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(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov

July 14, 2017

Parent
[REDACTED]

Cristin Blaskowitz, Director of Special Services
Eatonville School District
200 Lynch St W / PO Box 698
Eatonville, WA 98328-0698

William A. Coats, Attorney at Law
Erin Sullivan-Byorick, Attorney at Law
Vandeberg Johnson & Gandara
PO Box 1315
Tacoma, WA 98401-3791

In re: Eatonville School District
OSPI Cause No. 2017-SE-0024
OAH Docket No. 03-2017-OSPI-00254

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,

A handwritten signature in cursive script, appearing to read "Matthew D. Wacker".

Matthew D. Wacker
Administrative Law Judge

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

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JUL 14 2017

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION **SEATTLE-OAH**

IN THE MATTER OF:

EATONVILLE SCHOOL DISTRICT

OSPI CAUSE NO. 2017-SE-0024

OAH DOCKET NO. 03-2017-OSPI-00254

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

A hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Eatonville, Washington, over three days on May 15-17, 2017. The Parent of the Student whose education is at issue¹ appeared and represented herself. The Parent was accompanied and advised by Helen Caldart. The Eatonville School District (the District) was represented by William Coats and Erin Sullivan-Byorick, attorneys at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) on March 1, 2017. Prehearing conferences were held on April 10 and May 5, 2017. A Prehearing Order was entered on April 14, 2017.

The District's Stipulation

One of the issues for the due process hearing is whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate education (FAPE) because it did not find the Student eligible for special education. See April 14, 2017 Prehearing Order, p. 3. At the due process hearing, the District stipulated that the Student meets two of the three elements required to be eligible for special education. First, the District stipulated that the Student has a qualifying disability – autism. Second, the District stipulated that the Student's autism has an adverse impact on the Student's education. See also District Post Hearing Brief, p. 11, Section III; Testimony of Blaskowitz, Tr. 340.² Therefore, the only element still at issue is whether, because of the adverse impact on his education, the Student requires special education and related services. Washington Administrative Code (WAC) 392-172A-01035(1)(a); 34 Code of Federal Regulations (CFR) §300.8(a)(1).

¹ In the interest of preserving family privacy, the names of all family members of the Student are omitted from this decision. Instead, they are identified as, e.g., "Parent" or "Mother," "Student," "Parents," "Father," and "Sibling(s)."

² Citation to the transcript of the hearing will be to the page number. For example, citation to "Tr. 340" is a citation to page 340 of the hearing transcript.

Given the District's stipulation with respect to issue of the Student's eligibility for special education, this Order will focus on consideration of the evidence going to whether the adverse educational impact of the Student's disabilities can be addressed only through the provision of special education and related services.

Due Date for Written Decision

The due date for the written decision was continued to thirty calendar (30) days after the close of the hearing record, pursuant to a motion made by the District at the prehearing conference on April 10, 2017. See Prehearing Order entered April 14, 2017. The hearing record closed with the filing of post-hearing briefs on June 14, 2017. Thirty calendar days thereafter is July 14, 2017. The due date for the written decision is therefore July 14, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P1-P25;

District Exhibits: D1-D26.³

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

William Nation, math teacher, Eatonville Middle School (EMS);
Alma Bass, AVID teacher, EMS;
Katie Mettler, science teacher, EMS;
Ranelle Loftis, English and history teacher, EMS;
Jana Rush, principal, EMS;
Eric Vannatter, assistant principal, EMS;
Cristin Blaskowitz, District executive director of student services and assessment;
Anisa Parks, social worker, EMS;
The Parent of the Student;
Kelli Bacher, school psychologist, EMS;
Dora Wilson, special education teacher, EMS; and,
Gretchen Mertes, contract autism education specialist.

ISSUES

The issues and requested remedies for the due process hearing are:

a. Whether the District violated the IDEA and denied the Student a free appropriate public education (FAPE) by:

i. Failing to find the Student eligible for special education and related services;

³ Proposed Exhibits D27-D29 were offered at the hearing by the District, but were excluded by the ALJ.

- ii. Failing to consider or implement intervention strategies to address the Student's problems with attention, behavior, and sensory processing;
 - iii. Failing to address known bullying, harassment and intimidation of the Student when notified it was taking place;
 - iv. Making educational recommendations based upon the current availability of services in the District, rather than the Student's educational needs;
- b. And, whether the Parent is entitled to the requested remedies:
- i. A determination that the Student is eligible for special education and related services;
 - ii. Development of an initial individualized education program (IEP) for the Student within fourteen (14) school days;
 - iii. An order that the District will contract with the Brooks Powers Group to participate as a member of the Student's IEP team in the development of the Student's initial IEP;
 - iv. An order that the District will contract with the University of Washington Autism Center to provide training for District staff who provide services and/or have direct contact with the Student in the following areas;
 - a. Challenging Behaviors: Identifying challenging behaviors and teaching skills to replace them, strategies to implement and prevent challenging behaviors, challenging behaviors (in the moment), practical and manageable systems for collecting and analyzing data, monitoring behavior changes and fidelity of implementation;
 - b. Evidence-Based Strategies: What is Applied Behavior Analysis (ABA) and how to teach children with Autism Spectrum Disorder (ASD), and instructional strategies;
 - c. Direct Classroom/Program Observation: To include observation of staff and coaching and feedback to staff with recommendations;
 - v. An order that the District will contract with a Board Certified Behavior Analyst (BCBA), agreed upon by the District and the Parent, to work full-time with the Student to determine the functions of the Student's behavior and to develop an appropriate behavior plan. The BCBA will develop strategies and recommendations, including fading their services from direct involvement with the Student and for training District staff;
 - vi. Or other equitable remedies, as appropriate.

See Prehearing Order of April 14, 2017.

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

General Background

1. The Student has attended school in the District since at least the 2012-2013 school year, when he was in third grade in a general education classroom. Ex. D17p1.^{4,5} By that time, the Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and questions had been raised about the possibility of an autism spectrum disorder. *Id.*

2. The Student was determined eligible to receive special education and related services during kindergarten and first grade, but was exited from special education in January 2011. The Student was reevaluated in October 2012, but did not qualify for special education at that time. The Student was instead provided accommodations under a 504 Plan.⁶ *Id.* The accommodations included modified assignments, visual cues, shortened directions, extra time, preferential seating, opportunities for movement, and positive attention. *Id.* at 2.

3. In February 2013, the Student had a neuropsychological evaluation at Mary Bridge Children's Hospital & Health Center by Katrina Rayls, PhD. *Id.* The results of that evaluation included "diagnostic impressions" of a cognitive disorder and challenges with executive functioning, a learning disorder of written language, ADHD – combined type, depression and social skills problems. *Id.* at 9. The evaluation determined the Student had an IQ of 109 (73rd percentile), but the Student also demonstrated specific cognitive strengths and weaknesses. Notable weaknesses included components of the Student's executive functioning, characterized by difficulty with sustained attention, concentration, attention to detail, distractibility, impulsivity, mental flexibility, task persistence, and problems with low frustration tolerance and emotional reactivity. *Id.* at 10. Despite this, the Student was reported to be academically on track at grade level in all subjects. *Id.* at 11.

4. Despite concerns regarding an autism spectrum disorder, the results of the evaluation suggested that those concerns were signs of social delay and immaturity, moderated by the Student's cognitive challenges, reactivity, impulsivity, depression and poor coping. *Id.*

⁴ References to the exhibits that were admitted will be by exhibit and page number unless otherwise indicated. For example, Ex. D17p1 is reference to the District's Exhibit 17 at page 1.

⁵ Although it is not entirely clear, it appears from references in the record to the Student's kindergarten and first-grade school years (Ex. D17p1) that the Student has attended school in the District since kindergarten.

⁶ A "504 Plan" is a reference to Section 504 of the Rehabilitation Act of 1973, a federal law designed to provide services to students who have a disability that limits a major life function. A 504 Plan provides a student with accommodations to ensure the student may fully participate in his/her education.

5. The evaluation recommended the Student participate in individual counseling/psychotherapy, and consider the use of medication for depression, impulse management, and attention difficulties. *Id.* at 12. The evaluator opined that the Student would benefit from receiving special education services under the "health impairment classification." The evaluator opined that the Student would likely continue to experience difficulty with interpersonal interactions. The evaluator also recommended the following:

- Modified homework assignments to include fewer items;
- New information or instructions kept brief and to the point;
- Providing a written checklist of steps required to complete a task;
- A behavior program implemented across settings for consistency;
- Consequence-based systems;
- Ongoing behavioral consultation;
- Assistance with initiation of tasks and set shifting;
- High levels of rehearsal in new learning;
- Initially limiting the number of steps in a task;
- Development of a positive behavior management plan at school.

Id. at 12-14.

6. On May 15, 2013, the District issued a Prior Written Notice (PWN) to the Parents. The PWN informed the Parents that the District was declining to initiate an evaluation for the Student because he "still doesn't appear to have an academic impact from his disability and he doesn't appear to be in need of specially designed instruction." Ex. D18.

Fifth Grade 2014-2015 School Year

7. The Student was in fifth grade during the 2014-2015 school year. Ex. D15p1.

8. The Student had a psychological evaluation at Seattle Children's (Hospital) Autism Center in January 2015 with Felice Orlich, PhD. Exs. D16; P20. Dr. Orlich's diagnostic impressions included Autism Spectrum Disorder (ASD), ADHD – combined type, Expressive language disorder (rule out), Unspecified Anxiety Disorder; and Written language disorder, by history. *Id.* at 1. The evaluation determined the Student had an IQ of 101 (53rd percentile) in the high average range, but that estimate did not adequately capture his cognitive strengths and weaknesses. The Student also demonstrated strengths and weaknesses with respect to his executive functioning and social functioning. *Id.* at 2. Dr. Orlich concluded these results were consistent with a diagnosis of ASD. She concluded that given the Student's level of intellectual functioning, he could be considered to be in the high-functioning range. Dr. Orlich concluded that the Student would likely miss social cues and engage in controlling and/or impulsive behavior when attempting to forge a social connection. *Id.* at 4.

9. Dr. Orlich concluded that the Student qualified for special education services as a student with Autism and a communication disorder and was "likely to do best" in an educational setting with the following components:

- A predictable and routine environment;
- A low level of stimulation (noise, distractions);
- Preparation for change in routine;

- Direct instruction in executive functioning, social and communication skills.

Id.

10. Dr. Orlich opined the Student was appropriately placed in a mainstream setting, and would require direct instruction in executive functioning skills, social skills, written language and receptive/expressive language. *Id.*

11. Dr. Orlich recommended classroom strategies to help the Student be "more successful" regarding delivery of instruction, expectations and rules, environment, activities, and processing speed demands. These included:

- Break instructions into small steps and deliver steps one at a time;
- Provide visual supports;
- Use modeling to demonstrate activities;
- Repeat expectations and rules frequently;
- Seating near the teacher;
- Color-code materials to help the Student organize his work and schedule;
- Use lists for assignments, schedules, etc.;
- Break activities into small units;
- Modify tasks so that they are shorter;
- Use of a computer to facilitate output;
- Allow increased time for standardized tests.

Id. at 4-5.

12. Dr. Orlich recommended a medication consultation to address the Student's symptoms of anxiety and inattention, and the use of positive behavioral supports for the Student. *Id.* at 6. She also recommended the Student return to individual therapy to focus on cognitive behavioral treatment of the Student's anxiety and continue in occupational therapy. *Id.* at 7.

13. On March 5, 2015, the Parent signed a Section 504 Plan with the District, agreeing with the proposed plan. Ex. D21p2. That 504 Plan provided for the following accommodations:

- Modified/shortened assignments – chunking;
- Visual cues with verbal directions (rubrics, check-lists, assignment/HW sheet);
- Short and concrete directions;
- Extra time to complete assignments and assessments;
- Texts books for home when possible;
- Allow [the Student] to chew gum to increase focus;
- Quiet location to work on assignments or assessments;
- Preferential seating;
- Standing desk;
- Many opportunities for controlled movement throughout his day;
- Extra cues to stay on task;
- Frequent use of positive attention and encouragement;
- Social supports such as peer models, as available;
- Extra time for assessments or testing;
- Smaller setting with few to no distractions.

Id. at 1.

14. During Spring 2015, the Student participated in state-wide academic assessments for all students in science, mathematics, and English/Language Arts. The Student's science score reflected he was performing at the "proficient level." His score was above his school's average score and was one point below the state average score. Ex. D15p1.

15. The Student's mathematics score meet the state achievement standard, and was above both his school's average score and the state average score. *Id.* at 4.

16. The Student's English/Language Arts score (2478) nearly met the state achievement standard (2502). *Id.* at 3.

Sixth Grade 2015-2016 School Year

17. The Student was in sixth grade during the 2015-2016 school year at Eatonville Middle School (EMS). Ex. D22p1. The Student attended all general education classes during sixth grade.

18. The Student was involved in two incidents on his school bus during sixth grade that resulted in Bus Misconduct Reports; one on November 18, 2015, and one on March 2, 2016. Exs. P3p22/D24p1; P3p21/D24pp2-3. The second incident, on March 2, 2016, resulted in the Student being suspended from the school bus for two days. *Id.*

19. Between the start of the school year and the May 26, 2016 meeting to consider an evaluation of the Student (see below), the Student also received three Student Discipline Referrals and/or warnings for excessive tardies, disrespecting adults, disturbing the educational process, being out of his seat, and disturbing others. Exs. D24pp4-5; P3p20/D24pp6-7; D24pp8-9; P3p19/D24pp11-12.

The District's 2016 Evaluation of the Student

20. On February 19, 2016, the Parent requested that the District evaluate the Student for eligibility for special education. Ex. D2p1.

21. On February 24, 2016, the District proposed and implemented a new Section 504 Plan for the Student. Ex. D20p1.⁷ That 504 Plan included the following accommodations:

- Modified/shortened assignments and chunking for larger assignments;
- Visual cues with verbal directions (rubrics, check-lists, assignment/HW sheet);
- Short and concrete directions;
- Extra time to complete assignments and assessments without penalties;
- Text books for home when possible;

⁷ The copy of the 504 Plan is unsigned. (Ex. D20). However, the independent educational evaluation of the Student conducted by the Brooks-Powers Group notes that the Student's "most recent 504 Plan was reviewed Feb 2016 and was continued in order to provide several accommodations." Ex. P4/D14p4.

- Attempt to make eye contact with the Student before delivering individual direction;
- Quiet location to work on assignments and assessments;
- Preferential seating;
- Standing desk;
- Many opportunities for controlled movement throughout his day;
- Extra cues to stay on task;
- Positive reinforcement and encouragement;
- Social supports such as peer models;
- Separate location for testing for classroom assessments as well as state and district tests;
- Extra time for assessments and testing.

Id.

22. On March 10, 2016, School Psychologist Laqrisha Henderson⁸ confirmed with the Parent the areas in which the Student would be evaluated. Ex. D3p3.

23. On March 20, 2016, Ms. Henderson sent the Parents notice that the District would evaluate the Student, identifying all the areas that would be evaluated. Ex. D3p4.

24. The Parent provided information regarding the Student's developmental history as part of the evaluation. Ex. D4.

25. The evaluation of the Student was reflected in a report coordinated by Ms. Henderson. Exs. P2/D5.

26. At the time of the evaluation, the Student's grades in his general education academic classes ranged from "C+" to "B+". Exs. D5pp12-13/P2.

27. The record of the hearing, consisting of the parties' exhibits and the witnesses' testimony, reflects no substantial evidence going to establish any substantive or procedural deficiency in the evaluation. This is likely due to the parties' focus at hearing not on the underlying appropriateness of the evaluation, but rather on the ultimate conclusion of the evaluation team that the Student did not qualify for special education because he did not need specially designed instruction to address the adverse educational impact of his disability or disabilities. As has been noted, earlier, the District in fact stipulated that the Student has a qualifying disability, and that the Student's disability has an adverse impact on his receipt of an educational benefit. Accordingly, no detailed findings of fact will be made with respect to the procedures used to evaluate the Student, or the substantive findings of the evaluation, apart from the ultimate determination the Student does not require specially designed instruction.

28. The evaluation reviewed earlier assessments and records of the Student, used a variety of assessment tools administered by qualified professionals, included observations of the Student

⁸ Ms. Henderson was not a District employee. She was provided to the District through a contract with an outside agency.

and information from the Student's teachers and parents, and assessed the Student in multiple areas of suspected disability. *See generally* Exs. P2/D5.

29. A meeting was held on May 26, 2016, to consider the results of the Student's evaluation. Ex. D5p1. The Parent and District staff members of the team attended. *Id.* at 15. There was conflicting testimony and evidence presented regarding whether a decision was reached *at the meeting* that the Student did *not* qualify for special education. *See generally*, D5p13; P12; P11p1; P13; Resolution of this fact is not necessary because the record is crystal clear that as a result of the evaluation team meeting, the Student was not provided any special education or related services.

30. Subsequent to the evaluation meeting, the Parent filed a request for a due process hearing, raising as an issue the failure of the evaluation team to find the Student eligible for special education. Tr. 593.

31. On June 10, 2016, Anisa Parks, a District social worker at EMS, sent an email to all the staff at EMS. Ms. Parks was inquiring whether any of the staff knew any students who would be good candidates for school's AVID class. Ms. Blaskowitz replied, suggesting the Student. Ex. P15p1.

32. AVID is an elective class that offers instruction intended to prepare students for college. It focuses on organizational skills, note-taking skills, how to read strategically for information, writing, and public speaking. The students in AVID take field trips to college and workplaces, and have guest speakers come in to address them at EMS. Tr. 75-76.

33. During August 2016, the Parent, the Parent's advocate, and Cristin Blaskowitz, the District executive director of student services and assessment, met in a resolution meeting regarding the Parent's request for a due process hearing. The parties entered into a resolution agreement. As part of the resolution agreement, the District agreed to fund an independent evaluation of the Student with the Brooks Powers Group, and another evaluation of the Student by Gretchen Mertes. At the Parent's request, the District also agreed to place the Student in a special education resource room for English/Literature with a 1:1 paraprofessional or aide to assist the Student with staying focused and on task. The Parent then withdrew her request for a due process hearing. Tr. 595-596.

Seventh Grade 2016-2017 School Year

34. The Student was enrolled in AVID for 7th grade. His teacher was Alma Bass. Ms. Bass determined the Student's strengths included being very engaged and attentive during her AVID class, and asking relevant questions. But Ms. Bass confirmed that the Student does have difficulty remembering to turn in his AVID assignments, and has difficulty taking notes in class. As of the hearing, the Student had a "C-" grade in AVID, and Ms. Bass characterized his performance in her AVID class as typical of other students' performance in AVID. AVID is general education class at EMS. Tr. 75-103.

35. The Student began seventh grade at EMS in all general education classes, except for English/Literature. Ex. D22p6. By agreement of the parties, the Student was placed in a special education resource room for English/Literature, taught by Dora Wilson. The Student was also assigned a full-time, 1:1 paraprofessional, Ms. Leighton. Tr. 165, 311.

36. The Student did not do well in terms of his behavior in Ms. Wilson's resource room, and did not appear to respond to or appreciate having a 1:1 paraprofessional. At times the Student would not work with the paraprofessional. Ms. Wilson taught the Student using the 7th-grade general education English/Literature curriculum, but at a slower pace. Ms. Wilson did not believe that her resource room was an appropriate placement for the Student, because based on the Student's academic performance in her class she did not believe he had any type of a reading or writing disability. In Ms. Wilson's opinion, the Student did "extremely well" in her class. Tr. 554-558.

37. Towards the end of the first semester of 7th grade, the Parent requested the Student be removed from Ms. Wilson's resource room and returned to a general education English/Literature class, and the District agreed. P9p11.

38. As part of the resolution agreement reached the prior Spring, the District offered to provide the Student with counseling through Good Samaritan Mental Health. However, the Parent declined this service, having taken the Student to Good Samaritan for counseling "for years," but it didn't seem to make a difference. Ex. D25p1.

39. Ms. Mertes, an autism specialist recommended by the Parents, completed her informal social communication assessment of the Student pursuant to the resolution agreement. She concluded the Student was a weak interactive social communicator. Ex. P1/D10. Ms. Mertes also worked individually with the Student for approximately 3-4 hour on a 5-point social thinking scale.

40. Ms. Mertes is certificated as both a general and a special education teacher in Washington State. She holds a Masters Degree in Special Education, has interned at the University of Washington Autism Center, and has over a decade of experience as a general education elementary school teacher. She is employed by the Bethel School District as an autism specialist. Tr. 611-612. After informally assessing and working with the Student, it is Ms. Mertes' professional opinion that the Student does not require specially designed instruction with respect to his social communication. Tr. 626.

41. Ms. Mertes also provided multiple hours of social-thinking training to the entire staff at EMS. Ex. D11; Tr. 614.

Brooks-Powers Independent Educational Evaluation (IEE) of the Student

42. The Student's independent educational evaluation (IEE) with the Brooks Powers Group was conducted by Kate Odom, Psy.D, Licensed Psychologist, and Natalie Badgett, M.A., BCBA.⁹ The results, conclusions, and recommendations of the IEE were reflected in an IEE Summary Prepared by Ms. Odom. Exs. P4/D14.

43. The purpose of the IEE was to assess the Student's current cognitive and executive functioning abilities. *Id.* at 1. The IEE included an interview with the Parent, a review of records

⁹ BCBA is the typical abbreviation for a Board Certified Behavioral Analyst.

for the Student, observation of the Student at EMS, interviews with school staff at EMS, and assessment of the Student with multiple standardized tools. *Id.* at 1-2.

44. In her interview, the Parent reported that the Student is a smart kid and when motivated is quite capable of producing good work. She reported concerns about the Student paying attention, staying on tasks, and disruptive behaviors. She reported that at school peers often avoided the Student, that he has a few friends, but struggles to understand and "read" social cues. *Id.* at 2. The Parent reported that the Student has good fine motor skills despite a previous diagnosis of a writing disorder, and has participated in occupational therapy. She also reported that the Student has significant attention and hyperactivity symptoms that apparently prevent the Student from completing tasks and participating with peers. His poor social skills, empathy and social understanding are interfering with his ability to make and maintain appropriate relationships. *Id.* at 3.

45. The Student was observed in his English/Literature special education resource room class and his general education science class at EMS by Ms. Badgett. Ms. Badgett followed her observation of the Student by speaking with the Student's 1:1 paraprofessional, Ms. Leighton, his special education English/Literature resource room teacher, Ms. Wilson, his general education history teacher, Ms. Loftis, and EMS Assistant Principal Eric Vannatter. *Id.* at 4-10.

46. Ms. Badgett observed that during independent work in Ms. Wilson's class the Student required multiple prompts from his 1:1 paraprofessional to stay on task, and his vocalizations disrupted the independent work period. She noted the other students in the class did not call on the Student and that the Student was largely ignored by his peers during the class, but that the Student's behavior during a group activity in the classroom was similar to that of his peers. During another independent activity in the classroom, Ms. Badgett observed the Student was initially off-task, but after prompting by Ms. Wilson he did begin to work. Ms. Badgett observed the Student's materials (binder) appeared to be organized. *Id.* at 5.

47. In his general education science class, Ms. Badgett observed the Student was engaged in work with a group of students, but once the teacher, Ms. Mettler, gave the group instructions to work by themselves, the Student was off-task for the remainder of the class period.¹⁰ *Id.* at 6.

48. Ms. Badgett summarized her observations of the Student in his classrooms by stating that the "supports that are currently in place (i.e. 1:1 support staff throughout the school day, English/literature instruction in a resource room setting) do not appear to be effective in terms of [the Student's] disruptive behavior and engagement with materials." *Id.* at 7.

49. Following her observations of the Student, Ms. Badgett spoke with a group of his teachers and his 1:1 paraprofessional. The staff reported that the Student was a smart and capable student whose behavior impedes his learning, and that neither teacher prompts nor peer pressure has an effect on his behavior in class. The staff agreed that the Student "fixates" in the classroom. *Id.* at 7-8.

¹⁰ It is unclear how Ms. Badgett could have observed the Student though the remainder of the class period when she later remarks that "(m)y observation ended before the class was dismissed, because I had a scheduled meeting with the assistant principal." *Id.* at 7.

50. Ms. Badgett reported that Ms. Loftis described the Student as "all over the place with his body and his words," and that the group of educators discussed the Student's "verbal aggression towards peers." *Id.* at 8. However, at hearing, Ms. Loftis credibly testified that she does not recall some of the statements attributed to her by Ms. Badgett, and that she does not recall talking about any "verbal aggression" on the part of the Student. Tr. 145-146. Ms. Badgett did not appear as a witness to offer testimony at the hearing. Given Ms. Loftis' credible testimony and Ms. Badgett's non-appearance at the hearing, it is concluded that Ms. Loftis' testimony should be given greater weight than the statements by Ms. Badgett in the IEE summary. It is concluded that there was no discussion of any "verbal aggression" on the part of the Student, and Ms. Loftis did not make the statement regarding the Student being "all over the place" attributed to her by Ms. Badgett.

51. The teachers reported to Ms. Badgett that the Student had not been identified for special education services at the end of the previous school year (6th grade during the 2016-2016 school year), but that the Parents asked that he be placed in special education, i.e. a resource room, to address his writing. The teacher reported they did not believe the Student's placement in a resource room with a 1:1 paraprofessional were not helpful, that the Student's behavior had gotten worse since placement in the resource room, and that the Student was frustrated by his placement in special education. Both Ms. Wilson and Ms. Loftis reported that the Student said there was no reason for him to be in the resource room, and they both agreed with this. Ms. Wilson reported the Student should be placed in general education because he had no reading or writing issues. *Id.* at 8-9.

52. Ms. Badgett then spoke with Mr. Vannatter, the assistant principal. He is the EMS staff person responsible for administering discipline. Tr. 223. Mr. Vannatter described the Student as an honest kid who is straightforward about his behavior, that he has had only positive interactions with the Student, and that the Student was most often referred to him due to inappropriate language and tardies. *Id.* at 9-10.

53. Mr. Vannatter acknowledged the Student has been referred to him on multiple occasions for inappropriate behavior at school, but that the Student's record of discipline "falls in line basically with the rest of the 7th grade." Tr. 266.

54. The IEE included use of multiple assessment tools to evaluate the Student. With respect to the Student's cognitive and intellectual functioning, the IEE concluded that both the Student's IQ (Full Scale 102) and his General Ability Index (Standard Score 108) fell in the average range. Most of the Student's composite scores were in the average or high average range, although his Processing Speed was very low. *Id.* at 11. The IEE concluded that this indicated the Student has an adequate ability to learn and accumulate information, formulate concepts, apply logic and reason, recognize patterns, and solve problems, although his processing speed (the ability to quickly and efficiently make sense of data without making mistakes) was significantly lower when compared to his peers. *Id.* at 12.

55. With respect to his academic achievement, the IEE concluded that the Student is learning and performing at a rate comparable to his peers given his age and grade level, but his low scores on Written Expression and Math Fluency indicate that he is performing below his cognitive abilities in those two areas. *Id.* at 14.

56. The IEE concluded that the discrepancies between his scores on Written Expression and Math Fluency and his cognitive scores suggest the Student has a Specific Learning Disability (SLD) in writing and mathematics. But while he meets the clinical diagnosis of SLD, the discrepancy between his cognitive assessment and his academic achievement is under the significance level required for a diagnosis by the "discrepancy" criteria for educational eligibility. *Id.* at 15.

57. With respect to his executive functioning, the IEE concluded that when the Student is tasked with multiple mental processes (remembering instructions, sequencing, cognitive switching, etc.) he will likely slow down, make mistakes, be easily distracted, and might show frustration or defiance easily. *Id.* However, if the Student is not under time pressure, he seemed to display good self-monitoring and correction. *Id.* at 17. The IEE concluded that although the Student may learn information, he will likely struggle to apply it to new problems without guidance. *Id.* at 18.

58. The Parent and Ms. Wilson also completed rating scales regarding the Student's executive functioning and attention. The results of those rating scales supported a diagnosis of ADHD – combined type. *Id.* at 21. The results also described behaviors that are consistent with significant attention and hyperactivity problems that have a very significant negative impact on all areas of the Student's performance. *Id.* at 23.

59. In summary, the IEE concluded, in part, that the Student has deficits in executive functioning, specifically high distractibility, the Student's slow processing speed is having a significant impact on his functioning, and that the Student "simply need(s) more time to process information." *Id.* at 24. It went on to conclude that:

While [the Student] is certainly cognitively capable to (sic) complete his work at an age appropriate level, his significant executive functioning and processing speed deficits outweigh his abilities and interfere with his abilities to do so.

Id. at 25.

60. The IEE's diagnostic impressions were Attention Deficit/Hyperactivity Disorder – combined type, Other Specified Neurodevelopment Disorder, Autism Spectrum Disorder (per history), and Specific Learning Disorder – Written Expression, and Specific Learning Disorder – Mathematics (fluency). *Id.* at 26-27. However, the summary noted that with respect to the SLD diagnostic impressions:

[T]hese are clinical diagnoses, which are not automatically interchangeable with IDEA definitions regarding educational eligibility for Specific Learning Disorders (which require either evidence of "severe discrepancy" in states' interpretations of IDEA, or evidence of insufficient "Response to Intervention" (RTI), depending on each school district's standard of choice.

Id. at 27.

61. The IEE went on to conclude that the Student was in need of specially designed instruction to support his areas of deficit, and that special education eligibility:

[R]equires evidence of eligibility for one or more of the diagnostic categories in IDEA, as well as evidence that the disability results in an adverse educational impact (which includes not only academic, but also social, emotional, behavioral, and adaptive functioning).

Id., Emphasis in original.

62. The IEE recommended the following areas be “considered” for specially designed instruction: Executive functioning-organization and planning, Self-advocacy, Demonstrating listening/understanding/attention, and Self and Peer Monitoring. *Id.* at 29-31.

63. The IEE recommended formalized accommodations for the Student, including:

- Extended time for assessments;
- Opportunity to complete assessments in a smaller, quiet environment with reduced sensory input;
- Use of visual instructions, prompts, and cues to address interference due to high level of distractibility;
- Seating options that offer movement and/or sensory feedback while remaining seated and/or standing desk options;
- Noise cancelling ear phones;
- Fidget objects;
- Board to cover parts of page, to help keep place;
- Emphasizing quality of work rather than volume and speed completed. Providing praise and positive attention for on-task efforts and behavior;
- Shortening assignments, learning periods, and instructions;
- Allow extended time to complete tasks;
- Shortening repetitive tasks to only the number of times required to demonstrate understanding and ability;
- Allow taking home long assignments when appropriate;
- A classroom that is high in structure, boundaries, rules, and routine;
- Decrease environmental stimuli as much as possible;
- Presenting frequent reminders or check in with the Student to refocus;
- Asking the Student to repeat instructions;
- Modifying assignments when possible to topics of the Student's interest;
- Use of visual instructions;
- Building in motivators such as praise, recognition or rewards for maintaining attention;
- Give instructions in a clear and concise manner;
- Minimize distractions when the Student is trying to follow complex instructions.

Id. at 28-29.

64. With respect to the Student's behavior, the IEE recommended:

- Identifying and utilizing effective motivators/rewards/praise systems. This might include a point system;
- Access to positive attention for engaging in appropriate behaviors, and behavioral interventions be reinforcement-based and that punitive interventions be avoided;
- Praise/recognition/reinforcement be consistent;
- Rewarding effort rather than end products.

Id. at 32.

65. With respect to the Student's social skills, the IEE recommended:

- Increasing involvement in extracurricular activities;
- Providing a list of positive behaviors and expectations for the Student;
- Increasing the amount of time the Student is able to work in a group setting;
- Social skills training using a curriculum that addressed poor social skills such as those seen with children with ASD.

Id.

66. A meeting was held on February 17, 2017, to review the IEE and again consider the Student's eligibility for special education. The Parent attended along with Ms. Blaskowitz, Ms. Mertes, Renee Loftis (the Student's general education History and Language Arts teacher for the second semester of 7th grade), Ms. Parks, Kelli Bacher (District school psychologist), William Nation (the Student's general education math teacher for 7th grade), and Assistant Principal Eric Vannatter. Kate Odom from the Brooks Powers Group and Allison Brooks, owner of the Brook Powers Group), appeared and participated in the meeting by telephone. Tr. 335; 342.

67. Ms. Odom and Ms. Mertes discussed the results of their evaluations of the Student. The team discussed the recommendations for the Student from the IEE, and whether the Student required specially designed instruction. The team discussed the Student's 504 Plan, the interventions already in place for the Student, and how he was doing in his general education classes. Tr. 344; 507-508. The consensus of the team, with the exception of the Parent, was that the Student did not require specially designed instruction to address the adverse educational impact of his disability. Tr. 509; 601. Ms. Bacher agreed with the team's consensus. Tr. 508. Ms. Wilson agreed the Student did not require specially designed instruction. Tr. 560. Ms. Loftis agreed the Student did not need specially designed instruction. Tr. 163. Ms. Parks agrees the Student does not need special education. Tr. 368-369. Ms. Mertes agrees the Student does not need specially designed instruction with respect to her area of expertise – social communication. Tr. 640.

68. Although she did not attend the IEE review meeting, based upon her experience with the Student, Ms. Wilson agrees the Student does not need specially designed instruction. Tr. 560.

69. The team agreed that recommendations from the IEE would be incorporated as accommodations into a new 504 Plan for the Student, including adding a behavior plan, mental health counseling, working with a behavior interventionist, and a different type of planner for the Student. Tr. 600-601.

70. On March 1, 2017, the Parent filed the Due Process Hearing Request that is the subject of this matter.

CONCLUSIONS OF LAW

The IDEA

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, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).
3. In this particular case, the allocation of the burden of proof plays a heavy role. As will be discussed further below, the Parent did not call any witness to testify other than Ms. Mertes and District teachers and staff who was qualified by education, training, or experience to provide an expert opinion regarding the critical issue in this case. That issue is whether, because of his disability and the adverse educational impact of his disability, the Student requires specially designed instruction in order to receive an educational benefit. *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099 (9th Cir. 2007)(It is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard).
4. It is also important to note that the Parent has not raised any procedural challenge to the process by which the District conducted the evaluation of the Student or considered the Brooks Powers IEE. Rather, the Parent's challenge goes to the ultimate decision of the evaluation team, and later the team assembled to consider the results of the IEE, that the Student is not eligible for special education. This is clearly a substantive challenge to the determination that the Student is not eligible for special education.
5. A student who is eligible for special education is defined as a student who has a disability and who, because of the disability and an adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services. WAC 392-172A-01035(1)(a); 34 CFR § 300.8(a). This is in essence a three-part test for special education eligibility.
6. The District has stipulated that the Student meets the first two parts of the eligibility determination. The Student has a recognized disability – autism or autism spectrum disorder (ASD). And his disability also has an adverse educational impact. Therefore, as noted above, the only issue remaining is whether the Student requires special education despite the accommodations offered to him by the District through his 504 Plans.
7. The appropriateness of a decision regarding a student's eligibility should be assessed in terms of its appropriateness at the time of a student's evaluation, and not from the perspective of a later time with the benefit of hindsight. *L.J. v. Pittsburg Unified School District*, 117 LRP 6572 (9th Cir. 2017), citing *Adams v. Oregon*, 195 F.3d 1141 (9th Cir. 1999). The eligibility decision is judged on the basis of the information reasonably available to the parties at the time

the eligibility decision was made. *Id.*

8. There is no presumption in favor of outside evaluators. *D.L. v. Clear Creek Indep. Sch. Dist.* 117 LRP 22356 (5th Cir. 2017); *Alvin Indep. Sch. Dist. v. A.D. ex. rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007)(valuing teacher testimony over that of doctors). Rather, courts have recognized that teacher observations are especially instructive as they spend more time with students than do outside evaluators. *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 1292 (5th Cir. 1991).

9. When a student's unique needs can be addressed in the general education setting with appropriate accommodations so as to achieve an educational benefit, specially designed instruction is unnecessary and the student does not require special education. *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099 (9th Cir. 2007). For most students, individualized special education is calculated to achieve advancement from grade to grade. *Andrew F. v. Douglas County Sch. Dist. RE-1*, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017). Courts have also endorsed consideration of a student's grades and educators' assessments when determining whether a student is reaping some educational benefit in the general education classroom. *Hood, supra.*

10. After very careful consideration of all the evidence of record in this case, it must be concluded that the Parent has failed to produce sufficient credible evidence to carry her burden of proof to establish the Student requires specially designed instruction, i.e. special education, in order to obtain an educational benefit at EMS. This conclusion is primarily the result of the lack of any substantial evidence to persuasively contradict the uniform and unanimous opinion of the District professionals and educators who appeared and testified at the hearing. That opinion, that the Student is capable of obtaining an educational benefit with the implementation of the accommodations set forth in his 504 Plans, must be weighted principally against the results and recommendations of the Brooks Powers IEE.

11. While documents such as the Brooks Powers IEE are admissible evidence and have some persuasive weight standing on their own, the lack of any witness who conducted the IEE to appear at hearing and give testimony significantly diminishes the utility of the IEE report. Neither the Parent, nor the District, nor the ALJ was able to question either individual at Brooks Powers Group who conducted the IEE to have those individuals explain and interpret the results and recommendations. In contrast, the District produced multiple witnesses qualified by their education, training and experience to provide opinions regarding the educational needs of the Student, and how those needs can be met through the implementation of his 504 Plans such that the Student can obtain a benefit from his education. And as noted above, there is no presumption that an outside, independent evaluator is due any more deference to their opinion than a teacher who has the opportunity to observe and interact with a student over potentially long periods of time in multiple school environments.

12. It is also important to note that the uniform opinion of the District staff and educators who testified is supported by other evidence of record. As noted above, consideration of a student's grades, while not determinative, is instructive. In the Student's case, despite not receiving any special education or specially designed instruction since apparently first grade, the Student has achieved passing grades in his general education classes and advanced from grade to grade with his peers. This is significant evidence that the Student does not require special education to obtain a benefit from his education with the District. State-wide standardized testing and the

results of the cognitive assessment conducted by Brooks Powers Group both support the conclusion that the Student is learning and performing at a rate commensurate with his age- and grade-level peers.

13. The undersigned ALJ acknowledges the outcome of this case will be difficult for the Parents and the Student. At the hearing, it was clearly evident without any doubt that the Parent is a loving, caring and devoted advocate for the Student. It is clear the Parent has devoted tremendous time, energy and resources to find the best educational outcome for the Student. Any student, typically developing or disabled, would be tremendously fortunate to have such a parent and advocate. But the undersigned ALJ is compelled to decide this case based upon the best evaluation of the available evidence and the applicable laws and regulations.

14. In summary, the Parent has been unable to produce sufficient credible evidence to carry her burden of proof to establish the Student cannot obtain an educational benefit without the provision of specially designed instruction. It is concluded that the Student is not eligible to receive special education.

15. The Parent's request for a due process hearing raised additional issues apart from the Student's eligibility. However, having concluded the Student is not eligible for special education, the undersigned ALJ has no authority to address these additional issues. It is concluded that the remaining issues must be dismissed.

16. All arguments made by the parties have been considered. Arguments not specifically addressed herein have been considered, but are found not to be persuasive or not to substantially affect a party's rights.

ORDER

1. The Parent has not carried her burden of proof to establish the Student is eligible for special education.
2. The Parent's remaining issues are dismissed.
3. The Parent's requested remedies are denied.

Signed at Seattle, Washington on July 14, 2017.



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. *moa*

Parent



Cristin Blaskowitz, Director of Special Services
Eatonville School District
200 Lynch St W / PO Box 69B
Eatonville, WA 98328-0698

William A. Coats, Attorney at Law
Erin Sullivan-Byorick, Attorney at Law
Vandeberg Johnson & Gandara
PO Box 1315
Tacoma, WA 98401-3791

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