BEFORE LINDA MCCULLOCH, SUPERINTENDENT
OF PUBLIC INSTRUCTION
STATE OF MONTANA

IN THE MATTER OF	)	OSPI 2004-E-01
[The student]	)	MEMORANDUM OPINION AND ORDER

PROCEDURAL HISTORY

Petitioners, the parents of [the student], [petitioners] filed this petition for a due process hearing with the State Superintendent of Public Instruction on January 21, 2004. By order dated January 22, 2004, the Superintendent issued an order appointing the undersigned as the hearing officer herein. Thereafter by agreement dated February 19, 2004, the parties agreed to mediation pursuant to 34 C.F.R. §300.506. On March 23, 2004, the undersigned received notice from the parties that the mediation had not been successful and that they wished to proceed with a due process hearing. Thereafter on April 7, 2004, the petitioners filed a formal complaint with the Superintendent. The **** School District No. * [the District] filed its answer on April 12, 2004. Following the completion of discovery the hearing took place at the **** complex in****, Montana, on May 4 – 5, 2004.

Because of the intervening attempt at mediation the parties agreed to suspend the time for the rendering a final decision pursuant to 34 C.F.R. §300.511 and ARM §10.16.3523 pending the outcome of the mediation. Following the hearing the parties again agreed to suspend the deadline to enable counsel for the parties to review the hearing transcript, file post-hearing briefs and for the undersigned to thereafter render a decision. Post-hearing briefs having been filed the matter is ready for decision.

******

[The student] was born February 19, 1992. He lives at home with his parents, the petitioners herein, and four brothers ranging in age from 15 years to 16 months, three of whom also receive special education services in the **** Public Schools. [Transcript pp 13 –

16]. [The student] is a child with a disability as that term is defined in 34 C.F.R. §300.7 and currently receives special education services for impairments in speech and written language. He has attended **** School in **** since kindergarten and has received special education services from that time forward.

District psychologist, **** , first evaluated [the student] in March of 1998 when he was six. Using the Wechsler Preschool and Primary Scales of Intelligence-Revised [WPPSI-R] [the student] demonstrated a Verbal IQ of 77, a Performance IQ of 101 and a Full Scale IQ of 86 putting his cognitive abilities in the low average range at the 18th percentile, meaning that he did as well as, or better than, 18% of his age-mates in the standardization sample. School Exhibit C at pp 149 – 151. On the basis of that and other tests, [the student]'s Child Study Team determined that [the student] was eligible for special education services as a child with learning disabilities and speech and language impairments.

[The District psychologist] re-evaluated [the student] in January of 2001 when he was in the third grade. She administered the Wechsler Intelligence Scale for Children-Third Edition [WISC-111] on which he obtained a Verbal IQ of 98, a Performance IQ of 108 and a Full Scale IQ of 103. These scores placed [the student] in the average range at the 58th percentile. School Exhibit C at pp 146 – 148. Based on these tests [the student] continued to receive special education services in speech and language until 2003 when he was dismissed from these services but continued to receive services in written language and reading. District's Exhibit A at p. 99 and 111 - 114.

Beginning in February of 2003 [the student] began to have behavioral problems at school. His disciplinary history reflects several instances of assaults, bullying, intimidation and harassment which resulted in varying degrees of discipline being imposed on him including one ten-day suspension for assaulting a student after school on the playground. At the outset of the 2003-2004 school year [the student] resumed his pattern of disciplinary infractions running up to September 23, 2003, when he brought two 3-1/2" knives to school in violation of **** School's "zero tolerance" policy against bringing weapons to school. Doing so also violated **** Public School's "Safe Schools" Policy 3310. Petitioners' Exhibits 13, 14 and 33.

By letter dated September 24, 2003, **** School's principal, ****, notified the petitioners that [the student]'s suspension for this offense would remain in effect pending the convening

of an IEP team meeting to determine whether this infraction was a manifestation of his disability as is required by 24 C.F.R. §523. 34 C.F.R. §520(a)(2) permits a school to change the placement of a child with a disability to an appropriate interim alternative educational setting [IAES] for not more than 45 days when the child carries a weapon to school.

Following his initial ten-day suspension [the student] was provided with 50 minutes a day of tutoring in all subjects by District tutor, ****. These sessions took place at the **** between October 6 and December 22, 2003. According to [the tutor's] contact log [the student] attended 33 such sessions although when [the student] was late some of those sessions were for less than 50 minutes. That amounts to a total of 27-1/2 hours of tutoring in all subjects over approximately two and one-half months. Petitioner's Exhibit 37.

[The student]'s IEP team met on September 29, 2003, and determined that before making a manifestation determination, [the student] should be further evaluated. Pursuant thereto [the district psychologist] again tested [the student] on October 3, 2003, this time using the Wechsler Abbreviated Scale of Intelligence [WASI]. On this test administered at a chronological age of 11 years, 7 months, [the student] was found to have a Verbal IQ in the range of 83 – 97, a Performance IQ in the range of 82 – 95 and a Full Scale IQ in the range of 82 – 93. His full-scale score fell in the low average range at the 19th percentile. [The district psychologist's] summary concluded that [the student]'s "... cognitive abilities fell in the low average range with achievement results generally falling in the low average range." Her report noted that "[r]esults of a social-emotional evaluation suggested that externalizing problems such as conduct disorder and aggression were most significant . . . ." [i] Her evaluation report concludes as follows:

> Evaluation results suggested that [the student] probably would not qualify for special education services as a child with emotional disturbance since his clinically significant behaviors were primarily indicative of social maladjustment rather than internalizing problems such as anxiety, depression, poor self-esteem, or thought problems. [The student] might continue to qualify for services as a child with learning disabilities due to the discrepancy between his ability and written expression scores.
>
> Petitioner's Exhibit 32.

[The district psychologist] testified at the hearing as follows:

[i] Many of the exhibits appear on each party's exhibit books. For convenience I will only cite one source for an exhibit.

> Primarily, the results were that [the student's] cognitive abilities are in the low-average to average range, his achievement tends to be in the low-average range and his area of greatest need was in the written language area.
> . . . behaviors that are considered conduct-disordered type behaviors were considered the most significant and of the greatest concern.
>
> Transcript p. 393.

[The student]'s IEP team met on November 4, 2003, and concluded that his conduct was not a manifestation of his disability. Petitioner's Exhibit 9. Principal **** then advised the team that he would recommend to the **** School Board that [the student] be expelled for having violated the school's "zero tolerance" policy. He also so advised [the student]'s parents. Petitioner's Exhibit 9.

[The student]'s expulsion hearing before the **** School Board was initially set for November 17, 2003. Petitioner's Exhibit 34. The hearing was postponed at petitioners' request to December 15, 2003, to allow them time to obtain an independent assessment of [the student]. Petitioner's Exhibit 35. This evaluation was done by William A. Cook, Ph.D., a licensed psychologist who, in his November 7, 2003, evaluation concluded that ". . . there is no emotional condition such as depression or thought disorder which would suggest that he did not know what he was doing when he brought the knives to school. Instead, his actions seem to be a result of poor judgment." Petitioner's Exhibit 19.

At its December 15, 2003, meeting the **** School Board unanimously voted to expel [the student] for the remainder of the 2003 – 2004 school year. Following that meeting [the student]'s IEP team met on December 17, 2004, and determined that for the remainder of the school year [the student] would be schooled at an off-campus facility. The team determined that he would receive five hours a day of overall instruction including 3.75 hours per week of special education services in reading where, according to the December 17, IEP, he was functioning at one year below grade level. He would also receive 3.75 hours per week of specialized education in written language where, according to this IEP he was "having difficulty . . . and needs editing assistance." Petitioner's Exhibit 11. Overall, then, the December 17, 2003, IEP provided [the student] with a total of 1.5 hours a day of special education-related services. It also included a behavioral component. Petitioner's Exhibit 11 at p. 4. Petitioner, ****, signed the IEP. Petitioner, ****, wrote to principal **** on January 6, 2004, advising him that he would accept this arrangement. In his letter he said: "I do not

agree with the Homebound placement that was provided before and after the expulsion hearing." Petitioner's Exhibit 17.

When asked her opinion as to the adequacy of the December 17, 2004, IEP witness [school psychologist] said this:

> Q. [By Ms Kaleva]. Is it your opinion, then, that the five hours of educational services that are currently being provided meet [the student]'s educational needs?
>
> * * * * *
>
> A. [By Ms ****] I would think that would be adequate. In fact, that is close to the amount of time that many children [the student's] age spend in a classroom. And in the classroom, they're sharing their attention and their educational needs with 22 or 23 other students oftentimes, and [the student] was going to have a teacher who would work with him individually for five hours. I believe that adequately could meet his educational needs.

Transcript at p. 404.

Petitioner's counsel also asked [the school psychologist] about the adequacy of the one-hour-a- day of tutoring [the student] received between October 6 and December 22, 2003. This exchange took place between petitioner's counsel and [the school psychologist]:

> Q. [By Ms Brenneman] You testified that five hours a day of tutoring was sufficient for [the student].
> A. [By Ms ****] To meet his educational needs.
> Q. How about one hour a day?
> A. I would suspect, given proper supervision and in that hour of time if the person explained what needed to be done, that his educational needs could be met. He would need to spend some energy beyond one hour a day of direct instruction.
> Q. And really what we should be saying is 50 minutes of tutoring, because that's what he was receiving for a number of months, from October until December, 50 minutes.
>
> * * * * *
>
> Q. Is that enough time for an individual to be able to keep up with the general curriculum?
> A. Fifteen minutes?
> Q. Fifty.
> A. If they complete the work following the 50 minutes of direct instruction, it might be.
> Q. How about if they have a learning difficulty?
> A. It would depend upon the quality of the instruction, probably.

Transcript at pp 423-424

When **** Schools Superintendent **** was asked about this on cross- examination he testified as follows:

Q. [By Ms Brenneman] In your opinion, a 1-hour – or really a 50-minute tutoring each day was sufficient to keep him abreast of the developments in the general curriculum?
A. [By Mr.****] I think it gave him the opportunity to stay abreast. I mean is it the ideal? You know, I'm not saying that it's – I think it was a good thing. I think it gave him the opportunity to be exposed to the curriculum.

* * * * *

Q. So looking at the fact that it was for two months' [sic] time, was a one-hour tutoring arrangement sufficient?
A. In my opinion, it gave him access to the curriculum. I mean we're taking a fine line with "sufficient." I mean minimal requirements? Maximum requirements? It was the best thing we could do in the temporary setting, in my opinion.

Mr. **** also acknowledged on cross-examination that this was his first experience in developing an IEP for a child with a disability who would be serving out an expulsion from school for the remainder of that school year. He was also asked about the impact of one-on-one tutoring as to which he testified as follows:

Q. [By Ms Brenneman] So you don't know from experience what kind of impact one-on-one tutoring has on an individual?
A. [By Mr ****] From experience, academically, I do. I think in some cases where I've seen one-on-one tutoring, it makes a great deal of difference. If you've got one teacher with one student, your academic progress should be pretty good.
Q. But I'm talking about the isolation of the tutoring. You don't have personal experience about what sort of impact that may have on a child when they're isolated in that manner?
A. I would not.

Transcript at p. 473

[The student]'s expulsion having now expired he will return to school at the seventh grade level this Fall. Because this constitutes a change in placement [the student]'s IEP team will again need to write a new IEP for him for the forthcoming school year. According to Superintendent **** his IEP team could elect to place [the student] in the Alternative School at the **** complex or at **** Middle School. Transcript at p. 460.

There was an exchange between Superintendent **** and the undersigned as to whether given that [the student] had sat out the entire 2003-2004 school year first in a 50-minute-a-day homebound tutoring program for approximately 2-1/2 months and then, beginning in January of 2004, in a five-day-a-week five-hour-a-day tutoring program whether he is academically ready to enter school at the seventh grade level. Transcript pp 476 – 481. District counsel cited District Exhibit L consisting of progress reports and lesson plans prepared by [the

student]'s tutor, ****, for the period from January 6 – March 5, 2004. Her reports, which were sent to petitioners, indicate that [the student] was making generally satisfactory progress and also indicated areas where he needed to improve. Based on Superintendent ***'s testimony it may be that [the student]'s educational placement this Fall will turn on the results of his re-evaluation to be made before his IEP team meets to formulate his new IEP for the forthcoming school year. Transcript at pp. 479 – 481.

THE LAW

The statutory framework around which this matter turns is set out in 20 U.S.C. §1415(k) which reads as follows:

> (k) Placement in alternative educational setting
> (1) Authority of school personnel
> (A) School personnel under this section may order a change in the placement of a child with a disability--
> (i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and
> (ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if--
> (I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or
> …
> (B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A)--
> (i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address
> that behavior; or
> (ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.
>
> * * * * *
>
> (3) Determination of setting
> (A) In general
> The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.
> (B) Additional requirements
> *Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall--*
> *(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and*

modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and
(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.
(4) Manifestation determination review
(A) In general
If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children--
(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and
(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.
(B) Individuals to carry out review
A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.
(C) Conduct of review
In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team--
(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including--
(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;
(II) observations of the child; and
(III) the child's IEP and placement; and
(ii) then determines that--
(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.
(5) Determination that behavior was not manifestation of disability
(A) In general
If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children

> without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title.
>
> * * * *

See also 35 C.F.R. §519 *et seq* which further address the matters set out in the above statute. Both 45 U.S.C. §1415(k)(3)(B) and 34 C.F.R. §300.522(b) require that during the time a child with disabilities is placed in an interim alternative educational setting that child must continue to receive the services provided for in the child's IEP. 34 C.F.R. §300.522(b) reads in relevant part as follows:

> (b) Additional requirements. Any interim alternative educational setting in which a child is placed under §§300.520(a)(2) or 300.521 must—
>
> (1) Be selected *so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP;* and
>
> (2) *Include services and modifications to address the behavior described in §§300.520(a)(2) or 300.521, that are designed to prevent the behavior from recurring* [emphasis supplied].

THE ISSUES

[The parent] argues that because of the **** School District's failure to follow certain of IDEA's procedural and substantive provisions [the student] has been denied a free appropriate public education [FAPE]. According to [the student]'s post-hearing brief these failures are that:

1. [The student]'s IEP team did not develop a behavioral intervention plan [BIP] for incorporation into his IEP in the Spring of 2003 when his behavioral problems resulted in a ten-day suspension for an assault he committed on May 9, 2003.

2. **** Schools did not meet and develop a BIP for [the student] when he returned to **** School in the Fall of 2003 even after [the student] continued to commit a number of disciplinary infractions that Fall prior to the knife incident which resulted in his eventual expulsion for the remainder of the 2003-2004 school year. See [the student]'s disciplinary profile. Petitioner's Exhibit 12.

3. The functional behavioral analysis [FBA] done on [the student] following the September 22, 2003 IEP meeting was inadequate because the IEP team was not able to observe [the student] who was then out of school for having brought two knives to school on September 23, 2003.

4. The IEP team's finding that [the student]'s behavior was not a manifestation of his disability was incorrect because (1) his parents were denied the opportunity to meaningfully participate in the determination rather they were handed the IEP team's determination as a *fait accompli*; (2) his IEP lacked a behavioral intervention plan and (3) the manifestation determination meeting was not held within ten days of the date [the student] was suspended.

5. The IEP in place on September 23, 2003, the day that [the student] was suspended for bringing two knives to school, had no behavioral component and was, therefore, inadequate.

6. [The student]'s Interim Alternative Educational Setting [IAES], for the period from October 6, 2003 – December 22, 2003, was inappropriate because: (1) it did not allow [the student] to appropriately progress in the general curriculum; (2) it did not allow [the student] to meet his IEP goals; (3) the April 3, 2003 IEP which was the one in place during this period did not include a behavioral component or a BIP; (4) the IEP team did not develop an IEP for the IAES and, hence, failed to identify the necessary related services such as transportation to the tutoring site; (5) the IAES lasted longer than 45 days; (6) the District failed to provide [the student]'s parents with a full description of their procedural safeguards and (7) that the IAES violated [the student]'s right to FAPE because it does not include transportation as a related service.

Petitioners ask that because of the failures alleged above [the student]'s expulsion should be vacated and expunged; that [the student] be allowed to return to public school within the **** Schools District; that the District should provide compensatory education to [the student] and that the District should compensate [the student]'s parents for the cost of transporting [the student] to the tutoring site from October 6, 2003 to the present together with [the parents]'s reasonable attorney fees and costs.

The District's position on the above issues as expressed in its post-hearing brief is that:

1. [The student]'s behavior did not impact his education until the Spring of 2003 when as a result of an altercation the District suspended him for ten days pursuant to 34 C.F.R. §300.520(1) and that because [the student] did not return to school following that suspension the District could not address his behavioral problems.

2. Because [the student]'s father had indicated to **** School principal, ****, that he was considering home schooling for [the student] it was uncertain whether [the student] would be returning to school in the Fall of 2003; that when he did return that Fall whereupon his parents

requested that an IEP meeting be held on September 15, 2003, but that after completing an IEP meeting for their other son on that same date [the student]'s parents failed to remain for [the student]'s IEP meeting thus making it necessary to re-schedule that meeting to September 22, 2003.

3. That at the September 22, 2003, meeting the IEP team determined that a functional behavioral analysis [FBA] should be conducted; but, that because the next day [the student] brought two knives to school for which the District suspended and ultimately expelled him for the remainder of the school year the District was precluded from doing so.

4. The IEP team's manifestation determination was not in error because there was no behavioral intervention plan in his IEP in place on September 23, 2003, because following the completion of [the student]'s ten-day suspension in May of 2003, his parents chose to keep him out of school for the remainder of that school year.

5. As to whether the parents understood their procedural rights the District's post-hearing brief points out that ****, [the student]'s mother, acknowledged that she had received a number of the "Parental Rights In Special Education" booklets. In addition the District points out that she signed the manifestation determination.

6. The petitioners' request that [the student] be returned to a regular classroom setting is moot given that school is now over and that [the student] is scheduled to be returned to a regular classroom setting this coming Fall.

7. As to the petitioners' contention that the District failed to provide [the student] with an appropriate interim alternative educational setting from September 29, 2003, to January 6, 2004, the District cites 34 C.F.R. §300.520(a)(2) which allows school personnel to order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if a child carries a weapon to school. Accordingly, the District argues, it had the authority to unilaterally place [the student] in an IAES for up to 45 days. The District attributes the fact that he remained in this setting for more than 45 days to the fact that first the parents asked that [the student] be further evaluated before the IEP team made the manifestation determination which the District did through **** School psychologist, ****, and that following the manifestation determination the parents asked that [the student]'s expulsion hearing before the **** School Board be postponed from the original November 17, 2003 date to December 15, 2003, in order to allow

[the student]'s parents to obtain an independent evaluation of [the student]. Because of these requests the District argues that the "stay put" provisions of the IDEA mandated that he remain in that placement until after he was formally expelled and that during this time [the student] received Homebound instruction for one hour per day.

8. With respect to petitioners' contention that [the student]'s post-expulsion IEP does not address his behavioral needs and is inconsistent with the IDEA's least restrictive environment provisions the District contends that given that [the student] had been expelled for bringing two knives to school an off campus educational setting was warranted in the interest of the health, safety, and well-being of other students and staff and that in this setting from and after January of 2004 [the student] received five hours of one-on-one tutoring services for the remainder of the school year.

9. As to the petitioners' contention that the District should be required to reimburse [the student]'s parents for transportation costs the District notes that the December 17, 2003, IEP provides that "transportation will be provided by parents" and that, therefore, it is not the District's legal obligation to provide transportation as a related service. And as to attorney fees the District cites 20 U.S.C. §1415(i)(3)(B) for the proposition that only when the decision of a IDEA hearing officer is appealed to Court may the Court award attorney fees upon its finding that the petitioners are the prevailing party.

STANDARD OF REVIEW

In determining whether any of the procedural defects the petitioners cite as set out above are such that would require me to find that *** has been deprived of FAPE I look to existing case law. The seminal case is, of course, *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) in which the U.S. Supeme Court said:

> . . . a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more [footnotes omitted].

Following *Rowley* there has been a plethora of litigation over the issues involved herein. See *Evanston Community Consolidated School Dist. Number 65 v. Michael M.*, 356 F.3d 798,

(C.A.7.Ill., 2004) ["Once a school district has met the Rowley requirements, it has done enough to comply with the IDEA; school districts are not required to do more than provide a program reasonably calculated to be of educational benefit to the child, and they are not required to educate the child to his or her highest potential. [citation omitted]." See *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, (C.A.4.Md., 2004) [Held: The free appropriate public education that the state must provide to disabled students under the IDEA must only be calculated to confer some educational benefit on students]. And see *Loren F. ex rel. Fisher v. Atlanta Independent School System*, 349 F.3d 1309 (C.A.11.Ga., 2003) [In determining whether a school district has provided a free and appropriate public education (FAPE) to a disabled student as required under the Individuals with Disabilities Education Act (IDEA), a court asks whether: (1) the school complied with the IDEA's procedures; and (2) the individual education plan (IEP) developed through those procedures was reasonably calculated to enable the student to receive educational benefits]. And see *Adam J. ex rel. Robert J. v. Keller Independent School Dist.*, 328 F.3d 804, C.A.5.Tex., 2003 [Individuals with Disabilities Education Act (IDEA) guarantees only basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit; this benefit cannot be mere modicum or de minimis, but must be meaningful and likely to produce progress]. And further see *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 C.A.8.Mo, 2003 [While the IDEA requires school districts to provide disabled children with a free appropriate public education, it does not require that a school either maximize a student's potential or provide the best possible education at public expense; instead, the requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit].

The Montana Supreme Court takes the same approach. See *Parini v. Missoula County High School, Dist. No. 1*, 284 Mont. 14, 944 P.2d 199, (1997).

> The IDEA entitles disabled children to a FAPE. See 20 U.S.C. §1400(c). According to the United States Supreme Court, a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley (1982), 458 U.S. 176, 188-89, 102 S.Ct. 3034, 3042, 73 L.Ed.2d 690, 701. Moreover, the Court concluded that the IDEA does not obligate a state to maximize each disabled child's

> potential; rather, the IDEA requires a "basic floor of opportunity," "sufficient to confer some educational benefit upon the handicapped child." Rowley, 458 U.S. at 200- 01, 102 S.Ct. at 3048.

As to the adequacy of an IEP the Sixth Circuit Court of Appeals in *Kings Local School Dist., Bd. of Educ. v. Zelazny*, 325 F.3d 724, C.A.6 (Ohio), 2003, had this to say:

> The statute, at 20 U.S.C. § 1414(d)(1)(A), requires that an individualized education program include, among other things,
> (i) a statement of the child's present levels of educational performance ...; (ii) a statement of measurable annual goals, including benchmarks or short-term objectives ...; (iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child ...; (iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii); ... (viii) a statement of--(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and (II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress....
> These "are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused." Cleveland Heights, 144 F.3d at 398. Further, "[t]his Court has determined that appellant and his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate." Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 458 (6th Cir.1994); McLaughlin, 320 F.3d at 669.

Also some deference is due to a school's determination of what in a given case is the appropriate instructional method. See *L.T. v. Warwick School Committee, 361 F.3d 80 (1st Cir.Mar. 18, 2004).* ["The Rowley standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional method [citations omitted"].

DISCUSSION

Propriety of [the student]'s Expulsion: It is to be remembered that [the student] was removed from his regular classroom setting on September 23, 2003, immediately following his suspension for bringing two 3-1/2" knives to school. A knife of that length is a "weapon" within the meaning of 20 U.S.C. §1415(k)(10)(B)(2) and 18 U.S.C. §930(g)(2). [The student].'s doing so violated the **** School's "zero tolerance" policy against students bringing weapons to school. School's Exhibit G. It also violated **** School District's "Safe Schools" policy 3310." Nothing in the above statutes or in the **** School District's policies quoted above looks to the reason why a student may have brought a weapon to

school. Just doing so is sufficient cause for expulsion. So it is within the District's discretion whether or not to expel even a child with disabilities in education if that child brings a weapon to school. When, however, a school does so it must continue to provide the services called for in that child's IEP in whatever alternative setting the IEP team determines to place the child.

Here, following the completion of a ten-day suspension [the student] was sent to **** where between October 6 and December 22, 2003, he received a total of approximately 27-1/2 hours of tutoring in all subjects from **** Schools' tutor, ****. Then from and after January 5, 2004, [the student] received five hours a day of tutoring at the **** Public Library for the remainder of the school year a placement [the student]'s father agreed to. See Petitioner's Exhibit 7. Moreover [the student]'s mother, ****, signed the December 17, 2003, IEP which governed his education from January 5, 2004 forward.

Manifestation Determination. [The student]'s IEP team did not do the manifestation determination required by 20 U.S.C. §1415(k)(4) quoted above until November 4, 2003, because at the team's September 29, 2003 meeting, at which it intended to do so, the petitioners asked that [the student] be further evaluated which **** Schools' psychologist, **** did so on October 3, 2003. Petitioner's Exhibit 8. This delayed the manifestation determination meeting until November 4, 2004 at which time the IEP determined that [the student]'s behavior was not a manifestation of his disability. A subsequent independent evaluation done at the petitioners' request by Dr. William A. Cook, Ph.D. on November 7, 2004, reached the same conclusion.

While the petitioners complain that the manifestation determination was not done within ten days of the "triggering event" *i.e.*, the date [the student] was initially suspended for bringing knives to school, all members of the IEP team, including [the student]'s parents, agreed that [the student] should be further evaluated before that determination was made. Under these circumstances the District cannot be faulted for delaying the manifestation determination pending the completion of Ms ****'s evaluation of [the student].

Following the evaluation done by Ms **** the IEP team then met and completed the steps called for in the District's Manifestation Determination form which precisely tracks the requirements of 20 U.S.C. §1415(k)(3)(C) and 34 C.F.R. §300.523. Petitioner's Exhibit 9. The IEP team was of one mind that [the student]'s behavior was not a manifestation of his disability a conclusion that was buttressed by Dr. Cook's November 7, 2004 independent

evaluation. There is no evidence of record in the form of expert testimony or otherwise that contravenes the IEP team's conclusion that [the student]'s behavior was not a manifestation of his disability.

Functional Behavioral Assessment and Behavioral Intervention Plan Issues. Petitioners complain that [the student]'s IEP team did not develop a behavioral intervention plan [BIP] in the Spring of 2003 when his behavioral problems had resulted in a ten-day suspension; that the team again did not develop a BIP in the Fall of 2003 when he returned to **** School even after [the student] had continued to commit a number of disciplinary infractions prior to the knife incident; that the functional behavioral analysis [FBA] the team did on [the student] following the September 22, 2003 IEP meeting was inadequate because the team was unable to observe [the student] who was then out of school and because the IEP in place on September 23, 2003, the day [the student] was suspended did not include a behavioral component it, too, was inadequate. As discussed above the District defends by pointing out that because following [the student]'s ten-day suspension in the Spring of 2003 he did not return to school hence the District was unable to address his behavioral problems; that when [the student] returned to school in the Fall of 2003, his parents did not attend a September 15, 2003, IEP meeting which had been scheduled at their request making it necessary that that meeting be re-scheduled to September 22, 2003; that at that meeting the IEP team determined that an FBA should be conducted; but, by reason of [the student]'s suspension the very next day for the knife incident that undertaking was precluded. I find the District's response to these complaints as set forth above to be persuasive.

Procedural Rights. As to whether [the student]'s parents were not well informed as to their procedural rights there is [mother's] testimony that she had been provided with a number of the "Parental Rights In Special Education" handbook which she testified she had read. District Exhibit N and transcript at pp 115,145. In addition to having received a number of these handbooks from time to time the petitioners had the assistance of ****, a private educational consultant, who had been with PLUK for some 18 years. Ms **** became involved in this matter beginning in April of 2003 as a result of calls she had received from [mother] concerning [the student]'s behaviors. Transcript at p. 177. She remained involved in this matter at least through [the student]'s expulsion hearing before the ****School Board and following that through his December 17, 2003 IEP team meeting. Transcript at p. 233.

Appropriateness of the October 6 – December 22, 2003 IEAS. Petitioners challenge this on a number of grounds detailed above. Petitioners' main challenge is that it only provided [the student] with one hour a day of tutoring in all subjects for over two months. They make no challenge as to the sufficiency of the December 17, 2003, IEP, which provided for five hours a day of tutoring in all subjects including 1-1/2 hours a day of special education tutoring.

I do find merit in petitioners' complaint in this respect. Not even the school's witnesses were able to convincingly defend this. See the testimony of [school psychologist] and [district superintendent] quoted above. For me the question is whether the five hours a day of one-on-one tutoring [the student] received from and after January 5, 2004, which to my mind was clearly adequate offset the detrimental effects of the inadequate tutoring he received from October 6 – December 22, 2003. Put another way after taking into account the results of [the student]'s prior evaluations detailed above did one hour a day of tutoring in all subjects for a total, as I count it, of 27-1/2 hours over a period of two and one-half months taken together with the five hours a day of one-on-one tutoring he received from and after January 5, 2004, afford [the student] an opportunity to make progress in the educational curriculum and receive educational benefits? *Rowley*, *supra*, and other cases cited above.

My colloquy on the record with Superintendent **** as to whether [the student] is now educationally ready to enter **** Middle School as a seventh grader or even the Alternative School at the **** complex leaves that question unanswered. According to Superintendent ****'s testimony [the student] is due for his regular three-year re-evaluation this Fall when he returns to school which will include academic testing. Transcript pp 476 – 478. Hopefully this re-evaluation will answer the question.

Procedural Defects. Certain procedural defects have occurred as petitioners' post-hearing brief points out. However, for the reasons discussed above, I do not find that any of them with the possible exception of the adequacy of the one-hour-a-day of tutoring the District afforded [the student] from October 6 – December 22, 2003, to be such as to compel a finding that [the student] has been deprived of FAPE. Courts on occasion have overlooked procedural defects where they find that the services provided to a child with disabilities have provided that child with educational benefits. See the cases cited above. Certainly [the student]'s December 17, 2003, IEP was appropriate to his educational needs and provided him with significant educational benefits. Hopefully the five hours a day of tutoring [the student]

received from and after January 5, 2004, will have offset any educational detriment he suffered by reason of the one-hour-a-day of tutoring he received for some two and one-half months prior to his being expelled from school.

Compensatory Education. I look to the District to do a full psychoeducational re-evaluation of [the student] this Fall and on the basis of the results devise an IEP for him that fully addresses his educational disabilities and includes the requisite behavioral components *i.e.*, a FBA and a BIP. While petitioners ask for compensatory education to offset what they claim were deficiencies in his education during the 2003-2004 school year the record at this juncture in this proceeding is not such that I have any basis for doing so. Therefore I rely on the District to formulate a IEP for [the student] that takes the concerns I have expressed herein into account one in which any compensatory educational services the IEP teams finds to be warranted are included. If after the IEP team has been concluded its work the petitioners consider [the student]'s new IEP for the forthcoming school year to be deficient with respect to the issue of compensatory education or in any other respect they have the right to institute a new due process proceeding looking toward addressing those matters.

Transportation. Petitioners seek reimbursement for their cost of transporting [the student] to the tutoring site. However, as the District's post-hearing brief points out [the student]'s December 17, 2003 IEP expressly provides that "transportation will be provided by parents." While that IEP only covers the period from and after January 5, 2004, I do not otherwise find substantial evidence of record to support an award to petitioners of their transportation costs.

Attorney Fees And Costs. As the District's brief also points out only a Court can award attorney fees and costs. Accordingly I cannot grant this relief in any event. See 20 U.S.C. §1415(h)(3)(B). Accordingly,

IT IS ORDERED that:

1. The District shall do a full psychoeducational re-evaluation of [the student] prior to the IEP team's convening to prepare a new IEP to govern [the student]'s education for the forthcoming school year.

2. The District's re-evaluation shall include a determination as to whether [the student] requires compensatory education services for the forthcoming school year and, if so, set forth the required services.

3. If compensatory education services are found to be required the IEP team shall include them in [the student]'s IEP for the forthcoming school year.

4. The IEP team shall include a functional behavioral assessment and a behavioral intervention plan as part [the student]'s IEP for the forthcoming school year.

5. Petitioners' request for reimbursement for their costs of transporting [the student] to the tutoring site is denied.

6. Petitioners' claim for attorney fees and costs is denied.

7. Petitioners' other claims for relief are denied.

Dated this 21st day June 2004.

_____

Ross W. Cannon, Hearing Officer

NOTICE: This decision is the final decision of the Office of Public Instruction herein. A party aggrieved by this decision has the right to bring a civil action with respect to the complaint presented pursuant to CFR §300.507. The action may be brought in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy. See 20 U.S.C. §§1415(i)(2)(A), 1415(i)(3)(A) and 1415(l) and 34 CFR §300.512.

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of June 2004, a true and exact copy of the foregoing Memorandum Opinion and Order was mailed first class; postage prepaid, to:

Linda Brandon-Kjos
Office of Public Instruction
Legal Services
P.O. Box 202501, State Capitol
Helena, MT 59620-2501
Fax: 444-2893

Ms. Beth Brenneman
Montana Advocacy Program
Counsel for Guardians of ****
316 North Park Avenue
Helena, MT 59601
Fax: 449-2415

Ms. Debra A. Silk
% Montana School Board Assoc.
1 South Montana Avenue
Helena, MT 59601
Fax: 442-2194

_____
Ross W. Cannon, Hearing Officer

OSPI 2004-E-01