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

SEATTLE - OAH

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NOS. 2013-SE-0044
2013-SE-0091

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Seattle, Washington, on November 18 through 22, 25, 26, 2013, January 27 through 29, February 12, 24, and March 13, 2014. The Parents of the Student whose education is at issue¹ appeared and represented themselves (*pro se*). The Seattle School District (District) is represented by Tracy M. Miller and Elizabeth W. Rasmussen, attorneys at law. The following is hereby entered:

STATEMENT OF THE CASE

Procedural History

The Parents filed a due process hearing request ("Complaint") on April 25, 2013, which was assigned Cause No. 2013-SE-0044. The matter was assigned to ALJ Anne Senter. The District filed its Response to Complaint on May 6, 2013. On May 16, 2013, the Parents filed a request or motion for a ruling that the District had waived its right to appear and present evidence because it had not timely filed its Response, that Sound Options facilitate the resolution meeting, and that District attorneys not be permitted to attend the resolution meeting. A prehearing conference was held before ALJ Senter on May 17, 2013, on the Parents' motion. On May 20, 2013, ALJ Senter entered a Prehearing Order which denied the Parents' motion.

Another prehearing conference was held before ALJ Senter on May 28, 2013. ALJ Senter entered a Second Prehearing Order on May 31, 2013, which, in part, set out a statement of issues and remedies. A prehearing conference was held before ALJ Senter on June 4, 2013. ALJ Senter entered a Third Prehearing Order on June 4, 2013, which, in part, amended the prior statement of the issues and remedies.

Prehearing conferences were held before ALJ Senter on June 6 and 7, 2013. A Fourth Prehearing Order was entered on June 10, 2013, which, in part, addressed discovery issues raised by the Parents, further amended the statement of issues and remedies, and set the due process hearing to begin September 9, 2013. A Prehearing Conference was held before ALJ

¹ In the interests of preserving the family's privacy, this decision does not identify the parents or student by name. They are referred to herein as "Parents," "Mother," "Father," and "Student."

Senter on June 26, 2013, and a Fifth Prehearing Order was entered June 27, 2013. That Order, in part, addressed two discovery issues raised by the Parents.

A prehearing conference was held before ALJ Senter on August 22, 2013, and a Sixth Prehearing Order was entered August 30, 2013. The Sixth Prehearing Order, in part, continued the due process hearing to begin September 25, 2013. A prehearing conference was held before ALJ Senter on September 10, 2013, and a Seventh Prehearing Order was entered September 18, 2013. That Prehearing Order set a schedule for the District to respond to a Parents' request for summary judgment, and continued the due process hearing to start November 5, 2013.

A prehearing conference was held before ALJ Senter on September 26, 2013, and an Eighth Prehearing Order was entered September 26, 2013. That Order, in part, set deadlines for the parties to exchange discovery. A prehearing conference was held before ALJ Senter on September 30, 2013, and a Ninth Prehearing Order was entered October 4, 2013. That Order, in part, denied the Parents' request for summary judgment and dismissal of Cause No. 2013-SE-0083, and denied the District's request for a declaratory judgment it did not deny the Student a free appropriate public education (FAPE).

A prehearing conference was held before ALJ Senter on October 7, 2013, and a Tenth Prehearing Order was entered on October 8, 2013. That Order, in part, again denied the Parents' request to dismiss Cause No. 2013-SE-0083, and amended the issues and remedies for hearing under Cause No. 2013-SE-0044.

On October 8, 2013, the District filed a due process hearing request which was assigned Cause No. 2013-SE-0091. The matter was assigned to ALJ Matthew D. Wacker.

On October 8, 2013, a Notice of Reassignment of Administrative Law Judge was entered by Assistant Deputy Chief ALJ Mary Radcliffe. The Notice reassigned Cause Nos. 2013-SE-0044 and 2013-SE-0083 to ALJ Wacker. On October 16, 2013, the Parents filed a Motion of Prejudice and Affidavit regarding Cause Nos. 2013-SE-0044, 2013-SE-0083, and 2013-SE-0091. The Motion sought reassignment of all three matters from ALJ Wacker to another administrative law judge. On October 17, 2013, the District filed an Objection to Parents' Motion of Prejudice and Affidavit of Prejudice. On October 17, 2013, ADC Radcliffe entered an Order Denying Motion of Prejudice and Request for Reassignment, which denied the Parents' Motion of Prejudice as untimely. On October 24, 2013, the Parents filed a Petition for Disqualification of ALJ Wacker. The parties were heard on the Parents' Petition at a previously scheduled prehearing conference the same day, and the Petition was denied. On October 29, 2013, an Order on Parents' Petition for Disqualification was entered pursuant to Revised Code of Washington (RCW) 34.05.425(5), setting forth the facts and reasons why the Parents' Petition was denied.

A prehearing conference was held before ALJ Wacker on October 24, 2013, and an Eleventh Prehearing Order was entered on October 28, 2013. That Order, in part, consolidated Cause Nos. 2013-SE-0044, 2013-SE-0083, and 2013-SE-0091 for hearing and decision, set the consolidated hearing to begin November 18, 2013, ordered the District to produce certain discovery to the Parents, and granted the District's motion to extend the due date for a written decision in Cause No. 2013-SE-0091. Prehearing conferences were held before ALJ Wacker on November 4 and 5, 2013, and a Twelfth Prehearing Order was entered on November 5,

2013. That Order, in part, denied the Parents' request for creation of an attorney-client privilege log by the District, and granted the Parents' request for modification of the Student's stay-put placement.

On November 5, 2013, the District withdrew its due process hearing request under Cause No. 2013-SE-0083, and an Order of Dismissal was entered on November 6, 2013.

A prehearing conference was held before ALJ Wacker on November 12, 2013, and a Thirteenth Prehearing Order was entered November 13, 2013. That Order, in part, denied the District's motion to strike all of the Parents' late-exchanged proposed exhibits, denied the Parents' request that certain witnesses bring materials to the due process hearing, denied the Parents' request for additional subpoenas, and reserved ruling on the District's assertion regarding the preclusive effect of the parties' prior settlement agreement until after the due process hearing.

A prehearing conference was held before ALJ Wacker on December 5, 2013, and a Fourteenth Prehearing Order was entered on December 6, 2013.² That Order reset one day of the due process hearing due to the unavailability of the Father. Another conference was held before ALJ Wacker on December 11, 2013, and a Fifteenth Prehearing Order was entered December 24, 2013, which reset one day of the due process hearing due to the unavailability of the Father. A conference was held before ALJ Wacker on January 14, 2014, and a Notice of Due Process Hearing was entered the same day which added one day for the due process hearing at the parties' request. A conference was held before ALJ Wacker on March 3, 2014. A Notice of Due Process Hearing was entered on March 3, 2014, which granted the Parents' request to reopen the record and offer additional exhibits over the District's objection. The Notice set an additional day for hearing to take testimony and hear argument on the proposed additional exhibits.

Due Date for Written Decision

The due date for the written decision in Cause Nos. 2013-SE-0044 and 2013-SE-0091 was continued to 30 days after the close of the hearing record, pursuant to motions by the District. The motions were granted over the Parents' objections. See Second and Eleventh Prehearing Orders entered May 31, 2013 and October 28, 2013.

The hearing record closed with the filing of post-hearing briefs on May 7, 2014. Thirty days thereafter is June 6, 2014. The due date for the written decision is therefore **June 6, 2014**.

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² While captioned "Fourteenth Prehearing Order," the Order was entered after commencement of the due process hearing on November 18, 2013. However, for clarity of the growing record, it was determined to caption the Order as such.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents' Exhibits:

P1 through P3; P5 through P27; P29; P32 through P39; P41 through P60; P63 through P72; P75; P83, P85 through P88; P92; P94 through P102; P106 through P115³; P116 through P143; P146 through P159;

District Exhibits:

D1 through D7; D9 through D95

Court Exhibit: C1.⁴

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

Michelle Dorman, District school psychologist;
Allison Brooks, Ph.D., psychologist, Brooks-Powers Group;
Cindy Nitz, District speech language pathologist (SLP);
Courtney Buturac, District consulting special education teacher;
Heather Brown,⁵ District consulting special education teacher;
Carita Polin, District general education teacher;
Larry Davis, Parents' educational advocate;
Michelle Ota, District former vice-principal (retired);
Brett Joachim, District assistant principal;
Cindy Lehman, educational therapist and clinic director, Lehman Learning Solutions;
Nancy Shah, District special education teacher (retired);
Carolyn Kelley, District occupational therapist (OT);
Jennifer Benkovitz, District principal;
Heather Wixom, District special education teacher;
Dave Middleton, District general education teacher;
The Mother;
Carly Lawhead, SLP, Mosaic Center for Therapy Services;
The Father.

³ P115 was admitted solely as a demonstrative exhibit, and not for the truth of any matter asserted in the exhibit.

⁴ Exhibit C1 is a copy of the Parents' Due Process Hearing Request filed February 3, 2012, under Cause No. 2012-SE-0009. This exhibit is admitted on the ALJ's own motion (*sua sponte*), as it is necessary to adjudicate issues raised in this due process hearing.

⁵ Ms. Brown was formerly known as Heather Loschky.

ISSUES AND REMEDIES

The issues for the due process hearing under Cause Number 2013-SE-0044 are as follows:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) beginning April 25, 2011, by:
 - i. Failing to appropriately reevaluate the Student in approximately March 2013 by:
 - A. Not providing the Parents the opportunity to fully participate in the meeting, including by prematurely stopping the meeting;
 - B. Determining that the Student was not eligible for expressive language services, also referred to as speech and language services or expressive communication services;
 - C. Not adequately considering information provided by the Parents, including an outside speech/language evaluation and an outside psychological report;
 - ii. Failing to develop appropriate IEPs between June 2011 and December 2012 by:
 - A. Not including appropriate goals for the Student's expressive language needs;
 - B. Not including appropriate goals for the Student's social communications needs;
 - C. Not providing adequate goals or accommodations to address the Student's executive functioning and auditory processing needs; and/or
 - D. Failing to provide adequate explanation of when accommodations should be used;
 - iii. Failing to amend the Student's IEPs beginning April 25, 2011, to provide:
 - A. Appropriate goals for the Student's expressive language needs;
 - B. Appropriate goals for the Student's social communication needs; and/or
 - C. Adequate goals and/or accommodations to address the Student's executive functioning and auditory processing needs;
 - iv. Failing to implement the Student's IEPs by:

- A. Not delivering the service minutes in social skills, motor skills, and organization/study beginning April 25, 2011; and/or
 - B. Not providing progress reports for social skills or organization/study for Fall 2012 and Winter 2013;
- v. Failing to provide requested documents:
- A. Technical Assistance Team (TAT) records;
 - B. School working files; and
 - C. Data collected about the Student in the year before the December 2012 IEP meeting;
- vi. Failing to comply with procedural requirements by:
- A. Not providing the Parents the opportunity to fully participate on the IEP team;
 - B. Predetermining decisions;
 - C. Not including agreements made at IEP meetings in written IEPs or in prior written notices;
 - D. Amending the October 2011 IEP without holding an IEP meeting;
 - E. Failing to timely schedule IEP meetings related to the Parents' requests;
 - F. Denying the Parents' requests without scheduling IEP meetings or providing prior written notice;
 - G. Holding IEP meetings without reasonable advance notice to the Parents;
 - H. Scheduling IEP meetings when necessary team members were not available;
 - I. Refusing to provide IEP meeting notes before adjourning meetings;
 - J. Refusing to provide a copy of the current IEP with any agreed changes;
 - K. Refusal to provide Sound Options facilitation of IEP meeting;
 - L. Not timely responding to Parent requests and not responding to Parent requests at all;

- M. Not considering Parent responses if not provided within unreasonably short time periods;
- N. Not allowing the Parents to observe the Student in an academic setting;
- O. Unilaterally instituting communication plans that prevent the Parents from communicating with the IEP team;
- P. Refusing to include an OT at the April 2013 IEP meeting;
- Q. Refusing to continue the March 2013 reevaluation and eligibility meeting and failing to provide a prior written notice; and/or
- R. Not allowing the Parents to observe the Student in the classroom prior to IEP meetings;

b. And, whether the Parents are entitled to their requested remedies:

- i. Reimbursement of outside speech evaluation and reinstatement of eligibility for expressive language services, also referred to as speech and language services or expressive communication services or, if reinstatement is not possible, an order that a reevaluation and eligibility meeting be held and facilitated by Sound Options;
- ii. Private autism expert/consultant selected by Parents at District expense to 1) review reevaluation records and Parent-provided input/reports and meet with the IEP team to determine additional assessments needed and 2) to participate in drafting the IEP;
- iii. Reevaluation and IEP team meetings facilitated by Sound Options at District expense until the Parents and the District agree facilitation is no longer necessary;
- iv. Reimbursement for private educational therapy;
- v. Compensatory education for undelivered service minutes in motor skills, social skills, and organization-study;
- vi. Compensatory expressive language and social communication language services for lack of progress;
- vii. Daily communication log between home and school;
- viii. Discontinuation of communication plans imposed by the District and an order that no future communication plans be imposed without mutual agreement;

- ix. Provision of draft IEPs before meetings are concluded and the scheduling of follow up meetings if the IEP is not complete;
- x. Provision of copies of meeting notes to the Parents at the end of IEP team meetings;
- xi. Audio recording of all future IEP and IEP planning meetings;
- xii. Provision of prior written notice to Parents at the end of IEP team meetings;
- xiii. An order that the District discontinue requiring that IEP meetings be completed by email and requiring the Parents to put requests in writing in advance of IEP meetings;
- xiv. And/or other equitable remedies, as appropriate.

The issue for the due process hearing under Cause No. 2013-SE-0091 is whether the District's March 2013 reevaluation of the Student was appropriate, and if not, whether the District shall pay for an independent educational evaluation (IEE) of the Student.

See Eleventh Prehearing Order entered October 28, 2013.⁶

FINDINGS OF FACT

General Background

1. The Student entered kindergarten in the District at Salmon Bay K-8 School, and remains there to date. The Student is currently in fourth grade. He received a diagnosis of autism prior to entering kindergarten. Exhibit D9pp1-2.
2. In October 2010, a psychological evaluation of the Student was conducted by Julie Osterling, Ph.D., and Linda Mason, M.Ed., at the University of Washington Care Clinic. Exhibits P130, D9.
3. The Student attended second grade at Salmon Bay during the 2011-2012 school year. Dave Middleton was the Student's general education teacher. Cindy Nitz provided speech-language services, Carolyn Kelley provided occupational therapy services, and Nancy Shah was the Student's special education teacher.
4. An IEP team meeting was held on October 21, 2011. The Parents attended along with their advocate, Larry Davis. This meeting was facilitated by Sound Options, and lasted approximately 4 hours. Exhibits D37, D46p2, D54p2.

⁶ The statement of the issues and remedies as it originally appeared in the Eleventh Prehearing Order was subsequently modified by the District's withdrawal of its Request for Due Process Hearing under Cause No. 2013-SE-0083 on November 5, 2013. Only those issues and remedies under Cause Nos. 2013-SE-0044 and 2013-SE-0091 remain the subject of this Final Order.

5. On October 24, 2011, a second facilitated IEP Team meeting was held. The Parents and Mr. Davis again attended. The team members signed the IEP, and the IEP was implemented with a Prior Written Notice (PWN) dated October 25, 2011. Exhibits D32-D33.

6. Another IEP team meeting was held on November 3, 2011, which the Parents attended. D54p2. There is no evidence of record to find any amendments were made to the Student's October 24, 2011, IEP as a result.

7. On November 28, 2011, Principal Jodee Reed sent the Parents an email. The purpose of the email was to "review the safety plan for [the Student] which we put in place on Nov. 18 and are now including with your recent suggestions." After reviewing the safety plan, Ms. Reed went on to explain implementation of a "plan for communication." The communication plan limited the Parents to a meeting with Principal Reed once per month on the first Wednesday of the month from 8:30 a.m. to 9:00 a.m. in her office. All requests from the Parents for meetings or to speak with staff, including requests for IEP meetings, had to be made with Principal Reed. All emails from the Parents had to be sent to Principal Reed. Staff would provide the Parents with weekly reports on the Student's progress. Exhibit P75p2. This communication plan remained in effect until at least the commencement of the 2012-2013 school year.

8. In a letter dated December 7, 2011, to Jodee Reed, the Parents state, "Ms. Reed: It is well documented that [the Student] has an auditory processing component to his disability." The letter went on to explain how, when experiencing loud noises during unstructured periods at school, the Student can become overwhelmed. When this happens, the Student may compensate through his own verbal stimulation, including using a loud voice. The Parents expressed their concern that staff might not respond in an appropriate manner, and worried the Student might be subject to discipline when he was really exhibiting a symptom of his autism. Exhibit P36.

9. On or about January 17, 2012, the Student's IEP was amended, and the amendments were sent home with the Student in his backpack. Exhibit D44; Testimony of Mother. A PWN dated January 13, 2012, was also sent with the amendments. Exhibit D45.

10. The January 17, 2012 IEP contained the following three communication goals:

By 10/23/12, when given visual supports [the Student] will retell a story, event or book he has read improving narrative language skills/effective communication of ideas from average rating of 3.0 on the Narrative Language Rubric adding in emotional state and prediction areas to average of 3.8 on the Narrative Language Rubric (all areas) as measured by probe data scored using the Narrative Language Rubric in both the therapy room and classroom.

By 10/23/12, when given opportunities for pre-teaching and practice in small group settings [the Student] will use peer feedback (both verbal and non-verbal) to guide his social choices regarding topic choice, proximity, volume[,] improving peer interaction and social communication skills from 1/5 observed opportunities in a variety of settings to 4/5 observed opportunities in a variety of settings as measured by direct observation and probe data in a variety of settings.

By 10/23/12, when given opportunities for pre-teaching and practice [the Student] will demonstrate a variety of skills needed to initiate and maintain a peer interaction improving conversation/play skills as defined on the social skill rubric from average rating of 1.8 on the social skills rubric to average rating of 2.8 on social skills rubric as measured by probe data gathered in a variety of settings using the conversation/play skills section of the social skills rubric.

Exhibit D44pp3-4.

11. The same IEP contained one goal for study/organizational skills:

By 10/23/12, when given the need to make a transition to end a structured or semi-structured task, and [the Student] is not at a completion point, [the Student] will raise his hand and ask for 2 more minutes to complete what he is working on, improving his ability to complete a task within a determined time, from not using this system now, to 4 out of 5 opportunities per week, for 4 consecutive weeks, without adult prompt, as measured by systematic observation. At the end of the extra 2 minutes, he will transition to the next activity.

Exhibit D44p9.

12. The Student's January 17, 2012 amended IEP was the IEP in effect until his next IEP was adopted at a December 4, 2012 IEP meeting. Exhibit D64p3.

13. An IEP Cover Page Amendment dated January 13, 2012, was signed by some members of the Student's IEP team on January 17, 2012. Exhibit D44. Nancy Shah, the Student's special education teacher, confirmed no IEP meeting was held because the Mother told Ms. Shah there was no need for another meeting. Ms. Shah gathered signatures from other team members and sent the amendments home with the Student. Testimony of Shah.

14. The Student began receiving services at Lehman Learning Solutions during December 2011, and continued receiving services there into summer 2012 from a "learning specialist". Cindy Lehman,⁷ conducted a Functional Academic and Learning Skills Evaluation of the Student on December 19, 2011. The Parent's provided Ms. Lehman with a copy of the Student's initial evaluation for special education from 2010, and the Student's current IEP for her evaluation of the Student. But Ms. Lehman had no contact with any of the Student's teachers at Salmon Bay K-8, never observed the Student at school or at home, and never provided her evaluation of the Student to the District. The purpose of Ms. Lehman's evaluation was to determine if the Student could benefit from the services provided by her clinic, and was not intended to determine if the Student was eligible for special education at his school. Testimony of Lehman; Exhibit P106.

15. Ms. Lehman assessed the Student's auditory memory as ranging from a strength, based on the Student's scores from the assessment tools she administered, to a weakness based upon the Parents' reports of the Student. The Student's subtest scores from the Test of Auditory Processing Skills-3 placed him in the 63rd to 98th percentiles. All these subtest scores

⁷ Ms. Lehman's curriculum vitae is Exhibit P146.

reflected the Student possessed auditory processing skills that would be expected from children chronologically older than the Student at the time of Ms. Lehman's assessment. Exhibit P106pp3, 8.

16. Ms. Lehman administered the Gibson Cognitive Test Battery and the Woodcock Reading Mastery Tests-Revised (NU) to the Student. The results of those two assessment tools reflected the only two areas where the Student's skills or ability were below what would be expected for a child his chronological age; Processing Speed, which is the ability to perform relatively easy mental tasks quickly (1.1 years below the Students' age), and Visual Processing, which is the ability to picture, manipulate, organize, comprehend, and think with visual information (0.6 years below the Students' age). Ms. Lehman also administered the Test of Written Language-3, the results of which placed the Student in the 37th to 63rd percentiles. Exhibit P106pp6-9.

17. Ms. Lehman did not perform any post-service assessment of the Student to determine what progress he may have made as a result of the services provided at Lehman Learning Solutions. Testimony of Lehman.

18. Based on their observations of the Student during the time he received services at Lehman Learning Solutions and the progress they observed, the Parents believe the Student's goals in the January 17, 2012 IEP should have been amended. Testimony of Mother.

19. The Parents filed a prior Due Process Hearing Request regarding the District on February 3, 2012, which was assigned Cause No. 2012-SE-0009. Exhibit C1. That request raised issues regarding the Student's education provided by the District under the IDEA, including consent for and provision of services, requests to defer meetings, and lack of input by the Parents. The request also included a general claim that "FAPE [was] not provided." Exhibit C1p3.

20. In a letter to the Parents dated April 13, 2012, Allison Brooks,⁸ Ph.D., a psychologist, recounts her conversations with the Student on February 29, 2012, and April 11, 2012. The conversations were about a number of incidents which occurred at school involving the Student and another student at Salmon Bay K-8 School. The letter by Dr. Brooks was intended to provide her "professional opinion regarding interviewing [the Student] regarding past experiences and events, including my impressions of information he provides in such an interview". Exhibit P137. Dr. Brooks did not formally assess the Student's pragmatic language skills or expressive language skills, but observed the Student to have "good intact language skills." Testimony of Brooks.

21. On May 2, 2012, the Parents and the District entered into a Mediation Agreement facilitated by Sound Options Group, LLC. Exhibit D51. Under the terms of that agreement, the District agreed to pay the Parents \$4,300.00 for multiple services, hire Dr. Brooks for eleven hours of consultation at a cost of no more than \$130.00 per hour, and use a Sound Options facilitator for the Student's October 2012 IEP meeting. In return, the Parents agreed to withdraw the Due Process Hearing Request under Cause No. 2012-SE-0009 "without the right to refile in the future." Exhibit D51p1.

⁸ Dr. Brooks's curriculum vitae is Exhibit D90.

22. On May 14, 2012, ALJ Anne Senter entered an Order of Dismissal in Cause No 2012-SE-0009. Exhibit D52p2. The Order of Dismissal stated, in part, that:

The Appellants/Parents submitted notice on May 11, 2012, that the parties have successfully resolved their dispute and a hearing is no longer necessary. The Parents request the due process hearing be dismissed.

Following a review of the pleadings and documents on file it is determined the request for dismissal of the due process hearing is made with good cause. The following Order is hereby entered:

IT IS ORDERED: The Appellants/Parents' request to dismiss the due process hearing is granted and the case is DISMISSED.

23. The Order of Dismissal also included notice of the parties' rights to further appeal. The notice included the statement, "[t]his is a final administrative decision." Exhibit D52p2.

24. The Student entered third grade at Salmon Bay K-8 School in September 2012. Mr. Middleton remained his general education teacher, and Ms. Nitz and Ms. Kelley continued to provide their services. Ms. Shah retired, and was replaced as the Student's special education teacher by Heather Wixom.

25. By this time, Jennifer Benkovitz had replaced Jodee Reed as the principal. Ms. Reed had retired at the end of the prior school year. Principal Benkovitz met with Ms. Reed prior to the beginning of the school year, and informed Principal Benkovitz there was a communication plan in place with the Parents. Testimony of Benkovitz.

26. Principal Benkovitz met with the Mother prior to school starting, and recalls the Mother bringing up the communication plan as a concern. Principal Benkovitz asked her superiors if she could modify the communication plan to allow communication by email with staff.

27. In two emails to Heather Wixom on September 26, 2012, the Mother asked for "copies of the data that will be used to write the upcoming IEP." The Mother stated that she presumed Ms. Wixom could get data from all the IEP team members. The Mother further clarified that the Parents wanted to see the "raw data from each scorer by skill" from, as an example, the Jed Baker social skill rubric. Ms. Wixom replied via email on September 27, 2012, that she would "bring the data we have collected in the past 3 weeks to the Monday meeting." Exhibit P44p1.

28. A meeting was held on October 1, 2012, which was the Monday following Ms. Wixom's email response to the Mother. Attending the meeting were SLP Cindy Nitz, the Parents, and an "autism specialist." The purpose of the meeting was to discuss the Student's upcoming IEP, the Student's present levels of performance, and his progress. There is no mention of whether the Parents were provided with any data to be used to write the Student's new IEP. Exhibit D54p7. The Parents never received the raw data promised by Ms. Wixom. Testimony of Mother.

29. On October 10, 2012, Assistant Principal Brett Joachim sent an email to the Parents. Entitled "Communication Protocol," it stated:

In an effort to maintain clear and precise communication the staff at Salmon Bay, SPS Central Office and the [Student's] Family agree to utilize email as our primary source of

communication. This does not limit personal conversations and discussions; however, email summaries will follow to clarify any comments, concerns or decisions. Heather Wixom will be the communication monitor and all emails should be carbon copied (CC) to her email."

Exhibit P48p2. Heather Wixom was the Student's special education teacher for the 2012-2013 school year. This plan was established by Principal Benkovitz and Assistant Principal Joachim to replace the communication plan instituted under former principal Jodee Reed, and governed all communication between the Parents and the District. Testimony of Benkovitz, Testimony of Joachim.

30. The Parents believed this communication plan restricted their communication with the Student's IEP team because Ms. Wixom was a member of the IEP team, and they would have to send a copy of any email they wished to share with the IEP team to Ms. Wixom as well. The Parents were reluctant to express any problems or concerns they had with Ms. Wixom with the IEP team because she would have to be copied. Testimony of Mother.

31. On October 18, October 30, and December 4, 2012, the IEP team, including the Parents, met for a total of approximately 12½ hours of IEP meetings facilitated by Sound Options Group, LLC. The team developed a new IEP for the Student. Exhibits D54pp7-8, D61pp3, 6, D64pp1-2, P51p3.

32. The Parents never had any issue with the goals that were "hammered out" at these meetings and included in the Student's new IEP. Testimony of Mother, T2053.⁹ The Parents have raised no issue regarding the appropriateness of this December 2012 IEP for the Student.

33. On December 5, 2012, Principal Benkovitz sent an email to the Parents, in which she stated:

I met with Heather [Wixom] and Dave [Middleton] briefly this morning to follow up...As it turns out, we all feel very comfortable with the current communication plan, which is that all communication goes through Heather. We feel that this has been very effective, efficient and productive.

Please email me back (cc Heather) to let us know what you feel is not working with the current plan (include examples). This will help us better understand your concern/reasoning for wanting to make changes.

Exhibit P46p2.

34. The Mother replied to Principal Benkovitz's email the next day stating, "[w]e are not aware of any communication plan. We do recall you asked us to cc Heather on our emails to IEP staff which is very different than what I am reading now." Exhibit P46p1.

⁹ Reference to Testimony of Mother, T2053 is reference to the Mother's testimony that appears in the Transcript at page 2053.

35. The District initiated a triennial (three-year) reevaluation of the Student after receiving the Parents' consent on or about February 8, 2013.¹⁰ Exhibit D66p17. The Parents requested and the District agreed that Michelle Dorman, District school psychologist, would coordinate the reevaluation and conduct that part of the reevaluation requiring the services of a school psychologist. Exhibits P132p1, D66pp6-8, P128p2.

36. The 2012-2013 school year was Ms. Dorman's second school year as a practicing school psychologist.¹¹ Given her brief tenure as a school psychologist and what was anticipated to be a complex reevaluation of the Student, it was determined that Gordon Prinster, Ms. Dorman's supervising school psychologist, would lend support to Ms. Dorman as necessary. This was communicated to the Parents in an email on January 28, 2013. P128p1.

37. Prior to receiving the Parents' consent, Ms. Dorman had started to design her assessment plan for the Student, and had emailed her plan to the Parents on January 30, 2013. Ms. Dorman's assessment plan addressed only that part of the overall reevaluation which she was responsible for administering. It did not include plans for the speech-language or occupational therapy assessments that would be administered by professionals qualified in those areas. Exhibit D66p12. Ms. Dorman's assessment plan included concerns she had received from the Parents. Those concerns from the Parents appear in the column identified as "Concerns I heard from you" on Ms. Dorman's assessment plan. Exhibit D67.

38. In anticipation of the upcoming reevaluation, Ms. Dorman had also attended the Student's December 2012 IEP meeting as an observer so she could identify any areas of concern the Parents might have for the reevaluation. Testimony of Dorman.

39. In a series of emails over the period March 4 – 21, 2013, Ms. Dorman and the Parents communicated concerning the reevaluation, exchanging information and questions. Exhibits P123pp5-12, P124pp1-3.

40. The record includes a Prior Written Notice (PWN) dated March 5, 2013. Exhibit D83p2. The PWN proposes to continue the Student's eligibility category. It references a three-year reevaluation of the Student having been conducted. This PWN is misdated. It was provided to the Parents by Ms. Dorman at the March 26, 2013, reevaluation meeting. The date in error was the date of one of the draft reevaluations which Ms. Dorman sent to the Parents for their review and input prior to that reevaluation meeting. Testimony of Dorman:

41. Once the members of the reevaluation team finished their respective areas of assessment [see Finding of Facts, below], Ms. Dorman assembled all the assessments and the Parents' input from a Parent Feedback Questionnaire into a draft reevaluation report. Exhibit D68A; Testimony of Dorman. On March 5, 2013, Ms. Dorman sent the Parents a copy of her draft report along with a Notice of Eligibility Meeting form. Exhibit P129p1. Testimony of Dorman.

¹⁰ The record does not reflect a signed consent for reevaluation on or about February 8, 2013. This finding is based on a record by Michelle Dorman dated 2/8/13. No issue has been raised that the District lacked the Parents' consent to reevaluate the Student.

¹¹ Ms. Dorman's curriculum vitae is Exhibit D86.

42. The Parents provided their feedback from the draft reevaluation report to Ms. Dorman, who then incorporated this additional feedback into a second draft of the reevaluation report. Exhibit D68B; Testimony of Dorman. Ms. Dorman sent a copy of the second draft reevaluation report to the Parents on March 11, 2013. Exhibit P123p7; Testimony of Dorman.

43. The reevaluation meeting was held on March 26, 2013. At 4:39 a.m. that morning, the Parents sent Ms. Dorman a five-page email. Exhibit P123p1. This email was the Parents' "real" input for the Student's reevaluation. Testimony of Mother, T2055.

44. Ms. Dorman received the Parents' email the morning of the reevaluation meeting, reviewed it, and brought it with her to the reevaluation meeting. The Parents made reference to the email at the meeting, but Ms. Dorman does not recall the team going over the email point by point. Testimony of Dorman.

The Reevaluation Meeting

45. The reevaluation meeting convened at approximately 2:45 p.m. It was scheduled for one hour. Although Ms. Dorman had requested the Parents please let her know in advance if they wanted to bring any other individuals to the meeting so the team could accommodate the request, it was not until the meeting started that the Parents told the team they wanted their educational advocate, Larry Davis, to attend the meeting from a remote location. P124p8; Testimony of Dorman. The Parents, Ms. Dorman, Ms. Nitz, Ms. Kelley, Ms. Wixom, Mr. Middleton, and Principal Benkovitz all attended in person. Mr. Davis did attend from a remote location. D68p6.

46. Ms. Dorman recalls the meeting started late due to a discussion about whether or not to go forward with the meeting given the Parents wanted Mr. Davis to appear remotely. Ms. Dorman had an agenda for the meeting, but the team got "stuck" on the communication portion of the reevaluation, discussing individual sentences and words. The Parents brought Dr. Brooks' April 13, 2012 letter to the meeting, but it was not discussed. The Mosaic report was also not discussed at the meeting. The meeting ended after one hour, with the team members signing the reevaluation report.¹² After the meeting ended, Ms. Dorman and Mr. Prinster remained and spoke with the Parents and Mr. Davis about the Parents' concerns. Ms. Dorman recalls the Parents asking for another reevaluation meeting. Ms. Dorman opined the meeting was not "productive." Testimony of Dorman.

47. Mr. Davis testified over three different days at the due process hearing, giving at times apparently inconsistent testimony regarding events at the reevaluation meeting. This may be partially due to Mr. Davis's computer malfunctioning during his second day of testimony, which meant that he did not have his "working notes" or the exhibits in front of him. It does, however, make reconciling his testimony more difficult.

48. Mr. Davis recalls attending the meeting from an off-site location, and the team's discussion of the Student's eligibility for expressive or pragmatic language services. From his perspective as a participant at the meeting, Mr. Davis opined the team did not want to take any more

¹² The Parents signed the reevaluation report, indicating they had dissenting opinions. D68p6.

information from the Parents, there was no consensus or agreement about what information would be included in the reevaluation report, and the Parents were not allowed to participate as members of the team to reach a consensus. Mr. Davis recalled a discussion or debate about where the Parents' involvement came into the discussion of what would be included in the report. Mr. Davis opined it was a tightly run meeting to be concluded in an hour, and that the discussion at the meeting was not "collaborative." But Mr. Davis also recalls that the Parents provided input prior to the meeting, and that at the meeting the Parents spoke about the Student's disabilities, his needs for services, the areas the Student should qualify in to receive services, and that they had the "opportunity to converse" at the meeting. He also stated, "my impression was that parents' input was established in the documents through survey as well as present levels of performance and other elements, but in terms of people collaboratively interpreting data and findings and coming to conclusions as a team, no. That was not part of the discussion." Testimony of Davis, generally and at T828, T1881.

49. The Mother recalls bringing copies of the Parents' five-page email sent to Ms. Dorman the morning of the reevaluation meeting, but it was not discussed. The Mother also recalls bringing a Progress Report from Mosaic, but it was not discussed.¹³ The Mother opined that Mr. Prinster "shut down" the conversation at the meeting. Testimony of Mother.

50. Both at and after the reevaluation meeting, the Parents requested the meeting be continued, or that another reevaluation meeting be held. Exhibits P122pp1-2, P38p1; Testimony of Dorman, Mother.

The Reevaluation Report

51. Ms. Dorman's part of the Student's reevaluation included assessment in the areas of Adaptive/Self-Help, Cognitive, Math, Reading, Social/Behavior, and Study/Organizational Skills. Exhibit D68pp 10:14, 22, 24-30. Those parts of the reevaluation report reflecting Ms. Dorman's assessments included multiple sections where the Parents' input was reflected. Exhibit D68pp 15, 24, 26, 28.

52. Ms. Dorman used the following instruments to assess the Student for his reevaluation:

Instrument I will use	Method	What it measures
Kaufman Assessment Battery for Children, 2 nd Edition (KABC-II) Supplemented with subtests from the Wechsler Intelligence Scale or Children, 4 th Edition (WISC-IV)	Pull-out testing	Full Scale IQ Short Term Memory Fluid Reasoning Long-Term Retrieval Visual Processing Crystallized Knowledge

¹³ The Mosaic progress report is Exhibit P119. The progress report, in part, states "[o]n 4-5-13 the Test of Language Competence was administered [to the Student]." It is unclear how this progress report could have been presented or discussed at the March 26, 2013, reevaluation meeting given the reference to what appears to be April 5, 2013 on the progress report. There may be a typographical error in the progress report, but there is no testimony of record to reconcile this discrepancy.

		Working Memory (WISC-IV) Processing Speed (WISC-IV)
Kaufman Test of Educational Achievement, 2 nd Edition (KTEA-II) Supplemented with oral reading fluency subtest from Wechsler Individual Achievement Test, 3 rd Edition (WIAT-III)	Pull-out testing	Letter & Word Recognition Reading Comprehension Oral Reading Fluency (WIAT-III) Listening Comprehension Oral Expression
Vineland Adaptive Behavior Scale, 2 nd Edition (Vineland-II)	Rating scale to parent, general education teacher, and special education teacher	Communication Daily Living Skills Socialization Motor Skills
Social Responsiveness Scale (SRS)	Rating scale to parent, general education teacher, and special education teacher	Social Awareness Social Cognition Social Communication Social Motivation Autistic Mannerisms
Behavior Inventory of Executive Functions (BRIEF)	Rating scale to parent, general education teacher, and special education teacher	Executive functions including the abilities to: Inhibit Shift Emotional Control Initiate Working Memory Plan/Organize Organization of Materials

53. Ms. Dorman compared the results from the Mother's Vineland-II to the teachers' Vineland-II, and determined that the different results – the Mother's results reflected a lower level of functional skills than the teachers' results – was likely due to the teacher's opportunity to observe many more third-grade students than the Mother. *Compare* Exhibits D70 and D76 to D75. Given this difference, Ms. Dorman concluded that she required more information regarding the Student's functional skills, such as observations of the Student and more information from teachers. Testimony of Dorman.

54. Ms. Dorman compared the results from the Mother's SRS to the teachers' SRS, and determined that the different results – the Mother's results reflected a severe impairment while the teachers' reflected mild to no impairment - were likely due to the same reasons as the different results using the Vineland-II. *Compare* Exhibits D73 and D74 to D69. Testimony of Dorman.

55. Ms. Dorman compared the results from the Mother's BRIEF to the teachers' BRIEF, and determined there was no significant difference between their results, with the exception of

working memory, where the Mother's score was moderately elevated. Compare Exhibits D80 and D81 to D79. Ms. Dorman addressed this and made recommendations for working memory in the reevaluation report. Exhibit D68pp4-5. Testimony of Dorman.

56. Ms. Dorman assessed the Student's overall cognitive abilities as within the average range. Exhibits D68p2, D72, D77, D78; Testimony of Dorman.

57. The communication portion of the Student's reevaluation was carried out by SLP Cindy Nitz.¹⁴ Ms. Nitz used the Test of Problem Solving (TOPS-3) Elementary, the Social Skills Rating System (SSRS), and the Comprehensive Assessment of Spoken Language (CASL) to conduct her communication assessment. Exhibit D68p2. Ms. Nitz's assessment included observations of the Student in his classroom, morning "sing," PE, lunch, and recess. Exhibit D68p16.

58. On the CASL, the Student's comprehension of spoken language was assessed as ranging from the 50th percentile to the 72nd percentile for his age, with all subtest scores falling in the normal range. Exhibit P120, D68pp2,15. Ms. Nitz concluded that the addition of visual supports or written directions would continue to be a useful strategy for the Student. Testimony of Nitz.

59. The Student's social communication and verbal problem solving skills were assessed using the SSRS and the TOPS-3. The Student was assessed as ranging from the 38th percentile to the 80th percentile, with his overall score placing him in the 58th percentile and within normal limits for children his age. Exhibits D68pp 2, 16; Testimony of Nitz.

60. The SSRS is designed to evaluate the frequency and importance of social skills. Ms. Nitz compared the results from the Mother's SSRS to the teachers' SSRS, and determined that the different results – the Mother's results reflected a much lower frequency of important social skills than the teachers' results – was likely due to the difference between observing the Student in a unstructured home setting versus a structured school setting. Exhibit D82. The Mother's lower results were taken into account by the reevaluation team when it determined to continue the Student's specially designed instruction (SDI) for social skills. Testimony of Nitz.

61. Ms. Nitz's communication evaluation also expressly identified and considered the Student's December 2012 evaluation by speech pathologist Nola Marriner at the Mosaic Center for Therapy Services.¹⁵ Exhibit D68D. Ms. Nitz received the Mosaic report on February 28, 2013, after she requested it from the Parents. Exhibit D68pp15, 31. In fact, Ms. Nitz had to alter her planned assessment of the Student due to the fact that Ms. Marriner had used certain assessment tools. In Ms. Nitz's professional opinion, she could not use those same tools again for her evaluation due to the potential for invalid test results. Exhibit D83p1 Testimony of Nitz.

62. Ms. Nitz's evaluation includes a section entitled "PARENT INPUT," where she recounts the Parents' report of their observations of the Student. Exhibit D68p18.

63. Based on her evaluation of the Student, Ms. Nitz concluded that the Student's expressive language skills were within normal limits, and that he did not qualify for specially designed

¹⁴ Ms. Nitz's curriculum vitae is Exhibit D85.

¹⁵ Ms. Marriner was not available during the due process hearing, and did not appear as a witness.

instruction in the area of language comprehension or verbal expression. Exhibit D68pp15, 17. However, given the Student's scores on rating scales of social communication competence varied significantly based on the rater, i.e. home/parent versus school/classroom staff, and his diagnosis of autism spectrum disorder, Ms. Nitz concluded that he continued to qualify for specially designed instruction to improve his social skills. Exhibit D68p17.

64. The reevaluation report includes a section specifically devoted to an explanation of the reevaluation team's response to the Mosaic evaluation. Exhibit D68p31.

65. The fine motor portion of the Student's reevaluation was carried out by OT Carolyn Kelley.¹⁶ Ms. Kelley used the Berry-Buktenica Test of Visual-Motor Integration, 5th Edition, to assess the Student's visual perceptual skills and visual motor integration skills. The results reflected the Student's skills fell in the average to high average range for a child his age. Ms. Kelley used the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition, to assess his motor development. The Student did very well, with his overall score placing him in the 95th percentile. Exhibit D68p18. The Student's teacher and the Parents completed several sensory questionnaires. Ms. Kelley's assessment included her observations of the Student during their therapy sessions, in his classroom, and on the playground. Ms. Kelley concluded that:

[The Student] has made tremendous improvements in his gross and fine motor skills, as well as his ability to accurately process, register and modulate his responses to incoming sensory information. Based on results of this assessment and observations in the therapy room, classroom, on the playground and in PE and art, [the Student's] motor development is on a par with his peers, and Specially Designed Instruction in motor development is not recommended.

Exhibit D68p19.

66. Ms. Kelley's assessment includes a section entitled "PARENT INPUT," where she recounts the Parents' report of their observations of the Student. Exhibit D68p18.

67. An IEP amendment meeting was held on April 26, 2013. Exhibit D61p9, D54p9.

Implementation of the Student's IEPs – Service Minutes

68. During the 2011-2012 school year when the Student was in second grade, Ms. Kelley was responsible for providing the specially designed instruction (SDI) for the Student's motor skills needs. Ms. Shah was responsible for providing the SDI for the Student's social/behavioral and study/organizational skills needs. Ms. Nitz was responsible for providing the SDI for the Student's communication needs. Exhibit D32p14.

69. During the 2012-2013 school year when the Student was in third grade, Ms. Kelley and Ms. Nitz continued with their respective responsibilities for providing the Student's SDI. Ms. Wixom assumed Ms. Shah's responsibilities when Ms. Shah retired at the end of the school year in June 2012. In December 2012, Mr. Middleton took over responsibility for providing the Student's study/organizational skills SDI. Ms. Wixom retained her responsibility for providing the Student's social/behavior SDI. Exhibit D64p18.

¹⁶ Ms. Kelley's curriculum vitae is Exhibit D92.

70. Ms. Nitz recorded her provision of SDI service minutes to the Student during second and third grades in her "log," and in an Intervention Record. D54pp1-11. Ms. Nitz provided all of the SDI service minutes for which she was responsible under the Student's IEPs for second and third grades. Testimony of Nitz.

71. Ms. Kelley provided all of the SDI service minutes for which she was responsible under the Student's IEPs for second and third grades. Testimony of Kelley.

72. Ms. Wixom does not keep a service log of the SDI service minutes she provides to students, but Ms. Wixom provided all of the SDI service minutes for which she was responsible under the Student's December 2012 IEP. Testimony of Wixom.

73. Ms. Shah did not keep a "log" for her students. Whether this is a log of SDI service minutes provided, or a log of Ms. Shah's observations of students, is unclear from the record. P72.

Provision of Progress Reports: Fall 2102 and Spring 2013.

74. In an email to Ms. Wixom on April 9, 2013, the Mother reported the Parents had received the Student's report card and a "partial" IEP progress report, but they had not received a progress report for social skills or organization/study skills. Exhibit P38p4

75. Ms. Wixom replied in an email the same day stating, "I have not done the IEP progress reports yet. I will be sending them out the week after break." Exhibit P38p4.

76. In an email to Ms. Wixom on April 22, 2013, the Mother stated, "[w]e also still do not have progress reports (Nov or March) (sic). Can you send them home today please, we can't prepare for a meeting." Exhibit P138p1.

77. Ms. Wixom replied in an email stating, "[f]here were no progress reports for November because we were still in process of IEP (sic)...I was going to do a progress report for April, but we are having an IEP meeting this week and the evaluation was so recent this does not seem necessary. He no longer qualifies for two of the previous IEP goals, motor and study skills, and the social skills goals we will be talking about Friday." Exhibit P53p1.

78. District report cards go out to all students in November, February-March, and June. Testimony of Wixom.

79. The Student's IEP in effect for the Fall 2012 period was the October 24, 2011 IEP, as amended January 17, 2012. Exhibits D32, D44. That amended IEP required the District to report the Student's progress on his IEP goals on a trimester basis. Exhibit D32pp8-9.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United

States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Accordingly, in this case the Parents bear the burden of presenting sufficient evidence to support a conclusion the District violated the IDEA and denied the Student FAPE with respect to all issues raised in Cause No. 2012-SE-0044. The District bears the burden of presenting sufficient evidence of record to support a conclusion that the March 2013 reevaluation of the Student was appropriate, the only issue raised in Cause No. 2012-SE-0091.

The Evidence of Record

3. An ALJ is required to apply the applicable law to the facts as established by the evidence presented by the parties at the due process hearing. After applying the law to the facts, an ALJ must reach a conclusion of law on each and every issue raised by a party in a due process hearing request. An ALJ cannot consider evidence which has not been placed in the record of the hearing, either through an exhibit or the testimony of a witness under oath or affirmation. Testimony which is very general in nature, which lacks specificity of detail, or which is not relevant to the issues to be determined, may be less compelling and less useful in determining the facts at issue. The result of such testimony, particularly when it is the only evidence of record on a particular fact or issue, can and often does result in a record from which it is difficult to make the findings of fact or conclusions of law for which a party advocates.

The Individuals with Disabilities Education Act (IDEA)

4. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

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

[A] "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the

instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

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

6. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Rowley*, 458 U.S. at 200 - 201. A "[d]istrict must provide Student a FAPE that is 'appropriately designed and implemented so as to convey' Student with a 'meaningful' benefit". *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 432 - 433, (9th Cir. 2010); see also *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1038, n. 10, (9th Cir. 2009).

7. Procedural safeguards are essential under the IDEA:

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

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

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

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii); see also WAC 392-172A-05105(2); 34 CFR §300.513.

The Parties' Mediated Settlement Agreement, Res Judicata, and the Period at Issue

9. In its Post-Hearing Brief, the District argues that the doctrine of *res judicata* should preclude any of the Parents' claims regarding the provision of FAPE to the Student prior to May 14, 2012, the date the parties signed the Mediation Agreement. *Res judicata* is a legal doctrine that bars the litigation of claims that were, or could have been, raised in a previous suit between the parties that reached a final judgment on the merits. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *T.G. v. Baldwin Park Unified Sch. Dist.*, 443 Fed. Appx. 273, 275 (9th Cir. 2011). Federal courts must give state judgments the *res judicata* effect that state law prescribes. *South Kingstown Sch. Comm. v. Joanna S.*, 2013 U.S. Dist. LEXIS 183356 (D.C. RI 2013); *Dep't of Educ. v. Karen I.*, 435 Fed. Appx. 670, 672 (9th Cir. 2011). For

the doctrine to apply, a prior judgment must have involved the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Loveridge* at 763.

10. The facts in this case are clear. The subject matter (generally the District's provision of the Student's education), the cause of action (claims under the IDEA and the corresponding state regulations at chapter 392-172A WAC), and the parties (the Parents and the District) are the same in Cause No. 2012-SE-009 and Cause No. 2013-SE-0044. However, the fatal flaw in the District's argument concerns not those factors, but the requirement that there be an underlying prior judgment.

11. The District asserts that ALJ Senter's Order of Dismissal constitutes the required prior judgment necessary for *res judicata* to apply and preclude any claims by the Parents prior to May 14, 2012. The District cites to the language in the notice of appeal rights that it was a "final administrative order." However, the District's reliance on that language is misplaced. The Order of Dismissal was the final administrative order for the purpose of appeal, i.e. there was no further right to *administratively* challenge the Order of Dismissal. But that is not equivalent to a prior judgment for the application of *res judicata* to attach.

12. While the Order of Dismissal dismissed the Parents' due process hearing request under Cause No. 2012-SE-0009, it did not state that it did so *with prejudice*. In Washington State, unless otherwise stated in the order of dismissal, the dismissal is without prejudice. Civil Rule (CR) 41(4). Nor did the Order of Dismissal incorporate the terms of the parties' Mediation Agreement. See, *James T. & Lou Ann T. v. Troy Sch. Dist.*, 407 F. Supp. 2d 827 (E.D. MI 2005) (The IHO incorporated the entire letter, which was the district's offer of settlement, into his order of dismissal. By incorporating the terms of the settlement, to which the parties agreed, the IHO approved of all of the terms and made them judicially enforceable). While it appears from the text of the Mediation Agreement that the parties intended the Parents to request dismissal with prejudice of Cause No. 2012-SE-0009, this cannot be inferred by this ALJ given the lack of express language in ALJ Senter's Order of Dismissal. In Washington State, a dismissal without prejudice cannot be used to establish *res judicata*. *Zarbell v. Bank of Am. Nat'l Trust & Sav. Asso*, 52 Wn.2d, 549, 554, 327 P.2d 436 (1958); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 223 (1989). Therefore, it must be concluded that *res judicata* does not preclude the Parents from raising claims predating the Mediation Agreement so long as those claims otherwise fall within the two-year statute of limitations, WAC 392-172A-05080. However, this is not the end of the analysis regarding whether the Parents may be otherwise prevented from raising claims prior to the Mediation Agreement.

13. A parent or a school district may file a due process hearing request on any of the matters relating to the identification, evaluation or educational placement, or provision of FAPE to a student. WAC 392-172A-05080(1); see also 34 CFR §300.507. This regulation correspondingly sets the limit of an ALJ's authority to hear and decide issues. Were either a parent or a school district to file a due process hearing request that a mediation agreement has been breached, the request would be dismissed because that alone is not an issue relating to the identification, evaluation or educational placement, or provision of FAPE to a student. In Washington State, there is no regulation providing that a parent or school district may file a due process hearing request to seek *enforcement* of a mediation agreement. In other words, a party may not use a due process hearing request as a "sword" to seek enforcement of a mediation agreement.

14. Here, the Parents filed their request under Cause No. 2013-SE-0044 regarding, very broadly, the District's provision of FAPE to the Student. As such, there is clear authority to hear and decide the Parents' claims in an administrative hearing. However, in the context of hearing and deciding those legitimate claims, the District has asserted what is essentially a defense to some of the Parents' claims. The District has asserted as its defense that the Parents should not be allowed to raise claims that were the subject of the Mediation Agreement. Therefore, in order to fully adjudicate all the claims raised in the Parents' complaint, the issue of whether the Mediation Agreement offers any defense for the District must also be adjudicated as a necessary, corollary issue. Under these facts, the District is attempting to use the Mediation Agreement as a "shield." This is fundamentally different than a situation where a party has filed a due process hearing request to seek enforcement of a settlement agreement or mediation agreement, using an agreement as a sword. While the District's reliance on *res judicata* to bar the Parents from raising those claims must fail, as discussed above, there is another alternative legal theory that must be considered as well.

15. While the District may not rely on *res judicata* to bar claims that arose prior to May 2, 2012, because the Order of Dismissal did not dismiss those claims "with prejudice," the District may instead rely on a breach of contract theory to bar those claims. The District is party to a legally binding contract in which the Parents committed themselves not to refile those claims in the future. The elements of contract formation are: an offer, acceptance of that offer, and the exchange of something of value in consideration for entering into the contract. See, e.g., *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005). The offer in this case is documented in the Mediation Agreement. The acceptance of that offer is documented by the parties' signatures. The District provided consideration in monetary and other forms. The Parents were to provide consideration by dismissing the complaint *and by not refiling the same claims in the future*. Those claims included the broad claim that the District had denied the Student FAPE. It is concluded that the Mediation Agreement is a legally binding contract that prevents the Parents from asserting in this due process hearing that the District in any way denied the Student FAPE prior to and through May 2, 2012. Accordingly, it is concluded that the period at issue is from May 3, 2012, through the filing of the Parents' request for due process hearing on April 25, 2013.

Was the District's March 2013 Reevaluation of the Student Appropriate¹⁷

16. WAC 392-172A-03020¹⁸ sets forth the procedures that must be used for an evaluation or reevaluation of a student:

Evaluation procedures.

¹⁷ This issue includes within it or subsumes the related Parents' issues of whether the District denied the Student FAPE by concluding the Student was no longer eligible for expressive language services, or failed to adequately consider information provided by the Parents, including an outside speech/language evaluation and an outside psychological report.

¹⁸ The corresponding federal regulations are found at 34 CFR § 300.304.

(1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010, that describes any evaluation procedures the district proposes to conduct.

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(i) Whether the student is eligible for special education as defined in WAC 392-172A-01175; and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education and for determining an appropriate educational program for the student; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a student:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable. If properly validated tests are unavailable, each member of the group shall use professional judgment to determine eligibility based on other evidence of the existence of a disability and need for special education. Use of professional judgment shall be documented in the evaluation report;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(d) If necessary as part of a complete assessment, the school district obtains a medical statement or assessment indicating whether there are any other factors that may be affecting the student's educational performance.

(e) The student is assessed 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.

(f) Assessments of students eligible for special education who transfer from one school district to another school district in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(g) In evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(h) Assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student.

17. After a careful and thorough review of the District's reevaluation, it is concluded that the reevaluation complies with all applicable regulatory requirements, and is an appropriate reevaluation of the Student. The reevaluation used a wide variety of assessment tools and strategies to gather relevant information about the Student. Contrary to their assertion, the reevaluation report clearly and unambiguously included in multiple sections information provided by the Parents. The reevaluation used technically sound instruments to assess the Student, those instruments were administered by trained and knowledgeable personnel, and the reevaluation assessed the Student in all areas related to his suspected disability.

18. The Parents' assertion the reevaluation was not appropriate because it determined the Student was no longer eligible for expressive language or expressive/communication services is without merit. The very comprehensive communication evaluation conducted by Ms. Nitz is reflected in her part of the reevaluation report. It includes consideration of input provided by the Parents, and consideration of the Mosaic evaluation. It includes a well-reasoned discussion of the results, and Ms. Nitz's conclusion that the Student was no longer eligible for expressive language services. Ms. Nitz's testimony at hearing in support of her communication evaluation was thoughtful, consistent, and compelling. In reaching this conclusion, it is critical to note that the Parents produced no witness qualified by education, training, and experience to contest or refute Ms. Nitz's evaluation or her conclusions. It is concluded that the District's determination the Student was no longer eligible for expressive language or expressive communication services is correct, did not violate the IDEA, or deny the Student FAPE.

19. The Parents' assertion the reevaluation was not appropriate because it did not adequately

consider information provided by the Parents is also without merit. The reevaluation report includes a section devoted to the team's consideration of the Mosaic evaluation report. The only psychological report by a non-District source appears to be the evaluation of the Student from the Care Clinic in October 2010. While it cannot be determined with certainty from the reevaluation report that this psychological evaluation was considered, the Parents have not made any compelling argument how consideration of an almost three-year-old evaluation of the Student could possibly be relevant to the reevaluation team's conclusions regarding the Student's current status and needs for services. With respect to the Parents' five-page email sent to Ms. Dorman at 4:39 a.m. on the morning of the reevaluation meeting, it was manifestly unfair to expect the team to consider such a voluminous document with functionally no advance notice from the Parents. Furthermore, the Parents had more than ample opportunity to provide the team any feedback they wanted considered during the creation and their review of the two draft reevaluation reports prepared by Ms. Dorman. Even assuming for the purpose of argument that by not considering the five-page email at the reevaluation meeting the team committed a procedural error violating the IDEA, no remedy would be awarded the Parents. Given the Parents' failure, despite ample opportunity to timely provide the team with this feedback, and their feedback previously provided to the team through Ms. Dorman, such a procedural violation would not merit any type of equitable award or remedy.

20. The crux of this issue boils down to a more simple statement; the Parents really argue that the District members of the reevaluation team did not consider the information provided by them as much as or in the manner the Parents believed it should be considered. While from the Parents' perspective this is likely true, it is not the legal standard that the District must meet to prove its evaluation of the Student was appropriate. It is concluded the District did not violate the IDEA or deny the Student FAPE by failing to consider the information provided by the Parents.

Not Providing the Parents the Opportunity to Fully Participate in the Reevaluation Meeting, Including by Prematurely Stopping the Meeting

21. Parents have a clear and legal right under the regulations to participate as members of a reevaluation team. A group of qualified professionals *and the parents* of the student determine whether the student is eligible for special education and the educational needs of the student. 392-172A-03040(1)(a). The crux of this issue in this case, however, lies not with whether the Parents were present at the reevaluation meeting, but what legally constitutes participation as a member of the reevaluation team. In essence, the Parents appear to argue they were not permitted to participate as team members because the meeting was limited to one hour, which was not sufficient time to discuss all the issues they felt needed to be addressed, and because they could not present all the information they wanted the team to consider. The team members who testified about the reevaluation meeting, including the Parents, are generally in agreement on one point; no one came away from the meeting believing the meeting was as productive or collaborative as they had hoped. But from the evidence of record several conclusions can be drawn.

22. The Parents had ample opportunity for input into the reevaluation both prior to and at the meeting. The Parents spoke at the meeting about the Student's disabilities, his needs for services, the areas where he should receive services, and had an opportunity to converse. This was Mr. Davis's testimony. While not all the information or documents the Parents brought to the meeting were discussed, this is not a fatal flaw. Reevaluation meetings are not governed by

the least common denominator. There is no legal requirement that a reevaluation meeting continue indefinitely until the last team member believes every last iota of information is considered to that member's satisfaction. This would result in an unworkable and impracticable model for any meeting. There is no legal requirement that a reevaluation meeting must be at least some minimum number of minutes in duration. An argument that a reevaluation meeting was so short in duration as to effectively preclude any participation would have to be determined in light of the facts in each particular case. But this case does not present facts supporting a conclusion the time allotted for the Student's reevaluation meeting, standing alone, denied the Parents the opportunity to participate as members of the team.

23. It is clear that the Parents believe they did not have the time *they* determined was sufficient to participate in the reevaluation meeting to their satisfaction. It is clear the team did not reach a consensus regarding the Student's reevaluation. While this is desirable, it is not a fatal flaw. If a reevaluation team ultimately cannot reach a consensus regardless of how much time is spend at a meeting or meetings, a school district must make a decision. If parents disagree with that decision, they have the right to request a due process hearing. But given the facts in this case, the Parents have not proven the District violated the IDEA and denied the Student FAPE by not providing the Parents with an opportunity to participate in the reevaluation meeting. The Parents had an opportunity to participate in the reevaluation meeting, albeit not an opportunity which they considered satisfactory.

Amending the October 2011 IEP Without Holding an IEP Meeting

24. The Parents assert the District amended the Student's October 2011 IEP without holding an IEP meeting. This is correct. There was no IEP meeting held in January 2012 when the Student's IEP was amended. Whether the Mother told Ms. Shah that no meeting was necessary or not, this amendment occurred before May 3, 2012, and is therefore not an issue the Parents may raise.

Refusal to Provide IEP Meeting Notes Before Adjourning Meetings

25. The Parents assert the District or the IEP team did not provide them with notes from meetings before meetings were adjourned. Whether this is true or not, there is no duty under the IDEA requiring school districts to provide such notes *prior to adjourning* an IEP meet. The Parents have not proven any violation of the IDEA, or a denial of FAPE with respect to this issue.

Refusal to Provide Sound Options Facilitation of IEP Meeting(s)

26. There is no regulation under the IDEA that requires a school district to provide the services of a facilitator for IEP meetings. The Parents have not proven any violation of the IDEA, or a denial of FAPE with respect to this issue.

Unilaterally Instituting Communication Plans That Prevented the Parents From Communicating With the IEP Team

27. The Parents assert that the communication plans the District imposed on them prevented them from communicating with the Student's IEP team. There were two separate

communication plans imposed; one by Principal Reed beginning December 7, 2011, and then a second plan from Principal Benkovitz beginning October 10, 2012.

28. Neither of the two communication plans prevented the Parents from communicating with the IEP team members. Principal Reed's plan did prevent the Parents from communicating *directly* with the team members, as her plan required all communication to go to her first, after which she would pass it along to the team members. Principal Benkovitz's plan was more open; it simply required all emails to be copied to Ms. Wixom. The issue of whether imposition of *any* communication plan should have been imposed by the District is not strictly speaking an issue involving the IDEA. In order to rise to the level of an issue which could be considered an IDEA issue, a communication plan imposed on the parents of a student eligible for special education would have to be so restrictive that it denied those parents participation as *members of the student's IEP team*.

29. Principal Reed's plan is clearly the more restrictive of the two. However, even Principal Reed's plan permitted the Parents to communicate with IEP team members, although the Parents' communications with the IEP team had to go through Principal Reed. Principal Reed's communication plan was in place a relatively brief period of time during the period at issue in this case – May 3, 2012, until October 10, 2012 - and includes the summer recess period. In order for the Parents to prevail on this issue, there would have to be evidence sufficient to find they could not effectively participate as members of the Student's IEP team during this period of time. The Parents have not articulated, and the record does not reflect, sufficient evidence to reach such a conclusion.

30. Upon assuming the position of principal from Ms. Reed, Principal Benkovitz met with the Mother, understood the plan initiated under Principal Reed was a concern to the Parents, and by October 10, 2012, developed a new communication plan that was far more open to the Parents. Under Principal Benkovitz's plan, the Parents were free to speak with District staff, including those staff who were members of the Student's IEP team. The only limitation imposed was that the Parents were required to copy Ms. Wixom on any email they would send to staff. The Parents' assertion they could not communicate with the IEP team if they had any concerns with Ms. Wixom because she would be copied on their emails, while uncomfortable, cannot support a conclusion they were so restricted in their communication with IEP team members they were effectively precluded from participation as members of the IEP team. It is concluded that the District did not violate the IDEA or deny the Student FAPE by imposing the communication plans.

Failing to Provide Requested Documents

31. The Parents assert the District failed to provide them with Technical Assistance Team (TAT) records, school working files, and data collected about the Student in the year before the December 2012 IEP meeting. The evidence of record must establish that any such request(s) for records from the Parents must have occurred on or after May 3, 2012, due to the effect of the Mediation Agreement, discussed above. Only one specific example of the Parents requesting documents or data could be identified in the record during the period at issue. That was on September 26, 2012, when the Mother asked Ms. Wixom to provide the Parents with the "raw data" that would be used to develop the Student's December 2012 IEP.

32. School districts must permit parents of students eligible for special education to inspect

and review any educational records relating to the student which are collected, maintained, or used by the district. A district must comply with a request to inspect and review records promptly and before any meeting regarding an IEP. WAC 392-172A-05190(1). The Mother requested the District provide the Parents with copies of the data that would be used to develop the Student's upcoming IEP. This was the IEP developed over the course of three facilitated meetings in October and December 2012. Her request was made with the emails to Ms. Wixom on September 26, 2012. While the District never provided the data to the Parents, it was not required to do so. It was only required to allow the Parents to inspect and review the data. However, there is no evidence of record to find the District informed the Parents of their right to inspect and review the data. This is a procedural violation of the IDEA. Although this is a procedural violation, a remedy is not automatically warranted.

33. A determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a *procedural* violation, an administrative law judge may find that a student did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. WAC 392-172A-05105.

34. It is concluded that the District's failure to inform the Parents of their right to inspect and review the Student's educational records, including any raw data collected, maintained, or used by the District, did not impede the Student's right to a FAPE, significantly impede the Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefit to the Student. After requesting a copy of the data which would be used to develop the Student's IEP in October and December 2012, the Parents participated as members of the IEP team in 12½ hours of facilitated IEP meetings. The Parents confirmed through the Mother's testimony at hearing that they did not disagree with or believe any of the goals in that IEP were inappropriate goals for the Student. There is no evidence of record to support a conclusion the Parents' opportunity to participate in the development of the Student's IEP was denied because they did not inspect and review the Student's educational records prior to the IEP meetings. Accordingly, no remedy is warranted for this violation.

Failing to Develop Appropriate IEPs or Amend the Student's IEPs Between May 3, 2012, and December 2012

35. Initially, it must be noted that, because of the effect of the May 2, 2012 Mediation Agreement, discussed above, the period of time that can be considered with respect to these issues is more limited than set forth in the Statement of the Issues and Remedies in the October 28, 2013 Eleventh Prehearing Order. Next, these two issues, whether the District failed to *develop* appropriate IEPs and whether the District failed to *amend* the IEPs are combined for analysis because it appears they are legally indistinguishable. The goals in an IEP must be appropriate goals for an individual student's unique needs as determined by that student's evaluation and IEP teams. An IEP that contains inappropriate goals would deny a student FAPE. That IEP would have to be amended or replaced with an entirely new IEP by modifying or eliminating all inappropriate goals in order to provide a student FAPE.

36. The IEP in effect as of May 2, 2012, was the January, 17, 2011 amended IEP.¹⁹ In order to show that the goals in that amended IEP were not appropriate, the Parents must present sufficient evidence to conclude there was somehow a change in the Student's circumstances that persisted through at least May 2, 2012, and that caused those goals to become inappropriate for the Student, thereby requiring amendment to those IEP goals. The Parents challenge this amended IEP on four specific points. The Parents assert the amended IEP did not include appropriate goals for the Student's expressive language needs, social communication needs, executive functioning needs, or auditory processing needs. Each of these will be examined in turn.

37. The only change in circumstances which could be identified from the record is the Parents' belief that the services provided at Lehman Learning Solutions had improved the Student's skills and/or abilities such that the January 17, 2011 goals were no longer appropriate. This belief is based on their observations and interactions with the Student after he began receiving services at Lehman Learning Solutions.

38. While the Parent are clearly keen observers of the Student and their belief in his progress genuine, it cannot be concluded that their belief alone is sufficient to find the goals in the Student's January 17, 2011 IEP were no longer appropriate on or after May 3, 2012. The record reflects no objective evidence of such sufficient progress as to render the goals inappropriate. Ms. Lehman conducted no post-service assessment to determine the Student's progress. Dr. Brooks's letter in April 2012 was not intended as any assessment of the Student's skills and/or abilities with respect to his IEP goals. There is just not enough evidence to reach the Parents' desired conclusion.

39. Notice is taken of the Parents' letter to Principal Jodee Reed on December 7, 2011, in which the Parents reference the Student's well documented auditory processing component to his disability. But what the evidence of record lacks, however, is any evidence that absent a goal to address this auditory processing component, the Student's IEP would not be appropriate, i.e. the Student would be unable to obtain an educational benefit if his IEP did not include such an auditory processing goal.

40. As discussed above, the Parents may not challenge the appropriateness of the goals in the January 17, 2011 amended IEP because of the effect of the May 2, 2012 Mediation Agreement, and the Parents have not proven any change in circumstance upon which it can be concluded the goals were no longer appropriate as of May 3, 2012. Accordingly, it must be concluded that the Parents have not proven the District failed to develop appropriate goals or failed to amend the Student's IEP from May 3, 2012, through December 4, 2012.

Failing to Implement the Student's IEPs by Not Providing the Service Minutes in Social Skills, Motor Skills, and Organizational/Study Beginning May 3, 2012, to April 25, 2013

41. As discussed above, because of the effect of the May 2, 2012 Mediation Agreement, the

¹⁹ The amendments made in January 2011 were made without an IEP team meeting, and the evidence regarding whether the lack of a meeting would meet the requirements in WAC 392-172A-03110(2)(c) is unclear. However, those amendments were made prior to May 3, 2012, and therefore cannot be challenged due to the Mediation Agreement.

period of time that can be considered with respect to these issues is more limited than as set forth in the Statement of the Issues and Remedies in the October 28, 2013, Eleventh Prehearing Order.

42. This is perhaps the most troubling of all the issues raised by the Parents. The District has provided little in the way of documentary evidence to establish as fact that District staff has provided all the SDI service minutes called for in the Student's two IEPs during the period at issue. The exception is the records by Ms. Nitz, which along with her testimony substantiate her service minutes. Ms. Kelley and Ms. Wixom credibly testified to the provision of the service minutes which they were responsible for providing. Ms. Shah did not keep a log for her students, although the record is unclear if this is a reference to a log of service minutes, or of observations of students. In either event, there is no such log. Ms. Wixom does not keep a service log of SDI service minutes she provides to students.

43. The Parents have raised this issue and therefore bear the burden of proof. However, the Parents have presented no admissible evidence which is reliable enough to find they have even raised a *prima facie* issue that SDI service minutes called for in the Student's IEPs were not provided by District staff. Given what can only be characterized as an embarrassing lack of documentary evidence from the District to establish it in fact provided all the services in the Student's IEPs, had the Parents presented even a minimal quantum of credible evidence, the Parents likely would have prevailed on this issue. But this is not the case. It cannot be concluded that the Parents have carried their burden of proof to present sufficient credible evidence of record to raise as an issue any failure of the District to provide the SDI service minutes called for in the Student's IEPs. The District is placed on notice, however, that failure to maintain and produce adequate documentation establishing provision of such services to a student eligible for special education is a dangerous practice, and likely fraught with future liability.

Failing to Provide Progress Reports for Social Skills or Organizational/Study Skills for Fall 2012 and Winter 2013

44. WAC 392-172A-03090(1)(c)(ii) requires an IEP to include a description of when a school district will provide periodic reports on the progress a student is making towards meeting the annual goals. The Student's amended IEP in effect for the fall 2012 and winter 2013 trimester required the District to report the Student's progress on a trimester basis. The facts on this issue are clear. The District did not produce progress reports regarding the Student's social skills or organizational/study skills for November 2012 or April 2013, the periods that correlate with the fall 2012 and winter 2013 trimester reporting periods. These are procedural violations of the IDEA.

45. With respect to the failure to produce the fall 2012 progress reports at issue, it is concluded that although this is a procedural violation it does not warrant a remedy. At that time, the Parents were involved in three lengthy facilitated IEP meetings that ultimately resulted in an IEP with which the Parents agreed. The Parents have not proven how the lack of the progress reports either impeded the Student's right to FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefit.

46. With respect to the failure to produce the winter 2013 progress reports, the same

conclusion must be reached. While a procedural violation occurred, the Parents have not articulated through evidence of record how the lack of the progress reports either impeded the Student's right to FAPE, significantly impeded their opportunity to participate in the decision-making process, or caused a deprivation of educational benefit.

Refusing to Provide an Occupational Therapist at the April 2013 IEP Meeting

47. The only evidence of an IEP meeting being held in April 2013 is an IEP amendment meeting held on April 26, 2013. This is the day after the Parents filed their due process hearing request on April 25, 2013. Therefore, this IEP amendment meeting does not fall within the period at issue in this due process hearing, and accordingly this issue cannot be adjudicated. This issue is dismissed.

Failing to Timely Schedule IEP Meetings Related to the Parents' Requests; Holding IEP Meetings Without Reasonable Advance Notice to the Parents; Scheduling IEP Meetings When Necessary Team Members Were Not Available

48. These issues are closely related, and will be considered together. The record is simply unclear with respect to *specific* instances when the District allegedly failed to timely schedule IEP meetings related to the Parents' requests. This may be the result of this due process hearing involving so many issues the parties were unable to ensure the record was adequately developed with respect to each and every issue. However, it cannot simply be presumed what meetings the Parents are alleging were not timely scheduled. It must be concluded that the Parents have not carried their burden of proof on this issue.

49. The same situation holds true for the issue of whether the District held IEP meetings without reasonable notice to the Parents. Within the period at issue, beginning May 3, 2012, the record does not appear to reflect any meeting where the Parents were absent due to any lack of sufficient or reasonable notice. If by this issue the Parents intend to assert they appeared at meetings but were not sufficiently prepared to participate due to short notice, the evidence of record is again not sufficiently developed to find they have carried their burden of proof to establish any violation by the District.

50. The only instance where the record reflects an IEP meeting involving an issue of excusing IEP team members is either the facilitated IEP meeting on October 18, 2012, or the meeting on October 30, 2012. As discussed above, if there indeed was any procedural violation involving either of those meetings where an otherwise mandatory team member was missing, the final creation of the Student's IEP on December 4, 2012, would result in no remedy. The Parents have not proven any violation with respect to unexcused or absent IEP team members.

Not Allowing the Parents to Observe the Student in an Academic Setting or Classroom Prior to IEP Meetings

51. The IDEA does not guarantee parents the right to observe their children in class. *Letter to Mamas*, 42 IDELR 10 (OSEP 2004). The Parents have not proven any violation of the IDEA or denial of FAPE with respect to this issue.

Denying the Parents' Requests Without Scheduling IEP Meetings or Providing Prior Written Notice; Refusing to Continue the March 2013 Reevaluation Meeting, and Failing to Provide a

Prior Written Notice

52. Prior written notice must be provided to the parents of a student eligible for special education a reasonable time before a school district proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. WAC 392-172A-05010.

53. The Parents appear to interpret this requirement to mean any time a parent requests an IEP meeting a school district must either schedule an IEP meeting, or provide the parent a prior written notice denying the request. The Parents' interpretation is not correct. If a school district was required to respond to every such request, written or oral, and in the worst case scenario repeated daily requests from a parent, a school district would be paralyzed with paperwork. If a parent believes s/he has a legitimate reason to call for the convening of an IEP meeting, once a school district, either through an affirmative response in the negative or a failure to respond at all, evidences its intent not to convene a meeting, the parent can request a due process hearing to prove a meeting should have been held. This is the more appropriate remedy for the Parents' circumstances than requiring the District to issue a prior written notice. It is concluded the Parents have not established any violation of the IDEA with respect to this issue.

54. The Parents requested, both at and after the March 26, 2013, reevaluation meeting, that the meeting be continued, or another eligibility meeting be held. The same legal analysis applies to this request as that applied above to the Parents' assertion the District should have issued a prior written notice regarding their request(s) for IEP meetings. The Parents have not proven an violation of the IDEA with respect to this issue.

Failing to Provide the Parents with the Opportunity to Fully Participate on the IEP Team

55. During the period at issue there have been multiple IEP meetings, at least three in 2012 alone, all of them facilitated. The Parents have not made at all clear in the record in what meetings or in what manner they have allegedly been prevented from participating as members of the Student's IEP team. While an ALJ can carefully review a complex evidentiary record, as this case presents, to tease out facts, if the facts are not clearly alleged by the party asserting an issue it presents an unworkable situation. As remarked above, given the many, many issues raised by the Parents it is understandable how the record may have went undeveloped with respect to any one issue. Such is the case with this issue. Given the state of the record on this issue, it must be concluded that the Parents have not carried their burden to establish any violation of the IDEA, or any denial of FAPE.

Predetermining Decisions

56. The only decision which the Parents have identified as subject to this predetermination claim is the IEP team's eligibility decision reflected in the Student's March 2013 reevaluation. The evidence of record does not support a claim of predetermination. The only evidence going to this issue is the PWN misdated March 5, 2013, which was provided to the Parents by Ms. Dorman at the March 26, 2013, reevaluation meeting. Given Ms. Dorman's credible explanation about the error in dating and the lack of any further evidence of any predetermination, it is concluded the Parents have not proven any violation of the IDEA or denial of FAPE with respect to this issue.

Not Including Agreements Made at IEP Meetings in Written IEPs or in Prior Written Notices; Refusing to Provide a Copy of the Current IEP With any Agreed Changes; Not Timely Responding to Parent Requests and Not Responding to Parent Requests at all; Not Considering Parent Responses if Not Provided Within Unreasonably Short Time Periods

57. Resolution of these issues touches upon many of the same themes and legal analyses discussed above. Either the evidentiary record is not sufficiently developed by the Parents to adjudicate or decide these issues, there is no legal duty under the IDEA, or if there are any procedural violations, there has been no showing that would warrant a remedy for a purely procedural violation. It is concluded that the Parents have not proven any violation or that they are entitled to any remedy with respect to any of these issues.

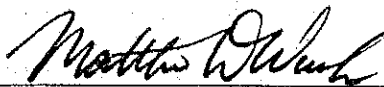
ORDER

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

The Parents' requested remedies are denied.

The District's March 2013 Reevaluation of the Student is appropriate.

Signed at Seattle, Washington on June 6, 2014.



Matthew D. Wacker
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. *MDW*

Parents



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