

No. 35353 - 9 - H  
PIERCE COUNTY SUPERIOR COURT, CAUSE NO. 06 - 2 - 06063 - 1  
[OSPI CAUSE NO. 2005 - SE - 0092]

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

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DIVISION II  
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STATE OF WASHINGTON  
DEP. CLERK

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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.,

APPELLEES.

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BRIEF OF THE APPELLEES

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RANDAL B. BROWN WSBA No. 24181  
RANDAL BROWN LAW OFFICE  
25913 ~163<sup>RD</sup> AVENUE SE  
COVINGTON, WASHINGTON 98042  
TELEPHONE: (253) 630-0794  
ATTORNEY FOR THE APPELLEES

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## I. INTRODUCTION<sup>1</sup>

This appeal stems from a dispute between the appellant herein, the Sumner School District, which is also known as School District No. 320 of Pierce County, Washington (“SSD No. 320”), and the respondents, A.D., a minor special education student, and L.D., his mother and legal guardian, over A.D.’s entitlement to “extended school year” (“ESY”) services.<sup>2</sup> However, there is no dispute between the parties regarding A.D.’s right to receive special education services and supports under the applicable federal and state laws<sup>3</sup> due to the nature and severity of his diagnosed developmental disabilities and behavioral disorders<sup>4</sup>, nor his subsequent verification and identification by appellant SSD No. 320 as a student who is “Multiply Handicapped”.<sup>5</sup>

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<sup>1</sup> The administrative record of the proceedings before Administrative Law Judge Janice E. Shave consists of six bound volumes with consecutively numbered pages, with Volumes IV, VI, and X containing the transcript of the hearing, which appear to be misnumbered because there are only six volumes to the entire administrative record. Witnesses’ testimony will be cited as *Witness Name, volume/page/line*. Exhibits will be cited as *AR - volume/page {Exhibit No.}*.

<sup>2</sup> 34 C.F.R. §§ 300.128 & 300.309; and WAC 392-172-163 (4).

<sup>3</sup> Individuals with Disabilities Educational Act, 20 U.S.C. § 1400, *et seq.* (1997) (hereinafter “IDEA”); 34 C.F.R. § 300, *et seq.* Congress recently reauthorized IDEA, P.L. 108-446. The Act, which is now known as the Individuals with Disabilities Educational Improvement Act of 2004 (hereinafter “IDEA-2004”), was amended, new sections were added, and much of IDEA’s preexisting sections were reorganized and renumbered. Most of the new Act’s provisions went into effect on July 1, 2005; however, prior to the start of the administrative hearing, the parties herein stipulated and agreed that the issues in the instant case arose under the preexisting statute, IDEA (1997). To date, the relevant provisions of Washington state’s special education law and implementing regulations have remained unchanged, and are found at RCW 28A.155; and WAC 392-172-010, *et seq.*

<sup>4</sup> A.D. has previously been diagnosed as having Attention Deficit Hyperactivity Disorder (“ADHD”) and Bipolar Disorder, as well as specific learning deficits in reading, writing, and

Following the conclusion of the “regular” 2004-2005 school year, the appellant school district informed L.D. that district staff had determined that A.D. was not eligible for ESY services.<sup>6</sup> L.D. immediately filed her request for a special education administrative due process hearing with the Office of the Superintendent of Public Instruction (“OSPI”) in order to secure ESY services for A.D.<sup>7</sup>

L.D.’s request was forwarded to the Washington State Office of Administrative Hearings (“OAH”)<sup>8</sup>, and assigned to the Honorable Janice E. Shave, Administrative Law Judge (“ALJ”). The administrative hearing was held on November 17 and December 16, 2005, at SSD No. 320’s central administrative offices, and concluded with a brief telephonic hearing on January 19, 2006. ALJ Shave issued her *FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER* on February 16, 2006 (“OAH Final Order”).<sup>9</sup> ALJ Shave found that SSD No. 320 had failed to secure the necessary data required to properly assess A.D.’s ESY eligibility, and that this omission had in turn resulted

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math, all of which adversely affect his educational performance. See: Vol. II, pp. 309-321 [Exhibit No. P-19] (“draft” IEP); and Vol. II, pp. 324-345 [Exhibit No. P-21] (IEP).

<sup>5</sup> Vol. II, pp. 267-282 [Exhibit No. P-15]. See also: 34 C.F.R. § 300.7; and WAC 392-172-136.

<sup>6</sup> Vol. II, pp. 348-349 (Exhibit No. P-23).

<sup>7</sup> Vol. I, pp. 190-197.

<sup>8</sup> OAH docketed L.D.’s request as OSPI Cause No. 2005-SE-0092.

<sup>9</sup> Vol. I, pp. 26-45.

in a violation of A.D.'s rights under the applicable federal and state laws<sup>10</sup> and deprived A.D. of his entitlement to a "free appropriate public education" ("FAPE").<sup>11</sup>

The appellant filed its *PETITION FOR REVIEW* with the Superior Court of Washington for Pierce County on March 15, 2006.<sup>12</sup> On August 17, 2006, following the submission of written briefs and oral arguments by the parties' attorneys of record, the Honorable Frederick W. Fleming, Superior Court Judge, issued his Final Order<sup>13</sup>, which affirmed the administrative Order in its entirety and dismissed SSD No. 320's appeal. Following the entry of the Superior Court's Final Order<sup>14</sup>, the appellant filed its appeal of the lower findings and Orders with this honorable court.

The respondents herein believe that the Final Orders issued by the Administrative Law Judge and Superior Court Judge, respectively, were both sound and well-reasoned. Further, the respondents also believe that the Findings of Fact<sup>15</sup> and Conclusions of Law<sup>16</sup> which

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<sup>10</sup> Individuals with Disabilities Educational Act, 20 U.S.C. § 1400, *et seq.*; 34 C.F.R. § 300, *et seq.*; RCW 28A.155; and WAC 392-172-010, *et seq.*

<sup>11</sup> 20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.121-122; and WAC 392-172-030 (1).

<sup>12</sup> Vol. I, pp. 1-25 (Superior Court Cause No. 06 - 2 - 06063 - 1).

<sup>13</sup> Clerk's Papers, pp. 134-135.

<sup>14</sup> *Id.*

<sup>15</sup> Vol. I, pp. 29-40.

served as the basis for those Orders fully complied with the applicable provisions of the federal and state special education statutes and regulations that governed A.D.'s rights and SSD No. 320's duties with respect to the provision of the "free appropriate public education" that A.D. was entitled to receive under those same laws. Finally, the respondents also believe that the aforesaid Final Orders were fully supported by the evidentiary record in OSPI Cause No. 2005-SE-0092, and consistent with relevant case law which controls ESY determinations here in Washington and throughout the Ninth Circuit. For these reasons, your respondents would respectfully submit that the appellant's request for relief from the lower Final Orders and findings be denied, and further, that its appeal be dismissed.

## II. OVERVIEW OF SPECIAL EDUCATION LAW

When it originally enacted the Education of the Handicapped Act ("EHA")<sup>17</sup>, Congress sought to end the automatic segregation and exclusion of children with disabilities that was an all too common reality in this nation's public schools prior to 1975. The overall goal of the EHA was to insure that all children with disabilities had access to

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<sup>16</sup> Vol. I, pp. 41-44.

<sup>17</sup> P.L. 94-142 (1975), and codified at 20 U.S.C. § 1400, *et seq.*, subsequently reauthorized and amended as P.L. 99-457 (1986); reauthorized and amended as P.L. 101-476 (1990), and renamed as the "Individuals with Disabilities Education Act"; reauthorized and amended as P.L. 105-17 (1997); and most recently reauthorized and amended as P.L. 108-448 (2004), and renamed the "Individuals with Disabilities Educational Improvement Act of 2004".

what the Act called a “free appropriate public education”, or “FAPE”<sup>18</sup> - regardless of the severity of their disability<sup>19</sup> or the limits of their cognitive abilities.<sup>20</sup>

In 1982, the United States Supreme Court issued its first EHA decision.<sup>21</sup> The *Rowley* Court set out a two-part test to help guide any inquiry into whether a child has been provided with the Act’s FAPE entitlement. Specifically, under *Rowley’s* two-pronged test, a school district must first show that it has complied with the Act’s procedural safeguards<sup>22</sup>, and then show that the child’s “Individualized Education Program” (hereinafter “IEP”), *as developed, proposed, and implemented by the school district*, was appropriate, i.e., reasonably calculated to enable [A.D.] to receive educational benefit (Emphasis added).<sup>23</sup>

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<sup>18</sup> 20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.121-122; and WAC 392-172-030 (1).

<sup>19</sup> *Campbell v Talladega County Board of Education*, 518 F.Supp. 47 (N.D. Ala. 1981).

<sup>20</sup> *Timothy W. V. Rochester N.H. School District*, 875 F.2d 954 (1<sup>st</sup> Cir. 1989); cert. denied 493 U.S. 954 (1989).

<sup>21</sup> *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 U.S. 176 (1982).

<sup>22</sup> *Id.*, at 206.

<sup>23</sup> *Id.* This language from *Rowley* is, in respondents’ view, significant, particularly in light of the appellant district’s contention and argument, both in the administrative proceedings below and here, that A.D.’s parents and/or the contracted out-of-district placement, New Horizon School, were somehow responsible for securing the documentation and then verifying A.D.’s need and eligibility for ESY services. To the best of the respondents’ knowledge, there has never been any provision in the Act, as amended, nor in any of the now thousands of administrative and court decisions which have interpreted the Act that has allowed a school district to pass its FAPE responsibilities and duties to a third party. Under IDEA, those responsibilities have always been placed on the child’s school district. *See*: 20 U.S.C. § 1412 (2)(C) (“[States must develop policies and procedures to assure that ] all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and

As many courts have noted, IDEA serves as a comprehensive outline for an educational scheme that provides children with disabilities a substantive right to receive public education and provides financial assistance to help the states meet these children's educational needs.<sup>24</sup> Receipt of these federal funds is in turn conditioned upon the states' compliance with IDEA's extensive substantive and procedural requirements. To qualify for these federal funds, each state must have in effect "a policy that assures all children with disabilities the right to a "free appropriate public education."<sup>25</sup>

Parental involvement is a central feature of IDEA, and parents are encouraged to join with their children's teachers and school district

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evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services."); 20 U.S.C. § 1415(b)(1)(C) ("[States must provide] written prior notice to the parents or guardian of [a handicapped] child whenever [the State] (i) proposes to initiate or change, or (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child."); 20 U.S.C. § 1412(7) ("The State shall assure that . . . procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities . . ."); and 34 C.F.R. § 104.36 ("A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards.") See also: *Pasatiempo v. Aizawa*, 103 F.3d 796 (9th Cir. 1996) ("[IDEA's] procedural safeguards, which allow parents the opportunity to be notified of and to contest school district decisions, were not intended merely to facilitate parental responses to a school district's suspicion of disability. Congress intended the procedural protections to counteract the tendency of school districts to make decisions regarding the education of disabled children without consulting their parents, and to require school districts to respond adequately to parental concerns about their children."

<sup>24</sup> *Hornig v. Doe*, 484 U.S. 305, 310 (1988).

<sup>25</sup> 20 U.S.C. § 1412(1).

representatives in the process of determining what constitutes FAPE for their child. This process culminates in the formulation of the child's IEP, which is expected to be tailored so that it will meet the child's unique needs.<sup>26</sup>

In order to ensure that each child's parents have "an opportunity for meaningful input into all decisions affecting their child's education," IDEA also provides for an elaborate system of procedural safeguards.<sup>27</sup> The Act requires that the child's parents first be notified in writing of any changes whenever their local school district proposes or refuses to make changes in their child's educational program.<sup>28</sup> This notice must also contain a description of the procedural rights available to the child's parents to challenge their local school district's decision and an explanation of the reasons for the district's decision.<sup>29</sup> Parents also have the right to examine their child's educational records and to obtain an independent evaluation of their child, if appropriate.<sup>30</sup>

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<sup>26</sup> 20 U.S.C. § 1401(a)(18) & (20).

<sup>27</sup> *Hornig, supra*, 484 U.S. at 311.

<sup>28</sup> 20 U.S.C. § 1415(b)(1)(c).

<sup>29</sup> 34 C.F.R. § 300.505.

<sup>30</sup> 20 U.S.C. § 1415(b)(1)(A).

Moreover, the Act also requires that the states guarantee that parents have the right to seek review of any decisions concerning their child's education if they consider them to be inappropriate or contrary to their child's existing needs. These rights include an opportunity to bring complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."<sup>31</sup> The preliminary forum for parental complaints is an "impartial due process hearing" conducted by the local school district or by the state.<sup>32</sup> Any party dissatisfied by the administrative decision may appeal by filing a civil action in federal or state court.<sup>33</sup> Washington has established administrative due process procedures pursuant to these requirements.<sup>34</sup>

There are no procedural 'shortcuts' hidden within the Act's regulations, but the IEP process outlined therein is clear - under EHA, which since *Rowley* has been amended and reamed as the Individuals with Disabilities Education Act, and more recently as the Individuals with Disabilities Educational Improvement Act of 2004, as well as

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<sup>31</sup> 20 U.S.C. § 1415(b)(1)(E).

<sup>32</sup> 20 U.S.C. § 1415(b)(2).

<sup>33</sup> 20 U.S.C. § 1415(e)(2).

<sup>34</sup> WAC 392-172-010, *et seq.*

Washington's own state special education laws, a school district is required to develop and offer every child with a verified disability an individualized program of specifically designed instruction and any other necessary related services required to meet that child's unique needs, as determined by a comprehensive educational evaluation "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." and in a manner that is "sufficiently comprehensive to identify all of the student's special education and any necessary related services needs, whether or not commonly linked to the disability category in which the student is classified."<sup>35</sup>

The parameters and importance of the evaluation process set forth in the Act are found in the Act's definition of an "evaluation"<sup>36</sup>; in the Act's requirements for such evaluations and the comprehensive assessment procedures themselves<sup>37</sup>; and in all of the Act's other regulations that govern how such evaluations are to be conducted.<sup>38</sup> All of these procedural requirements are designed to ensure that the

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<sup>35</sup> 34 C.F.R. §§ 300.126 & 300.530-532; and WAC 392-172-106.

<sup>36</sup> 34 C.F.R. §§ 300.9, 300.19, 300.500 & 300.533; and WAC 392-172-040.

<sup>37</sup> 34 C.F.R. §§ 300.126, 300.530-534, 300.540 & 300.543; and WAC 392-172-106 - 111.

<sup>38</sup> *Id.*

results of each child's educational evaluation are accurate, fair, and most importantly, reflective of each child's unique needs.<sup>39</sup> As noted by the United States Supreme Court in *Rowley*, the Act does not impose a duty on school districts to provide disabled students with the "best" education possible. Instead, school districts are merely required to provide services so each eligible child receives "some educational benefit."<sup>40</sup>

While courts since *Rowley* have generally agreed that a child's IEP need not 'maximize' his individual potential, a clear majority have found that a child's IEP must provide him with some form of "meaningful" access to an education<sup>41</sup>, and confer "some educational benefit" upon the child for whom it was designed.<sup>42</sup>

In the instant case, the evaluation procedures and process under review were supposed to focus on A.D.'s potential need for and

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<sup>39</sup> *Union School District v Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994), cert. denied, 115 S. Ct. 428 (1994).

<sup>40</sup> *Rowley*, *supra*, 458 U.S. at 188-189 (1982).

<sup>41</sup> *Id.*, at 192. See also: *Amanda J. V. Clark County School District*, 267 F.3d 877 (9<sup>th</sup> Cir. 1991); *Union*, *supra*, 15 F.3d at 1524 (9<sup>th</sup> Cir.), cert. denied, 115 S. Ct. 428 (1994); and *Polk v Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3<sup>rd</sup> Cir. 1988) (IDEA "calls for more than a trivial educational benefit" and requires an appropriate IEP to provide "significant learning").

<sup>42</sup> "An IEP must specify specially designed instruction reasonably calculated to enable a child to receive meaningful educational benefit. *Id.*, at 206-07 (Emphasis added). See also: *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984); *Amanda J.*, *supra*, 267 F.3d 877 (9<sup>th</sup> Cir. 1991); *Union*, *supra*, 15 F.3d at 1524 (9<sup>th</sup> Cir.), cert. denied, 115 S. Ct. 428 (1994); and *Walker v. Bennett*, 203 F.3d 1243 (11<sup>th</sup> Cir. 2000).

entitlement for special education services, including the ESY services that his mother had requested from the district. Because IDEA's strict rules and procedures are the vehicles through which parents can ensure that their disabled child receives an appropriate educational program, appellate courts have frequently been called on to review whether school districts have met the "rigorous procedural requirements set forth in IDEA."<sup>43</sup>

Under IDEA, a child's parents must be afforded an opportunity for full and fair involvement in the process of developing their child's IEP, and further, a school district must:

(a) inform parents of their procedural rights<sup>44</sup>;

(b) take reasonable steps to provide prior notification of and include parents in their child's IEP meetings and groups that make decisions regarding their child's educational program and placement<sup>45</sup>;

(c) complete a full and individual evaluation of the child's educational needs before the initial provision of special education and any necessary related services.<sup>46</sup>

(d) assemble a complete IEP team with all of the necessary and required participants<sup>47</sup>;

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<sup>43</sup> *Union, supra*, 15 F.3d at 1524 (9<sup>th</sup> Cir. 1994).

<sup>44</sup> 20 U.S.C. § 1415(d); 34 C.F.R. §§ 300.500 - 300.529; and WAC 392-172-300 & 392-172-302.

<sup>45</sup> 34 C.F.R. §§ 300.345, 300.501; and WAC 392-172-105, 392-172-10900(4), 392-172-15700, and 392-172-15705.

<sup>46</sup> 34 C.F.R. §§ 300.126, 300.530 - 532, & 300.540; and WAC 392-172-108 (1).

(e) provide copies of all evaluation reports and/or other relevant documents to the child's parents prior to and IEP meeting; and also inform the child's parents of any other material information about their child or his program<sup>48</sup>;

(f) review any parent-provided assessments of their child<sup>49</sup>;

(g) make a formal written offer of an appropriate placement at the child's IEP meeting<sup>50</sup>; and

(h) provide the child's parents with 'written prior notice' of any school district decision to initiate, change, or terminate the child's identification, evaluation, placement, or provision of FAPE to the child<sup>51</sup>.

With respect to the evaluation and assessment of its special education students, including any ESY evaluation or assessment, a school district must also:

(a) perform an adequate evaluation of the child in all areas related to the child's known or suspected disabilities<sup>52</sup>;

(b) use a qualified assessor who is knowledgeable about the child's suspected disability<sup>53</sup>;

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<sup>47</sup> 20 U.S.C. § 1414(d)(1); 34 C.F.R. § 300.344; and WAC 392-172-153. See also: *Pitchford v. Salem-Keizer School District*, 155 F. Supp. 2d 1213, 1236- 37 (D. Or. 2001).

<sup>48</sup> 34 C.F.R. §§ 300.126, 300.530-532, 300.534, 300.540, & 300.543; and WAC 392-172-108 (14) and 392-172-10905. See also: *Arranda J.*, *supra*, 267 F.3d 877 (9<sup>th</sup> Cir. 2001).

<sup>49</sup> 34 C.F.R. § 300.533; and WAC 392-172-10900 (1)(a).

<sup>50</sup> See: *Union*, *supra*, 15 F.3d at 1526. A school district may not, however, unilaterally determine a child's placement prior to his IEP meeting. See: *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4<sup>th</sup> Cir. 1988).

<sup>51</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503; and WAC 392-172-302.

<sup>52</sup> 20 U.S.C. § 1414(b)(3)(c); 34 C.F.R. §§ 300.126 & 300.532; and WAC 392-172-106.

(c) the assessment tools used must provide relevant information that directly assists persons in determining educational needs of the child<sup>54</sup>; and

(d) provide the child's parent with an independent educational evaluation at public expense if and when the child's parents reasonably object to an inadequate school district evaluation.<sup>55</sup>

Procedural flaws do not automatically require a finding of a denial of FAPE. For that, the flaw must result in a loss of educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP formation process.<sup>56</sup> Courts must also determine if the outcome of the IEP process would have been different but for the school district's procedural failure.<sup>57</sup> As will be discussed more fully below, ESY services are but one part of the wide spectrum of supportive educational services that children deemed eligible to receive special education may be entitled to receive, if and when such specific

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<sup>53</sup> 34 C.F.R. §§ 300.126, 300.530-532, & 300.540; and WAC 392-172-108 (2)(a). See: *Union, supra*, 15 F.3d at 1523.

<sup>54</sup> 20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.126, 300.530-532, & 300.540; and WAC 392-172-108 (4).

<sup>55</sup> 34 C.F.R. § 300.502; and WAC 392-172-150.

<sup>56</sup> See: *Amanki, L.*, *supra*, 267 F.3d at 892; and *W.G. v Board of Trustees of Tuzet Range School District No. 23*, 960 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1992).

<sup>57</sup> See, e.g., *Shapiro v Paradise Valley School District*, 317 F.3d 1072, 1079 (9<sup>th</sup> Cir. 2003) (superseded by statute on unrelated grounds by *M.L. v Federal Way School District*, 394 F.3d 634 (9<sup>th</sup> Cir. 2005)).

'instruction' and/or 'related services' are deemed 'appropriate' for an individual student.<sup>58</sup>

Given the evidence offered and received over the course of the administrative special education due process hearing below, it is abundantly clear that A.D. was entitled to receive ESY during the 2004-2005 school year under the applicable provisions of IDEA<sup>59</sup>, Washington's state special education laws<sup>60</sup>, and the established criteria which govern ESY eligibility assessments here in the Ninth Circuit.<sup>61</sup>

Applying the 'test' adopted by the United States Court of Appeals for the Ninth Circuit in *Hoeff* to the facts in the instant case, respondents would respectfully submit that they have clearly

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<sup>58</sup> Under IDEA and Washington state's special education laws, the term "special education" means specially designed instruction provided to an eligible student, provided at no cost to the child's parents, and in conformance with the student's IEP, which is designed to meet the unique needs of the student. This specially designed instruction includes instruction conducted in the classrooms, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. Special education may also include ESY services and a host of other "related services", such as transportation and such developmental, corrective, preventative and other supportive services as may be required to assist a special education student to benefit from his special education, including classified staff services, counseling services, early identification and evaluation of disabilities in students, medical services, parent counseling and training, psychological services, recreation, rehabilitation counseling services, school health services, social work services in schools. The list of related services is not exhaustive and may include other developmental, corrective, preventative or supportive services, if they are required to assist a special education student to benefit from special education. See: 34 C.F.R. §§ 300.7, 300.24, & 300.26; and WAC 392-172-045 & 392-172-055.

<sup>59</sup> 20 U.S.C. §§1415(b)(1)(c); and 34 C.F.R. §§ 300.128 & 300.309 (b).

<sup>60</sup> RCW 28A.155.090 & 28A.300.070; and WAC 392-172-163 (4).

<sup>61</sup> See: *Hoeff v Tucson United School District*, 967 F.2d 1298, 1301 (9<sup>th</sup> Cir. 1992), citing *Johnson v Independent School District No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990).

demonstrated by a preponderance of the evidence that appellant SSD No. 320 failed to properly undertake any meaningful action with respect to the evaluation and assessment of A.D.'s regression potential after an extended break from his IEP program<sup>62</sup>, nor did the district make any effort to assess the time required for him to recoup what he had learned after such a break.<sup>63</sup> In ignoring its duties and obligations to A.D. under IDEA and Washington law following his parents' request for ESY services<sup>64</sup>, appellant SSD No. 320 clearly failed to undertake any of the steps necessary to evaluate and assess A.D.'s need for such services, and then, compounded this error by completely ignoring the severity of his developmental and behavioral disabilities<sup>65</sup>, the observations and input from his teachers at New Horizon School on his need for ESY services<sup>66</sup>, and his previous ESY service history<sup>67</sup>, thus depriving A.D. of the ESY services he required in order to receive the FAPE he was entitled to receive from the district under those same

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<sup>62</sup> Testimony of Cher Collins, Vol. VI, p. 882, l. 8 – p. 885, l. 2; Testimony of Kathy Hart, Vol. VI, p. 906, l. 13 – 21.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Vol. II, pp. 309-321 [Exhibit No. P-19] (“draft” IEP); and Vol. II, pp. 324-345 [Exhibit No. P-21] (IEP).

<sup>66</sup> Testimony of Elena Tsaregordtseva, Vol. VI, p. 762, l. 2 – 15; Vol. II, pp. 391-399 [Exhibit No. P-31]; and Testimony of Marla Veliz, Vol. X, p. 676, l. 10 – p. 679, l. 10; Vol. II, pp. 400-408 [Exhibit No. P-32].

<sup>67</sup> Testimony of Eileen Highley, Vol. VI, p. 724, l. 3 – p. 727, l. 13.

laws. Further, based on the severity of his verified developmental disabilities, his prior ESY service history, and the testimony provided by his mother and teachers from New Horizon School, respondents also believe that they were able to show by a preponderance of the evidence that appellant SSD No. 320 also failed to comply with the procedural requirements set forth in IDEA and Washington's state special education laws, as reflected in the Final Orders.<sup>68</sup>

As noted earlier, it is the respondents' contention that the administrative law judge's well-reasoned Final Order<sup>69</sup>, as affirmed by the Superior Court's Order on the initial review below, was fully supported by the factual record in this case, conformed to the spirit and intent of the applicable federal and state laws which govern special education ESY determinations, and fully consistent with the controlling prior ESY case law decisions here in the Ninth Circuit. For these reasons, the respondents would respectfully submit that the Final Orders<sup>70</sup> under review should be affirmed in their entirety, and the appellant school district's request for relief should be denied, and further, its appeal should be dismissed.

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<sup>68</sup> Vol. I, pp. 26-45.

<sup>69</sup> Id.

<sup>70</sup> Vol. I, pp. 26-45 (OSPI Cause No. 2005-SE-0092); and Clerk's Papers, pp. 134-135 (Superior Court Cause No. 06 - 2 - 06063 - 1).

### III. STATEMENT OF FACTS

#### A. PROCEDURAL HISTORY

Over the course of a series of meetings held during the latter half of the 2004-2005 school year<sup>71</sup>, the parties herein met to review SSD No. 320's initial 'Evaluation Report' of A.D.<sup>72</sup>, and then develop and finalize his 2004-2005 IEP.<sup>73</sup> On June 29, 2005, the day after A.D.'s final 2004-2005 IEP meeting, L.D. received written notice from SSD No. 320<sup>74</sup> that the district was still of the opinion that A.D. was not entitled to ESY services<sup>75</sup>, and that it was therefore denying her request for ESY services. Following receipt of the aforesaid written notice<sup>76</sup>, L.D.'s mailed her written request for an administrative special

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<sup>71</sup> March 23, April 6, and June 28, 2005. Testimony of Elena Tsaregordtseva, Vol. VI, p. 749, l. 15 – p. 753, l. 13 (See also: Vol. II, pp. 391 - 399 [Exhibit No. P-31]); Testimony of Marla Veliz, Vol. VI, p. 773, l. 10 – p. 774, l. 25 (See also: Vol. II, pp. 400 - 408 [Exhibit No. 32]); and Testimony of L.D., Vol. VI, p. 801, l. 16 – p. 819, l. 24.

<sup>72</sup> Vol. II, pp. 267-282 [Exhibit No. P-15].

<sup>73</sup> Vol. II, pp. 289-306 [Exhibit No. P-18]; Vol. II, pp. 324-345 [Exhibit No. P-21]; and Vol. II, pp. 324-345 [Exhibit No. P-21].

<sup>74</sup> Vol. II, pp. 348-349 [Exhibit No. P-23].

<sup>75</sup> In the administrative proceedings below, and on appeal, respondents have maintained that SSD No. 320 made its initial decision to terminate A.D.'s ESY eligibility when it changed his then-existing IEP without any prior written notice in its initial "evaluation". See: Vol. II, p. 234 [Exhibit No. P-9]; and Vol. II, p. 279 [Exhibit No. P-15].

<sup>76</sup> Vol. II, pp. 348-349 [Exhibit No. P-23].

education “due process” hearing to OSPI<sup>77</sup>, consistent with her rights under IDEA and Washington’s state special education laws.<sup>78</sup>

The administrative hearing was held at the district’s central administrative offices in Sumner, Washington, on November 17 and December 16, 2005, and completed via a brief telephonic hearing on January 19, 2006. On February 16, 2006, the administrative law judge issued her Final Order.<sup>79</sup> Thereafter, on March 15, 2006, the appellant district timely filed its *PETITION FOR REVIEW*<sup>80</sup> with the Superior Court below. On August 17, 2006, following the submission of written briefs and oral arguments by the parties’ attorneys of record, Superior Court Judge Fleming issued his Final Order<sup>81</sup>, affirming the administrative Final Order<sup>82</sup> in its entirety and dismissing SSD No. 320’s appeal. Thereafter, the appellant filed its appeal of the lower findings and Orders with this honorable court.

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<sup>77</sup> Vol. I, pp. 162-169.

<sup>78</sup> 20 U.S.C. § 1415 (i); 34 C.F.R. § 300.507; and RCW 28A.155 and WAC 392-172-350. It should also be noted that due to the July 4<sup>th</sup> federal holiday, OSPI did not receive or docket L.D.’s “due process” request until July 5, 2005. *See*: Vol. I, pp. 170 - 172.

<sup>79</sup> Vol. I, pp. 26-45.

<sup>80</sup> Vol. I, pp. 1-25.

<sup>81</sup> Clerk’s Papers, pp. 134-135.

<sup>82</sup> Vol. I, pp. 26-45.

## B. SUMMARY OF THE EVIDENCE PRESENTED AT HEARING

As noted above, the parameters and importance of the evaluation process and procedures outlined in IDEA are found in the Act's comprehensive definition of an "evaluation"<sup>83</sup>; the specific and extensive procedural requirements which the Act applies to such "evaluations"<sup>84</sup>; and in those same provisions of the Act which outline how such "evaluations" are to be conducted.<sup>85</sup> All of these procedural requirements are designed to ensure that each child's "evaluation" is accurate, fair, comprehensive, and, most importantly, reflective of each individual child's unique needs.<sup>86</sup>

Under the "evaluation" process outlined in IDEA and Washington's own special education state laws, every evaluation undertaken by a school district is supposed to consist of an thorough and comprehensive evaluation of the child in all areas related to the child's known or suspected disabilities<sup>87</sup>, conducted by a qualified assessor who is knowledgeable about the child's identified and/or

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<sup>83</sup> 34 C.F.R. §§ 300.128 and 300.341-342; and WAC 392-172-040.

<sup>84</sup> 34 C.F.R. §§ 300.126, 300.530-534, 300.540, and 300.543; and WAC 392-172-106 – 111.

<sup>85</sup> *Id.*

<sup>86</sup> See: *Union, supra*, 15 F.3d at 1519 (9<sup>th</sup> Cir. 1994).

<sup>87</sup> 20 U.S.C. § 1414(b)(3)(c); 34 C.F.R. §§ 300.126 & 300.532; and WAC 392-172-106.

suspected disabilities<sup>88</sup>, and who is qualified to use the assessment tools necessary to provide relevant information that directly assists those individuals who are trying to assess the educational needs of the child being evaluated.<sup>89</sup>

In the instant case, however, SSD No. 320 used an evaluation process that failed to seek any meaningful input from A.D.'s teachers in the Ramona Unified School District (CA) or New Horizon School<sup>90</sup>; failed to include any actual tests, evaluations, or assessments of A.D.'s need for ESY services<sup>91</sup>; performed by a school psychologist who by her own admission had never performed an ESY evaluation or assessment<sup>92</sup>, and who was not familiar with any of the actual assessment, test, or evaluation procedures required for an appropriate ESY determination<sup>93</sup>; and conducted by the district after the regular school year had ended.<sup>94</sup> Despite the absence of all these

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<sup>88</sup> 34 C.F.R. §§ 300.126, 300.530-532, & 300.540; and WAC 392-172-108 (2)(a). See: *Union supra*, 15 F.3d at 1523.

<sup>89</sup> 20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.126, 300.530-532, & 300.540; and WAC 392-172-108 (4).

<sup>90</sup> Testimony of Roger Smith, Vol. VI, p. 850, l. 19 – p. 854, l. 19; p. 859, l. 5 - 23; and Testimony of Cher Collins, Vol. VI, p. 872, l. 20 – p. 876, l. 16; p. 882, l. 18 - 24; & p. 884, l. 16 – p. 885, l. 2.

<sup>91</sup> Testimony of Cher Collins, Vol. VI, p. 882, l. 25 – p. 883, l. 2.

<sup>92</sup> Testimony of Cher Collins, Vol. VI, p. 883, l. 9 - 20.

<sup>93</sup> Testimony of Cher Collins, Vol. VI, p. 883, l. 21 – 23.

<sup>94</sup> Testimony of Cher Collins, Vol. VI, p. 888, l. 14 – p. 889, l. 5.

“components” to A.D.’s ESY evaluation, SSD No. 320’s special education administrators and staff were still able to “determine” that A.D. did not qualify for or require ESY services.<sup>95</sup> Respondents would respectfully submit that IDEA and Washington’s special education laws impose a duty on SSD No. 320 to utilize an evaluation process that consists of something more than doing nothing to support such a finding.<sup>96</sup>

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW.

When reviewing an administrative decision issued pursuant to the “due process” provisions of IDEA, courts are required to apply a ‘preponderance of the evidence’ standard to the task before them.<sup>97</sup> Further, the party challenging the administrative decision on appeal carries the burden of proof on all issues.<sup>98</sup> Although the United States Supreme Court recently changed the standard for who bears the ‘burden of proof’ in administrative special education “due process”

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<sup>95</sup> Testimony of Roger Smith, Vol. VI, p. 846, l. 8 - 23; Testimony of Cher Collins, Vol. VI, p. 863, l. 3 – p. 867, l. 19; p. 874, l. 13 – p. 876, l. 25; Testimony of Kathy Hart, Vol. VI, p. 902, l. 3 – p. 903, l. 11; Testimony of Ruth Conrad, Vol. X, p. 581, l. 1 – p. 584, l. 6; Testimony of Betsy Minor Reid, Vol. X, p. 653, l. 9 – 25.

<sup>96</sup> See: *Hoft v Tucson United School District*, 967 F.2d 1298, 1301 (9<sup>th</sup> Cir. 1992), citing *Johnson v Independent School District No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990).

<sup>97</sup> *Roadley, supra*, 458 U.S. at 206 (1982); 20 U.S.C. § 1415 (i)(2)(B)(iii).

<sup>98</sup> *Poolaw v Bishop*, 67 F.3d 830, 833 (9<sup>th</sup> Cir. 1995).

proceedings<sup>99</sup>, the party challenging the final administrative findings and decision on appeal still has the burden of proof as a matter of law.<sup>100</sup>

The administrative law judge’s decision is also entitled to *prima facie* correctness, and the party who challenges such a decision on appeal must rebut this presumption.<sup>101</sup> The party challenging an administrative special education “due process” decision must also support its contention with evidence exceeding a naked assertion that the decision was contrary to the law or evidence.<sup>102</sup> The challenging party must thus prove that the administrative law judge’s decision was incorrect by a preponderance of the evidence.<sup>103</sup>

A reviewing court should avoid “substituting their own notions of sound educational policy for those of the school authorities which they review.”<sup>104</sup> If such deference were not given to the administrative decision, “[t]he very importance which Congress has attached to

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<sup>99</sup> *Schaffer v. Weast*, 546 U.S. \_\_\_\_ (04-698)(2005) (377 F.3d 449, affirmed).

<sup>100</sup> *Clyde K. V. Puyallup School District*, 35 F.3d 1396, 1398-99 (9<sup>th</sup> Cir. 1994); and *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9<sup>th</sup> Cir. 1996).

<sup>101</sup> *Doyle v. Arlington County School Board*, 953 F.2d 100, 105 (4<sup>th</sup> Cir. 1992) (citing *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1<sup>st</sup> Cir. 1984), *aff’d sub nom* 471 U.S. 359 (1985)); and *Jones v. Washington County Board of Education*, 15 F.Supp. 2d 783, 785 (D. Md. 1998).

<sup>102</sup> *Jones*, *supra*, 15 F.Supp. 2d at 785-786.

<sup>103</sup> *Rovley*, *supra*, 458 U.S. at 206 (1982).

<sup>104</sup> *Id.*, *supra*

compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted to simply set aside state decisions at naught.”<sup>105</sup> Deference to the findings of an administrative law judge is even greater where such findings are, as here, particularly “thorough and careful.”<sup>106</sup> Reviewing courts must also “accord deference to the policy decisions of a school district *when it is acting within the bounds of federal and state law*”<sup>107</sup>

Although a reviewing court retains the ultimate discretion to accept or reject an administrative law judge’s findings, the United States Court of Appeals for the Ninth Circuit has indicated that a reviewing court should consider an administrative law judge’s findings “carefully and endeavor to respond to the hearing officer’s resolution of each material issue.”<sup>108</sup> A court must not engage in “Monday morning quarter backing” when evaluating the appropriateness a child’s special education program and placement.<sup>109</sup> “The primary responsibility for formulating the education to be accorded a

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<sup>105</sup> *Id.*

<sup>106</sup> See: *Union, supra*, 15 F.3d at 1524; and *Gregory K. V. Longview School District*, 811 F.2d 1307, 1311 (9<sup>th</sup> Cir. 1987).

<sup>107</sup> *Id.* (Emphasis added).

<sup>108</sup> *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884, at 891 (9<sup>th</sup> Cir. 1995) (quoting *Gregory K.*, 811 F.2d at 1311).

<sup>109</sup> *O’Toole v. Olathe District Schools*, 144 F.3d 692, 701-702 (10<sup>th</sup> Cir. 1998).

handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."<sup>110</sup>

This honorable court has a duty to apply the proper "standard of review" in the instant appeal - to do otherwise would constitute clear error. Applying IDEA's "preponderance of the evidence" standard<sup>111</sup> to the facts of this case, it is abundantly clear that the administrative law judge's Final Order<sup>112</sup> was based on solid and substantial evidence which clearly reflected SSD No. 320's disregard for A.D.'s rights and its own duties under IDEA and Washington's own state special education laws. ALJ Shave judge was present throughout the hearing, and was thus better able to consider and determine the credibility of the witnesses who may have offered testimony that conflicted with her decision. Further, ALJ Shave properly interpreted and applied the law to the facts of this case, and as such, it is abundantly clear that the appellant's request for reversal of her Final Order<sup>113</sup> should be denied.

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<sup>110</sup> *Rowley, supra*, 458 U.S. at 207 (1982).

<sup>111</sup> 20 U.S.C. § 1415 (i)(2)(B)(iii).

<sup>112</sup> Vol. I, pp. 26-45.

<sup>113</sup> Vol. I, pp. 26-45.

## B. EXTENDED SCHOOL YEAR SERVICES

Within Washington state and the Ninth Circuit, any questions related to a special education student's entitlement to ESY services begins and ends with a review of the factors outlined in the Ninth Circuit's *Hoefl* decision.<sup>114</sup> In *Hoefl*, the Ninth Circuit Court chose to "adopt" by reference an ESY "test" that the United States Court of Appeals for the Tenth Circuit had outlined in an earlier decision.<sup>115</sup> In *Johnson*, the Tenth Circuit Court found that any ESY determination must first focus on whether the provision of "educational programming which extends instruction beyond the conventional school year [is required] to prevent serious regression over the summer months."<sup>116</sup>

Given the Ninth Circuit's adoption of the Tenth Circuit's reasoning in *Johnson*, petitioners would respectfully direct this honorable court's attention to the following language from that decision:

. . . [P]arties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan. In *Alamo Heights Independent*

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<sup>114</sup> *Hoefl v. Tucson Unital School District*, 967 F.2d 1298 (9<sup>th</sup> Cir. 1992).

<sup>115</sup> *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990).

<sup>116</sup> *Hoefl*, 967 F.2d at 1301, citing *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990).

*School District v State Board of Education*, 790 F.2d 1153 (5<sup>th</sup> Cir. 1986), the Fifth Circuit reiterated that the Act ‘placed primary responsibility for formulating handicapped children’s education in the hands of state and local school agencies in cooperation with each child’s parents.’ In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . the Act creates a ‘presumption in favor of the education placement established by [a child’s individualized education plan],’ and ‘the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate.’<sup>117</sup>

In the instant case, it was the appellant that initially embraced A.D.’s previous special education evaluation and IEP. It makes no difference if this “decision” was by design or default - under the specific provisions of IDEA which govern the implementation and provision of federally-funded special education programs and services, once a school district has determined that a child with a disability is entitled to receive special education instruction and services, it must develop a written IEP for that child, based on a proper and comprehensive evaluation, and do so before it provides any special education services to that child.<sup>118</sup>

As noted at the outset of the administrative hearing by the respondents herein, no one seems to have a logical explanation for the

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<sup>117</sup> *Id.*, *supra.*, at 1024-25 (quoting *Tatro v Texas*, 703 F.2d 823, 830 (5<sup>th</sup> Cir. 1983), *aff’d*, 468 U.S. 883 (1984)) (footnotes omitted).

<sup>118</sup> 34 C.F.R. §§ 300.128 & 300.141-142; and WAC 392-172-158 (1)(a).

lengthy delay between the resolution of the parties' earlier due process dispute<sup>119</sup> and the eventual completion of SSD No. 320's 'initial' "Evaluation Report"<sup>120</sup> and its subsequent "draft" IEP proposal.<sup>121</sup> Regardless of the reason(s), however, this lengthy delay did not mean that A.D. did not have an IEP prior to his enrollment at New Horizon School.

[W]hen a student moves from a school district in State 'A' to a school district in State 'B', the State 'B' school district must first ascertain whether it will adopt the most recent evaluation and IEP developed for the student by the State 'A' school district. Since the State 'A' school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State 'A', the student's evaluation and IEP developed by the State 'A' school district might not necessarily be consistent with the education standards of State 'B'. *Therefore, the State 'B' school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State 'A' and the State 'A' school district's IEP meet the requirements of Part 'B' as well as the education standards of State 'B'. If the State 'B' school district accepts State 'A's' determination that the student has a disability and adopts the State 'A' school district's evaluation, the school district in State 'B' must provide notice to the students' parents in accordance with 34 CFR § 300.504(a).*

*The school district in State 'B' also could elect to implement the most recent IEP developed by State 'A's' school district, provided that it determines that this IEP meets Part 'B'*

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<sup>119</sup> OSPI Cause No. 2004-SE-0151X.

<sup>120</sup> Vol. II, pp. 267 - 282 [Exhibit No. P-15].

<sup>121</sup> Vol. II, pp. 307 - 321 [Exhibit No. P-19].

requirements and State 'B's' education standards. The school district in State 'B' would not be required to conduct another IEP meeting if a copy of the current IEP is available, the parents indicate that they are satisfied with that IEP, and the school district in State 'B' believes that the IEP is appropriate for the student and that it can implement that IEP. Appendix C to 34 CFR Part 300 (question 6). However, if the parties are not satisfied with the IEP developed for the student by the school district in State 'A', an IEP meeting would have to be conducted without undue delay, but in no case later than 30 calendar days after the date that the school district in State 'B' determined that it would accept the State 'A' school district's eligibility determination and evaluation. Appendix C, at question 6; See also 34 CFR § 300.343(c).

*If the school district in State 'B' elects not to adopt the State 'A' school district's evaluation of a student who transfers into its jurisdiction, the school district in State 'B' must evaluate the student without undue delay and provide proper notice to parents. 34 CFR §§ 300.128, 300.220 and 300.504(a). The evaluation would be treated as a preplacement evaluation of the student under 34 CFR § 300.531, and the school district in State 'B' must obtain parental consent under 34 CFR § 300.504(b)(1)(i) before conducting this evaluation. While the evaluation is in process, the school district in State 'B' could serve the student in a special education placement in accordance with an interim IEP unless the parents and State 'B' school district are unable to agree on an interim placement, in which case, the student would be placed in the regular school program. Once the school district in State 'B' completes the student's evaluation, an IEP meeting must be convened without undue delay, but in no case later than thirty calendar days after the date of the eligibility determination. 34 CFR § 300.343(c). At this IEP meeting, the State 'B' school district must develop and adopt an IEP for the student that addresses his or her unique educational needs. (Emphasis added)<sup>122</sup>*

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<sup>122</sup> OSEP Memorandum 96-5 (December 6, 1995), 24 IDELR 320.

As noted in the administrative record below, shortly after A.D. and his family moved to Washington, his parents undertook the necessary steps to enroll him as a student in SSD No. 320.<sup>123</sup> Following his initial enrollment, SSD No. 320 acknowledged that A.D. was a child who was entitled to receive special education instruction and services.<sup>124</sup> At that time, no one from SSD No. 320 ever raised any concerns to A.D.'s parents about the adequacy of his previous evaluations, IEPs, or ESY services by the Ramona Unified School District (CA). Further, despite his identification as a child who was eligible to receive special education from SSD No. 320<sup>125</sup>, no one from the district undertook any steps to proceed with an evaluation or develop an IEP for A.D. following his initial special education verification by the district.<sup>126</sup> While such inaction may have made sense to someone with no understanding of or interest in IDEA's FAPE mandate, under the Act, as well as Washington's own laws, SSD No. 320 had a lawful obligation to provide and safeguard A.D.'s FAPE

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<sup>123</sup> Testimony of L.D., Vol. VI, p. 790, l. 23 – p. 791, l. 24; Testimony of Roger Smith, Vol. VI, p. 823, l. 13 – p. 825, l. 5; and Testimony of Cher Collins, Vol. VI, p. 858, l. 18 – p. 859, l. 7.

<sup>124</sup> Testimony of Roger Smith, Vol. VI, p. 824, l. 24 – p. 827, l. 4; & p. 836, l. 7 – p. 8840, l. 1.

<sup>125</sup> *Id.*

<sup>126</sup> Testimony of Roger Smith, Vol. VI, p. 836, l. 7 – p. 840, l. 20; and Testimony of Cher Collins, Vol. VI, p. 858, l. 18 – p. 859, l. 10.

entitlement. The district's inaction in this matter was contrary to law, and made no sense at all.<sup>127</sup>

Given the district's inaction at the start of the 2004-2005 school year, one might have assumed that the filing of the respondents' initial administrative special education "due process" request<sup>128</sup> would have resulted in some sort effort by SSD No. 320 to comply with its IDEA duties and responsibilities to A.D. As reflected in the administrative record below, no one in the district undertook any meaningful steps to complete an evaluation or develop an IEP following A.D.'s initial enrollment.<sup>129</sup> While SSD No. 320 eventually took steps to comply with its IDEA obligations through a written settlement agreement with A.D.'s parents<sup>130</sup>, no one within SSD No. 320 took any meaningful action with respect to A.D. special education program and services<sup>131</sup>, at least not until L.D. and New Horizon School staff had begun to inquire about A.D.'s ESY service needs.<sup>132</sup>

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<sup>127</sup> 34 C.F.R. §§ 300.126 & 300.503; and WAC 392-172-104.

<sup>128</sup> OSPI Cause No. 2004-SE-0151X.

<sup>129</sup> Testimony of Roger Smith, Vol. VI, p. 836, l. 7 – p. 840, l. 20; and Testimony of Cher Collins, Vol. VI, p. 858, l. 18 – p. 859, l. 10.

<sup>130</sup> Vol. II, pp. 244 - 248 [Exhibit No. P-11].

<sup>131</sup> 34 C.F.R. §§ 300.126, 300.503, 300.530-532, & 300.540; and WAC 392-172-104 & 392-172-108(1).

<sup>132</sup> Testimony of L.D., Vol. VI, p. 799, l. 5 – p. 806, l. 8; Testimony of Marla Veliz, Vol. VI, p. 781, l. 18 – p. 785, l. 12; Testimony of Roger Smith, Vol. VI, p. 836, l. 7 – p. 840, l. 20; and Testimony of Cher Collins, Vol. VI, p. 858, l. 18 – p. 859, l. 10.

Such lengthy delays would clearly constitute violations of IDEA and Washington's state special education laws<sup>133</sup> were it not for the fact that through such inaction, SSD No. 320 had, by design or default, "adopted" and accepted A.D.'s previous special education evaluation<sup>134</sup> and 2003-2004 IEP<sup>135</sup> from the Ramona Unified School District (CA) to verify his status as an SSD No. 320 special education student at the start of the 2004-2005 school year.<sup>136</sup> This 'decision', coupled with the district's subsequent reaffirmation of that 'decision' on December 20, 2004<sup>137</sup> and its commitment to place A.D. in an out-of-district program, i.e., New Horizon School, at district expense, on January 31, 2005<sup>138</sup>, without benefit of its own evaluation or a new IEP, clearly reveals that SSD No. 302 "adopted" A.D.'s previous evaluation<sup>139</sup> and 2003-2004 IEP from the Ramona Unified School District (CA).<sup>140</sup> As reflected in the administrative record, the Ramona Unified School District had

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<sup>133</sup> 34 C.F.R. §§ 300.126, 300.128, 300.503, 300.530-532, 300.540, & 300.341-342; and WAC 392-172-104, 392-172-108(1), & 392-172-158 (1)(a).

<sup>134</sup> Vol. II, pp. 220 - 223 [Exhibit No. P-6].

<sup>135</sup> Vol. II, pp. 233 - 240 [Exhibit No. P-9].

<sup>136</sup> Testimony of Roger Smith, Vol. VI, p. 823, l. 13 - p. 825, l. 5.

<sup>137</sup> Vol. II, pp. 244 - 248 [Exhibit No. P-11].

<sup>138</sup> Vol. II, p. 402 (¶ 8) [Exhibit No. P-32].

<sup>139</sup> Vol. II, pp. 220 - 223 [Exhibit No. P-6].

<sup>140</sup> Vol. II, pp. 233 - 240 [Exhibit No. P-9].

previously determined that A.D. required ESY services in order to derive FAPE from his IEP.<sup>141</sup>

Even the most cursory review of IDEA reveals that the Act places a great deal of weight on parental participation in the evaluation of a special education student and the development of his IEP.<sup>142</sup> In furtherance of this “goal”, the Act also imposes a duty on school districts in order to insure that they provide parents with prior notice of any changes in their child’s special education program or services:

*A school district or other public agency shall give prior written notice in accordance with WAC 392-172-306 to the parent(s) of a student (or to the adult student) a reasonable time before the school district or other public agency:*

*(1) Proposes or refuses to initiate or change the identification, evaluation, educational placement of the student or provision of FAPE to the student.*

*(2) If the notice required under this section relates to an action proposed by a district or other public agency that also requires parental consent under WAC 392-172-185 and 392-172-304, notice may be given at the same time parental consent is being requested. (Emphasis added)<sup>143</sup>*

As reflected in the administrative record below, A.D.’s prior evaluations and IEPs from the Ramona Unified School District (CA)

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<sup>141</sup> Testimony of Eileen Highley, Vol. VI, p. 723, l. 16 – p. 727, l. 13; and Testimony of L.D., Vol. VI, p. 790, l. 23 – p. 792, l. 14. See also: Vol. II, p. 234 [Exhibit No. P-9].

<sup>142</sup> 34 C.F.R. §§ 300.345 and 300.501-505; and WAC 392-172-105 and 392-172-302 - 307.

<sup>143</sup> WAC 392-172-302. See also: 34 C.F.R. § 300.503.

had determined that he was entitled to receive and required ESY services in order to derive FAPE from his special education program and services.<sup>144</sup> SSD No. 320's special education administrators and staff were fully aware of this fact when they "adopted" and utilized A.D.'s 2003-2004 evaluation and IEP.<sup>145</sup> SSD No. 320's special education administrators and staff were fully aware of this fact when they completed and issued their initial evaluation on March 14, 2005.<sup>146</sup> Following its subsequent decision to change A.D.'s special education eligibility classification, SSD No. 320 provided A.D.'s parents with a "prior written notice" of this change, as required by the Act.<sup>147</sup> Despite its decision to change his ESY eligibility, and thus, the provision of his FAPE<sup>148</sup>, however, the district failed to provide A.D.'s mother with any "prior written notice" of this change, in violation of her rights under IDEA and Washington law.<sup>149</sup>

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<sup>144</sup> Testimony of Eileen Highley, Vol. VI, p. 724, l. 3 – p. 727, l. 13; Testimony of L.D., Vol. VI, p. 790, l. 23 – p. 792, l. 14; Testimony of Roger Smith, Vol. VI, p. 845, l. 12 – p. 848, l. 11; and Testimony of Cher Collins, Vol. II, P. 861, l. 21 – p. 868, l. 17. See also: Vol. II, p. 279 [Exhibit No. P-15].

<sup>145</sup> Testimony of Roger Smith, Vol. VI, p. 845, l. 12 – p. 848, l. 11; Testimony of Cher Collins, Vol. II, p. 861, l. 21 – p. 868, l. 17; and Testimony of Kathy Hart, Vol. VI, p. 904, l. 19 – p. 906, l. 21.

<sup>146</sup> Testimony of Roger Smith, Vol. VI, p. 845, l. 12 – p. 848, l. 11; and Testimony of Cher Collins, Vol. II, p. 861, l. 21 – p. 868, l. 17. See also: Vol. II, p. 279 [Exhibit No. P-15].

<sup>147</sup> Testimony of Cher Collins, Vol. II, p. 861, l. 21 – p. 868, l. 17. See also: Vol. II, pp. 281 - 282 [Exhibit No. P-15].

<sup>148</sup> Vol. II, p. 279 [Exhibit No. P-15].

<sup>149</sup> 34 C.F.R. § 300.503; and WAC 392-172-302.

Turning to the specific criteria adopted by the Ninth Circuit Hoefft court to help guide ESY eligibility determinations, petitioners would ask that this honorable court consider the following language from Johnson:

We are bound by the Act, which rests on the cornerstone of granting handicapped children entitlement to a ‘free appropriate public education,’ 20 U.S.C. § 1412(1), based on an individually designed education plan revised at least annually. *Id.* at § 1414(a)(5); Rowley, 458 U.S. at 203. The individualization requirement is of paramount importance in the Act. 20 U.S.C. §§ 1401(a)(19), 1412(2)(B); Rowley, 458 U.S. at 188-89, 198, 202; Polk, 853 F.2d at 172; Battle v Pennsylvania, 629 F.2d 269, 280 (3<sup>rd</sup> Cir.), *on remand*, 513 F. Supp. 425 (E.D. Pa. 1980), *cert. denial sub nom Scanlon v Battle*, 452 U.S. 968 (1981). While it would be easier for those involved in administrative review under the Act to have one and only one criterion for evaluating the appropriateness of a handicapped child’s IEP, the handicapping impediments which force individualization of the child’s education program in the first place also mandate an individualized approach to review of the child’s IEP.

The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child’s need for continuation of his or her structured educational program in the summer months. In Alamo Heights, the Fifth Circuit explained this ‘regression-recoupment’ analysis, which plays an integral part in the case before us today:

As we stated in Crawford v Pittman [708 F.2d 1028 (5<sup>th</sup> Cir. 1983)], ‘The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child,’ in accordance with ‘the unique needs’ of that child. The

some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought 'to a virtual standstill.' Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. 790 F.2d at 1158 (citations omitted).

*However, the regression-recoupment analysis is not the only measure used to determine the necessity of a structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an 'appropriate' educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, Battle, 629 F.2d at 280; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs, Yaris v. Special School District, 558 F. Supp. 545, 551 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984); and whether the requested service is 'extraordinary' to the child's condition, as opposed to an integral part of a program for those with the child's condition. Polk, 853 F.2d at 182. In fact, the Third Circuit recently explicitly rejected using solely a regression analysis to determine the necessity of a summer program under the Act:*

[A] serious problem . . . lies in defendants' implicit suggestion that a child must first show regression before his parents may challenge the appropriateness of his education. . . . [W]e do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress. *Polk*, 853 F.2d at 184.

In *Rowley*, the Supreme Court explicitly held that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. ‘We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.’ 458 U.S. at 202; *see also Yaris*, 558 F. Supp. at 558. This restraint is as applicable to a specific educational program element, such as whether a child should be provided a structured summer educational experience, as it is to a generalized issue such as the ‘adequacy of educational benefits conferred upon all children covered by the Act.’ *Rowley*, 458 U.S. at 202; *see also Crawford*, 708 F.2d at 1034 n. 28 (declining to state whether the ‘regression-recoupment syndrome’ should be used as a test to narrow the class of children to whom a summer program must be offered).

We prefer to adopt the Fifth Circuit's broad premise, as articulated in *Alamo Heights*:

The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard, but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness. 790 F.2d at 1158.

*The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community.*

In so holding, we are mindful of the Supreme Court's caution in Rowley that the 'appropriate' education required by the Act is not one which is guaranteed to maximize the child's potential. 458 U.S. at 197 n.21; accord Polk, 853 F.2d at 178-179; Muth v. Central Bucks School Dist., 839 F.2d 113, 119 (3<sup>rd</sup> Cir.), *cert. denied*, 109 S.Ct. 103 (1988)(as to local school district defendant and grounds pertinent hereto), and *rev'd*, 109 S.Ct. 2397 (1989)(only as to state as defendant on 11<sup>th</sup> Amendment immunity grounds). The Act insures, first, that some services are provided to children who previously had received no services at all. 20 U.S.C. § 1412(3); *see, e.g., Rowley*, 458 U.S. at 201 (each child must be provided with a 'basic floor of opportunity'); Polk, 853 F.2d at 179. Second, it insures that those services which are provided are individualized. 20 U.S.C. § 1412(2)(B). And third, it gives parents the right and obligation to act as the enforcement arm of the entitlement through the procedural safeguards outlined and mandated by the Act. 20 U.S.C. § 1412(5); Rowley, 458 U.S. at 205-06; Hall v. Vance County Bd. of Educ., 774 F.2d 629, 634 (4<sup>th</sup> Cir. 1985). Congress was mindful of the financial burdens which such expanded services imposed, and was not utopian in its goals.

The State of Oklahoma is a recipient of federal assistance though the Act, and its legislature has enacted a correlative enabling statute, Okla. Stat. Tit. 70, § 13-101 (1989 & Supp. 1990)(the Oklahoma statute). The Oklahoma statute includes the provision that, if the child's IEP recommends continuing educational services during the summer, the local school district will be funded to provide a maximum of forty days educational programming during the summer to prevent loss of the educational gains achieved during the nine-month school year.

If state legislation implementing the Act grants a broader entitlement than that found in the federal statute, the state statute defines the parameters of the program which must be extended to children living in that state. *See: Board of Educ. v. Diamond*, 808 F.2d 987,

992 (3<sup>rd</sup> Cir. 1986); *David D. v Dartmouth School Comm.*, 775 F.2d 411, 417, 420 (1<sup>st</sup> Cir. 1985)(the Act incorporates state substantive law implementing the Act), *cert. denied sub nom. Massachusetts Dept. of Educ. v David D.*, 475 U.S. 1140 (1986).

However, the Oklahoma statute is not broader than its federal counterpart in its provision for funding for forty days of summer programming under an IEP. The Third, Fifth, Eighth and Eleventh Circuits have all held that under the Act itself, states must provide a continuous educational experience through the summer under the child's IEP if that is the 'appropriate' educational experience for the handicapped child's situation. *Georgia Ass'n of Retarded Citizens v McDaniel*, 716 F.2d 1565, 1576 (11<sup>th</sup> Cir. 1983), *modified on other grounds*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985); *Crawford*, 708 F.2d at 1034; *Yaris*, 558 F. Supp. at 559; *Battle*, 629 F.2d at 281. Thus, the federal statute's mandate of a 'free appropriate public education', as judicially interpreted, includes the provision for a summer program if appropriate under a child's IEP. It follows that the Oklahoma statute, while assuring local school districts that state funding will cover a forty-day structured educational program during the summer for a child's individualized program, does not expand the federal statute.

To the extent that the Oklahoma statute has been interpreted to require the party attacking the child's proposed IEP to prove that the child has already experienced significant regression with ineffective recoupment of educational or basic life skills, or could be predicted to experience such regression during summer months, in isolation from any other elements which may be important to an individualized assessment of the child's situation, the Oklahoma statute is actually more restrictive than the federal entitlement, rather than more expansive. We cannot reconcile that interpretation with the individualized review demanded by the Act. As an example which is not uncommon, what of the child who has not shown regression in the past, but for whom other factors, such as acceleration of his or her

deficiencies with increased physical maturity, outweigh the lack of past egregious regression? Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child's educational, home, and community life.

*Turning to the case before us, a thorough review of the entire administrative record reveals it to be focused exclusively on a limited regression-recoupment analysis, which itself is vigorously disputed with opposing competent testimony and evidence. Because of the conflict in evidence concerning Natalie's past regression, other factors, including some or all of those discussed above, should have been considered as part of the evaluation of whether Natalie's IEP is 'appropriate' for her individual circumstances. However, there was scant factual development in the record from the administrative proceedings concerning many aspects of Natalie's life. Because the record focuses so completely on only one component of Natalie's education, we do not have sufficient facts to make an informed disposition on the merits of this case, and we therefore express no opinion as to whether Natalie's IEP is 'appropriate' under the Act's mandate. We do hold, however, that those who conducted the administrative review, the administrative appeal, and the federal district court review of that administrative process erred by converting what should have been a multifaceted inquiry into application of a single, inflexible criterion.*

As to the first issue, therefore, we reverse summary judgment in favor of the schools and remand the case for further proceedings, which should include presentation and consideration of evidence concerning other factors in addition to the regression-recoupment evaluation previously conducted, relevant to a decision as to whether a structured educational summer program should be included as part of Natalie's IEP. [Emphasis added]<sup>150</sup>

Turning to the first factor under the *Hoefl/Johnson* ESY "test", it is clear from the facts presented that respondent SSD No. 320 did not

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<sup>150</sup> *Johnson, supra*, 921 F.2d at 1027-1029 (10<sup>th</sup> Cir. 1990)(footnotes omitted).

use an “individualized approach” in its initial “review” of A.D.’s previous evaluations, IEPs, and ESY service history in the Ramona Unified School District (CA). As noted by the *Johnson* court, this “analysis of whether the child’s level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child’s parents as well as circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community.”<sup>151</sup>

During the administrative proceedings under review, SSD No. 320’s witnesses deemed A.D.’s extensive ESY service history to be irrelevant on the question of his eligibility for ESY services at the end of the regular 2004-2005 school year.<sup>152</sup>

As has already been noted, when A.D. received his special education instruction and services in California, every one of his annual IEPs in that district provided for ESY services.<sup>153</sup> The Ramona

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<sup>151</sup> *Id.*, at 1028 (Emphasis added).

<sup>152</sup> Testimony of Roger Smith, Vol. VI, p. 847, l. 13 – p. 848, l. 11; Testimony of Cher Collins, Vol. VI, 883, l. 9 – p. 885, l. 9; Testimony of Kathy Hart, Vol. VI, p. 906, l. 24 – p. 907, l. 11; Testimony of Betsy Minor Reid, Vol. X, p. 637, l. 19 – p. 640, l. 21, Vol. X, p. 665, l. 3 – p. 666, l. 5; Testimony of Ruth Conrad, Vol. X, p. 586, l. 11 – p. 587, l. 5; and Testimony of Joanne Streek, Vol. X, p. 615, l. 8 – p. 616, l. 10.

<sup>153</sup> Testimony of Eileen Highly, Vol. VI, p. 724, l. 13 – p. 725, l. 1.

Unified School District was under the same duty to comply with the Ninth Circuit’s ESY *Hoefft* “test” and regression analysis.<sup>154</sup> In light of SSD No. 320’s special education administrators and staff refusal to accept or acknowledge the *Hoefft/Johnson*’s directive to consider A.D.’s prior ESY service history in California<sup>155</sup>, respondents would respectfully submit that this “decision” also reflects a failure to grasp the complexities of “regression” and “recoupment” as they relate to A.D.’s previously-identified special education FAPE needs.

As has been noted in several research studies, there is no dispute that many special education students suffer serious regression when they experience extended breaks from their ‘normal’ educational programs.<sup>156</sup> Further, both Congress and the courts have determined that ESY eligibility determinations are not limited to those students

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<sup>154</sup> *Hoefft v Tucson United School District*, 967 F.2d 1298, 1301 (9<sup>th</sup> Cir. 1992), citing *Johnson v Independent School District No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990).

<sup>155</sup> *Id.*

<sup>156</sup> Browder, D.M., and Lentz, F.E. Extended School Year Services. *School Psychology Review*, 14, 188-195 (1985); Ellis, N.R.; Deacon, J.R.; Harris, I.A.; Poor, A.; Angers, D.; Diorio, M.S.; Watkins, R.S.; Boyd, B.D.; and Cavalier, A.R. Learning, Memory, and Transfer in Profoundly, Severely, and Moderately Retarded Persons. *American Journal of Mental Deficiency*, 87, 186-196 (1982); Koegel, R.I., and Rincover, A. Some Research on the Difference between Generalization and Maintenance in Extra-Therapy Settings. *Journal of Applied Behavior Analysis*, 10, 1-16 (1977); Rincover, A., and Koegel, R.I. Setting Generality and Stimulus Control in Autistic Children. *Journal of Applied Behavior Analysis*, 8, 235-246 (1975); and Stokes, T.F.; Baer, D.M.; and Jackson, R.I. Programming the Generalization of Greeting Responses in Four Retarded Children. *Journal of Applied Behavior Analysis*, 7, 549-556 (1974). See also: *Battle v Commonwealth of Pennsylvania*, 629 F.2d 269 (3<sup>rd</sup> Cir. 1980), *cert. denied sub. nom.*, *Scarlon v Battle*, 452 U.S. 968 (1981).

who only demonstrate “academic” regression concerns.<sup>157</sup> In the instant case, SSD No. 320 never made any effort to show what, if any, inquiry its staff had made into A.D.’s need for ESY services on the basis of his identified social, emotional, and behavioral deficits. Given the concerns raised by A.D.’s teachers at New Horizon School on this very issue<sup>158</sup>, it is abundantly clear that SSD No. 320 never had any interest in an evaluation of A.D.’s regression potential and recoupment needs.

Several of the district’s witnesses also claimed that there are no specific ESY ‘tests’ that they could use to definitively identify A.D.’s regression potential and entitlement for ESY services.<sup>159</sup> No doubt this explains why the *Hoft/Johnson* courts adopted an ESY assessment process that required consideration of “*retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child’s parents as well as*

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<sup>157</sup> 20 U.S.C. §§1415(b)(1)(c); and 34 C.F.R. §§ 300.128 & 300.309. *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3<sup>rd</sup> Cir. 1980), *cert. denied sub. nom., Scanlon v. Battle*, 452 U.S. 968 (1981); and *Hoft v. Tucson Unified School District*, 967 F.2d 1298 (9<sup>th</sup> Cir. 1992). See also WAC 392-172-163.

<sup>158</sup> Testimony of Eileen Highley, Vol. VI, p. 716, l. 8 – 718, l. 11; Testimony of Duane Smalley, Vol. II, pp. 385 - 390 [Exhibit No. P-30]; Testimony of Elena Tsaregordtseva, Vol. VI, p. 762, l. 10 - 15, & Vol. II, pp. 391 - 399 [Exhibit No. P-31]; and Testimony of Marla Veliz, Vol. VI, p. 774, l. 11 – 25., & Vol. II, pp. 400 - 408 [Exhibit No. P-32].

<sup>159</sup> Testimony of Cher Collins, Vol. VI, p. 883, l. 9 - 23; Testimony of Kathy Hart, Vol. VI, p. 907, l. 5 - 14; Testimony of Betsy Minor Keid, Vol. X, p. 645, l. 7 - 15; Testimony of Joanne Streek, Vol. X, 590, l. 17 - 22; and Testimony of Ruth Conrad, Vol. X, p. 584, l. 14 – p. 586, l. 19.

*circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community.*"<sup>160</sup> Further, even in the absence of a specific EST eligibility 'test', education professionals have identified a number of ESY assessments procedures over the course of the past thirty-five years to help parents, special education staff, school district administrators, and other concerned professionals that can be utilized to accurately evaluate a student's regression potential, recoupment needs, and entitlement to the ESY services.<sup>161</sup>

It is not the respondents' contention that ESY eligibility determinations are 'easy' or 'simple'. The available ESY research<sup>162</sup> clearly suggests that ESY eligibility evaluations are both complicated and difficult. Even so, respondents would respectfully submit that under IDEA, ESY evaluations are held to the same standard that the Act applies to all of the other necessary "evaluations" required to ensure that a special education student's FAPE needs are properly

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<sup>160</sup> *Hoelt v Tucson United School District*, supra, 967 F.2d at 1301 (9<sup>th</sup> Cir. 1992); and *Johrson v Independent School District No. 4*, 921 F.2d at 1027-1029 (10<sup>th</sup> Cir. 1990).

<sup>161</sup> See: Browder, D.M.; Lentz, F.E.; Knoster, T.; and Wilansky, C. Determining Extended School Year Eligibility: From Esoteric to Explicit Criteria. *Journal of the Association for Persons with Severe Handicaps*, 13, 235-243 (1988); Turner, K. Determining Regression/Recoupment in Extended School Year Litigation for Handicapped Pupils. *CASE Newsletter*, p.4 (1983); and Edgar, E.; Spence, W.M.; and Kenowitz, L.A. Extended School Year for the Handicapped: Is It Working? *Journal for Special Education*, 11, 441-448 (1977).

<sup>162</sup> Turner, K. Determining Regression/Recoupment in Extended School Year Litigation for Handicapped Pupils. *CASE Newsletter*, p.4 (1983); and Edgar, E.; Spence, W.M.; and Kenowitz, L.A. Extended School Year for the Handicapped: Is It Working? *Journal for Special Education*, 11, 441-448 (1977).

identified and addressed.<sup>163</sup> In the instant case, the district’s ESY “evaluation” was directed by an evaluator who had no experience with or understanding of the ESY evaluation process<sup>164</sup>, and completely oblivious to the procedural steps required for an appropriate ESY evaluation under the Ninth Circuit’s guidelines.<sup>165</sup> In lieu of an IDEA-appropriate ESY evaluation, SSD No. 320 opted for an ESY “evaluation” process that was little more than a “Don’t Ask, Don’t Tell” ESY process, in direct violation of its duties and obligations to A.D. under IDEA and Washington law.

When asked for their input on A.D.’s ESY needs, New Horizon School staff told SSD No. 320 that they believed that A.D. was eligible for and required ESY services in order to receive his FAPE.<sup>166</sup> This information, coupled with A.D.’s prior ESY eligibility and ESY service

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<sup>163</sup> Specifically, under IDEA, SSD No. 320 was required to: (1) perform an adequate evaluation of child in all areas related to his suspected disability [20 U.S.C. § 1414(b)(3)(c); 34 C.F.R. §§ 300.126 & 300.532; and WAC 392-172-106]; (2) use qualified professionals who are knowledgeable about the student and the suspected areas of disabilities [34 C.F.R. §§ 300.126, 300.530 - 532, & 300.540; and WAC 392-172-108 (2)(a)]; (3) use assessment tools that will provide relevant information that directly assists persons in determining the educational needs of the child [20 U.S.C. § 1414 (b)(3)(D); 34 C.F.R. §§ 300.126, 300.530 - 532, & 300.540; and WAC 392-172-108 (4), (11), & (12)]; and be completed within the specified time lines set forth in the Act [34 C.F.R. §§ 300.126 & 300.503 ; and WAC 392-172-104].

<sup>164</sup> Testimony of Cher Collins, Vol. VI, p. 883, l. 9 - 23.

<sup>165</sup> *Hoft v. Tucson United School District*, supra, 967 F.2d at 1301 (9<sup>th</sup> Cir. 1992); and *Johnson v. Independent School District No. 4*, 921 F.2d at 1027-1029 (10<sup>th</sup> Cir. 1990).

<sup>166</sup> Vol. II, pp. 385 - 390 [Exhibit No. P-30]; Testimony of Elena Tsaregordtseva, Vol. VI, 760, l. 13 – p. 762, l. 5, & Vol. II, pp. 391 - 399 [Exhibit No. P-31]; and Testimony of Marla Veliz, Vol. VI, 772, l. 5 – p. 774, l. 25, p. 783, l. 2 – p. 785, l. 4, & Vol. II, pp. 400 - 408 [Exhibit No. P-32].

history from California, should have been sufficient to spur SSD No. 320's interest in conducting an actual ESY evaluation, but that did not occur. Contrary to the comprehensive evaluation process outlined in *Hoelt/Johnson*<sup>167</sup>, SSD No. 320 elected to "continue" the "discussion" about A.D.'s ESY needs, without ever bothering to initiate an actual ESY evaluation.

C. ALL OF THE FINDINGS OF FACT CONTAINED IN THE FINAL ORDER ARE SUPPORTED BY THE ADMINISTRATIVE RECORD

The appellant school district contends that the administrative law judge's Findings of Fact and Conclusions of Law were not supported by the record. Respondents would respectfully submit that this contention is not true. Turning to the district's objection with Finding of Fact No. 32, for example, there was nothing in the parties' earlier settlement agreement<sup>168</sup> to suggest or imply that there was any "agreement" to extend IDEA's evaluation time lines<sup>169</sup> - A.D.'s parents wanted their son to receive his FAPE without delay.

Under IDEA, it was the appellant school district, rather than New Horizon School or A.D.'s mother, which bore the responsibility

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<sup>167</sup> *Hoelt v. Tucson United School District*, supra, 967 F.2d at 1301 (9<sup>th</sup> Cir. 1992); and *Johnson v. Independent School District No. 4*, 921 F.2d at 1027-1029 (10<sup>th</sup> Cir. 1990).

<sup>168</sup> Vol. II, pp. 244 - 248 [Exhibit No. P-11].

<sup>169</sup> 34 C.F.R. §§ 300.126, 300.530-532; & 300.540; and WAC 392-172-108.

to properly evaluate and assess A.D. ESY eligibility<sup>170</sup>, even after his placement at New Horizon School.

The district's objections to OAH administrative Findings of Fact and Conclusions of Law simply ignore the specific requirements set forth in IDEA and Washington law. The appellant's arguments on appeal, as well as its assignments of error with respect to the administrative hearing and subsequent review by the Superior Court are without merit – the only individuals who: (1) erroneously interpreted and/or applied the law; (2) failed to follow the prescribed procedures; and (3) acted arbitrarily and capriciously with regard to A.D.'s ESY eligibility evaluation and FAPE entitlement were the appellant's own special education administrators and staff, and these errors are clearly reflected in the administrative record as previously noted herein and above.

## V. CONCLUSION

The Ninth Circuit's *Hoelt/Johnson* ESY eligibility test was meant to insure that ESY services would be provided to those special education students who require educational “instruction beyond the conventional school year to prevent serious regression over the

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<sup>170</sup> See, e.g., *Letter to Garin*, 30 IDELR 609 (OSEP 1998). See also: WAC 392-172-224 (h); and AR - Vol. III:466 (§ IV) [Exhibit No. D-7].

summer months.”<sup>171</sup> As is clear from the evidentiary record, SSD No. 320 chose to ignore A.D.’s prior ESY service history, disregarded the opinions of his New Horizon School teachers, initiated a change his then-existing IEP program and services without any prior written notice to his parents, and refused to complete an appropriate ESY eligibility evaluation without any regard for A.D.’s rights or its own duties under IDEA and Washington law.

A.D. is a disabled special education student with complex needs who is entitled to receive an appropriate special education program of specially designed instruction and such other services deemed necessary to meet his unique needs. Respondents believe that they were able to show during the OAH administrative hearing and on review before the Superior Court below that A.D. was eligible for and required an ESY service component as a part of his 2004-2005 IEP. SSD No. 320’s refusal to recognize this fact, coupled with its complete disregard for its own duties and obligations under IDEA and Washington law, constituted substantive violations of law, and clearly resulted in a denial of A.D.’s rights and FAPE entitlement. The findings, conclusions, and Final Orders were thorough and well-reasoned, based on substantial evidence, and fully consistent with

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<sup>171</sup> *Hoft v Tucson United School District*, 967 F.2d 1298 (9<sup>th</sup> Cir. 1992), citing *Johnson v Independent School District No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990).

IDEA and the controlling case law here in Washington and the Ninth Circuit. Respondents therefore respectfully pray that the Final Orders be affirmed in their entirety, and that this matter be dismissed.

DATED this 18<sup>th</sup> day of January, 2007.

Respectfully submitted,

A.D., a minor special education student, by and through L.D., said child's Mother and Legal Guardian.  
Respondents

By: .....

RANDAL B. BROWN

WSBA No. 24181

Attorney for the Respondents

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18<sup>th</sup> day of January, 2007, he personally caused the original **BRIEF OF THE RESPONDENTS** to be served and filed with the Clerk of the Washington State Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, Washington 98402.

The undersigned hereby further certifies under penalty of perjury under the laws of the State of Washington that on the 18<sup>th</sup> day of January, 2007, he personally caused true and correct copies of the foregoing **BRIEF OF THE RESPONDENTS** to be served upon all parties

of record or their legal representatives by personal delivery to their last known and regular business address to:

Lawrence B. Ransom  
Karr, Tuttle, Campbell  
1201 Third Avenue, Suite 2900  
Seattle, Washington 98101-3028  
Attorney for the Appellant SSD No. 320;

Office of Administrative Hearings  
1904 Third Avenue, Suite 722  
Seattle, Washington 98101-1100; and

Attorney General Robert McKenna  
Office of the Attorney General  
1125 Washington Street SE  
P.O. Box 40100  
Olympia, Washington 98504-0100

FILED  
COURT OF APPEALS  
DIVISION II  
07 JAN 18 AM 9:19  
STATE OF WASHINGTON  
BY DEPUTY

By:   
RANDAL B. BROWN  
WSBA No. 24181  
Attorney for the Respondents