

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
SUPERINTENDENT OF PUBLIC INSTRUCTION**

IN THE MATTER OF THE EDUCATION OF)	FINAL ORDER
)	
Student and Oregon City School District)	Case No. DP 08-118
)	

HISTORY OF THE CASE

On July 30, 2008, Parent filed a request for due process hearing ,on behalf of Student, with the State Superintendent of Public Instruction under the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). The matter was referred to the Office of Administrative Hearings (OAH) on March 31, 2008. Administrative Law Judge (ALJ) A. Bernadette House was assigned to the matter.

Pursuant to OAR 581-015-2360(3), ALJ House conducted a pre-hearing teleconference on September 3, 2008. The pre-hearing was held in person at the Oregon City School District (District), Special Services Office, in Oregon City, Oregon. Parent appeared *pro se*. Counsel for the District, Suzi Harris, Attorney at Law, appeared on behalf of the District, accompanied by Vernon Ferguson, director of special education services for the District. Marilyn Hoover, certified court reporter, provided real-time translation and transcription services.¹

The OAH issued the Notice of Hearing and Rights, amended, on September 4, 2008, setting the dates and pertinent deadlines for the hearing. Prior to hearing, Parent did not waive the 45-day deadline for issuance of the final order.

The hearing was held in Oregon City, Oregon on September 18, 2008. At the conclusion of the hearing, Parent requested a waiver of the 45-day deadline to a date certain to allow time to submit written closing argument. As there was no objection from the District, the deadline was waived. In anticipation of receipt of transcripts on or before October 2, 2008, closing arguments to be received on or before October 13, 2008, and final arguments to be received on or before October 20, 2008, at which time the record was closed. The order was due to be issued on or before

¹ Real-time transcription was provided by the OAH at pre-hearing in response to Parent’s request for an in-person pre-hearing and for accommodation of a hearing impairment. All written communication from the OAH was provided to Parent in 18-point font at Parent’s request to accommodate a visual impairment. The original location of the pre-hearing conference was set by OAH staff to be held at OAH offices because of the request for an in-person pre-hearing conference with real-time translation services. Following Parent’s request to reschedule the pre-hearing conference due to transportation difficulties, at the ALJ’s request, the District provided a hearing location at the District offices and an Amended Notice was issued with the new hearing location. Real-time transcription services for the pre-hearing conference were provided as an accommodation for the hearing impairment, but not pursuant to OAR 581-015-2385(1)(b). No written transcription of the pre-hearing conference was provided.

November 10, 2008.

Parent appeared, *pro se*, for Student. Vernon Ferguson, director of special education, appeared for the District which was represented by its attorney, Suzi Harris.

Parent testified at hearing. In addition to Vernon Ferguson, the following witnesses appeared and testified on behalf of the District: Susan Nisbet, licensed special investigator; Kristin Kovack-Sievers (Sievers), assistant director of special education; Irene Hughes, special education teacher (SE teacher); and Lila Waits, special education teacher acting as educational assistant (EA) for period of District's ESY of 2008.

ISSUES

1. Whether the District failed to provide a Free Appropriate Public Education (FAPE), when extended school year services (ESY) in July 2008 were suspended prior to the end of the time allocated under Student's Individual Education Plan (IEP)?

2. If so, what is the appropriate remedy?

EVIDENTIARY RULINGS

Parent objected to what was marked and offered as District's exhibits D1 through D6, for lack of foundation and on the basis of relevancy. D1 through D6 were admitted into evidence during the hearing, following the District's establishing proper foundation and Parent's objections were overruled. District offered additional exhibits D7 through D9, which were admitted into evidence, without objection, at hearing.

Parent's exhibits, marked S1 through S4, were received into evidence, without objection.

FINDINGS OF FACT

(1) Student is a resident of District and is eligible for special education services under the category Other Health Impaired, based on a medical diagnosis of epilepsy, with significant motor skills impairment. Student experiences seizures and requires constant attention to ensure Student's safety. Student uses a manual wheelchair for mobility, but requires assistance to operate the wheelchair. Student's functions within the range of a mentally retarded student with significant communication and motor involvement. (Test. of Sievers, Tr. at 51.) Student is able to move the chair back and forth a minimal distance by placing hands on wheels and pushing in either direction, creating a "rocking" motion. Student uses the motion for self-soothing behavior. Student communicates, in part, through word approximations. The meaning of Student's word approximations is best understood by individuals who have known Student for a long period of time. (Test. of Parent, Tr. at 136, 141; Ex. D1.)

(2) Student's IEP, dated September 10, 2007, initially indicated that ESY services were to be considered at a later date and mandated that a meeting be held for that purpose prior to April 15, 2008. (Ex. D1 at 15.) At an IEP team meeting held on July 9, 2008, a detailed service plan for ESY services was developed. Services were to begin on July 14, 2008, from 11:30 a.m. to 2:00 p.m., and

were to continue, Mondays through Thursdays, with the last day being Wednesday August 13, 2008, for a total of 19 days of ESY services. (*Id.* at 1.)

(3) Parent attended the July 9, 2008 meeting as did the SE teacher and other educational providers. (Test. of Parent, SE teacher; Ex. D1 at 1.) In addition to other matters, Parent requested a feeding evaluation and a feeding protocol to be developed. The team determined the evaluation would be completed during ESY if Student were able to attend ESY sessions. (Ex. D1 at 2.)

(4) Neither the SE teacher, nor the EA assigned to Student to provide for the 2008 period, had previously worked with Student. The SE teacher and EA met Student at the beginning of ESY. (Test. of SE teacher, EA.) During the first day of ESY, the team began the feeding evaluation, with the Parent present. (*Id.*; Test. of Sievers, Tr. at 55, 56, and 70-77, and Parent, Tr. at 147.)

(5) Student did not attend ESY on July 15, 2008. A second bus was sent to pick up Student after Parent expressed concern with a harness on the first bus. By the time the second bus arrived, Parent determined it was too late to send Student to school that day. (Test. of Sievers, Tr. at 56.)

(6) Student attended ESY on July 16, 2008. Student was met by the EA and the SE teacher when Student arrived. (Test. of EA, Tr. at 36.) Because Student had not attended the previous day, the feeding team had been instructed to wait until called and notified of Student's arrival. While waiting for the team, Student and the EA played games. (*Id.*; Ex. D6 at 2, 5.) Student was offered liquids intermittently. (Test. of EA, Tr. at 98.)

(7) Parent also came to school on July 16th, arriving approximately one hour after Student had arrived. Parent observed Student's activities and interactions with both the SE teacher and the EA. Parent asked the EA if the reading program "Edmark" was a test and EA said it was not. (Test. of EA, Tr. at 97.) Parent and the SE teacher discussed Student's responses to a computer program. The SE teacher interpreted Student's selection of a particular answer as an accidental response. Parent, based on her knowledge of Student, believed Student was deliberately selecting the particular answer because Student enjoyed the program's response to her selection. Parent considered the difference in interpretation by the SE teacher and herself insignificant and expressed no concerns to the teacher at that time. (Test. of Parent, Tr. at 146, 147.) Parent did not object to any interactions, or lack of interactions, between Student and either the SE teacher or the EA, during the time Parent was at school on July 16.² (Test. of SE teacher, Tr. at 88-90; Ex. D6 at 2, 6, 8-9.)

(8) Parent left the classroom prior to Student's leaving, and stopped to talk with Sievers. Parent asked questions and made suggestions regarding materials used in the classroom with

² Parent testified at hearing to several incidents that resulted in the allegations of abuse that Parent later made regarding the treatment of Student at school on July 16th. Parent described Student as "screaming," and crying as loudly as Student could to express unhappiness with being unable to move Student's wheelchair. (Tr. at 142.) Parent testified that the SE teacher had locked the brakes when Student did not comply with attempts to redirect Student. (Tr. at 142, 149) Parent also testified that when Student attempted to ask for a cup, the SE teacher misinterpreted Student's attempt to communicate, believing that Student wanted the Parent, and that, when Parent attempted to explain Student wanted a cup, that the SE teacher disagreed. (Tr. at 143.) Parent did not intervene further, or attempt to feed or comfort the Student, because Parent did not want to distract Student from the computer program and or risk Student becoming upset in a new environment. (Tr. at 138, 139.)

Student. Sievers perceived the interaction as pleasant. Parent did not voice concerns about the treatment of Student in the classroom. (Test. of Sievers, Tr. at 57, 58.)

(9) After Parent returned home, Parent received a note informing Parent that the feeding team had returned. Parent was upset because Parent had not understood that the team would return and Parent wanted to be notified and to participate if the team were to continue the feeding evaluation. (Test. of Parent, Tr. at 147-149.) Parent observed that Student returned with most of the food Parent had provided for lunch. Parent observed that Student returned from school with all but a small amount of liquid that Parent had provided for Student to drink during her time at school. (*Id.* at 156, 157.) Parent concluded that the SE teacher had willfully withheld food and liquids from Student and had intentionally restrained Student by activating the brakes on Student's wheelchair, as a form of punishment when Student did not cooperate with the SE teacher in using the computer program. (*Id.* at 149, 156.)

(10) At 3:30 p.m. that day, Parent an email to the District. The subject title of the email was "The abuse of my developmentally delayed, severely handicapped child." The email stated as follows:

Ms. Sievers, Mr. Ferguson, Mr. Roberts:

I would like to meet with you all immediately to review [Student's] day at school today, and the mistreatment of my child.

In the event you choose not to meet with me, I am more than willing to take my concerns to the closest Police Department.

Until such time as this District is willing to meet with me regarding the mistreatment of my severely disabled child during class today, [Student] will not be attending the ESY program (and this District is failing to provide FAPE to [Student].)

Until such time as this District is willing to meet with me regarding the mistreatment of my severely disabled child during class today, she will not be attending the ESY program (and this District is failing to provide FAPE to Student[.]

[Parent]

(Emphasis added.)

(Ex. D6 at 4.)

(11) Sievers received Parent's email and called Ferguson, who was on vacation at that time. (Test. of Sievers, Tr. at 59, and Ferguson, Tr. at 107.) Sievers replied to Parent's July 17th email at 7:18:00 PM, advising Parent that "given your allegations, ESY services for [Student] are suspended. We will take your allegations under advisement." (Ex. D2 at 1.)

(12) Student did not attend ESY the next day, July 17, 2008. (Ex. D6, at 7.) At 11:30 a.m., Parent sent an email, with the same subject title as the July 16, 2008 email, to those same individuals. The July 17th email included an allegation that the District was continuing to evaluate

Student and revoked Parent's consent to "any and all testing of either of my children." In addition, Parent stated "My consent to transport my child for purpose of evaluation is revoked effective immediately upon the sending of this email." (Ex. D2 at 1.)

(13) The email continued with the following allegations:

Yesterday, my child was subjected to inhumane treatment. [Student] was physically restrained, had food and fluids withheld, and in general was tormented with no attempt to calm or console [Student]. This upset contributed to the amount of seizures [Student] had upon returning home yesterday, and this situation must be dealt with immediately.

(*Id.*)

(14) After stating that Parent believed the District did not want to accept Parent's evidence regarding the allegations, Parent's email then stated:

I want the current teacher, [SE teacher,] immediately replaced. Until such time as the District will replace this teacher, and/or meet with me to discuss the issue of corporal punishment used on my child, I want the educational materials used in the class to be provided to me to use in my home (to ensure my child has access to the academic materials [Student] is supposed to be offered during ESY) and a tutor to explain the purpose and use of such materials. I want this provided immediately and until such time as the [district] either meets with me to discuss this matter, or replaces the teacher.

(*Id.*)

(15) At approximately 11:30 a.m., the SE teacher and the EA noticed that Student had not arrived and the SE teacher called Parent. Parent told the SE teacher that, on the previous day, Student had been physically restrained by use of the brakes on her wheelchair, that Student had been deprived of food and drink, and that Student would not be coming to school that day. (Test. of EA, Tr. at 95; Ex. D6 at 7, 8; Test. of SE Teacher, Tr. at 73, 74; Ex. D6 at 7.)

(16) The SE teacher attempted to reassure Parent that Student had been offered and had consumed food and fluids during the day. The SE teacher also told Parent that Student had not been deliberately restrained. (Ex. D6 at 7.) Following contact with Parent, the SE teacher recorded notes of what happened the previous day. (*Id.* at 2.)

(17) Ferguson was away from work due to injury from July 18 to July 28, 2008. (Test. of Ferguson, Tr. at 106, 119.) Ferguson had had previous experience with Parent and Parent making allegations against instructional staff with either the District or with the Teachers Standards and Practices Commission (TSPC). (*Id.*, at 107, 118.) Ferguson was aware that other staff who would be qualified to substitute for the SE teacher were intimidated and who were fearful to work with Student based on past complaints from Parent. (*Id.* at 121,122.) Ferguson considered Parent's complaint serious and he followed District procedure regarding reported abuse of a student. The matter was referred to the District superintendent and to its human resources department. (*Id.* at 106-109, 117.) Ferguson drafted a response to Parent on his first day back at work, on July 28, after

he was able to consult with counsel. (*Id.* at 106, 108.)

(18) District's response, mailed on July 29, 2008, acknowledged receipt of Parent's allegations of abuse of Student and informing Parent that the District was conducting an investigation. Parent was told that the investigator would be contacting Parent to gather information. District's letter offered make-up services to be provided at the conclusion of the investigation if possible, or during school breaks in the upcoming school year. The District declined to provide the materials and tutor requested by Parent because District was bound to provide services to Student according to the IEP by qualified staff for the remaining 15 days of services due. (Ex. D3; Test. of Ferguson, Tr. at 106.)

(19) Parent filed the request for due process hearing in this matter on July 30, 2008, prior to receiving the District's response letter mailed July 29, 2008. (Pleadings file, Request for Due Process Hearing mailed July 30, 2008; Test. of Ferguson, Tr. at 106.)

(20) Upon referral of Parent's allegation of abuse to the human resources department, District contacted legal counsel, and subsequently hired the investigator recommended by counsel to conduct an investigation. (Test. of Ferguson, Tr. at 116, 117.) Susan Nisbet, licensed private investigator, conducted the investigation for the District. Nisbet was a former chief investigator of 10 years for the TSPC. Prior to working for the TSPC, Nisbet was a law enforcement officer, working for various agencies in Oregon, from 1988 through 1995. (Test. of Nisbet, Tr. at 25, 26.) Following receipt of the complaint and other materials from the District, Nisbet contacted the staff involved and conducted interviews in addition to requesting written statements. Nisbet also asked the District to contact Parent so that Parent would have the opportunity to provide information. (*Id.* at 29, 30.) Nisbet had no contact with Ferguson regarding the investigation during or after the investigation. (Test. of Ferguson, Tr. at 109.)

(21) District contacted Parent and an interview was scheduled for Nisbet and Parent on September 18, 2008. (*Id.* at 44.) Parent cancelled the interview by email sent to District on September 18, 2008. (Ex. D6 at 11.) Parent believed the investigator was biased. (*Id.*) Nisbet completed her investigation on the three allegations made by Parent and compiled a final report for the District. Nisbet concluded Parent's allegations were unfounded. Nisbet found that no torment behavior had occurred, that Student had been provided fluids and that fluids were made available to Student repeatedly during the day in question, and that setting the brakes, as the conduct occurred on July 16, did not constitute physical restraint. (Test. of Nisbet, Tr. at 29-31; Ex. D6.)

(22) Larry Didway, District's human resources director, provided a copy of Nisbet's report to Parent by letter dated September 9, 2008. (Ex. D5.)

(23) District continued to offer to provided make-up services, following conclusion of the investigation. (Test. of Ferguson, Tr. at 110, 114.) District was willing to provide a computer to Student for home use with the requested program, but was not willing to send District staff to the home. (*Id.* at 114,115.)

(24) Parent does not believe Student is physically capable of extending Student's school day in order to make up services. Parent believes Student will not be available during school breaks during the upcoming school year because Student is obligated to visit Student's other00 parent,

pursuant to a court order. Student's other parent lives out-of -state. (Test. of Parent, Tr. at 157, 158.)

(25) Student was more active at the end of the school day. (Test. of Sievers, Tr. at 61.) Student is often quite active and alert at night. (Test. of Parent, Tr. at 161.)

CONCLUSIONS OF LAW

1. District did not fail to provide a Free Appropriate Public Education (FAPE), when extended school year services (ESY) in July 2008 were suspended prior to the end of the time allocated under Student's Individual Education Plan (IEP).

2. There being no denial of FAPE, Student is not entitled to a remedy.

OPINION

Burden of Proof

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S Ct 528 (2005). In this case Parent sought relief and bore the burden of persuasion. The standard of proof applicable to an administrative hearing is preponderance of the evidence. *Cook v. Employment Div.* 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Public Education requirements under the IDEIA

The IDEIA provides for the public education of children with disabilities. The purpose of the IDEIA is to ensure that all children with disabilities are provided a free appropriate public education, emphasizing special education and related services designed to meet the unique needs of the child and to ensure the rights of children with disabilities, and parents of those children, are protected. 20 USC §1400(d)(1). The US Supreme Court, when considering requirements for education of special education students in *Board of Educ. Of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), set out a two-part test for evaluating complaints about the content of an IEP:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"

(*Rowley*, 458 U.S. at 206-07.)

Student qualifies for, and has been provided, special education services by the District under the provisions of IDEIA. Parent, *pro se*, requested a hearing in a due process complaint, alleging that District suspended Student's ESY program prior to completion, thereby denying Student FAPE.

As a remedy, Parent requested materials that were to be used by special education service providers at the school so that Parent could continue Student's program at home and a tutor for the amount of hours Student was to have received ESY services.

Facts regarding the interruption of Student's ESY program and witness reliability

Although some testimony was in direct conflict regarding events leading to the interruption in Student's ESY, several critical facts were not in dispute. On July 16, 2008, Parent sent an email to the District making an allegation of abuse against the SE teacher. In addition to other statements made in the email, Parent stated Student would not be returning to ESY until the District met with Parent. In addition, Parent threatened to bring the matter to the attention of the police if District failed to respond. The SE teacher was not aware at the beginning of the school day on July 17, 2008, that Student would not be attending ESY. When Student did not arrive for ESY, the SE teacher spoke with Parent, who then told the teacher that Parent believed Student had been abused. Also on July 17, 2008, District received Parent's second email, containing further allegations and demanding, among other things, that District replace the SE teacher immediately. Parent also demanded that District provide Parent with educational materials for Student to use at home and a tutor to explain the purpose and use of the materials. District informed Parent by email in the late afternoon that, given the allegations, ESY would be suspended and that the District would take Parent's concerns under advisement.

Reliability where facts were in dispute

The testimony was in conflict on factual matters that were the basis of Parent's accusations. The factual basis of Parent's allegations is critical to deciding whether there is an appropriate remedy in this case. I must resolve the discrepancies in order to first determine if a violation of Student's rights under IDEIA occurred. If a violation of FAPE occurred, the appropriate remedy, if any, must then be determined.

In making the determination as to which evidence is more probably correct, I must assess the credibility of the various witnesses offering testimony. Under provisions of the Oregon Evidence Code, a witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370. ORS 44.370 provides, in part, that:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

(ORS 44.370.)

Also, as the Court held in *Tew v. DMV*, 179 Or App 443 (2002):

[A] determination of a witness's credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether

human experience demonstrates that the evidence is logically incredible.

Tew, 179 Or App at 449.

The testimony of Parent at hearing was significant in that Parent testified to a series of events, withholding of fluids and food by the SE teacher, physical restraint of Student by locking the brakes on Student's wheelchair such that Student was in considerable and obvious distress, that were alleged to have occurred while Parent was present. Parent also testified that Parent did not intervene to offer fluids or food, or to prevent the SE teacher from restraining Student because Parent did not want to upset Student. Parent admitted that the disagreement over understanding Student's response to the computer program was "an insignificant issue." Parent did not intervene while observing conduct Parent later alleged was abuse. Nor did Parent inform the SE teacher or anyone else at the time the conduct was occurring, that Parent considered the teacher's actions "abuse," Parent did not complain because "the District [was] being so hostile toward me, that I didn't want to complain if there was no reason to complain." (Test. of Parent, Tr. at 149, 152.) After observing Student in the classroom, Parent consulted privately with Sievers, acting as the SE teacher's supervisor, about the program materials in use in the classroom on July 16, 2008, but made no complaints or allegations of abuse or wrongdoing by the SE teacher. Parent became upset later in the day, after Parent learned that the feeding team had returned earlier in the day without Parent being aware that the team had been with Student.

Reviewing the record as a whole, and in considering the demeanor and manner of testimony, I find Parent's testimony is not reliable when testifying that Parent observed abusive behavior towards Student by the SE teacher on July 16, 2008. Parent's failure to report the alleged abuse immediately when speaking to the SE teacher's supervisor is unlikely if the abusive conduct had occurred. According to Parent's testimony, Parent failed to intervene earlier to avoid upsetting Student when in the classroom. Parent was not in the presence of Student when speaking with Sievers and would have been able to voice concerns without being in the Student's presence. More importantly, the subject and nature of Parent's testimony and Parent's demeanor at hearing demonstrated a close, intimate relationship between Parent and Student. Based on the above, I find it unlikely that Parent would have failed to intervene if Parent was observing conduct that rose to the level of the alleged abuse as Parent alleged to have occurred.

Furthermore, the testimony of the SE teacher and the EA regarding what occurred, corroborated by their notes taken the day of and the day following the alleged incident, was consistent and logical. The SE teacher and the EA were with Student at times before and after Parent was present, during which times food and drink were offered to Student, by both the SE teacher, the EA, and members of the feeding team. Whether Student refused the offered fluids or food was not established. Even if Student had refused fluids or food when offered, Parent did not meet the burden to prove that District personnel withheld food or fluids from Student.

In Parent's allegations of abuse, Parent alleged that District personnel used corporal punishment on Student by immobilizing Student's wheelchair. Student communicates with word-

approximations and is not easily understood by individuals who have little experience with Student. District personnel attempted to understand and act upon what they understood were Student's attempts to communicate. District personnel locked Student's brakes to facilitate safe and effective use of the computer. Parent's interpretation of the application of brakes to Student's wheelchair as intentional "corporal" punishment was not supported by the record. The record supports a finding that the brakes were applied in order to appropriately and safely position Student's wheelchair while using the computer. Parent, having made the request for due process hearing bears the burden of proof to show that a denial of FAPE occurred as alleged. Parent did not meet that burden of proof. Parent's allegations were unfounded.

Initial interruption of services and Parent's allegations of denial of FAPE

Parent alleges that the District cancelled Student's ESY program, which was mandated by Student's IEP, thereby failing to provide FAPE in violation of the requirements of the IDEIA. District argues that Parent removed Student from the program and made allegations that required an interruption in services until an investigation could be conducted. The District contends that suspending Student's ESY following receipt of Parent's accusations of abuse, on July 16th and July 17th, was District's only available response. District argues that suspending services was necessary based both on the nature of Parent's allegation, requiring that District act immediately, and on the lack of available alternative qualified instructors. The lack of alternative teachers was caused in part by the natural lack of teachers during the summer term and in part by the experience of prior instructors and staff with Parent, such that few, if any, of District's qualified teachers or staff were willing to work with Student.

Further, the District argues that, by offering the remainder of the time due under Student's ESY program, as soon as the investigation was complete and at a time when District believed Student would be able to utilize the special educational services, no violation of FAPE occurred. Even if it were determined a violation occurred, the District argues that its proposed remedy, offered as soon as possible following the interruption of services, was, and remains, the appropriate remedy. Therefore, District offered as a remedy what was required to Student under the IEP in effect at that time and cannot be found to have failed to provide Student with FAPE.

Appropriate remedy if available

Based on the sequence of events and the record as a whole, I find that Parent, by informing the District that Student would not be returning until Parent's demands were met, essentially made a unilateral decision to change the placement of Student to that of a home-schooled student, without providing prior notice to the District.

The District's response stating it was suspending ESY was after Parent had removed Student from ESY. In the email entitled "The abuse of my developmentally delayed, severely handicapped child[.]" Parent alleged that Student was "subjected to inhumane treatment * * * physically restrained, had food and fluids withheld, and in general was tormented * * * *." (Ex. D2 at 1.) Despite Parent's removal of Student from ESY, the District continued to meet its obligation to provide FAPE to Student. District responded appropriately when it suspended provision of services to Student by the SE teacher while the District investigated Parent's allegations. To have done

otherwise would have been a failure to properly supervise school personnel in order to prevent possible harm to Student.

In denying qualified immunity to school officials where a teacher was found to have physically abused a special education student, the 9th Circuit Court of Appeals held:

It has long been clearly established that "[s]upervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." (citations omitted.) We have also held that a person "subjects" another to the deprivation of a constitutional right, within the meaning of § 1983, "if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. The requisite causal connection may be established when an official sets in motion a "series of acts by others which the actor knows or reasonably should know would cause others to inflict" constitutional harms.[]

The alleged acts and omissions on the part of the School Officials, if proven true, establish that they are liable for the violation of [Student's] clearly established constitutional rights because they demonstrated disregard of their responsibilities in hiring, training, supervising, disciplining and reporting abuses committed by [the teacher.] *The physical abuse allegations here do not concern IDEA violations or some obscure and abstract legal requirements. Instead, a reasonable special education school official would know that [the teacher's] alleged abusive conduct, and the failure of other special education officials to address that conduct, are grounds for liability.* For these reasons the district court properly denied qualified immunity to the School Officials.

Preschooler II v. Clark County School, 479 F.3d 1175, 1183 (9th Cir. 2007) (emphasis added.)

Parent's accusations of abuse were such that a reasonable special education school official would know that the alleged conduct had to be addressed. The record supports a finding that, due in part to the staff qualifications required to provide services to Student and to the usual paucity of available qualified school personnel during summer term, compounded by difficult relations between Parent and District staff in the past, District's actions were appropriate. The District instigated investigation of the complaint by a highly qualified investigator, independent of the District. Having limited, or no, alternative SE teachers immediately available, the District offered to resume ESY as soon as the investigation was completed.

Parent requests that the District be ordered to provide compensatory services, which is a request for an equitable remedy.³ *Parents of Student W. v. Puyallup School District* 3, 31 F 2d 1489

³An equitable remedy is "usu[ally] a non-monetary one such as * * * a specific performance, obtained when available legal remedies * * * cannot adequately redress the injury." *Black's Law Dictionary*, 1072 (abridged 8th ed 2005).

(9th Cir. 1994) (finding "compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief.") Parent requests compensatory services in the form of a computer program for home use and instruction for Parent in the use of the program to allow Parent to provide services to Student in the home to remedy the alleged violation of FAPE. District's argues that, because the requested remedy is one of equity, it requires consideration of the conduct of both parties when deciding the appropriate remedy. (District's Closing Statement, at 10.) In addition, the District points out that, during the resolution process, District offered to provide Parent with the materials and with a tutor to explain the use of the materials but that Parent refused. (District's Closing Statement, at 5.)

The 9th Circuit addressed factors for consideration in granting equitable remedies in the case of *W.G. v. Board of Trustees of Target Range School District*, 960 F 2d 1479 (9th Cir. 1992) (cited with approval in *Puyallup School District 3*, 31 F 2d 1489 at 1496.) In making its determination of the appropriateness of the remedy, the Court in *Target Range* looked to the conduct of both parties, when fashioning appropriate relief "designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Target Range*, 960 F 2d, at 1486. The conduct of the parties during the day in question is at issue in this hearing.

Therefore, because I find that Parent withdrew Student from ESY, thereby causing the interruption in services due Student under the IEP, District is determined not to have denied Student FAPE. Because I also find that Parent's allegations were serious, even if unfounded, I find that District's subsequent suspension of the offer of ESY while its investigation was completed was not only reasonable but was appropriate. To have done otherwise was to expose Student to further harm if the allegations were true and to have exposed the District to further liability. District met its obligation to provide FAPE by offering make-up services at times when Student could attend school.

The District has offered, and continues to offer Student, FAPE by offering to provide the 15 days of ESY as mandated in Student's IEP at a time when Student is able to access those services. The remedy is appropriate. In summary, on each allegation, Parent did not meet the burden of proof to show that the District violated the requirements of IDEIA as alleged in the request for a due process hearing or that District is required to offer alternative remedies other than that which has been offered.

ORDER

Parent, having withdrawn Student from ESY services on July 17, 2008, did not show that District denied Student FAPE. Parent failed to show by preponderance of the evidence that a denial of FAPE occurred and therefore, there is no jurisdiction upon which to order the requested remedy.

A. Bernadette House, Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 10th day of November, 2008 with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE,
Salem, OR 97310-0203.