

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of:

Battle Ground School District

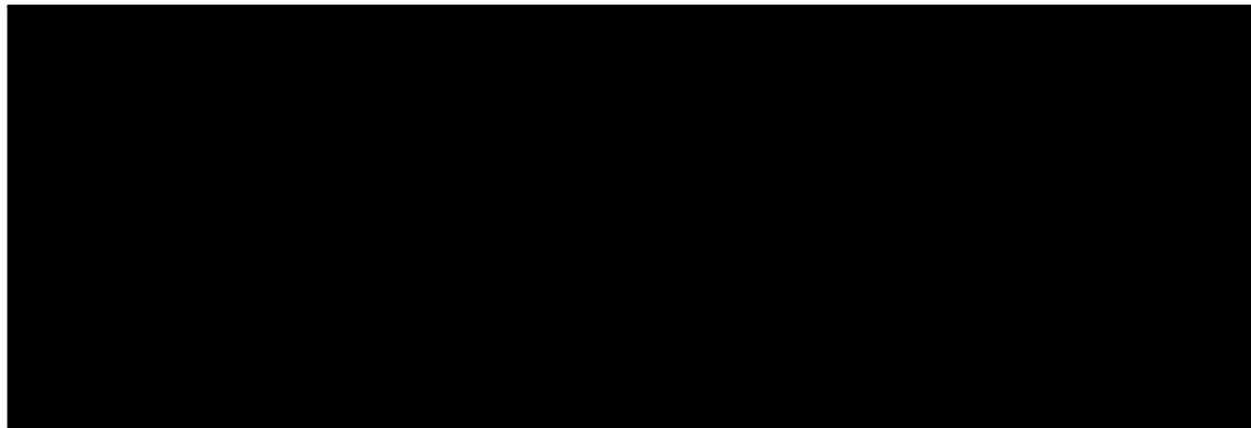
Docket No. 05-2022-OSPI-01602

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

Agency: Office of Superintendent of Public
Instruction

Program: Special Education

Cause No. 2022-SE-0071



A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on September 26, 27, and 28, 2022, via videoconference. The Parents of the Student whose education is at issue¹ (Parents) appeared and represented themselves. Also present briefly with the Parents was their lay advisor, [REDACTED]. The Battle Ground School District (District) was represented by Erin Sullivan-Byorick, attorney at law. Also present for the District was Ellen Wiessner, District Executive Director of Special Services. Accompanying Ms. Sullivan-Byorick and observing for a portion of one day was attorney Nathan Schmutz from Vandenberg Johnson & Gandara.

PROCEDURAL HISTORY OF THE CASE

The Due Process Hearing Request (Complaint) in this matter was filed by the District with the Office of Administrative Hearings (OAH) on May 25, 2022. The Complaint was given Cause No. 2022-SE-0071 and assigned to ALJ Becker. The Complaint was amended to provide

¹ To ensure confidentiality, names of parents and students are not used.

additional information on July 5, 2022. The Complaint alleges that the Parents requested an Independent Educational Evaluation (IEE) of the Student at public expense and the District denied that request. The District sought to demonstrate the appropriateness of its evaluation of the Student via a due process hearing.

Multiple prehearing conference were held to address various issues. Hearing dates were set by an order issued on June 22, 2022, and the due process hearing was held as scheduled. A [REDACTED] was provided for the Mother at all of the pretrial conferences and at the due process hearing.

EVIDENCE RELIED UPON

Exhibits Admitted

Parent's Exhibits: P7, P8, P15, P19, P22, and P25.²

District's Exhibits: D1-D5, D5A,³ D8-D21, and D23-D47.

Witnesses Heard

[REDACTED], friend of Parents
Kim Hamilton, District school psychologist
Jordan Osborne, District general education teacher
Lesli Collum, Assistant Principal at the District's Daybreak Middle School
Ellen Wiessner, District Executive Director of Special Services
Sarah Pitoyo, District speech language pathologist
The Student's Mother

Motion to Amend the Record

On October 21, 2022, the District filed a Motion to Amend the Record by adding exhibit D5A to the hearing record and removing exhibit D5. Exhibit D5A is the finalized version the May 11, 2022 reevaluation of the Student along with a prior written notice (PWN). Exhibit D5 was inadvertently offered by the District and admitted at the due process hearing, but it is a draft version of the reevaluation. The differences between the two exhibits are very minor. The

² Several exhibits offered by the parties were duplicates. In such cases, the District's version of the exhibit was admitted and used during the hearing.

³ This exhibit was admitted to the record after the due process hearing when District's Motion to Amend the Record was granted.

District's Motion to Amend the Record was granted by order dated November 7, 2022. Exhibit D5A was added to the record but exhibit D5 was not removed from the record because witnesses had been questioned about it at the due process hearing. See Order Granting Motion to Amend Hearing Record.

Post-Hearing Briefs

The due date for post-hearing briefs was November 14, 2022. The parties' post-hearing briefs were timely filed.

DUE DATE FOR WRITTEN DECISION

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of the record by order dated June 22, 2022. The record closed with the receipt of the post-hearing briefs on November 14, 2022, and the due date for the written decision is December 14, 2022.

ISSUE

The issue heard at the due process hearing is: Whether the District's reevaluation of the Student dated May 11, 2022, was appropriate and, if not, whether the Parents are entitled to an Independent Educational Evaluation of the Student at public expense.

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 conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence is set forth below as necessary.

1. The Student is currently [REDACTED] years old. English is his primary language. D5A p.6.⁴
2. The Student's Mother has an associate's degree in early childhood studies, focused on children up to age five. Tr. 329. She holds credentials to teach children ages six months to five years. The Mother currently works at a childcare facility for children ages eighteen months to

⁴ Exhibits are cited by party ("P" for Parent, "D" for District), exhibit number, and page number. For example, a citation to "P1 p.5" is to the Parent's Exhibit 1 at page 5. The hearing transcript is cited as "Tr." with references to the page of the cited testimony. For example, a citation to "Tr. 80" is to the testimony at page 80 of the transcript.

twelve years. *Id.* at 332-33. Part of her duties include serving as a teaching aide and substitute teacher for elementary school aged children. *Id.*

3. Prior to moving to the District, the family lived in [REDACTED] where the Student was initially determined to be eligible for special education services under the disability category of autism. D2 p.6. He began receiving speech services when he was five years old. Tr. 330. In May of 2019, the Student's [REDACTED] Individualized Education Program (IEP) team considered determining that the Student was no longer eligible for special education. The Parents disagreed with that proposed determination and believed that the Student continued to need support in the area of social communication. D2 p.6. The [REDACTED] IEP team then continued the Student's eligibility and developed an IEP for him on May 23, 2019. *Id.*

4. The Student and his Parents moved from [REDACTED] to the District in February of 2021. D2 p.6. He was in fifth grade and attended Daybreak Middle School (Daybreak) during the 2020-21 school year. D2. A new IEP was written for the Student on March 1, 2021. It provided for specially designed instruction (SDI) in communication, as well as accommodations. *Id.* at 6.

5. In April of 2021, the Parents requested that an "assessment revision" be performed regarding the Student and asked that an occupational therapist be included in the revision. D2 p.2. The District uses the term "assessment revision" to describe a "mini reevaluation" that is conducted when the IEP team is not questioning eligibility for special education services, but is looking to see if a student needs a different amount of services. Tr. 114. The Parents requested that the Student's independent living skills and adaptive skills be assessed in the assessment revision. D2 p.5. When consenting for the assessment revision, the Mother noted that the Student does not wash his hands, and needs to be reminded about eating and drinking because he forgets to eat at school when talking to classmates. *Id.* The Mother also noted that the Student does not tell anyone when he is injured or in pain, and that he had been experiencing stress, evidenced in part by him chewing on his shirt. *Id.* at 6.

6. The assessment revision was conducted by District school psychologist Kim Hamilton. D2. Ms. Hamilton has a Bachelor of Arts degree in psychology, and a Master of Science degree in school psychology. D38. She has worked as a school psychologist for 40 years. Tr. 66.

7. The assessment revision included the following areas: review of existing data, adaptive, and sensory. D2 p.3. Information was obtained from the Parents as well as school staff members. *Id.* at 7; Tr. 75. Additionally, Ms. Hamilton observed the Student in class and at recess. She noted that he was attentive, engaged, answered questions eagerly, socialized with his peers, and exhibited behaviors similar to his peers. Tr. 78-79. Ms. Hamilton felt the Student behaved like a typical middle school child. *Id.*

8. On June 4, 2021, a meeting was held to review the assessment revision. D2 p. 6. The assessment revision determined that the Student was below average but within normal limits on his general adaptive scores, and no significant concerns were noted. *Id.*; Tr.74. Parent ratings on the Autism Spectrum Rating Scales (ASRS) were very elevated, while only one area, peer socialization, was slightly elevated in the staff ratings. The Student scored in the typical range for sensory processing at school and in the “definite dysfunction” range at home. According to Ms. Hamilton, it is common for observations of a student at home to differ from observations made at school. Tr. 77. The Student’s grades at the time of the assessment revisions were As and Bs in all of his classes. D2 p.9. The assessment revision noted that the Student continued to meet special education eligibility criteria due to autism, and that he had difficulties in communication that adversely affected his educational performance. *Id.*

9. The assessment revision did not establish a need for SDI in any new areas. The Student continued to receive SDI in communication, as well as related accommodations. D5A p.6.

10. The Student was in sixth grade and attended Daybreak during the 2021-22 school year. In October of 2021, the Student was involved in an altercation with another student at recess. D8. According to the District’s discipline report, the other student attempted to take a drawing away from the Student by wrapping the Student in his arms and then kicking him. When he was released, the Student punched the other student in the face. The Student received a one-day in-school suspension for this conduct. *Id.*; D9.

11. On November 19, 2021, the Mother emailed the Student’s speech language pathologist (SLP), Sarah Pitoyo, and one of the Student’s general education teachers, Jaynie Mintz.⁵ The Mother expressed concern that the Student only had one friend and usually ate lunch by himself. She stated that the Student seemed sad and she was concerned about his self-esteem. D17 pp. 1-2. Ms. Mintz replied that the Student was “doing great” and he sat with two friends in class. *Id.* at 1.

12. A reevaluation of the Student was initiated by Ms. Hamilton in February of 2022. D4 p. 13. A PWN was provided to the Parents stating that the Student required his triennial reevaluation and the following areas would be addressed: review of existing data, general education teacher report, student observation, behavior/social, communication, and adaptive. D5A p.3. The Mother signed the consent for the reevaluation on February 1, 2022. She suggested the following areas be considered in the reevaluation: behavior/social, expression [sic] communication skills, adaptive, and self-help skills and routine/habits. *Id.* at 5.

⁵ Ms. Mintz has Bachelor and Master of Science degrees in Education. She has endorsements in elementary/middle school mathematics and English for Speakers of Other Languages. D40.

13. At the time the Student's reevaluation was started in February of 2022, Ms. Pitoyo had worked with him for a year. Ms. Pitoyo has been employed as an SLP in the District since 2018. Tr. 277. She has Bachelor and Master of Science degrees in communications sciences and disorders. D42. Ms. Pitoyo has provided services to children with a variety of disabilities, including Down syndrome, autism, and intellectual disabilities. Tr. 275.

14. As of February 2022, the Student had been very successful in achieving his IEP goals related to maintaining conversation, self-reflection, and asking for help when needed. Tr. 283. Ms. Pitoyo noted that he was independent in the school setting and could obtain assistance if and when needed. *Id.* at 283-84. She had also observed that the Student had a "big group of friends" that were all "really great students." Tr. 286.

15. The Parent emailed Ms. Pitoyo on February 13, 2022, and stated, in part:

I give consent for my child to be evaluated. And the parts: I would suggest the following areas of need be considered in assessing my child:

1/ Behavior/social: how to get along with other peers and adults. [Student's] level of problem solving skills?

2/ Expression communication skills: using appropriate language and words politely. (Please/thank you/Excuse me...) Manners in different situations. Does he ask for his needs and help? Frustrated/stress or upset.

3/ Adaptive: it's been around 6 months when he started 6th grade. According to his words when we have talked to him. He has not found any friends yet. He barely remembers his classmates name. It doesn't seem that he has conversation during resets (lunch) with anyone in his 6th grade class children. He mentioned he eats lunch haft of time with previous 5th grader, [name]. Then haft of the time he ends up eat alone. Which makes him sad. He really wants to have a friend to talk too... but he's not able to find one. [Student] takes time to adjust with new environment and people around him.

4/ Self help skills and routine/habits: At home [Student] often forgets to wash hand before/after mealtimes and after using restrooms. He needs remind to drinking water/milk.

Please help and advice for those areas. It would be greatly appreciated.

[Sic throughout.]

D20 p.1.

16. Ms. Pitoyo forwarded this email to three other staff members and stated that the items listed by the Mother "are a bit much." She further stated, "We're working on friendship skills, asking for help, etc. in Communication. There are parts of him that we can't 'fix.'" D20 p.1.

17. Jordan Osborne⁶ was the Student's general education teacher for history class and leadership class during the 2021-22 school year. Tr. 143-45. He described the Student as hardworking and polite, with a great sense of humor. Mr. Osborne noted that the Student participated in class discussions every day and would offer answers that were humorous. The Student listened well when other students spoke. *Id.* The Student had friends in Mr. Osborne's classes and would gather with them at free time to play games. *Id.* at 147.

18. Mr. Osborne has experience working with students with special needs and is familiar with the signs of bullying. Tr. 137-39, 150. He did not observe the Student to exhibit signs of being harassed or bullied. *Id.* at 150-151

19. The reevaluation was completed in February of 2022. On February 16, 2022, the Student's IEP was reviewed and the IEP team discussed the recommendation that the Student be found no longer eligible for special education services. D4, D5A p.6. The "present levels of educational performance" portion of the IEP review noted that the Student's communication goals had all been met. *Id.* at 6. At the meeting, Ms. Pitoyo recommended that communication/language SDI be discontinued. However, the IEP team could not reach a consensus regarding eligibility. *Id.* at 13. The Parents did not agree that the Student was ineligible and requested that additional assessments and observations be conducted regarding social communication and adaptive skills. D5A p.6.

20. Following the February 16, 2022 meeting, the Mother emailed Ms. Pitoyo and Ms. Hamilton and stated that the Parents did not agree with the decision to cease providing the Student with an IEP. D21 p.1. The Mother expressed concerns about the Student's social/emotional and expressive language skills. She further stated that the Student's issues usually arose at recess and the Parents wanted follow-up and monitoring of the Student at recess because they were concerned about bullying, among other things. *Id.*

21. Ms. Hamilton responded to the Mother the following day and stated that District personnel had been considering the Parents' concerns. She proposed "extending" the reevaluation until its actual due date of May 20, 2022. In the meantime, the District would provide 30 minutes per week of support for social communication to the Student, and would further assess his behavior/social and adaptive skills. Ms. Hamilton felt this would provide more data to support any decision about eligibility and would make the Parents feel more comfortable. D21 p.1. The Mother responded that same day and stated that the plan "sounded

⁶ Mr. Osborne has a bachelor's degree in secondary English education and is a certificated teacher. D41. He has been a teacher since 2016, and has taught middle school language arts, history, and leadership. Tr. 137.

good” to the Parents. She also requested that the Student receive instruction in problem-solving skills so he could stand up to bullying and advocate for himself. D24 p.2.

22. The PWN issued after the February 16, 2022 meeting states, “A decision was made to reopen the reevaluation to gather more data, and to continue to provide services to the Student while the reevaluation was pending. The reevaluation was set to close by May 20, 2022.” D4 p. 13. Adaptive and behavior were added as areas to be evaluated. Tr. 82.

23. As part of the extended reevaluation, Ms. Pitoyo created a data log in which she recorded her observations of the Student. D3. She noted that he had a stable group of friends with whom he interacted appropriately. He did not interrupt others, he used “whole-body listening,” and he exhibited “nice back-and-forth conversation” skills. Tr. 289.

24. Ms. Pitoyo’s data log contains two clerical errors in that the date recorded for two observations is incorrect; the indicated dates were actually snow days. Tr. 307. According to Ms. Pitoyo, “I predated my sheet... so I saw him within that week but just not on that specific day.” *Id.* These clerical errors do not change Ms. Pitiyo’s opinions and conclusions expressed in the reevaluation and at the IEP meeting. *Id.* at 314.

25. The Student continued to perform well in school and had As and Bs in all subject areas. D23. On March 22, 2022, Ms. Pitoyo emailed the Parents and informed them that she had been observing the Student at lunch and recess. She noted that he was doing “extremely well,” and that he ate lunch with a group of friends and engaged appropriately in conversation with them. She noted that he played with friends at recess, too. D27 p.1.

26. The Student’s reevaluation was completed in May of 2022. It addressed the following areas: review of existing data, general education teacher report, student observation, behavior/social, communication, and adaptive. D5A p.3. The reevaluation summary reflects that the Student was determined not to meet eligibility criteria for special education, and was determined to no longer require SDI in the area of communication. *Id.* at 6-7. The Student’s communication skills were in the average range in the areas of social language, articulation, receptive and expressive language, voice, and fluency. *Id.*

27. The reevaluation summary further reflects that the Student was earning As in all of his classes and that his academic skills were at grade level. He was noted to be engaged during class and transitions, both in his learning and with his peers. D5A p.7. The reevaluation summary specifically states that the Student does not meet the three-pronged criteria required for eligibility for special education services, which include: (1) standard scores indicating significant discrepancy from the mean in the school setting; (2) evidence of adverse impact of

delays and differences on his educational performance; and (3) need for SDI in the areas of communication, adaptive and/or social skills. *Id.*

28. The general education assessment portion of the reevaluation indicates that the Student has excellent work habits, cooperates and works well with others, and has no behaviors that interfere with his learning. He was noted to engage in conversation with peers and to socialize in and out of class. D5A p.11

29. The communication portion of the reevaluation was conducted by Ms. Pitoyo. She administered the Test of Pragmatic Language – Second Edition (TOPL-2) as well as the Clinical Evaluation of Language Fundamentals – Fifth Edition Screening Test (CELF-5 Screening Test). The TOPL-2 assesses the effectiveness and appropriateness of a student’s pragmatic language skills. The test has a mean score of 100 and an average range of 85-115. The Student scored a 107 which is in the average range. D5A p. 11. The CELF-5 is a research-based clinical tool designed to screen students for language disorders. The Student received a score of 27 on the CELF-5, which is above the criterion score, or expected minimum score, of 15. *Id.*; Tr. 300. He did not require the full battery of CELF testing because he scored well on the screening assessment. Tr. 299-300.

30. The Student’s articulation was also evaluated by Ms. Pitoyo, and he demonstrated age-appropriate skills. D5A pp. 11-12. His speech fluency and voice are appropriate, and he passed a hearing screening in both ears in February of 2022. *Id.* at 12. Based on her evaluation and testing, Ms. Pitoyo determined that the Student does not require SDI in communication. *Id.*

31. There is a typographical error in the communication portion of the reevaluation in which the Student is referred to as “Michael,” which is not his name. D5A p. 11.

32. The observation portion of the reevaluation was conducted by Ms. Hamilton and Ms. Pitoyo. D5A p.15. Ms. Hamilton observed the Student at least five times for approximately 20 minutes each time. Tr. 92. The Student was observed to talk with his friends at lunch about what they wanted to do at recess, as well as things they found interesting such as sports and games. The Student exhibited appropriate conversational skills including active listening, taking turns, and knowing when to stop talking. At recess, the Student played catch with a group of friends. He exhibited appropriate conversation skills and explained the rules of the game to a new Student who joined to play. D5A p. 15. Ms. Hamilton also gathered input from the Student’s classroom teachers. None of them had any significant concerns and they noted the Student interacted well and navigated their classrooms without issues. Tr. 92.

33. The Parents inquired at the due process hearing as to why the notes of these observations were not made available to them.⁷ Tr. 96. Ms. Hamilton did not recall if she kept the notes after she summarized them in the reevaluation report. *Id.*

34. The behavior/social portion of the reevaluation was conducted by Ms. Hamilton. She utilized the ASRS to measure the Student's behavior. D5A p. 15. The ratings questionnaires were completed by the Student's Mother, Mr. Osborne, and Ms. Pitoyo. The ASRS scales use a normative score of 50, meaning that a score of 50 indicates behavior that is considered typical for a child of the given age. *Id.*; Tr. 83. In other words, the closer the score is to 50, the more typical the child's behavior. Tr. 83. The Student's ASRS ratings were within the average range on the general education teacher's and SLP's ratings, with the exception of "social/emotional reciprocity" which was slightly elevated (i.e., not as close to average) on Ms. Pitoyo's rating. Social/emotional reciprocity measures a student's ability to provide an appropriate emotional response to another person in a social situation. D5A pp. 16, 17. All of the Student's ASRS scores were either slightly elevated, elevated, or very elevated on the Mother's ratings. *Id.* at 18. Notably, however, the Mother's ASRS ratings of the Student were closer to typical in the reevaluation as compared to her ratings in the assessment revision performed in June of 2021. For example, the Mother's total ASRS rating score was 73 in the assessment revision and 68 in the reevaluation. Her score for social/communication was 75 in the assessment revision and 66 in the reevaluation. Her score for sensory sensitivity was 79 in the assessment revision and 67 in the reevaluation. D2 p.7; D5A p.18. This indicates that she observed the Student's behavior as becoming more typical of children his age.

35. The adaptive portion of the reevaluation was conducted by Ms. Hamilton. She administered the Adaptive Behavior Assessment System - Third Edition (ABAS-3) which is designed to measure a child's independent daily living skills as compared to same-age peers. D5A p.19. The ABAS-3 has three main areas: conceptual, social and practical. The ABAS-3 ratings were completed by the Student's Parents, Mr. Osborne, and Ms. Pitoyo. *Id.* The Student's composite ABAS-3 score was in the average range according to Mr. Osborne's rating, in the below average range according to Ms. Pitoyo's, and in the low range according to the Parents' rating. *Id.* All of the Parent's scores in the ABAS-3 were low or extremely low. *Id.* at 20. All of Mr. Osborne's scores were average, and all of Ms. Pitoyo's scores were average or below average. *Id.* at 21.

36. Ms. Hamilton opined that it is not unusual for a child to exhibit a higher degree of independence and adaptive skills at school as opposed to at home. Tr. 116. In her opinion, the Student is typical for his age based on test scores and observations at school. *Id.* at 118.

⁷ The Parents did not file any pretrial motions seeking to compel the District to produce records.

37. On May 11, 2022, an evaluation team meeting was held to review the reevaluation and determine the Student's eligibility for special education services. D5A. The evaluation team included the Parents, Ms. Hamilton, Ms. Mintz, general education teacher Jaime Jeffries,⁸ Ms. Pitoyo, District representative Lesli Collum,⁹ and Mr. Osborne. *Id.* at 10. An interpreter was provided for the Mother. The District representatives on the team recommended that special education services be discontinued since the Student no longer met eligibility requirements. They relied on the reevaluation's determination that the Student's skills were within normal limits in the school setting in the areas of social skills, social language, and adaptive skills. Moreover, it was concluded that the Student's communication/social language skills no longer adversely affected his educational performance and he no longer required SDI. *Id.* at 22. The PWN issued following the meeting notes that the Parents continued to have concerns about the Student's communication, social, and adaptive skills, but those concerns do not present in the school setting. The Parents were not in agreement with the reevaluation's findings or the evaluation team's decision to exit the Student from special education. *Id.*

38. The reevaluation is signed by the evaluation team members and reflects that the report represents their conclusions, with the exception of the Parents, who are noted as having a dissenting opinion. D5A p. 10.

39. Mr. Osborne opined at the due process hearing that, based on observing the Student in two classes for an academic year, he did not believe the Student required special education services. He agreed with the evaluation team's decision. Tr. 157.

40. Ms. Collum observed the Student in the school community as part of her duties as assistant principal. Tr. 184. She observed him to sit with friends at lunch and actively engage in conversation. At recess he played catch with a group of friends. Ms. Collum never observed the Student to sit alone. *Id.* at 184-188. She opined that the Student's disciplinary referral for the playground incident was not abnormal or concerning. *Id.* at 190.

41. The Parents requested an IEE after the meeting on May 11, 2022. D29 p.1. The District denied the request and filed this action on May 25, 2022. The decision to deny the IEE was made by Ms. Wiessner.¹⁰ Ms. Wiessner has worked as a school psychologist and has been

⁸ Ms. Jeffries has a Bachelor of Science degree in education. She has worked as a teacher since 2007. D39.

⁹ Ms. Collum has a Bachelor of Science degree in elementary education and special education, and a master's degree in Educational Leadership. She is certificated in elementary education for K-8 and special education for K-12. She also holds principal and administration credentials. D37; Tr. 175. Ms. Collum was a special education teacher in the District prior to becoming assistant principal at Daybreak. She also has experience teaching first and fourth grades. Tr. 175-76.

¹⁰ Ms. Wiessner has a bachelor's degree in psychology and a master's degrees in school psychology. She worked in the District as a school psychologist in elementary and middle schools for over ten years. She then became a

responsible for reviewing District evaluations to ensure compliance with regulations and other mandates. Tr. 214-15. She has written and reviewed hundreds of evaluation reports. *Id.* at 216, 234. According to Ms. Wiessner, the District is required to destroy raw data obtained for an evaluation once the data is incorporated into an evaluation. *Id.* at 235.

42. The Parents emailed various District staff members on May 27, 2022, and set forth their disagreement with the reevaluation. They expressed their concern that the Student was being bullied at school. D31. The Parents also believe that the Student has deficits in his adaptive skills that affect his school performance. Tr. 339.

43. The Mother testified at the due process hearing that she disagrees with the reevaluation results in the area of adaptive. Part of the reason for her disagreement was the Student's reaction after the incident on the playground for which he was suspended in October of 2021. Tr. 244. She recounted that the Student was not able to speak about the incident, but he acted it out with his hands and feet. *Id.* at 247. He acted out being hit, punched, and kicked by the other student. He was also stabbed with a pen or pencil by the same student twice before the playground incident. *Id.* The Student later described the other student's grasp of him as a "choke hold" that impaired his breathing. *Id.* at 247. The Mother believes the Student was frightened after the incident and noted that he was unable to sleep "for weeks." He would grab his head and cover it up with a blanket in bed, and ask his Mother not to leave. *Id.* at 243. The Student also refused to talk to his Parents about how things were going at school. The Mother felt the Student could not express his concerns. *Id.* He subsequently developed pains in his neck and was taken to urgent care, where he cried profusely. The Mother felt this was due to bottled up anxiety and stress from school. *Id.* at 244.

44. The Mother also testified about [REDACTED] *Id.* at 253. The Mother is concerned that the Student does not know how to react if he or someone else is injured or in pain, and that this is unsafe for him and others. *Id.* at 253.

45. The Mother also believes the Student has a sensory disorder, evidenced by the fact that he will not let the [REDACTED] Tr. 252. She notes that this only happens at home, however, not at school. *Id.*

behavioral consultant in the District. In 2008, she became the assistant director of special education, and is now the District executive director of special services. Tr. 214-15, 234.

46. [REDACTED]

47. [REDACTED]

[REDACTED] Tr. 46-47, 52. She has attended multiple IEP meetings pertaining to her own children. *Id.* at 52. [REDACTED] knows approximately 24 children with autism who she has met in programs in which her children participated. *Id.* Based on her observations of her own son, [REDACTED] does not believe the Student is “high functioning.” *Id.* at 46-47. [REDACTED] testified about observing the Student at a social event with other children and people he knew, although this was the first time she had met him. *Id.* at 45, 57. She observed that the Student did not interact with anyone and made no conversation. *Id.* She believes the Student’s social skills are very low and that observations made in the District’s reevaluation regarding the Student’s social skills describe a child “that is not the Student.” *Id.* at 47. [REDACTED] believes her two-year-old and five-year-old grandchildren have more social skills than the Student. *Id.* She feels this makes the Student vulnerable to being bullied and manipulated, and that he needs help from the District. *Id.* at 48-49. [REDACTED] has not observed the Student at school. She sees him after school at the facility where his Mother works when she picks up her grandchildren. *Id.* at 55.

48. While the ALJ appreciates [REDACTED] input and the assistance she has given to the Parents, her lack of relevant training and the fact that she has never observed the Student at school cause her opinions to be given little weight.

49. On June 17, 2022, nurse practitioner Sandy Niehm of the Battle Ground Family Medicine Clinic wrote a letter “to whom it may concern” expressing her opinion that the Student should be considered for “504 accommodations” and that he would benefit from an IEE. P19 p1. Ms. Niehm wrote a similar letter on August 3, 2022, recommending that the Student be provided with increased supervision at lunch and recess “because he lacks the skills to advocate for himself and to protect himself” during stressful interactions. *Id.* at 2. Ms. Niehm was not called as a witness at the due process hearing and was not made available for cross examination regarding her opinions. The letters were written at the Parents’ request and the information contained in them was provided by the Mother. Tr. 254-55. It is clear from the text of her first letter that Ms. Niehm based her opinions almost entirely on information provided by the Mother. There is no evidence regarding Ms. Niehm’s training or experience pertaining to matters of special education. She has not observed the Student at school. *Id.* at 255. She has seen him three or four times at the medical clinic. *Id.* at 323. For these reasons, this exhibit is not found to be probative of the issue in this case and is not given any weight.

50. On August 5, 2022, the Parents filed a due process hearing request (OSPI cause number 2022-SE-0097), alleging, among other things, that the District inappropriately exited the Student from special education, and failed to protect him from harassment, intimidation and

bullying. That matter was not consolidated with the present case and is set for hearing in January of 2023.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings 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 pursuant to these statutes, 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, 126 S.Ct. 528 (2005). Since the District is the party seeking relief in this case, it has the burden of proof. Neither the IDEA nor Office of Superintendent of Public Instruction (OSPI) regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S.Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the District's burden of proof in this matter is preponderance of the evidence.

The IDEA

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

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

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

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

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

Id. at 188-189.

5. The Supreme Court clarified the substantive portion of the *Rowley* test quoted above in 2017:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S.Ct. 988, 999-1000 (2017).

6. A school 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. *Rowley*, 458 U.S. at 200-01.

Independent Educational Evaluations (IEEs)

7. Parents have a right to obtain an IEE if they disagree with a school district’s evaluation of their child, under certain circumstances. WAC 392-172A-05005; 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(1)(c)(i); 34 CFR 300.502(b). If a parent requests an IEE, a district must either ensure that an IEE is provided at no cost to the parent without unnecessary delay, or initiate a due process hearing within 15 calendar days to show that the district's evaluation is appropriate. WAC 392-172A-05005(2)(c).

8. If the district initiates a due process hearing and the final decision is that the district's evaluation is appropriate, the parent still has the right to obtain an IEE but not at public expense. WAC 392-172A-05005(3).

Evaluations

9. When conducting an evaluation, the District is required to follow the requirements 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 [sic] for special education services 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 service 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 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 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.

Appropriateness of the Student's May 11, 2022 Reevaluation

12. In the present case, the District provided the Parents with a PWN of the Student's reevaluation that described the reevaluation the District proposed to conduct, as required by WAC 329-172A-03020(1). The Mother signed the evaluation consent form on February 1, 2022.

13. The Student's evaluation was conducted by a group of qualified professionals. The individuals who participated in the evaluation had the education, training, and experience necessary to conduct the evaluation. The District has offered more than sufficient evidence to establish those qualifications and the Parents have not raised any challenge to that evidence.

14. The District has also demonstrated that it used a variety of assessment tools and strategies to gather relevant information about the Student, including information provided by the Parents. A multitude of standardized assessments were administered to the Student by trained and knowledgeable professionals. Information was gathered from the Parents, general education classroom teachers, and the SLP via various assessment tools. Moreover, the Student was observed extensively by Ms. Hamilton and Ms. Pitoyo.

15. No single measure or assessment was the sole criterion for determining the Student's eligibility for special education, and technically sound instruments were used to assess the Student's behavior and social skills, communication, and adaptive skills.

16. The Student was assessed in all areas related to his suspected disability in accordance with WAC 392-172A-03020(3)(e). The District assessed not only communication, but also behavior/social and adaptive.

17. The District's review of existing data included information provided by the Parents, and observations by teachers and service providers as required by WAC 392-172A-03025.

18. Finally, the May 11, 2022, reevaluation report satisfies all of the requirements of WAC 392-172A-03035. It states that the Student does not meet the eligibility criteria to receive special education services and discusses the data and assessments that support that conclusion. The report includes the date and signature of each professional member of the evaluation team and a certification that the evaluation report represents each team member's conclusion.

The Parents' contentions

19. The Parents first contend that the District inappropriately destroyed the underlying data that supports the reevaluation's findings. Parents' Closing Statement (Parents' Statement) at 2. The Parents argue, "We even doubt that the destruction of the primary data was in compliance with district protocols." *Id.* at 5. The Parents do not provide any authority for this assertion. The Parents did not bring any pretrial motions to attempt to obtain underlying data that may still exist or the District's policies pertaining to data retention. The Parents' unsupported speculation is not persuasive evidence that the reevaluation is in any way inappropriate. Moreover, the District personnel who supplied much of the data used in the

reevaluation, Ms. Pitoyo, Ms. Hamilton, and Mr. Osborne, all agree with the reevaluation's findings and conclusions.

20. The Parents further contend that the District made numerous clerical errors throughout the course of the reevaluation, and the due process proceeding, that demonstrate a general lack of care and thoroughness. The Parents argue that these minor errors call into question the accuracy of the reevaluation and the report. Parents' Statement at 2-6. The Parents cite the reference to the Student by an incorrect name in the reevaluation report and the erroneous dates in Ms. Pitoyo's data log as evidence of the District's consistent inaccuracy. However, errors that are harmless do not invalidate the results of assessments or the ultimate conclusion that is reached based on those assessments. *B.G. v. Board of Educ. of the City of Chicago*, 901 F.3d 903, 912 (8th Cir. 2018)(holding that mistakes in the administration of assessments during an evaluation did not invalidate the assessment results). The minor clerical errors pointed out by the Parents do not affect the content of the reevaluation or render it inappropriate in any way. The Parents have presented only speculation, and there is no evidence that significant errors were made by the District so as to render the reevaluation inappropriate.

Conclusion

21. Based on the record, it is concluded that the District has established by a preponderance of the evidence that the May 11, 2022 reevaluation of the Student is appropriate. Consequently, the Parents are not entitled to an IEE at public expense.

22. 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

The Battle Ground School District's May 11, 2022 reevaluation of the Student is appropriate. The Parents are not entitled to an independent educational evaluation at public expense.

Served on the date of mailing.



Jacqueline H. Becker
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 (90) 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, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at appeals@k12.wa.us.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that true copies of this document were served upon the following as indicated:

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Dated December 1, 2022, at Seattle, Washington.

Representative
Office of Administrative Hearings
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cc: Administrative Resource Services, OSPI