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July 2, 2016

Parents  


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In re: Zillah School District  
OSPI Cause Nos. 2016-SE-0009  
2016-SE-0025  
OAH Docket Nos. 03-2016-OSPI-00011  
03-2016-OSPI-00030

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

Handwritten signature of Anne Senter in cursive.

Anne Senter  
Administrative Law Judge

cc: Administrative Resource Services, OSPI  
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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

MAILED  
JUL 02 2016  
SEATTLE-OAH

IN THE MATTER OF:

ZILLAH SCHOOL DISTRICT

OSPI CAUSE NOS. 2016-SE-0009  
2016-SE-0025

OAH DOCKET NOS. 02-2016-OSPI-00011  
03-2016-OSPI-00030

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Zillah, Washington, on April 26 - 29, 2016. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Kerri W. Feeney and Monica K. Hollenberg, attorneys at law. The Zillah School District (the District) was represented by Gregory L. Stevens and Tanya Barton, attorneys at law. Justin Irion, District director of special education, also appeared.

**STATEMENT OF THE CASE**

The Parents filed a Due Process Hearing Request (Parents' Complaint) with the Office of Superintendent of Public Instruction (OSPI) on February 3, 2016. The Parents' Complaint was assigned Cause No. 2016-SE-0009 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered February 3, 2016, which assigned the matter to ALJ Senter. The District filed its response to the Parents' Complaint on March 17, 2016.

The District filed a Due Process Hearing Request (District's First Complaint) with OSPI on February 29, 2016. It was assigned Cause No. 2016-SE-0020 and was forwarded to OAH for the assignment of an ALJ. A Scheduling Notice was entered March 1, 2016, assigning the matter to ALJ Senter. That case was dismissed on March 8, 2016, after the District withdrew its request for hearing.

The District filed another Due Process Hearing Request (District's Second Complaint) with OSPI on March 9, 2016. The District's Second Complaint was assigned Cause No. 2016-SE-0025 and forwarded to OAH for the assignment of an ALJ. A Scheduling Notice was entered March 9, 2016, which assigned the matter to ALJ Senter. The Parents filed their response to the District's Second Complaint on March 21, 2016.

The parties agreed that Cause Numbers 2016-SE-0009 and 2016-SE-0025 be consolidated for purposes of hearing and decision.

<sup>1</sup>In the interests of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parents," "Mother," "Father," and/or "Student."

Prehearing conferences were held on March 4, 17, and 24, and April 12, and 25, 2016. Prehearing orders were entered March 8, 16, and 25, and April 13, 2016.

### Evidence Relied Upon

#### Exhibits Admitted:

**District's Exhibits:** D1-D2, D3 (pp. 1-3 only), D4-D10, D12, D14, D16, D27-D31, D33-D38, D40, D42, D47-D48, D50-D54, D56-D58, D60 (p. 1 only), and D65; and

**Parents' Exhibits:** P1-P2, P4-P17, P19-P25, P29, P30 (except p. 6), and P31-P39.

#### Witnesses Heard (in order of appearance):

Sheri Rynd, District speech and language therapist;  
Spring Keller, District general education teacher;  
The Student's Father;  
Doug Burge, District principal;  
Justin Irion, District special education director;  
The Student's Mother;  
Victoria Fox-Behrle, M.D., Yakima Valley Farm Workers Clinic physician;  
Sara Weiss, Yakima Hearing and Speech Center speech-language pathologist;  
Kristin Leslie, District occupational therapist;  
Danielle Myers, District general education teacher;  
John McKay, District superintendent;  
Kathy Morford, District paraeducator;  
Wendy Marlowe, Ph.D, private practice neuropsychologist; and  
Marbella Aparicio, District general education teacher.

### Post-Hearing Briefs

The parties each timely submitted post-hearing briefs on June 3, 2016, as agreed upon at the close of the hearing.

### Due Date for Written Decision

As set forth in the Prehearing Order dated March 8, 2016, in Cause No. 2016-SE-0009, the due date for a written decision in that case was continued to 30 days after the close of record based on the Parents' motion. As set forth in the Third Prehearing Order, the due date for a written decision in Cause No. 2016-SE-0025 was also continued to 30 days after the record of the hearing closes based on the Parents' motion. As the record in both cases closed with the submission of the parties' post-hearing briefs on June 3, 2016, the due date for a written decision is **July 3, 2016**.

## ISSUES

As set forth in the Third Prehearing Order,

1. The issues with respect to Cause No. 2016-SE-0009 are:
  - a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2015-2016 school year by:
    - i. Failing to comply with its child find responsibilities to locate, evaluate, and identify the Student as a child with suspected disabilities in need of special education services;<sup>2</sup>
    - ii. Failing to provide the Parents with prior written notice within statutory timelines of its decision whether to evaluate the Student;
    - iii. Predetermining that the Student would not qualify for special education and related services;
    - iv. Failing to allow the Parents to fully participate in education planning by:
      - I. Not providing the Parents with procedural safeguards beginning in October 2015; and
      - II. Ignoring information the Parents shared with the District in December 2015;
  - b. And, whether the Parents are entitled to their requested remedies:
    - i. Reimbursement of an Independent Educational Evaluation (IEE);
    - ii. Compensatory services to be provided to reimburse the Student for lost educational opportunity in an amount to be determined;
    - iii. If the evaluation shows the Student qualifies for special education services, that any speech language services be provided by a credentialed provider other than Ms. Rynd;
    - iv. If the evaluation shows the Student qualifies for special education services, that a speech language therapist other than Ms. Rynd be assigned to the IEP team tasked with developing an appropriate IEP for the Student;
    - v. And/or other equitable remedies, as appropriate.

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<sup>2</sup> The parties agreed at a prehearing conference on March 17, 2016, that this issue includes the consideration of alleged violations of the rules regarding the referral and evaluation process.

2. The issues for hearing with respect to Cause No. 2016-SE-0025 are whether the District's February 18, 2016 evaluation of the Student is appropriate and, if not, whether the District should pay for an IEE of the Student.

### FINDINGS OF FACT

1. The Student attended kindergarten in the District during the 2014-2015 school year. Exhibit D8. He met standards each term in every area assessed on his grade report with only two exceptions. *Id.* During the first term, he was below standard in sounding out three and four letter words and approaching standard in "story elements (character, setting, retells beginning middle and end of a story)." *Id.* The Student's results on easyCBM benchmark assessments, which screen for students who may be at risk, identified him as being at "low risk" each term in all areas assessed, which were letter names, letter sounds, phoneme segmenting, word reading fluency, and CCSS math. Exhibit D10.
2. The Student's kindergarten teacher, Marbello Aparicio, observed that he began his kindergarten year "a little timid" but warmed up to her and his peers. Aparicio, Tr. 873.<sup>3</sup> She observed that he was a bright student who gained confidence and became more enthusiastic and involved throughout the year. *Id.* Ms. Aparicio never witnessed or heard of other students bullying or teasing the students. *Id.* at 877. His speed and pace in completing assignments was average in comparison to his peers. *Id.* at 879. Ms. Aparicio observed hesitations in the Student's speech, but she and his peers were able to understand him. Aparicio, Tr. 880-81.
3. Ms. Aparicio conducted WaKIDS testing of students, which includes assessments of how students meet social-emotional, physical, language, cognitive, literacy, and mathematics objectives. Exhibit D9; Aparicio, Tr. 887. The Student met kindergarten expectations in the fall for most areas, including all the physical areas: traveling skills, balancing skills, gross-motor manipulative skills, uses fingers and hands, and uses writing and drawing tools. Exhibit D9, pp. 1, 2. The only areas in which he did not fall within the kindergarten band in the fall were the language objectives of "tells about another time or place," "engages in conversations," and "uses social rules of language;" the cognitive objectives of "recognizes and recalls" and "uses classification skills, and in the literacy objective of "notifies and discriminates smaller and smaller units of sound." Exhibit D9.
4. The Student was in Spring Keller's first-grade class for the 2015-2016 school year, including at the time of the hearing. Keller, Tr. 155.
5. At the beginning of the school year, Ms. Keller noticed that, at times, the Student repeated himself or "stuttered" when he started talking. Keller, Tr. 156. She could understand him, although she had to concentrate to do so and she sometimes asked him to slow down. *Id.* at 158.

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<sup>3</sup> References to the transcript of the hearing are to the name of the witness followed by the page number(s) on which the testimony is located.

6. On September 22, 2015, Sheri Rynd, District speech-language pathologist, sent an email to all teachers at the Student's school. Exhibit P5, p.1. She asked the teachers to identify students they thought "may have speech problems" so she could meet with those students. *Id.* In response, Ms. Keller sent Ms. Rynd an email containing the Student's name. *Id.*

7. Ms. Keller did not consider her email to be a special education referral of the Student, only a response to Ms. Rynd's request to identify students in her class with speech issues. Keller, Tr. 161-62. Ms. Keller did not believe the Student needed a special education referral as he could function in class and she worked with all first-grade students on speech sounds. *Id.* at 557.

8. After receiving Ms. Keller's email, Ms. Rynd talked to the Student and noticed that he had a lisp. Rynd, Tr. 399. She also spoke with Ms. Keller and reviewed the Student's file. Rynd testimony. She did not refer him for a special education evaluation as she did not believe that would be necessary. Rynd, Tr. 399.

9. Ms. Rynd informed that Parents that the Student would benefit from stimulus training, which is working with students on their tongue placement for particular sounds. Mother, Tr. 195; Rynd, Tr. 74, 400. It is not a special education service. Rynd testimony. Stimulus training is one of several interventions the District provides for students. Irion, Tr. 467.

10. On or about October 29, 2015, the Mother signed a permission slip, which stated:

Your child [Student] has visited with the speech and language therapist for Hilton Elementary School.

With your permission the Speech and Language Pathologist would like to include your child in a small "stimulus group" to encourage correct placement and production on certain phonemes.

I give permission for [Student] to see Ms. Rynd in a "speech stimulus" group to learn placement for specific phonemes to enhance speech intelligibility in kindergarten.

Exhibit P6.

11. Stimulus groups are not scheduled and Ms. Rynd fits them in when she has time. Rynd, Tr. 81. Ms. Rynd was not able to meet with the Student as often as she wished. *Id.* at 84. She met with the Student for stimulus lessons briefly on November 17 and 18, 2015. Exhibit D14.

12. Shortly before December 9, 2015, the Mother asked Ms. Keller whether Ms. Rynd had been pulling the Student from class. Ms. Keller said that, to her knowledge, Ms. Rynd had not. Exhibit P38, p. 2; Keller, Tr. 167, 172, 184-85. Ms. Keller and the Mother talked about whether the Student should be referred for a special education evaluation as another way to get some help with his speech. Keller, Tr. 185, 561. Ms. Keller had not thought before that time that the Student needed to be referred for an evaluation. *Id.* at 561.

13. On December 9, 2015, the Mother emailed Ms. Rynd, stating in part:

Mrs. Keller and I agreed [the Student] is in need of help regarding his speech. I'm requesting that he gets tested for a full speech and language evaluation including sub-tests.

Exhibit P7, p.1. Ms. Rynd responded:

If you would like me to test him, I certainly can. I will send home a referral for you to fill out. When I receive it, I can take the next step. One of the questions of students in school is how speech affects academics. Also, for [kindergarten] and 1<sup>st</sup> graders some articulation errors linger, but still within average range for chronological age. By law we have to consider this. If you would like me to send you home a referral form, let me know.

*Id.* at 2.

14. On December 11, 2015, the Mother sent Ms. Rynd an email, thanking Ms. Rynd for "touching base" with her about the Student. Exhibit 7, p. 3. The Mother asked Ms. Rynd if she would send an email "explaining again what the plan is and what the testing is or what it does etc." *Id.* She stated that she was trying to explain it to her husband but he did not understand and she thought Ms. Rynd could explain it better. *Id.* The Mother mentioned that her husband's four-year-old niece was in speech therapy for her "s" sounds and that he wanted to know what steps would be followed with the Student because he believed that early intervention was crucial. *Id.*

15. On December 14, 2015, the Mother sent Ms. Rynd another email stating that she had not yet received an email about the process for the Student's "speech therapy." Exhibit 8, p. 1. She asked Ms. Rynd to send a letter directly to her husband. *Id.*

16. On December 14, 2015, Ms. Rynd sent an email to the Father, stating in part:

I realize you have some concerns about [the Student's] articulation. I mentioned to [the Mother] that if you would like me to consider testing him, the first step would be to fill out a referral form.

After I receive the referral, I will talk with his teacher regarding his academic work and speech and language. If we see a definite concern, testing may be valuable. In the public schools we have to follow the Washington guidelines for communication disorders. You mentioned that your 4 year old niece is receiving speech therapy for /s/. In the school district sound production is considered developmentally (i.e. /s/ may begin to emerge between 7 yrs. - 8 yrs. of age and considered within normal limits).

The type of testing I would do would depend on the needs expressed by you, your wife and teacher. If the child is doing well in school, language development likely is within normal limits. For a child to qualify for speech and language therapy, the child must be 2 Standard Deviations below average in speech and language development. Some of the areas that may be tested would include

articulation, expressive language, auditory processing (memory, comprehension, etc. for material presented orally).

Exhibit 8, p. 2. After summarizing some things that would need to be considered with respect to how the Student's lisp affected him, Ms. Rynd offered to answer any questions the Parents had. *Id.* She then reiterated that "the first step is the referral" and then she and the Parents may want to meet with Ms. Keller to determine whether or not testing is needed. *Id.*

17. Ms. Rynd provided the "referral form" to the Mother at the District elementary school kitchen, where the Mother works, on December 15, 2015. Exhibits P9, p. 2; P38, p. 3.

18. The document referred to as the "referral form" is entitled "Review of Referral for Special Education Evaluation." Exhibit 9, p. 2. The form states that its purpose "is to review information regarding a student who has already been referred and to make a decision whether to evaluate the student for special education services." *Id.*

19. The Mother sent the completed referral form as an attachment to an email to Ms. Rynd and Ms. Keller on December 16, 2015. Exhibit 9, p. 1. The form is dated December 17, 2015. *Id.* at 2. As the "reason for referral," the Mother checked the boxes associated with the following instructional concerns: pre-literacy skills, basic reading skills, written language skills, and communication skills. *Id.* She also checked "other" and wrote in "pronunciation" and "lisp/hesitation." *Id.* Under behavioral concerns, the Mother checked the boxes associated with attention and concentration, following directions, easily frustrated, and adaptive behavior skills. *Id.* Under "review of medical information/records," the Mother stated "Dr. removed tonsils at 3 due to extremely enlarged tonsils and adenoids. Thickness of tongue is concern for speech. [Student] wasn't able to speak until 3 ½." *Id.* Under "educational history," she wrote "Mrs. Keller suggested speech evaluation because of his inability to communicate fluently. She and I are concerned about his lisp and mispronunciation of many letters." *Id.* Under "other relevant information," the Mother wrote "same a [sic] previously listed." *Id.* There is no further explanation listed by the Mother on the form. *Id.*

20. Ms. Rynd was concerned when she saw the referral form because the Parents had previously mentioned only a speech and language evaluation but checked a number of other areas of concern on the form. Rynd, Tr. 100.

21. Ms. Rynd went to the school kitchen to talk to the Mother about it. Mother, Tr. 318. The testimony of the Mother and Ms. Rynd differ considerably about this conversation. The Mother testified to the following: Ms. Rynd was frustrated that the Mother had checked so many boxes on the referral form and said she should only check boxes related to speech and language. *Id.* at 318. The school psychologist would have to be involved if the other boxes were checked and that would be a "bad thing." *Id.* at 319. Ms. Rynd lectured the Mother about how busy she was and that she did not have time to evaluate every student. She stated that the Student would not qualify for an IEP. Exhibit P38, p. 5. Ms. Rynd gave the Mother a clean copy of the referral form and instructed her to fill out the first page again and only identify communication concerns. *Id.* Ms. Rynd told her not to date it and not to turn it in until after the winter break. *Id.* Ms. Rynd kept the second page of the form. Mother, Tr. 321.

22. In contrast, Ms. Rynd testified: She did not tell the Mother that she marked too many boxes or that she needed to resubmit the form, only that if she wanted the Student evaluated in



those areas, they would go through Mr. Burge, the principal. Rynd, Tr. 100-01. The Mother laughed and said she only wanted a speech and language evaluation. *Id.* at 102. Ms. Rynd did not tell the Parent not to date the form or to turn it in after winter break, only that she could turn it in after winter break if she wanted. *Id.* at 104-05. Ms. Rynd did not tell the Mother it would be too burdensome if every parent wanted their child comprehensively evaluated. *Id.* at 101. Because it is not necessary to the determination of the issues in this case, no finding is made about what the Mother and Ms. Rynd discussed when Ms. Rynd gave the Mother new forms to fill out.

23. Regardless of the reason, the Mother completed a new referral form, which she emailed to Ms. Rynd and Ms. Keller on January 5, 2016. Exhibits P11, P12. The referral form is dated January 6, 2016. Exhibit P12, p. 1. The Mother checked the box for communication skills as a reason for referral and also checked boxes marked "other" twice and wrote in "pronunciation" and "lisp/hesitation." *Id.*

24. The Parents also signed a form entitled "Parent Consent" dated January 6, 2016. Exhibit 12, p. 3. The Mother had received the form from Ms. Rynd when she came to the kitchen to talk about the Parents' first referral form with multiple boxes checked. Mother, Tr. 322. The form states "[w]e are requesting consent for the action checked below regarding your child, [the Student]. The attached written notice explains the action." Exhibit P12, p. 3. The form has boxes to check to provide consent for an initial evaluation, an initial placement in special education, a reevaluation, or other. *Id.* None of the boxes are checked and no prior written notice (PWN) is attached to the form. Exhibit P12, p. 3.

25. The Mother completed another referral form dated January 7, 2016. Exhibit P13, p. 2. She did this because Ms. Rynd had told her that she could not find the second page from the referral form submitted in December. Exhibit P13, p. 1. The Mother decided, on her own, to obtain a new set of referral and consent forms from the office and complete them again so Ms. Rynd would have them all together. Exhibit P13, p. 1; Mother Tr. 321.

26. The referral form dated January 7, 2016, had the same boxes checked as the reason for referral as the one dated a day earlier. Exhibits P12, p. 1; P13, p. 1. On the consent form dated January 7, 2016, the Parents checked the boxes to give consent for an initial evaluation, an initial provision of special education and related services, and a reevaluation. Exhibit 13, p. 4. There is no PWN attached to this second consent form. *Id.* Ms. Rynd considered the date of these forms, January 7, 2016, to be the referral date because the Parents "did away" with the earlier referral when they submitted the new referral form with fewer boxes checked. Rynd, Tr. 143. She considered that a withdrawal of the earlier referral. Rynd, Tr. 144.

27. Ms. Rynd decided to evaluate the Student. Rynd, Tr. 411. She completed a PWN dated January 7, 2016, stating that its purpose was to notify the Parents the District was proposing to initiate an initial evaluation on January 9, 2016. Exhibit P14. The PWN stated that the evaluation would include an articulation test, a language assessment, an auditory processing test, and an observation of fluency. *Id.* at 2. After talking with teachers and reviewing the Student's record, Ms. Rynd did not suspect that there were any other areas of suspected disability for the Student. Rynd, Tr. 453.

28. Ms. Rynd testified that she mailed the PWN to the Parents on the day it was dated, January 7, 2016. Rynd, Tr. 136. The Mother testified that she never saw it until her attorney

showed it to her in February 2016, after this case was filed. Exhibit P38, p. 8. It is found, based on the Parents' understanding that no decision had yet been made to evaluate the Student when they later filed their due process hearing request, that Ms. Rynd did not provide the PWN to the Parents.

29. There were 11 school days between December 9, 2015, when the Mother requested in an email that the Student be evaluated, and January 7, 2016, when Ms. Rynd made the decision to evaluate the Student. Exhibit P1.

30. Ms. Rynd began conducting assessments as part of the evaluation of the Student on January 14, 2016. Exhibit D30.

31. On January 28, 2016, Ms. Rynd spoke with the Mother in the hall at school about the District's new online special education forms. Exhibit P38, p. 6; Mother, Tr. 327. The Mother testified that Ms. Rynd told her that she had to make a new request online and sign additional forms. Exhibit P38, p. 6. She believed that this was further delaying the process to decide whether to evaluate the Student. *Id.* Ms. Rynd testified that she told the Parent it was only an option to fill out forms online and that the other request was still in effect with the same timelines in place. Rynd, Tr. 108. It is found that Ms. Rynd did not tell the Parent that she did not need to fill out the forms or that the timelines would remain the same. Again, if Ms. Rynd had told the Parents that she had decided to evaluate the Student and that the completion of online forms would not change that decision, the Parents would not have needed to file a due process hearing complaint soon thereafter seeking to have the Student evaluated.

32. On January 31, 2016, the Mother emailed Ms. Keller to ask if they could meet after school the next day. Exhibit P5. When they met, the Mother asked Ms. Keller if the Student seemed agitated or irritated at school because she was seeing such behaviors at home. Keller, Tr. 182, Mother, Tr. 313, 363. Ms. Keller had not seen these behaviors at school and told the Parent so. Keller, Tr. 182. The Mother did not tell Ms. Keller, as part of this conversation, that the Student was reporting to the Parents that other students were making fun of him or about problems he mentioned about the playground. Mother, Tr. 313.

33. On February 3, 2016, the Parents filed their due process hearing request in Cause No. 2016-SE-0009. The request summarized the Parents' completion of multiple referral and consent forms and stated that Ms. Rynd had informed the Mother that she needed to fill out new referral forms on January 28, 2016. *Id.* at 6. One of the remedies requested was an expedited evaluation of the Student in all areas of suspected disability. *Id.* The Parents did not know that Ms. Rynd had begun evaluating the Student before the Parents filed the request for hearing. Exhibits P37, p. 5; P38, p. 7.

34. A few days after the Parents filed their due process hearing request, Ms. Rynd told the Mother that she had completed the Student's evaluation and wanted to review it with the Mother because Ms. Rynd thought it might resolve the Parents' Complaint. Exhibit P38, p. 7. This is the first time the Parents understood that Ms. Rynd had decided to evaluate the Student. Father, Tr. 207.

35. Justin Irion, District special education director, had not been aware of the Parents' request for evaluation or been involved in the matter before the Parents filed their due process hearing request. Irion testimony. He sent the Parents a letter dated February 11, 2016, which attached

an invitation to an evaluation meeting on February 18, 2016. Exhibit P15. The letter stated that the purpose of the meeting was to review the evaluation results and determine if the Student qualified for special education services. *Id.* at 1. The letter stated that Mr. Irion understood from Ms. Rynd that the Parents did not want to attend an evaluation meeting, only a resolution meeting. *Id.* The letter stated that the District was required to hold an evaluation meeting and very much hoped that the Parents would attend. *Id.* It further stated that the District would like to receive any input the Parents wished the evaluation team to consider and asked them to call Ms. Rynd or submit written information. *Id.* Although the District had hoped to hold the evaluation meeting before the resolution meeting in case it resolved the Parents' complaint, it agreed to hold the resolution meeting first. *Id.* The District did not receive any information from the Parents in response to this letter. Irion, Tr. 477.

36. A resolution meeting was held on February 16, 2016. The Parents stated that they had requested a comprehensive evaluation and Mr. Irion responded that there was no record of that. Exhibit P38, p. 7. Mr. Irion asked the Parents to complete a new referral form if they had other areas of concern for evaluation so they could be considered. Irion, Tr. 351. He provided a blank form and suggested they fill it out together at the meeting, but the Parents declined. Mother, Tr. 351.

37. Later the same day, following the resolution meeting, Mr. Irion sent the Parents an email stating:

Thank your for meeting with us today for a resolution meeting. At the meeting you indicated you had some other areas that you would like [the Student] to be evaluated in. You began filling out a new referral form at the meeting. I understand you will complete the form and submit it to me soon. Since you have other areas that you want [the Student] evaluated in, we discussed whether we should go ahead with the evaluation meeting scheduled for Thursday, February 18, 2016, or whether we should wait in case there are other evaluations. We shared with you the likelihood that [the Student] would qualify for speech services. You indicated your desire to begin the speech services as early as possible. In this regard, we offered to hold the evaluation meeting this Thursday, February 18, 2016 and to combine it with an IEP meeting so that we could begin speech services right away. If other evaluations are conducted, we could have another evaluation meeting afterward. You and your attorney stated you wanted to think about this and would get back to us regarding your desires.

Exhibit D40.

38. The evaluation meeting took place on February 18, 2016. The District provided the Parents, for the first time, with notice of their procedural safeguards. Mother, Tr. 353; Rynd, Tr. 417. The Parents had the opportunity to participate in the meeting but did not state their concerns for the Student other than his speech, and they indicated they were still working on the referral form. Exhibit D42; Irion, Tr. 482.

39. The evaluation report presented at the evaluation meeting on February 18, 2016, was marked "draft." Exhibit 28, p.1.

40. The report identifies the effects of the disability on the Student's involvement in general education by stating that his articulation and speech nonfluencies interfere in communication with peers and with adults. Exhibit D28, p. 1.

41. Ms. Rynd administered three tests. One of them was the Photo Articulation Test, Third Edition (PAT-3). Exhibit D30. She misidentified this test twice in the evaluation report, alternately calling it the Peabody Articulation Test and the Picture Articulation Test. Exhibit D29, pp. 2, 4. The Student's standard score on the PAT-3 placed him in the mild deficit range for articulation. Exhibit D28, p. 91.

42. Ms. Rynd also administered the spoken subtests of the Illinois Test of Psycholinguistic Abilities, Third Edition (ITPA-3) to assess his understanding and expression of oral language. Exhibit D31; Rynd, Tr. 115, 140. She did not administer the written assessment subtests. *Id.* For each of the ITPA-3 subtests administered, the Student's scores were within the average range. Exhibit D28, p.2. The evaluation report misidentified several of the Student's composite scores. *Id.* The report listed three areas of composite scores: grammar, phonology, and comprehension, and provided the standard score, percentile, and description, which was "average," for each. *Id.* However, the information listed was really associated with the semantic, grammar, and phonology composite scores respectively. *Id.*; Exhibit P31, p. 2; Rynd, Tr. 423, 425. Ms. Rynd did not realize she had made this mistake until after the evaluation team meeting. Rynd, Tr. 423. She handwrote changes on the evaluation report and gave a copy to the Parents later. *Id.* at 425. Because the scores were all the same, the errors did not impact the results of the evaluation or the team's eligibility decision. *Id.* at 426. Additionally, the evaluation report stated that the grammar score was "average," but it should have said "low average." *Id.* at 426. This change was not made on the report. Exhibit P31, p. 2.

43. The third test Ms. Rynd administered was the Test of Auditory Processing Skills, Third Edition (TAPS-3). Exhibit D29. The test includes an auditory figure-ground subtest, which is identified as being "optional." *Id.* at p. 4. Its purpose is to assess whether the subject has sufficient attentional and hearing capacity to perform the tasks for the TAPS-3 subtests. *Id.* The test instructions state that a student experiencing difficulty with the subtest should be examined further for attention and/or hearing problems. *Id.* Ms. Rynd did not perform this subtest, but administered the rest of the test in its entirety. Rynd, Tr. 440.

44. Ms. Rynd gave part of the test before the Student went to lunch and part of it after. Rynd, Tr. 455, 854. She did not note this on the score sheet or in the evaluation report. Exhibits D28, D29. The test instructions do not require that the subtests be given all at once or that any failure to do so be noted. Exhibit P29.

45. The instructions for the TAPS-3 states that responses should be recorded exactly as instructed so all the scoring will be accurate. Exhibit D29, p. 4. It noted this was particularly important for certain subtests, including subtest four, which use multi-point scoring. *Id.* Subtest four shows how well a student can retain simple sequences of auditory information. *Id.* at 10. The evaluator reads a series of numbers, which the student is to repeat back in the same order. *Id.* The test instructions say to "write each number as the student responds, whether it is correct or not." *Id.* Ms. Rynd did not do this and instead had her own system for recording the Student's responses. *Id.*; Rynd testimony. If the Student repeated the numbers back in the proper order, she did not record his response and gave him two points, the score for a response with no errors. Exhibit D29, p. 10; Rynd testimony. If the Student repeated the correct numbers,

but in the wrong order, she put a line between the reversed numbers and gave him one point, the score for correctly repeating the correct numbers but in the wrong order. Exhibit D29, p. 10. If the Student was not entitled to a score, she was inconsistent about whether or how she recorded his answer and whether she entered a 0 for the points and/or put a slash through the item number. Exhibit D29, p. 10.

46. Ms. Rynd noted in the TAPS-3 test booklet that the Student was "rather distracted" and wanted to talk about his activities throughout the test. Exhibit D29, p. 25. She noted that she needed to give him a cue to get him back on track. *Id.* Ms. Rynd noted in the evaluation report that the Student wanted to share about the context of text items rather than listening to the test item and answering the question. Exhibit D28, p. 4. Although Ms. Rynd noted this information, she did not believe it was an indication that the Student had attention issues as he would answer a question, share something, and then come back on task immediately. Rynd, Tr. 140.

47. The Student's subtest and composite scores on the TAPS-3 were all in the average range except that his score for the phonological blending subtest was in the high average range and his scores in number memory forward and number memory reversed subtests were each in the low average range. Exhibit D28, p.3. His global score was in the average range. *Id.*

48. The evaluation report included a summary of Ms. Rynd's conclusions from observing the Student. Exhibit D28, p. 4. Ms. Rynd did not conduct a physical examination of the Student's mouth and tongue as part of the evaluation. Rynd, Tr. 116.

49. The report contained a validity statement, which included a statement that all testing was conducted "in accordance with WAC 392-151-351." Exhibit D28, p. 3. The cited portion of the Washington Administrative Code (WAC) does not exist, and Chapter 392-151 of the WAC addresses traffic safety, not special education.

50. The evaluation summary states in part that "[w]hile [the Student] does not meet standard criteria for eligibility since his assessment scores and academic performances do not indicate a significant adverse educational impact, it is, non the less, [sic] the team's decision that [the Student] should qualify for speech and language services on the basis of professional judgment in order to assist with his communication skills." Exhibit D28, p. 2.

51. The evaluation report identified the Student's "handicapping condition" as "communication disorders." Exhibit D28, p.1. The report states that for "Communication Disorder Category a student meets the eligibility criteria for Communication Disordered if there is present a documented communication disorder such as stuttering, voice disorder, language impairment, and/or impaired articulation, which adversely affects a student's educational performance." *Id.* These terms are not currently used in the Washington Administrative Code. Instead, students are found to be eligible for special education if they have a "disability" in one of several "eligibility categories," rather than a "handicapping condition." See WAC 302-172A-01035(1). The relevant eligibility category is "speech or language impairment," not "communication disorder, although that term is used within the definition of a speech or language impairment. See WAC 392-172A-01035.

52. The evaluation report does not include any recommended special education and related services needed by the Student. Exhibit D28, p. 1. The report contains the signatures, title, and date of the persons attending the meeting. Exhibit D28, p. 4. They signed the copy that had

been marked "draft" before the meeting. Exhibit 28, p. 1. There is no certification in the report of each professional member of the group stating that the report represents his or her conclusion. *Id.*

53. The Student met standards in every area assessed on his grade report for the first two terms of his first grade year except for two. Exhibit D4. For the first term, he was below standard for master of first-grade Fry words and approaching standard for demonstrating conventions for standard 'English grammar and usage. *Id.* By the second term, he was meeting standards in these areas as well. *Id.* The Student's performance on easyCBM benchmark assessments identified him as being at "low risk" in all areas. Exhibits P5, P6; Keller, Tr. 574.

54. Ms. Keller observed that the Student did well academically. Keller, Tr. 562. He was in the second highest of four reading groups in her class. *Id.* at 571-2.

55. Ms. Keller observed that the Student got along fine socially as well. *Id.* at 562. She observed that, whatever the class was doing, he was "right there in the middle with everything." *Id.* He volunteered in class and did fine working in groups. *Id.* at 562. She observed that he was not below adequate classroom performance as far as the speed of his work. *Id.* at 630-31.

56. Ms. Keller observed that the Student's handwriting was probably the best in the class and that he did fine with scissors and art projects. *Id.* at 566. He was able to move within the classroom without bumping into things, falling, or losing his balance. *Id.* at 567.

57. Ms. Keller observed that the Student was accepted by his peers. *Id.* at 568. She did not observe that the Student's classmates expressed concerns about his speech or made fun of him. *Id.* at 180-81, 568. Neither the Student nor the Mother reported to Ms. Keller the Student being bullied or teased by his classmates. *Id.* at 180-81, 186.

58. Ms. Keller did not observe that the Student was easily frustrated, impulsive, or distracted, or that he had difficulty with organization. *Id.* at 181, 576-78.

59. Likewise, neither the Student's PE teacher nor a para-educator who monitored recess observed the Student to have coordination problems. Myers, 683, 686-87, 689; Morford, Tr. 716-17. The PE teacher observed him to be an "average first grader." Myers, Tr. 683. Nor did they observe him being bullied or teased or receive reports from him about such behavior. Myers, Tr. 696-97; Morford, Tr. 721-23. Nor did the PE teacher believe the Student demonstrated any signs of having attention problems. Myers, Tr. 692.

60. Based on the District's observations of the Student's performance and behavior at school, the District had no reason to suspect the Student had disabilities in areas other than speech and language prior to and during the evaluation.

61. The Parents have a number of concerns about the Student based on their observations of him outside of school and the Student's reports to them about what happens at school. They observe that he is uncoordinated, physically awkward, and clumsy; runs awkwardly compared to his peers; trips and falls; and has difficulty dribbling and catching balls and kicking and running at the same time. Exhibits P37, p. 2; P48, p. 4. They observe that he has difficulty holding a pencil or using scissors correctly as well as buttoning clothing, tying shoes, and brushing his

hair and teeth. *Id.* They observe that he writes slowly and cannot do work at “normal speed.” Exhibit P38, p.4. They observe he loses his train of thought mid-sentence and is easily distracted. *Id.* The Parents observe that the Student has poor coping skills and is impatient and poorly organized. *Id.* Other than checking boxes for multiple testing areas on the December 2015 referral form and the Mother questioning Ms. Keller about whether the Student was anxious or frustrated at school, there is no evidence that the Parents shared these concerns with the District before or during the Student’s evaluation.

62. The Student has reported to the Parents that he is “bullied” at school and that other students tease him about how he speaks and for being slow and uncoordinated. Exhibit P37, pp. 2-3; Father, Tr. 193. He shared that he had told the teacher and the other students got in trouble, but the bullying continued. Father, Tr. 193. The Student has also reported to private evaluators that he is bullied daily at school. Exhibits P23, p. 6; P34, p.5. Because all of the evidence in the record about the Student being bullied and reporting it to the teacher is hearsay not corroborated by other evidence, no finding can be made that the Student was bullied or reported bullying to the teacher. See RCW 34.05.461 (findings may not be based exclusively on hearsay unless doing so would not unduly abridge the parties’ opportunities to confront witnesses and rebut evidence). There is no evidence that the Parents reported the bullying to the District before or during the evaluation.

63. There were 28 school days between January 6, 2016, when the Parents first provided consent for an evaluation and the evaluation meeting on February 18, 2016. Exhibit P1.

64. The Parents wrote Mr. Irion a letter dated February 17, 2016, which was hand-delivered to him on February 19, 2016, a day after the evaluation meeting. Exhibit P21; Irion, Tr. 299. The Parents summarized a number of their concerns about what took place at the earlier resolution meeting and asked several questions about the District’s policies and positions. Exhibit P21. They stated that they had requested Ms. Rynd’s evaluation be reviewed by a private SLP at public expense. *Id.* at 4. Additionally, they stated that they believed the Student deserved an evaluation in “every area of suspected need” and that they anticipated that a “thorough evaluation” would show he had needs in addition to speech. *Id.* They did not identify the suspected areas of need. *Id.*

65. On February 22, 2016, the Mother took the Student to see his primary care provider, Dr. Victoria Fox-Behrle. Mother, Tr. 330. The Mother reported to Dr. Fox-Behrle that the Student did not qualify for speech therapy but would be working with the speech therapist on exercises. Exhibit P23, p. 1. The Parent further reported to the doctor that she had concerns for apraxia of speech as well as the Student’s difficulty with fine motor skills, lack of coordination, anger and frustration issues, and teasing and bullying at school. Exhibit P23, p. 1. Dr. Fox-Behrle determined that childhood apraxia of speech was the most likely cause of the Student’s speech difficulties. Exhibit P23, p.1. She completed a special education referral form in motor skills and speech/language. Exhibit P23, p. 1. Dr. Fox-Behrle also recommended the Parents make an appointment for the Student with the clinic’s behavioral health consultant to learn anger management skills and also referred him to a speech pathologist to assist with the diagnosis of apraxia. Exhibit P23, p.2; Fox-Behrle, Tr. 377, 392.

66. The Mother delivered Dr. Fox-Behrle’s special education referral to Mr. Irion on February 24, 2016. Exhibit P38, p. 10.

67. On February 24, 2016, Mr. Irion sent the Parents a copy of the evaluation report that was signed at the evaluation meeting. Exhibit 25. He noted that it was the final report even though the word "draft" had not been removed from the top. Exhibit 25, p.1.

68. On February 29, 2016, the District filed a due process hearing request in response to the request in the Parents' letter dated February 19, 2016, that the Student be evaluated by someone outside the District. Exhibit P38, p. 10.

69. On March 1, 2016, Mr. Irion sent the Parents a PWN informing the Parents it had received a special education referral for the Student for motor skills and speech/language and stating that the District would decide whether or not to evaluate the Student within 25 school days. Exhibit D47.

70. On March 8, 2016, the District withdrew its request for a due process hearing. Exhibit P38, p. 10.

71. On March 9, 2016, the Parents sent the District a letter requesting that it reimburse them for an independent educational evaluation (IEE) by Dr. Wendy Marlowe. Exhibit P38, p. 10. The District filed its Second Complaint, requesting a due process hearing, the same day.

72. Between March 10 and 17, 2016, the District's occupational therapist, Kristin Leslie, observed the Student on three different days in three different settings to assist the District in determining whether to evaluate the Student. Exhibit D58, p.1; Leslie, Tr. 666. Ms. Leslie observed the Student coloring, writing, and picking up a pencil in the classroom; playing with other students on a play structure, running and kicking a soccer ball, and standing on one foot at recess, and galloping, skipping, and hopping on one foot during PE. *Id.* at 668-673.

73. A meeting was held on March 22, 2016, to determine whether to evaluate the Student based on the referral made by Dr. Fox-Behrle. Exhibit D51. The Parents were invited to attend but chose not to. Exhibit D50. The team determined not to further evaluate the Student in speech because it had already determined he was eligible for special education in that area. Exhibit D51. The team also determined it would not evaluate the student in occupational therapy because Ms. Leslie had observed him in the classroom, at PE, and at recess and spoken to his PE teacher, and determined that his fine and gross motor abilities were appropriate for his age and not impacting him in the classroom. Exhibit D51.

74. The Parents' attorney referred the Student for a comprehensive neuropsychological evaluation by Dr. Wendy Marlowe. Exhibit P34, p.1. She conducted a number of assessments on March 18 and 19, 2016. Exhibit P34. Her diagnostic impressions included Attention Deficit Hyperactivity Disorder (ADHD) combined, disorders of executive functions, dyspraxia of speech and motor functions, receptive-expressive language disorder, and adjustment disorder with mixed anxiety and depression. Exhibit D34, p. 15.

75. The cost of Dr. Marlowe's evaluation was \$4,500. Mother, Tr. 926. There is no breakdown as to what portion of the cost was associated with the speech and language testing. It is estimated, based on a review of Dr. Marlowe's evaluation report, that the speech and language testing constituted approximately 20 percent of her evaluation. See Exhibit P34. Accordingly, it is determined that the cost of the speech and language portion of the evaluation was \$900.00.



76. The Student was also evaluated by Sara Weiss, speech-language pathologist at the Yakima Valley Hearing & Speech Center, at the referral of Dr. Fox-Behrle. Exhibit P36. The evaluation took place on March 31, 2016. Ms. Weiss's diagnostic impressions were childhood apraxia of speech, other speech disturbance, and mixed receptive and expressive language disorder. Exhibit P36, p. 4.

77. At some point after March 30, 2016, an IEP meeting was held, and the Parents attended. Exhibit D54; Rynd, Tr. 436. Although an IEP was developed for speech and language services, the Parents did not give consent for the District to provide the services. Mother, Tr. 353, 366.

78. On April 19, 2016, Mr. Irion wrote to the Parents, confirming that the District had received Dr. Marlowe's report. Exhibit D56, p. 2. He asked for times the Parents were available to meet to discuss Dr. Marlowe's report and its impact on the need for additional District assessments or amendment to the Student's IEP. *Id.* He also mentioned that the Student could see the school counselor about the anger and concerns about bullying addressed in Dr. Marlowe's report. *Id.*

79. Ms. Rynd earned a master's degree in speech pathology and audiology in 1972. Exhibit 30, p. 3. She has worked as a speech pathologist for the District since 2002. *Id.* She holds educational staff associate (ESA) certification from OSPI to provide SLP services in schools. Rynd, Tr. 37, 141-42. She is not otherwise "licensed" to provide SLP services by the state. *Id.* at 35.

80. Ms. Rynd provides SLP services to the District under a service contract. Exhibit P30, pp. 7-8; Rynd, Tr. 47, 49. The contract states that Ms. Rynd is "licensed by the state of Washington to provide speech therapy services" and that her failure to remain licensed would be cause to terminate the contract. Exhibit P30, p. 7. Both Kevin McKay, District superintendent, and Ms. Rynd understood that the "licensing" required by the contract is ESA certification from OSPI. Rynd, 51-51; McKay, Tr. 701-02.

## 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. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As both parties seek relief in this case, they each have the burden of proof with respect to the issues raised in their respective Complaints. Thus, the District bears the burden of proof with respect to the appropriateness of its evaluation and the Parents bear the burden of proof for all other issues.

## The IDEA

3. 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 *Board of Education of Hendrick Hudson Central School District 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.

*Id.* at 206-207 (footnotes omitted).

4. A "free appropriate public education" 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" [FAPE] as defined by the Act.

*Id.* at 188-189.

5. A district is not required to provide a "potential-maximizing" education" in order to provide FAPE, but only a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01. A district must provide a student with a "meaningful benefit" in order to satisfy the FAPE requirement. *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9<sup>th</sup> Cir. 2014).

## Child Find/Evaluation

6. Under its "child find" duty, a district must conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating and identifying students in need of special education and related services. WAC 392-172A-02040(1). See also 34 CFR § 300.111.

7. Separate from the District's child find obligation, a parent, district, or other person may initiate a request for an initial evaluation to determine if a student is eligible for special education. WAC 392-172A-03005; See also 34 CFR 300.301(b). The request must be in writing unless the person is unable to write. WAC 392-172A-03005.

8. A district must make a determination whether or not to evaluate the student within 25 school days after receiving the request. WAC 392-172A-03005. If the district determines that it will evaluate the student, it must evaluate the student and arrive at a decision within 35 school days after parents provide written consent for the evaluation. WAC 392-172A-03005(3).

9. The District is also required to follow the requirements for evaluations set forth in WAC 392-172A-03020, which provides:

**Evaluation procedures.**

- (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.

See also 34 CFR 300.304.

10. The District is also required to follow the requirements for evaluations set forth in WAC 392-172A-03025, which provides:

**Review of existing data for evaluations and reevaluations.**

As part of an initial evaluation, if appropriate, and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, must:

(1) Review existing evaluation data on the student, including:

(a) Evaluations and information provided by the parents of the student;

(b) Current classroom-based, local, or state assessments, and classroom-based observations; and

(c) Observations by teachers and related services providers.

(2)(a) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(i) Whether the student is eligible for special education services, and what special education and related services the student needs; or

(ii) In case of a reevaluation, whether the student continues to meet eligibility, and whether the educational needs of the student including any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum; and

(b) The present levels of academic achievement and related developmental needs of the student.

(3) The group described in this section may conduct its review without a meeting.

(4) The school district must administer such assessments and other evaluation measures as may be needed to produce the data identified in subsection (1) of this section.

(5)(a) If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be a student eligible for special education services, and to determine the student's educational needs, the school district must notify the student's parents of:

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the student continues to be a student eligible for special education, and to determine the student's educational needs.

(b) The school district is not required to conduct the assessment described in this subsection (5) unless requested to do so by the student's parents

*See also* 34 CFR 300.305.

11. Likewise, the District is required to follow the requirements for evaluation reports set forth in WAC 392-172A-03035, which provides:

**Evaluation report.**

(1) The evaluation report shall be sufficient in scope to develop an IEP, and at a minimum, must include:

- (a) A statement of whether the student has a disability that meets the eligibility criteria in this chapter;
  - (b) A discussion of the assessments and review of data that supports the conclusion regarding eligibility including additional information required under WAC 392-172A-03080 for students with specific learning disabilities;
  - (c) How the student's disability affects the student's involvement and progress in the general education curriculum or for preschool children, in appropriate activities;
  - (d) The recommended special education and related services needed by the student;
  - (e) Other information, as determined through the evaluation process and parental input, needed to develop an IEP;
  - (f) The date and signature of each professional member of the group certifying that the evaluation report represents his or her conclusion. If the evaluation report does not reflect his or her conclusion, the professional member of the group must include a separate statement representing his or her conclusions.
- (2) Individuals contributing to the report must document the results of their individual assessments or observations.

### *Timing*

12. In order to decide whether the District timely complied with referrals to evaluate the Student, it must first be determined when referrals were made.

13. Because Ms. Keller's identification of the Student to Ms. Rynd in October 2015 as a student who had speech issues was not intended as a special education referral, it did not trigger the timeline for determining whether to evaluate the Student.

14. The Parents' emailed request for an evaluation on December 9, 2015, was a referral for special education. A referral need not be on a particular form and need not include information about the particular areas the referring party believes should be evaluated. See WAC 392-172A-03005(1). Moreover, the District's own referral form states that its purpose was to review information about a student who had already been referred for special education, meaning that it was never intended as being required for a valid referral. Thus, the Parents' request on December 9, 2015, triggered the District's obligation to gather information, including from the Parent, and determine, within 25 school days, whether or not to evaluate the Student. See WAC 392-172A-03005(2).

15. The District made its decision to evaluate the Student within 25 school days of the Parents' request on December 9, 2015. Additionally, the District timely completed its evaluation within 35 school days of obtaining the Parents' consent. Accordingly, the Parents have not proven a violation with respect to the timing of the decision to evaluate the Student or the evaluation itself.

*Child find obligation during period before referral*

16. The District did not violate its child find obligation by not making a referral earlier during the Student's first-grade year than the Parent's referral of December 9, 2015. Ms. Keller and the Student's classmates could understand his speech, and Ms. Rynd believed that the Student may only need stimulus lessons, rather than a referral for special education. As the District did not have other concerns about the Student, the Parents have not, under these facts, proven a violation of the child find obligation with respect identifying the Student as needing to be evaluated prior to the Parent's request.

*Informed consent*

17. A district proposing to conduct an initial evaluation to determine if a student is eligible for special education services must obtain informed consent from the student's parents. WAC 392-172A-03000; 34 CFR 300.300(a)(1)(i). Consent means that 1) the parent has been fully informed of all information relevant to the activity for which consent is sought, 2) the parent understands and agrees in writing to the carrying out of the activity and the consent describes the activity, and the parent understands that the consent is voluntary and can be revoked at any time. WAC 391-172A-1040(1); 34 CFR 300.0(a) - (c).

18. Because the stimulus group was not a special education activity, the IDEA informed consent rules do not apply. Accordingly, there is no IDEA violation with respect to the District's permission slip for the stimulus group.

19. Neither of the consent forms completed by the Parents in January 2016 constitute informed consent. The forms do not describe the proposed evaluations and do not even make clear that it is an initial evaluation that is at issue. The form dated January 6, 2016, does not have any box checked with respect to what activity the District proposes and the form dated January 7, 2016, in contrast, has every box checked - for an initial evaluation, a reevaluation, and the initial provision of services. The forms state that a PWN must be attached, but no PWN had been provided to the Parents let alone attached to the forms when they signed them. The Parents have proven a procedural violation with respect to the failure to obtain informed consent before evaluating the Student. Whether this procedural violation constitutes a denial of FAPE will be discussed below.

20. The Parents argue that an observation of the Student in April 2016 was done without their consent. Because the alleged event took place after the filing of the Parents' Complaint and the Complaint was not amended to include it, this argument is not considered.

*Failing to evaluate in all areas of suspected disability*

21. When conducting evaluations, districts must ensure that a child is assessed in "all areas related to the suspected disability." WAC 392-172A-03020(3)(e); 34 § CFR 300.304(c)(4). But a district need not evaluate in areas in which it does not suspect a disability. See, e.g., *Razzaghi v. Dist. of Columbia*, 44 IDELR 271 (D.D.C. 2005); *Moses Lake Sch. Dist.*, 109 LRP 26490 (2008). An evaluation must also be "sufficiently comprehensive" to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified. WAC 392-172A-03020(g); 34 CFR § 300.304(c)(6).

22. Based on the Student's performance and behavior at school, the District did not suspect any areas of disability other than speech and language for the Student. But the District is obligated to consider parental input in determining whether to evaluate a student and in what areas as well. WAC 392-172A-03005(2). Thus, when the Parents checked the boxes about areas other than speech on the December 2015 referral form, Ms. Rynd should have followed up to learn about their concerns in those areas, regardless of whether the Mother told Ms. Rynd she was only asking for an evaluation in speech, in order to determine whether there were additional areas of suspected disability that should be evaluated. The failure to consider this information is a procedural violation of the IDEA.

23. Procedural violations of the IDEA amount to a denial of FAPE only if they 1) impeded the child's right to a free appropriate public education, 2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child, or 3) caused a deprivation of educational benefits. WAC 392-172A-05105(2); 20 USC §1415(f)(3)(E)(ii).

24. The District's failure to consider the areas of concern raised by the Parents could have significantly impeded their right to participate in the decision making process with respect to the evaluation. However, once they filed their due process hearing request and Mr. Irion became involved, he expressly asked them to identify the other areas the Parents believed the Student should be evaluated in and offered to postpone the evaluation meeting in the event additional evaluations were conducted. And he asked them, prior to the evaluation meeting, to provide any information they wanted the evaluation team to consider. Thus, it was the Parents' choice not to provide the requested information to the District that prevented their views from being considered. Accordingly, the Parents have not proven a violation of FAPE with respect to Ms. Rynd's failure to consider the information they provided in the December referral form or to evaluate in those areas.

#### *Appropriateness of the evaluation*

25. The Parents argue that the District's evaluation of the Student was not appropriate because Ms. Rynd was in violation of the licensing requirements contained in her agreement with the District. Ms. Rynd has the certification OSPI requires for SLPs. Her compliance with her agreement with the District is a matter between the District and Ms. Rynd and is not relevant to the question of whether the evaluation was appropriate.

26. The evaluation report contains a number of errors demonstrating a lack of attention to detail, including the failure to use the current eligibility category to identify the Student's disability. See WAC 392-172A-01035(a)(1)(a). And Ms. Rynd failed to follow the testing protocols with respect to at least one subtest. More importantly, however, the evaluation report fails to comply with the IDEA requirements in two significant ways. First, the evaluation report must contain a statement of whether the student has a disability "that meets the eligibility criteria in this chapter." WAC 392-172A-03035. The evaluation report specifically states that the Student did not meet eligibility criteria but was found eligible anyway based on "professional judgment." The evaluation rules allow districts to use professional judgment in two specific circumstances that do not apply here – when determining whether a student has specific learning disability and when properly validated tests are unavailable. See WAC 392-172A-03070(2); 382-172A-03020(3)(a)(iii). The rules do not otherwise allow for the use of



professional judgment to override eligibility criteria in other circumstances. Second, the evaluation report does not include the recommended special education and related services needed by the Student. See WAC 392-172A-03035(d). Because of these critical failures, the District has not proven that its speech and language evaluation of the Student was appropriate.

27. As discussed above, the District must evaluate a student in all areas of suspected disability. As also discussed above, the Parents elected not to provide information about their concerns for the Student beyond speech and language when requested by the District while the evaluation was still in progress. And the District did not suspect other areas of disability based on the Student's performance and behavior at school. Accordingly, the District's failure to evaluate the Student in other areas was not inappropriate.

#### Prior Written Notice

28. A district must provide prior written notice (PWN) to the parents of a child eligible or referred for special education a reasonable time before it proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student 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; 34 CFR 300.503(a).

29. Because the communication between Ms. Rynd and Ms. Keller in October 2015 was not a referral for special education, the District was not obligated to make a determination of whether to initiate an evaluation and, therefore, no PWN was required.

30. The Parents should have received a PWN when Ms. Rynd decided on January 7, 2016, to evaluate the Student. The failure to provide the notice to the Parents was a procedural violation. The effect of this procedural violation will be discussed below. Because it is determined that the Parents failed to receive the PWN, the Parents' arguments that the form Ms. Rynd completed was outdated and inappropriate are not separately considered.

#### Parents' Participation

31. 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).

32. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48

IDELR 31 (9th Cir. 2007). By extension, this applies to the meaningful participation in the evaluation process.

#### *Procedural safeguards*

33. School districts must provide a copy of a notice of procedural safeguards once per school year and also 1) upon initial referral or parent request for evaluation; 2) upon receipt of the first state complaint and receipt of the first due process complaint in a school year; 3) when a decision is made to remove a student for more than ten school days in a year and that removal constitutes a change of placement; and 4) upon request by a parent. WAC 392-172A-05015(1); 34 CFR 300.504(a).

34. The Parents should have received a notice of procedural safeguards when they requested an evaluation on December 9, 2015. They did not receive it until the evaluation team meeting on February 18, 2016. Accordingly, they have proven a procedural violation of the IDEA. The effect of this violation will be discussed below.

#### *Ignoring information the Parents shared in December*

21. As set forth above, Ms. Rynd should have considered the concerns raised by the Parents in the December 2015 referral form but this procedural violation does not constitute a denial of FAPE because the Parents failed to provide the information later when requested while the evaluation was still ongoing.

#### Predetermination of Eligibility

35. As set forth above, parents are entitled to meaningful participation with respect to the identification, evaluation, and educational placement of their child. A district violates this procedural requirement if it predetermines a student's placement, meaning that it "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003). Likewise, a district "may not enter an IEP meeting with a 'take-it-or-leave-it' approach." *Id.* However, preparation by a district prior to an IEP meeting, including developing a draft IEP, does not itself establish predetermination. *Lee's Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012). The Parents argue that the District here predetermined the Student eligibility. It is not necessary to decide whether there is a violation of the IDEA when a district predetermines a Student's eligibility, as opposed to his placement, under the facts of this case.

36. The Parents argue that Ms. Rynd predetermined in October 2015 that the Student would not qualify for an IEP. No referral for a special education evaluation had been made at that time so there was no IDEA decision to be made that required the Parents' participation and, therefore, no opportunity for Ms. Rynd or the District to predetermine the Student's eligibility for special education or an IEP.

37. The Parents also argue that Ms. Rynd convinced the Parents that a comprehensive evaluation would be a waste of time, assured them it was common for children the Student's age to have lingering articulation issues, and made them complete multiple referral forms to delay the process and that these acts also constituted a predetermination of eligibility. None of

these alleged acts constitute predetermination because they are not the District's determination of whether the Student qualified for special education.

38. The determination of eligibility was made at an evaluation meeting to which the District encouraged the Parents to come, although they had stated they did not want to. Additionally, the District specifically invited the Parents to submit information they wished the District to consider before the meeting. Most importantly, the District determined that the Student was eligible for special education. The Parents have not met their burden of proving that the District predetermined the Student's eligibility.

#### Effect of Procedural Violations

39. As set forth above, procedural violations of the IDEA amount to a denial of FAPE only if they 1) impeded the child's right to a free appropriate public education, 2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child, or 3) caused a deprivation of educational benefits. WAC 392-172A-05105(2); 20 USC §1415(f)(3)(E)(ii).

40. The failure to provide the Parents with their procedural safeguards, prior written notice, and informed consent, especially in combination, prevented the Parents from understanding what actions the District was taking and their rights related to those actions. Therefore, the violations significantly impeded their right to participate in the decision-making process. Accordingly, these procedural violations of the IDEA constituted a denial of FAPE.

#### REMEDIES

##### Reimbursement for IEE

41. Parents have a right to obtain an IEE if they disagree with the school district's evaluation under certain circumstances. WAC 392-172A-05005(1); 34 CFR 300.502(a)(1). An IEE is an evaluation conducted by a qualified examiner who is not employed by the school district at district expense. WAC 392-172A-05005(c)(i); 34 CFR 300.502(b). If a parent requests an IEE, a district must either ensure that an IEE is provided at public expense without unnecessary delay or initiate a due process hearing within 15 days to show that its evaluation is appropriate. WAC 392-172A-05005(c).

42. Because the District did not meet its burden of proving its evaluation was appropriate, the Parents are entitled to an IEE at public expense. They are only entitled to an IEE with respect to speech and language because the District's failure to evaluate the Student in other areas was not inappropriate given the Parents' failure to provide requested information. Thus, the Parents are only entitled to reimbursement for the speech and language portion of Dr. Marlowe's evaluation, which was found above to be \$900. The District shall reimburse the Parents for this amount within 60 days of the Parents producing proof of the cost of Dr. Marlowe's evaluation. If the actual cost for Dr. Marlowe's evaluation is less than \$4,500, the District shall pay 20 percent of the actual amount. No adjustment is to be made to the reimbursement amount if the actual cost is higher than \$4,500.

43. The District argues that it should not be required to reimburse the Parents for Dr. Marlowe's evaluation because it is not appropriate. The only limitation on a district's obligation

to pay for an IEE set forth in the rules is that the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, be the same as the criteria the school district uses when it initiates an evaluation. The District has not argued that Dr. Marlowe does not meet that criteria.

44. The Parents' request for reimbursement for travel expenses for the IEE is denied as they have not demonstrated a necessity to travel outside their geographic area to obtain a speech and language evaluation or explained why the speech and language IEE could not have been conducted by Ms. Weiss. The Student's doctor referred him to Ms. Weiss for a speech and language evaluation and her Yakima location would not have required travel.

#### Compensatory Education

##### *Compensatory education*

45. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is a remedy intended to place a student in the position the student would have occupied if a school district had honored its duty to provide FAPE, and it must be based on a determination of each student's individual needs. It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case.

46. The Parents request 100 minutes per week of SLP services as compensatory education. This request is denied. The District conducted an SLP evaluation that was timely completed after the Parents' request for evaluation on December 9, 2015. The District determined that the Student was eligible for special education and offered an IEP that included SLP services. The Parents declined to allow the District to provide special education services under the IEP and have not here challenged the services offered. Accordingly, there is no District failure to provide SLP services to be remedied by compensatory education.

47. The Parents also requested compensatory services in executive functioning and private counseling to help the Student deal with school-related anxiety. As discussed above, there was no reason for the District to suspect that the Student had disabilities in these areas at the time the evaluation was conducted. Accordingly, these requests are also denied.

#### Other requested remedies

48. The Parents request that an SLP provider outside the District who is trained in the evidence-based techniques proven effective for treating apraxia provide the Student's SLP services. They also request that Dr. Marlowe participate in the IEP meeting to develop the Student's IEP for the 2016-2017 school year at District expense. These requests are denied. Decisions about staffing are generally within a district's discretion. There is no evidence that Ms. Rynd lacks the training necessary to treat apraxia or is otherwise unqualified to provide the Student's SLP services. Nor is there evidence that the District cannot convene an IEP team with appropriate qualifications to develop the Student's IEP.

## Training

49. The District's procedural violations and District staff testimony demonstrate a lack of understanding of the District's obligations in the evaluation referral process. As a remedy for the procedural violations, the District shall provide staff training. The District shall provide training for all District staff with responsibility for responding to referrals for evaluations and for conducting evaluations at Hilton Elementary School to include the District's director of special education, the principal, and any school psychologist, speech language pathologist, occupational therapist, or other staff who may be called upon to determine whether a referral for special education evaluation should be conducted or to conduct a special education evaluation. This training shall be no less than two hours in duration and include, at a minimum, the District's obligations under WAC 392-172A-03005 as well as the District's obligations with respect to providing notice of procedural safeguards and obtaining informed consent. The District shall also provide training to every general education teacher at Hilton Elementary School. This training shall be no less than 20 minutes and shall include, at a minimum, a teacher's role with respect to identifying students in need of referral for a special education evaluation and with respect to a request by a parent or other person for a special education evaluation or reevaluation directed to a teacher.

50. These trainings shall be provided no later than 90 days after the date of this order and may be offered in conjunction with other District trainings, including staff training at the beginning of the school year. The training shall be provided by an individual with the education, training, and experience to provide such training. The District shall document the attendance of District staff at the training.

## ORDER

1. The District violated the IDEA and denied the Student FAPE by failing to provide the Parents with notice of their procedural safeguards, prior written notice of the decision to evaluate the Student, and informed consent about the evaluation.
2. The District's speech and language evaluation of the Student was not appropriate.
3. The Parents are entitled to an IEE with respect to speech and language. The District shall reimburse the Parents for the speech and language portion of Dr. Marlowe's evaluation as set forth above.
4. The District shall provide training for District staff as set forth above.

Signed at Seattle, Washington on July 2, 2016.



Anne Senter  
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.



Parents



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cc: Administrative Resource Services, OSPI  
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator