions. The ALJ's conclusion that "the failure of the School District to obtain necessary data was a significant error which interfered with the Parents' ability to participate in the IEP process"<sup>70</sup> is not a decision regarding educational policy. The record is abundantly clear that what really happened was that the District did obtain all of the data that was available, and that data simply did not support a requirement that ESY services be included as part of an "appropriate" program for A.D. in the summer of 2005.

B. Extended School Year Services Are Not Required to Maximize Progress, But Are Only Required When Students Are Likely to Significantly Regress AND Unlikely to Recoup Lost Skills Within a Reasonable Period of Time

A student receives FAPE if his program is "reasonably calculated" to provide him with *some* educational benefit.<sup>71</sup> Schools are not required to *maximize* a child's potential or to provide the best possible program and services.<sup>72</sup> The U.S. Supreme Court has held that

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<sup>70</sup> ALJ's Order, Conclusion No. 16, p. 18.

<sup>71</sup> *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

<sup>72</sup> *Id.* at 189.

the FAPE requirement contains both procedural and substantive components.<sup>73</sup> Under the two-prong inquiry established in *Rowley v. Board of Education of the Hendrick Hudson Central School District*, courts examine whether a school district provided a student with FAPE by asking if the district (1) developed and implemented an IEP that was reasonably calculated to enable the student to receive some educational benefit and (2) complied with the procedural requirements of the IDEA.<sup>74</sup>

Not every procedural violation automatically amounts to a denial of FAPE.<sup>75</sup> A denial of FAPE on procedural grounds occurs *only* if procedural inadequacies “result in the loss of educational opportunity . . . or seriously infringe the parents’ opportunity to participate in the IEP formulation process.”<sup>76</sup>

In this case, the ALJ found that procedural violations had occurred and that they amounted to a denial of FAPE because violations

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<sup>73</sup> *Id.* at 206-07.

<sup>74</sup> *Id.*

<sup>75</sup> *W.G. v. Target Range Sch. Dist. No. 23 Bd. of Trustees*, 960 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1992).

<sup>76</sup> *Id.*; see also, e.g., *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4<sup>th</sup> Cir, 1990) (failure to prepare IEP within time required under state law did not deprive student of educational benefits and did not deny FAPE); *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6<sup>th</sup> Cir. 1990) (although the IEP did not include two of the § 1401(a)(19) factors, the IEP was not invalid because all information required by that section was well known to the IEP team).

denied the parents the opportunity to participate in IEP development.<sup>77</sup> Although it is difficult to figure out from the ALJ's Order exactly what the "procedural error" was, it appears that the ALJ concluded that the District had not gathered sufficient data to enable it to make an informed decision about whether A.D. needed ESY services during the summer of 2005.<sup>78</sup>

ESY services are not mentioned in the IDEA statute itself, but are referred to in brief, identical state and federal administrative regulations. The state version of the regulation is reproduced in its entirety in the appendix to this brief. Notably absent from the state and federal regulations are any specific procedural requirements that govern how the IEP team must make its determination regarding the need for ESY.

Special education students deemed eligible for ESY services are those who have demonstrated or are at risk of a significant regression in skills that cannot be recouped within a reasonable amount of time upon returning to school. In determining whether ESY services are needed, educators typically analyze the amount of regression a child experiences during the summer months, together with the amount of time required to

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<sup>77</sup> ALJ's Order at ¶ 14.

recoup those lost skills, along with other individualized factors as appropriate.<sup>79</sup> The concept of regression and failure to recoup as a means of analyzing eligibility for ESY services is directly related to the federal and state requirement that a special education program provided for a student with disabilities must be reasonably calculated to enable the student to receive educational benefit—in other words, to make progress in his or her IEP goals.<sup>80</sup>

No “ESY evaluation” is required under state or federal law; no test can be given to determine whether a student needs these services.<sup>81</sup> Instead, to assess significant regression or failure to recoup reasonably promptly, educators must review the grades and other data that are regularly kept for each special education student, and look at whether there is a significant disparity between the student’s performance before and after a break in instruction.<sup>82</sup> If the student’s work suffers after a break, educators then look to see how long it takes the student to regain his or her previous skill level. If the amount of regression is high and

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<sup>78</sup> ALJ’s Order at ¶ 11.

<sup>79</sup> *Id.*; CP 635:3 – 636:22.

<sup>80</sup> 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.13; WAC 392-172-135; *see also Rowley*, 458 U.S. at 189.

<sup>81</sup> If there were such a test, the burden would be on the parents to prove that it exists.

the time it takes to recoup lost skills is long, a student *may* need ESY.<sup>83</sup> The basic issue is whether the lack of ESY instruction will erase all or substantially all of the progress the student made during the school year.

As discussed more fully below, the Parents in this case argued that A.D. should receive ESY services because he was not working at grade or age level and thus needed summer schooling to “catch up” with non-disabled students, and that he would “benefit” from summer instruction.<sup>84</sup> That is not, however, the criterion for ESY eligibility. Many special education students function below grade or age level, and most would, of course, gain some benefit from additional instruction; but very few qualify for ESY services. Because ESY imposes additional requirements on students with disabilities and deprives them of the vacation time that all other students enjoy, state and federal law require members of the student’s IEP team to decide *annually*, on an individualized basis, whether a particular student requires ESY.<sup>85</sup>

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<sup>82</sup> CP 594:7 – 595:24; 612:11–16; 627:6 – 628:4; 630:3–11; 644:11–15; 894:23 – 895:13.

<sup>83</sup> *See generally* CP 649:19 – 650:7.

<sup>84</sup> *See, e.g.*, 902:23 – 903:5.

<sup>85</sup> 34 C.F.R. § 300.309(a)(2); WAC 392-172-163(2).

C. The Parents Had the Burden of Proof at the Hearing and Failed to Meet It

Pursuant to the U.S. Supreme Court's recent decision in *Schaffer v. Weast*,<sup>86</sup> the Parents had the burden of proving that there was a procedural or substantive denial of FAPE due to the District's decision that A.D. did not require ESY services as part of his IEP.

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [student], as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.<sup>87</sup>

The Parents here have challenged the IEP put in place by the District and specifically, the District's decision that A.D. did not need ESY. The Parents therefore bear the burden.

Courts have noted that, "ESY is the *exception* and not the rule under the regulatory scheme. Given those policy considerations, therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression. More specifically, it must be shown that an ESY is necessary to permit the child to benefit from his

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<sup>86</sup> 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

instruction.”<sup>88</sup> The Parents burden in this case is, therefore, a heavy one.

D. The Parents Failed to Prove that A.D. Required ESY Services.

1. Ramona’s Decision to Previously Offer ESY Services Is Not Dispositive.

The Parents continually cited to Ramona’s decision to offer A.D. ESY services in the past as support for their belief that the District was required to provide ESY services, too. The ALJ seemed to place weight on Ramona’s decisions regarding A.D.’s ESY services. In Findings of Fact 2, 3, 10, and 35, the ALJ erroneously stated that Ramona School District “determined” or “found” that A.D. was eligible for behavioral ESY services, so that his behavior would not regress over the summer.

Ramona did determine that A.D. was eligible for ESY services. However, Ramona did not make the ESY determination in a proper manner; or if it did, it provided no information to the District to support that determination, despite the District’s requests. The Parents offered no evidence to show that Ramona made a proper determination of ESY beyond the mere reference in A.D.’s Ramona IEPs that he was receiving ESY services (summer school).

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<sup>87</sup> *Schaffer*, 126 S. Ct. at 537.

<sup>88</sup> *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 278 (6th Cir. 2004) (quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1472-73 (6th Cir. 1990)).

Eileen Highley, Ramona's Director of Pupil Services, testified at the hearing that in Ramona they do not make an individualized evaluation of whether a student requires ESY:

Q: [By Mr. Brown] Ms. Highley, you can answer the question which was, what factors does the district consider in making ESY decisions for special education students in your district?

A: [By Ms. Highley] In my district, generally when a student is in special day class, when more than 50 percent of their day is spent receiving special education services, it is strongly felt that due to the nature of their disability that they should have extended school year services.<sup>89</sup>

Ms. Highley's testimony clearly indicated that Ramona offered ESY services to *all* special education students, without requiring an individualized showing of need or eligibility.<sup>90</sup>

Further, Ramona provided the District with A.D.'s school records. Included among the Ramona records was a copy of an IEP that had been developed by a Ramona IEP Team in March 2004.<sup>91</sup> The IEP noted that A.D. had been deemed eligible for ESY services, but there was nothing on the IEP or in any of A.D.'s other Ramona records

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<sup>89</sup> CP 725:23 – 726:6.

<sup>90</sup> CP 725:23 – 726:6

<sup>91</sup> CP 797:14-25; 825:2-5.

indicating whether he ever actually attended any ESY program.<sup>92</sup> Most importantly, the District found no information in those records about the *basis* for Ramona’s decision to provide ESY, nor any description of why the Ramona staff believed that A.D. might require ESY services. Regardless, because a student’s eligibility for ESY must be determined on an individual basis each year, any information from Ramona about past years would not even have been dispositive when he moved to Washington.<sup>93</sup>

Because no individualized “determination” of any kind was made by Ramona, the Parents’ argument that Ramona’s determination is dispositive of A.D’s ESY services in the District is simply wrong. The ALJ’s findings of fact regarding Ramona’s determinations must be reversed.

2. Subjective “Beliefs” Do Not Support the Conclusion that ESY Services Were Required for A.D.

The Parents bring forth evidence of the “beliefs” of Ramona staff and A.D.’s mother regarding A.D.’s need for ESY services. Such “beliefs” do nothing to prove that ESY services were required for A.D. In Findings of Fact 8, 9, 23, 33, and 38, the ALJ relies on the fact that

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<sup>92</sup> CP 731:20 – 732:10.

<sup>93</sup> 34 C.F.R. § 300.309; WAC 392-172-163.

both the Ramona staff and the Mother “believed,” “felt strongly,” or had the opinion that A.D. should receive ESY services, or “disagreed” with the District’s conclusion that A.D. did not qualify.<sup>94</sup> These beliefs may have been sincerely held, but there is no support in the testimony or in the documentary evidence to back up such subjective “beliefs.”

No evidence was presented to indicate that “the nature of the Student’s emotional disabilities” played any role in the Ramona district staff’s decision to offer ESY to A.D., because such services were offered as a matter of course to all students with disabilities. In addition, the Parents presented no evidence to back up A.D.’s mother’s or the Ramona staff’s subjective beliefs, and certainly no evidence about regression over the summer, the need for speech therapy, or “other issues, including socialization,” as the ALJ stated in Finding of Fact 9.<sup>95</sup>

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<sup>94</sup> CP 819:22-24; 772:5-18 (Marla Veliz, CEO of New Horizons, testified that her opinion about A.D.’s need for ESY was based on discussions with his teachers and on his tendency to regress academically, socially, and behaviorally after a vacation or break. Ms. Veliz is an administrator and has never been one of A.D.’s instructors. CP 776:22-24.); CP 385, Petitioner’s Ex. 30 at 2-3 (Sworn Statement of Duane Smalley in Lieu of Direct Examination); CP 391, Petitioner’s Ex. 31 at 3-5 (Sworn Statement of Elena Tsaregorodtseva in Lieu of Direct Examination); CP 400, Petitioner’s Ex. 32 at 5-6 (Sworn Statement of Maria Veliz in Lieu of Direct Examination).

<sup>95</sup> Finding of Fact 9 is based upon the Mother’s testimony at CP 793:4-19, in which she states that Ramona staff told her that her son needed ESY because he regressed too much, needed speech therapy, and had issues with his socialization. None of this (totally hearsay) information appears anywhere on the paperwork from Ramona, and it contradicted the testimony of Ramona’s administrator Ms. Highley, who stated that all students who receive special education for 50% or more of their

Further, A.D.'s mother was ably represented by counsel at the hearing, and yet she made little attempt to provide any information in support of these subjective beliefs and opinions. The Parents, Ramona, and New Horizon did not do the most obvious things to prove that A.D. was eligible for ESY services based on regression and recoupment as required.<sup>96</sup>

The ALJ states in Conclusion of Law 11 that the "data" presented to the District by Ramona and New Horizon indicated unanimity of *opinion* that A.D. required ESY. An opinion is not the same thing as data; an opinion is subjective and cannot be independently verified by others. Further, the ALJ's findings and conclusions (and the testimony presented at the hearing) do not establish any basis for those beliefs or that the New Horizon staff had any clue about what the applicable criteria (regression/recoupment) were. The IEP team would have been derelict in its duty to make an individualized determination had it relied solely on feelings and subjective beliefs of people who either did not know, or simply ignored, the applicable criteria.

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school day are automatically enrolled in ESY, regardless of their individual needs. *See* CP 726:2-6.

<sup>96</sup> They did not present the testimony of A.D.'s New Horizon counselor, and did not even provide the "grade book" that had been touted as a source of data about A.D.

3. Information Provided by New Horizon Staff Supported a Decision That ESY Services Were NOT Needed.

At the hearing before the ALJ, the District produced evidence regarding A.D.'s performance before and after his spring and summer breaks at New Horizon that convincingly established that he was not in need of ESY services. A.D.'s September 22, 2005 evaluation report from New Horizon showed that he was doing very well in his first month back to school after summer break.<sup>97</sup> The report shows grades ranging from 79% to 96%.<sup>98</sup> This is simply not the record of a student who suffered serious regression over his summer vacation and failed to recoup his skills at a reasonable rate.<sup>99</sup>

Further, testimony from District staff showed that the information obtained from New Horizon indicated that A.D. was not in need of ESY services. However, the ALJ mischaracterized such testimony. In Finding of Fact 51, the ALJ stated that Betsy Reid, Director of Special Services for the District, was "surprised" by the information provided by the New Horizon staff at the June 28, 2005, IEP meeting because it indicated that A.D. was making progress in his

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<sup>97</sup> CP 525, District Ex. 16.

<sup>98</sup> *Id.*

<sup>99</sup> CP 898:18 - 902:2.

reading, writing, and leathercraft courses. However, Ms. Reid was not surprised by the fact that A.D. was doing well. She stated that she was surprised because she thought New Horizon staff would present data or evidence that indicated a need for ESY services, and instead their reports of A.D.'s progress were quite glowing and complimentary.<sup>100</sup> Making steady, impressive progress is incompatible with a need for ESY.<sup>101</sup> Ms. Reid was therefore surprised that New Horizon staff did not appear to realize that the information they were providing did not support the conclusion that ESY services were warranted.<sup>102</sup>

4. The District Was Required to Make Its Own Determination of A.D.'s Possible Need for ESY Services.

Instead of providing evidence showing that A.D. was entitled to ESY services, the Parents asserted that the District somehow "accepted" the IEP prepared by his previous school district, Ramona. Therefore, according to the Parents, the District was apparently precluded from conducting its own evaluations or implementing an updated IEP for

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<sup>100</sup> CP 652:9-24 (Ms. Reid characterized the information as "he was absolutely making progress.")

<sup>101</sup> CP 636:8-22.

<sup>102</sup> New Horizon staff seemed to have the impression that if they could show that A.D. was making good progress during the school year, there would be justification for continuing his program during the summer so that the program could continue. This, of course, is not the basis for eligibility for ESY services.

A.D.<sup>103</sup> The Parents then leapt to the conclusion that the District was therefore required to automatically provide ESY to A.D. because Ramona did.<sup>104</sup>

There are several problems with this assumption. First, the Parents misstate the facts. The District did not “accept” the IEP created by Ramona for A.D. The District simply “accepted” that A.D. was eligible for special education. Once it decided that A.D. was eligible for special education, the District was required to develop an IEP for A.D. as a new student to the District. The District was not bound by Ramona’s decision to offer ESY to A.D. but was required to make its own evaluations and determinations about ESY for A.D.

Second, it is unclear how the District could be automatically bound to provide ESY to A.D. in the summer of 2005 based solely on the fact that Ramona provided ESY at some point in the past. A.D. did not receive ESY in the summer of 2004<sup>105</sup> and therefore, there was no previous ESY program for the District to somehow automatically adopt, as was apparently expected by the Parents.

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<sup>103</sup> Parents’ Brief in the Superior Court at 23:5 – 25:1.

<sup>104</sup> *Id.* at 25:1-10.

<sup>105</sup> CP 798:16-22.

Third, both federal and state law require that IEPs be developed *annually*. Not only is it appropriate to revisit the issue of ESY, it is required. The District is required to revisit its own decision about ESY each year, and thus it cannot be bound by the decision of a school district in another state where the student no longer attends. Even if Ramona had provided some meaningful, individualized information about why A.D. was given ESY services in California—which it did not do as described above—the Sumner School District would still be required to make its own decision based on how A.D. was progressing during the current school year.

The lack of merit in the Parents’ argument that the District is in any way bound by Ramona’s ESY decisions is readily demonstrated by applying the argument to a Ramona decision not to provide ESY services. If Ramona had decided that A.D. should not receive ESY services when he was living in California, the Sumner School District could not have said “we do not need to provide ESY services because Ramona did not.” The issue is one that must be reexamined at least *annually* by whatever school district the student is currently attending. The Parents’ argument on this point must be rejected.

A fourth, key problem with the Parents' argument is that Ramona did not make the type of individualized determination about ESY eligibility that is required by both Washington and federal special education law. The Parents claim that Ramona "determined that A.D. required ESY services in order to derive FAPE from his IEP[.]" and they cite the testimony of Eileen Highley in support of that assertion. As quoted above, Ms. Highley's testimony clearly shows that Ramona automatically enrolled students in ESY if they spend more than 50% of their regular school day in special education classes, regardless of whether an individual student actually has a demonstrable need for ESY services.<sup>106</sup>

The Parents noted that Ramona was under the same obligation as the District here to determine individually whether A.D. was experiencing regression, yet they failed to explain how Ms. Highley's testimony can be reconciled with this requirement. As the Ninth Circuit has noted, it is a *facial violation* of IDEA's individualization requirements when a school district adopts a policy of providing a uniform amount of ESY programming to children regardless of each

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<sup>106</sup> It appears that what Ramona offered was "summer school," not an individualized program of ESY services. *See* CP 226, Petitioner's Ex. 8 (left middle of page under heading "Other Program Information," box marked "Extended School Year—yes—summer school").

child's individual need. *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1306 (9th Cir. 1992). The decision of A.D.'s former school district in California not to follow IDEA's individualized determination requirements does not compel the District here to perpetuate that approach.

E. The Parents Failed to Prove a Procedural Denial of FAPE.

The ALJ never even reached the question of whether the Parents had met their heavy burden of challenging the District's decision that A.D. did not require ESY services. Instead, the ALJ erroneously jumped to the conclusion that the District had not followed procedural requirements when making that determination, and that procedural violations resulted in a denial of the Parents' ability to participate in the IEP development process and thus denied FAPE.

However, the Parents offered no testimony or evidence at all about how their participation might have been limited, and the ALJ likewise failed to explain how participation had been denied. In fact, the evidence clearly showed that there was very active participation by A.D.'s mother throughout the evaluation and IEP development process. It seems that the Parents failed to meet their burden of proving a substantive denial of FAPE, and the ALJ proceeded to find a procedural

error where none existed in order to hold that the District's decision about A.D.'s ESY eligibility was wrong.

1. The District Did Not Commit Procedural Violations.

The District Sought Information From the Two Best Sources – Ramona and New Horizon. In an ESY case, an absence of information supports a conclusion that ESY services are not required. However, in Conclusions of Law 7 through 14, the ALJ faults the District for having “delegated” its obligation to gather data to the staff at A.D.'s former school in Ramona or to his current teachers at New Horizons. However, the District was simply seeking available data about A.D.— which was exclusively in the control or possession of Ramona or New Horizon — to support the beliefs or opinions of Ramona and New Horizon that A.D. needed ESY services. The District did not “delegate” the gathering of information to anybody. The District went to the two best sources of data – Ramona and New Horizon – and asked them to provide what existed. The District received nothing to support a conclusion that A.D. required ESY services in the summer of 2005. In fact, the District ultimately received information that supported the conclusion that ESY services were not required.

As noted above, Ramona did not make an individualized decision at all, but simply presumed that a student whose day included a certain

percentage of special education services should go to summer school.<sup>107</sup>

In other words, Ramona offered ESY to *all* students who qualified for a particular level of special education, regardless of their specific needs. Ramona's offering of ESY services for A.D. did not result from any individualized determination. Ms. Highley provided no data to indicate that A.D. had a history of regression or failure to recoup, and A.D.'s records from Ramona provided no useful information on this subject. In contrast to the "criteria" used in Ramona, the District here did exactly what the law required: it evaluated A.D.'s need for ESY services on an individualized basis using information from the current school year.

The ALJ appears to fault the District for "ignoring" the fact that A.D. had a history of receiving ESY in his former school district in California. However, the District did not "ignore" the Ramona decisions on ESY. District staff members tried to find evidence to explain Ramona's conclusion regarding ESY eligibility, but could find no support for the decision. The testimony of Ms. Highley from Ramona confirmed that none existed. This is not "ignoring" the history;

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<sup>107</sup> CP 226, Petitioner's Ex. 8 at 2.

it is scrutinizing that history to see if there is any support for the prior school district's decision. No support was found.<sup>108</sup>

In any event, the fact that a student received ESY services in the past is hardly relevant to the decision an IEP team must make based on the student's changing needs each year, and certainly cannot be a determinative factor under either state or federal law. The requirement that a school district develop an IEP annually is simply confirmation of the legal principle that children change, progress, mature, etc., and that what they needed in the past does not control what they need in the future.

The District also tried repeatedly to obtain relevant information from New Horizon staff. New Horizon could not come forward (either at the meetings in 2005 or at the administrative hearing) with any concrete, written information that would reflect regression and failure to recoup. The District did receive some data from New Horizon the day after the June 28, 2005, IEP meeting, and the District considered whether that information changed the District's decision. It did not. The graphs provided by Ms. Tsaregorodtseva did not show a significant

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<sup>108</sup> It makes no sense to hold the District responsible for a decision made by a school district in another state to send more students to summer school than special education law requires.

problem with regression or slow recoupment.<sup>109</sup> None of the documentation or information that New Horizon provided indicated that A.D. was experiencing any regression; instead, it appeared that he was doing well and making good progress.

The ALJ refers in Findings of Fact 28 and 29 to a “breakdown in communication” between the District and the New Horizon staff. The Parents suggested throughout the hearing and in their various submissions and arguments that the District somehow inappropriately imposed upon New Horizon staff the responsibility to “evaluate” the Student for ESY eligibility. This is a totally inaccurate characterization of what the District asked of the staff of New Horizon, and the ALJ’s finding simply repeats the error.

As the record before the ALJ made clear, A.D. began attending New Horizon in January of 2005 as the result of a settlement agreement between the District and the Parents.<sup>110</sup> A.D. had hardly attended school in the District at all—only for a short period of time in the fall of 2004. The District’s responsibility under the settlement agreement was essentially to reimburse the Parents for the cost of New Horizon for the

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<sup>109</sup> The Parents’ failure to produce the New Horizon grade book at the hearing—something that could easily have been accomplished—demonstrates clearly how the Parents failed to carry their burden of proof.

<sup>110</sup> CP 244, Petitioner’s Ex. 11.

remainder of the 2004–2005 school year and to conduct an evaluation to prepare for the provision of services at the conclusion of that year.<sup>111</sup>

Therefore, the only information that would realistically be available about A.D.’s performance during the second half of the 2004–2005 school year would be information gathered by New Horizon staff in the normal course of their dealings with A.D. New Horizon was required to provide data and other information to the District under the terms of the settlement agreement. While New Horizon staff complained in their testimony that they could not do anything to “evaluate” the Student on short notice, the fact is that the District was not asking New Horizon staff to do anything of a special, evaluative nature. The District simply wanted the current information that New Horizon acknowledged it was routinely gathering regarding A.D.

In her testimony, Ms. Tsaregorodtseva stated that she keeps regular data sheets indicating how a student is performing on the annual goals that are in his IEP.<sup>112</sup> Ms. Tsaregorodtseva also testified that she keeps a grade book in which she records, on essentially a daily basis, how each student is doing.<sup>113</sup> Ms. Tsaregorodtseva’s data sheets and

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<sup>111</sup> CP 244, Petitioner’s Ex. 11 at 2, ¶¶ 4-5.

<sup>112</sup> CP 753:16–24.

<sup>113</sup> CP 755:20–756:23.

grade book are all that the District was requesting. New Horizon staff members were simply asked for the information that they supposedly already had. None of it was produced upon request by the District. Astonishingly, none of it was produced by the Parents at the hearing, despite the fact that the Parents had the burden of proof.

Between March 15, 2005 (when the District's initial evaluation report was issued), and June 29, 2005, the District gave the Parents and New Horizon staff encouragement and every opportunity to provide data that would have addressed the issues of regression and recoupment. District staff made it clear that grade books and daily data sheets for recording progress on IEP goals would be sufficient. When the New Horizon staff did not bring any such information to either the April 9 or June 28 IEP meetings,<sup>114</sup> District staff told them that they could still send in grade books, data sheets, or any other information the day after the June 28 IEP meeting, and that any such information would be

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<sup>114</sup> As Ms. Reid testified, it appeared at the June 28, 2005, IEP meeting that several of the New Horizon staff had the impression that they were to come to the meeting prepared to demonstrate what terrific progress A.D. was making at New Horizon. CP 654:6-20. When told by District staff that what they were saying was not supportive of ESY eligibility, the New Horizon staff tried to regroup by claiming that A.D.'s regression would be shown in the grade book. *Id.* The grade book was never provided—not even at the due process hearing.

considered. The only information sent in was Ms. Tsaregorodtseva's graph<sup>115</sup>; she never sent in A.D.'s grades or her daily data sheets.<sup>116</sup>

This was not a "breakdown in communication," as the ALJ characterized it. The District explained very clearly to New Horizon staff that it would need to see A.D.'s regular grades and marks over a period of time to determine whether his skills were significantly regressing and were not recouped quickly after breaks. The District did not have the information because A.D. was attending school at New Horizon. The only way for the District to get any such information was if New Horizon staff would provide it. The District was certainly entitled to not simply rely on the subjective statements from the staff of New Horizon, a private business that stood to benefit financially if the District was required to fund a summer program for A.D. at New Horizon. New Horizon failed to respond to the District's reasonable request for information, and in fact New Horizon staff told the District at the June meeting that A.D. was making good progress and doing well. The District did not contribute to any "communication breakdown" here.

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<sup>115</sup> CP 441, District Ex. 4. If anything, the graphs prove a lack of regression because A.D. continued to do well on old work after a break. In addition, any hint of regression is overcome by the clear indication in the graph that he rapidly recouped his skills.

<sup>116</sup> ALJ's Order at ¶ 31.

If New Horizon or the Parents had any relevant data (in the form of grades, assessments, tests, or other regular periodic evaluations), they could have presented it at the April 9 IEP meeting, at the June 28 IEP meeting, on June 29, or at the due process hearing. They did not. New Horizon's failure to provide any data to back up its staff members' subjective beliefs about the need for ESY cannot be chalked up to a simple misunderstanding. It was, plain and simple, a failure to provide the requested data because the Parents and New Horizon staff knew that the data did not support a need for ESY services for A.D. under the applicable criteria (regression/recoupment).

An additional error in Finding of Fact 29 is the ALJ's statement that "[i]t is not clear how a copy of the grade book alone would address the Student's need for socialization and other behavioral support." There were no social or behavioral goals in A.D.'s IEP from Ramona,<sup>117</sup> and only one slightly related goal (to improve "school adjustment" skills) in the IEP developed at the April 6, 2005, IEP meeting.<sup>118</sup> If A.D. was not working towards any IEP goals in the areas of social or behavioral conduct (besides the one that arguably required a typical

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<sup>117</sup> CP 225, Petitioner's Ex. 8 at 5 (reading and writing goals), 6 (reading goals), 7 (math goals).

<sup>118</sup> CP 414, District Ex. 1 at 9 (reading), 11 (writing), 13 (math), 15 (school adjustment), 17 (real-world work skills).

school setting in which it could be taught), then there could be no need for ESY to help prevent regression in his progress.<sup>119</sup>

The ALJ also mischaracterized Ms. Hart's, Ms. Conrad's, and Ms. Streeck's testimony in Findings of Fact 37, 43, and 48, respectively. None of these educators testified that "more data was needed" in order for the District to determine whether ESY services were warranted. Instead, all three educators testified that on the basis of the data that *had* been made available, A.D. was not eligible for ESY.<sup>120</sup> Their point was that if he were to be deemed eligible, New Horizon would be the source of the information to support such a conclusion.

In Finding of Fact 32, the ALJ states that the District took a "hands-off" approach to data gathering. This pejorative and judgmental characterization of District staff's actions is unsupported by the record. As the evidence clearly demonstrated, the District and the Parents entered a settlement agreement under which A.D. would attend a private school at District expense.<sup>121</sup> The parties planned to use that year to work together to agree on an IEP that would apply when A.D. was

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<sup>119</sup> The ALJ also ignored the fact that the Parents failed to call as witnesses anybody who could address regression/recoupment issues in relation to "socialization and other behavioral" issues.

<sup>120</sup> CP 902:20 – 903:11; 581:25 – 584:6; 611:14–17; 612:23 – 614:7.

<sup>121</sup> CP 481, District Ex. 11 at 1.

expected to transfer back into the District the next school year. By mutual agreement, A.D. was not present at any District school where District staff could have taken data on his progress.

In Finding of Fact 39, the ALJ erroneously refers to a June 6, 2005, IEP meeting, but there is no evidence that an IEP meeting was ever held on this date. The ALJ also erroneously concluded in Finding of Fact 41 that Ms. Conrad had testified she did not believe the District had a responsibility to gather any data regarding A.D.'s ESY eligibility. This is a mischaracterization of Ms. Conrad's testimony. The District *did* attempt to gather all available information, which (because A.D. had only attended classes in the District for a very brief period of time) was in the possession of either Ramona or New Horizon. District staff could not "gather" data in the sense of collecting or creating it themselves, because A.D. was not attending their classes and they had no means of observing him directly. The District did all that it could do, which was to ask Ramona for all of A.D.'s records<sup>122</sup> and to ask New Horizon for information that was in the control, possession, and records of New Horizon staff.

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<sup>122</sup> If there had been information from Ramona that would have supported the regression/recoupment analysis for ESY eligibility, the Parents should have provided it at the hearing. They did not do so.

The ALJ also describes the testimony of District staff (Ms. Conrad, Ms. Streeck, and Ms. Minor Reid) in a very misleading manner in Findings of Fact 42, 47, 49, and 50. Accusing District staff of “placing the blame” on New Horizon,<sup>123</sup> of believing that a student’s history of past ESY services is “not of interest” and “not of any value,”<sup>124</sup> of being “unaware of the criteria” used by A.D.’s California school district (when in fact none existed),<sup>125</sup> and of “conceding” various points in their testimony is an inaccurate and misleading description of the District witnesses’ testimony.

In Conclusion of Law 10, the ALJ cites and relies upon three state regulations that govern initial evaluations (to determine whether a student needs special education) and reevaluations (which occur approximately every three years to assess whether a student continues to require special education).<sup>126</sup> These regulations are inapplicable to this situation. As the state and federal regulations clearly state, the determination of whether a student requires ESY services in order to continue making progress on his IEP goals must be made by the IEP

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<sup>123</sup> ALJ’s Order at ¶ 42.

<sup>124</sup> ALJ’s Order at ¶ 47.

<sup>125</sup> ALJ’s Order at ¶ 49.

<sup>126</sup> ALJ’s Order at ¶ 10.

team. No particular evaluation or evaluation procedure is required. There is no test that the District could have administered to gather this sort of data; the only information that would show regression and failure to recoup is a record of daily classroom observations about how a student is performing. This is precisely what the District asked New Horizon, on numerous occasions, to provide.

The ALJ erred by concluding that a procedural error occurred because “It was not appropriate for the School District to wait for the ‘missing’ data to be delivered, then deny services based upon the lack of data.”<sup>127</sup> The District did *not* lack sufficient information to make its decision. It decided that A.D. was not eligible for ESY based upon the information that had been provided, which included glowing reports of progress from New Horizon.

There is no authority for the ALJ’s holding that the District was required to do more than examine data that was already available about A.D.’s progress in deciding whether ESY services were needed. The District therefore met its procedural obligations under state and federal law by making an individualized decision based on current information about A.D.

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<sup>127</sup> ALJ’s Order at ¶¶ 11, 12.

The ALJ's conclusion that the District committed a procedural violation is unwarranted. The ALJ cited no specific procedural requirement in state or federal law that had been breached but instead seemed to want to find a procedural error where none existed in order to justify an award of compensatory services when the parent could not prove the need for such services, when in fact the District committed no procedural error when it correctly engaged in its evaluation and determination that A.D. did not need ESY services.

2. The Alleged Procedural Violations Were Not Severe Enough to Deprive the Parents of the Opportunity to Participate in IEP Development.

Having erroneously decided that the District committed a procedural violation, the ALJ then compounded the error by holding in Conclusions of Law 14 and 16 that this was such a serious violation that it interfered with the Parents' ability to participate in the development of their son's IEP. A.D.'s mother participated in *three* different meetings in the 2004–2005 school year. Each time she invited outside service providers to attend. A.D.'s mother had ample opportunity to participate in and give input into every decision made about A.D.'s program and placement. As explained above, the Parents had the burden of proving that any procedural violation was so significant that it denied them the ability to participate in IEP development. The Parents offered no

testimony or evidence on this point, and the ALJ cited none in her order. Neither the Parents nor the ALJ ever articulated *how* any of the District's actions limited the Parents' ability to participate in decisions about their son's program in general or about ESY services in particular.

Even if the District's actions could be construed as a procedural violation, the Parents and their outside service providers had numerous opportunities to participate in meetings, to provide their advice and observations, and, especially, to give the District any documents, grade reports, or other student work that would have demonstrated that their subjective beliefs about A.D.'s level of regression were correct. No action by the District deprived these Parents of their ability to participate in the development of A.D.'s IEP.

The court in *North Kitsap School District v. K.W.*, *supra*,<sup>128</sup> considered the impact of procedural errors on FAPE. In that case, the school district had delayed in holding an IEP meeting and then had offered to place the student in a program which the district had already acknowledged was not appropriate.<sup>129</sup> The court had determined that procedural errors had occurred and concluded that "Because of these procedural errors, K.W. did not receive any special education for the

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<sup>128</sup> 130 Wn. App. 347 (Div. II, 2005).

<sup>129</sup> 130 Wn. App. at 364.

2002-2003 school year.”<sup>130</sup> The present case is not even remotely like the *North Kitsap* case in terms of the impact of a procedural error (which the District here denies occurred at all) on the provision of FAPE for A.D.

V. CONCLUSION

For the reasons set forth above, the Sumner School District submits that ALJ’s Order and subsequently, the Final Order of the superior court, should be reversed.

DATED this 21 day of December, 2006.

KARR TUTTLE CAMPBELL

By:



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<sup>130</sup> 130 Wn. App. at 365 (emphasis added).

## Appendix

### WAC 392-172-163 Extended School Year Services

- (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with this section.
- (2) Extended school year services must be provided only if a student's IEP team determines, on an individual basis, in accordance with this chapter that the services are necessary for the provision of FAPE to the student.
- (3) In implementing the requirements of this section, a public agency may not:
  - (a) Limit extended school year services to particular categories of disability; or
  - (b) Unilaterally limit the type, amount, or duration of those services.
- (4) As used in this section, the term extended school year services means special education and any necessary related services that:
  - (a) Are provided to a student with a disability:
    - (i) Beyond the normal school year of the public agency;
    - (ii) In accordance with the student's IEP; and
    - (iii) At no cost to the parents of the student; and
  - (b) Meet the standards of the state for provision of special education and related services.

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IN THE COURT OF APPEALS  
 OF THE STATE OF WASHINGTON  
 DIVISION II

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IN THE MATTER OF  
 Sumner School District,

Appellant.

v.

A.D., a Minor Special Education Student, by and through his Mother and Legal Guardian, L.D.,

Respondent.

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CERTIFICATE OF SERVICE

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I, Marilyn J. Hargan, hereby declare that on December 21, 2006, I caused a copy of Brief of Appellant to be served on opposing counsel by sending a true copy of same as indicated below.

Randal B. Brown Randal Brown Law Office 25913 - 163 <sup>rd</sup> Avenue SE Covington, WA 98042	<input type="checkbox"/> Certified U.S. Mail <input type="checkbox"/> Regular U.S. Mail <input checked="" type="checkbox"/> Messenger (hand delivery)
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DATED this 28<sup>th</sup> day of December, 2006.

  
Marilyn Hargan  
Legal Assistant  
Karr Tuttle Campbell