

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

IN THE MATTER OF:

ISSAQUAH SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2002-SE-0030

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

A hearing in the above-entitled matter was held before Administrative Law Judge Mary L. Radcliffe in Issaquah, Washington, on March 19, March 28, 2002 and April 2, 2002. The interested parent, T.B., (Parent)¹ was represented by Randal Brown, attorney at law. The appellant, Issaquah School District (District) was represented by Joseph Brown, Jr., attorney at law. The Administrative Law Judge, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

On February 21, 2002, the District filed a request for hearing with the Office of Superintendent of Public Instruction (OSPI). Exhibit (Ex.) C1. The District seeks to establish that its evaluation of the Student is appropriate and that the Parent is not entitled to an independent educational evaluation at public expense.

On February 21, 2002, the Office of Administrative Hearings mailed to the parties a Notice of Prehearing Conference, Notice of Hearing, and attachments. Ex. C2. On February 28, 2002, the prehearing conference was held as scheduled and the parties indicated readiness for the hearing scheduled for March 19, 2002. On February 28, 2002, a Prehearing Order was entered, which identified the issues for hearing and scheduled resolution of the District's Motion to Dismiss, among other things. Ex. C3. On March 7, 2002, the ALJ entered an Order on District's Motion for Order on Scope of Hearing, denying the District's motion. The ALJ concluded that the principle of *res judicata*, based upon a previously resolved Citizen Complaint, did not apply to the matter at hand, and that the matter was not susceptible to a summary judgment because material facts were in dispute.

¹In the interests of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parent", "Fiancé", and/or "Student."

On March 15, 2002, the District filed Motions *in Limine* related to the admissibility of exhibits and testimony.

The hearing convened on March 19, 2002 but did not conclude. On March 25, 2002, with the agreement of the parties, the ALJ entered an Order of Continuance of Hearing and Due Date for Written Decision for March 28, 2002 and April 16, 2002 respectively.

The hearing re-convened on March 28, 2002 but did not conclude. A third hearing date was set for April 2, 2002 and the deadline for issuance of a written decision continued to April 21, 2002. (See April 1, 2002 Order of Continuance, Ex. C6)

The hearing concluded on April 2, 2002, and at the request of the parties, a date set for submissions of post-hearing briefs. By letter dated April 4, 2002, the ALJ set April 19, 2002 as the submissions due date and continued the deadline for issuance of the decision to May 13, 2002.

The parties timely filed post-hearing submissions.

Evidence Relied Upon:

Exhibits Admitted:

For the District: D101 through and including D127 were admitted.

For the Parent: P100 through P112 were withdrawn, P113 through and including P124 were admitted.

Witnesses Heard:

Stephen Sulzbacher, Ph.D., Susan Palmer, M.A., Kathryn Wynkoop, OTRL, Diana Waterstrat, director of special services, Deborah Thurber, M.D., and the Parent.

ISSUES

1. The issue for hearing is:

Whether the District's evaluation of the Student is appropriate, and if not, is the Parent entitled to an IEE at public expense?

2. The issue for hearing is limited to the following more specifically identified issues:

Whether the Student's eligibility category is [REDACTED] or [REDACTED], and whether the District erred in choosing [REDACTED] so that the category should be changed to [REDACTED]?

Whether a parent is entitled to only one IEE per district evaluation, and if so, is the Parent not eligible for an IEE even if the District's evaluation is found inappropriate?

Whether the District's decision to not conduct a Sensory Integration evaluation nor a Sleep Study is appropriate, or did it fail to assess all suspected areas of disability?

Findings of Fact, Conclusions of Law and Order

Whether the District provided the Parent her right to participate in the evaluation process?

See February 28, 2002 Prehearing Order. Ex. C3.

FINDINGS OF FACT

1. The District's responsibility to provide the Student a FAPE is not at issue.
2. In 1997, the Student moved into the District from Mukilteo School District (Mukilteo). At the time, the Student attended [REDACTED] on [REDACTED]. The District reviewed the Student's 1996 Seattle School District (Seattle) evaluation and records from Mukilteo. The Seattle reevaluation reviewed by the District contained a doctor's, Carrie Freedheim, M.D., diagnosis of [REDACTED], and [REDACTED] - NOS (not otherwise specified). Upon review, the District determined the Student continued to be eligible for special education under the Seattle's reevaluation category of [REDACTED], and that his current IEP and placement at [REDACTED] was appropriate.
3. The Parent is a strong advocate for what she believes in and for what she perceives to be the Student's best interests. She holds two bachelor of arts degrees from the University of Washington, in psychology and sociology. She is detail oriented and capable of making fine distinctions.
4. Very early in his life, the Student began to have behavior problems. He has been hospitalized for [REDACTED] reasons approximately [REDACTED] times in his life: [REDACTED] times at [REDACTED], [REDACTED] at [REDACTED], [REDACTED] at [REDACTED], [REDACTED] at [REDACTED], and [REDACTED] at [REDACTED].
5. At the time of the hearing, the Student was [REDACTED] years old.

2001 Evaluation

Process & Parent Involvement

6. On April 24, 2001, the District initiated a reevaluation of the Student pursuant to a determination by OSPI that its 1999 reevaluation was inappropriate. According to state regulation, the evaluation was to be completed within 35 school days, September 12, 2001.
7. Susan Palmer, M.A., M.S., District special services supervisor and director of related services, served as case manager for the Student's reevaluation team. Ms. Palmer has conducted hundreds of evaluations and determinations of special education eligibility as

a school psychologist. She now supervises school psychologists, behavior specialists, and SLPs for the District.

8. It was Ms. Palmer's task to bring everyone together to synthesize, summarize and to ultimately render an evaluation report which included educational recommendations. It was not her job to conduct any assessments and she did not meet the Student. Ms. Palmer was the author of the Background Information section of the reevaluation. She relied upon all the records available, including school records, various professional reports, including Dr. Majovski, Dr. Sulzbacher, the Parent, and Dr. Thurber.

9. On May 11, 2001, the District held a meeting of reevaluation team members to identify the scope of the reevaluation. The team discussed existing data and decided on the additional data and assessments needed to conduct the reevaluation. The Student's continuing eligibility for special education was not at issue.

10. The Parent participated in the May 11, 2001 meeting and provided input in connection with every assessment of the Student to be conducted: neuropsychological, academic, intellectual, (all by Dr. Majovski) psychological (Dr. Sulzbacher), occupational therapy (Katie Wynkoop), physical therapy (Penny Coyner), and speech and language pathology (Brian Johnson). She signed the Consent for Re-Evaluation.

11. The Parent attended all of the Student's individual assessments and provided her input to each evaluator.

12. At the Parent's request and selection, the District paid for a comprehensive evaluation by Dr. Majovski. It is undisputed that Dr. Majovski's evaluation is an independent educational evaluation (IEE) within the meaning of WAC 392-172-150.

13. The District encouraged and sought the Parent's attendance at the reevaluation meetings held September 12, October 15, and November 1, 2001.

14. The District gave advance written notice of each meeting to the Parent, through her attorney, and with respect to each meeting gave alternative days and times to increase the likelihood of the Parent and her attorney attending.

15. The Parent was aware in advance of each of the reevaluation team meeting dates, times and locations.

16. Although the Parent attended only two of the four evaluation team meetings (May 11 and November 1, 2001), her attorney attended three of the four (May 11, October 15, and November 1, 2001). Neither the Parent nor her attorney attended the September 12, 2001 meeting.

17. The District offered to arrange the Parent's and her attorney's participation by telephone at the meetings they did not or could not attend in person.

18. Although the SLP portion of the reevaluation had not been conducted, the District held an evaluation team meeting on September 12, 2001 because it was the 35th day of the evaluation time line. The SLP evaluation was late because of the time it took to select the outside evaluator and the Parent's delay in scheduling the appointment. It was the District's intention that the meeting was to discuss the assessments completed as of September 12, 2001.

19. On September 12, 2001, the evaluation team met to discuss the assessments completed thus far. Though timely invited, the Parent did not attend because she did not consider it an IEP or MDT meeting. Randal Brown, her attorney, attended but did not have authority to make decisions.

20. On October 15, 2001, a second meeting took place. Ms. Palmer, Ms. Woolever (supervisor for secondary services), Diana Waterstrat, Dr. Sulzbacher, Dr. Majovski (by telephone), Annette McNabb (special education teacher), Randal Brown (attorney for Parent), and Joe Brown (attorney for the District) attended. The Parent did not attend. Mr. Johnson's SLP evaluation had been conducted but the report not written. Mr. Johnson attended in order to discuss his evaluation.

21. The group discussed the [REDACTED], and [REDACTED] special education eligibility categories. They discussed the Student's [REDACTED], and long standing aggression and non-compliance issues. They determined that the [REDACTED] eligibility category most ably described the Student.

22. On November 1, 2001, a final evaluation meeting was held at Dr. Thurber's office to accommodate the Parent's request that the Student's psychiatrist be included in the reevaluation process. Prior to the final reevaluation meeting, Ms. Palmer had provided the Parent and Dr. Thurber with a draft of the Reevaluation Report.

23. The Parent, the Parent's fiancé, and Randy Brown attended the November 1, 2001 meeting at Dr. Thurber's office. The reevaluation report was discussed thoroughly. The Parent and Dr. Thurber made recommendations and the report was edited to include them. Everyone agreed that the Student had symptoms of [REDACTED] except Dr. Sulzbacher. It was reported that Dr. Thurber did not object to the eligibility category of [REDACTED] as long as her recommendations were included. At the hearing, Dr. Thurber did not recollect saying this. The team discussed the relative merits of three eligibility categories: [REDACTED], [REDACTED], and [REDACTED]. The team gave a great deal of consideration to Dr. Thurber's opinion that the Student's eligibility should be [REDACTED]. With

the exception of the Parent and Dr. Thurber, the team concluded that [REDACTED] was the best and most applicable category.

24. Dr. Sulzbacher attended the November 1, 2001 meeting at Dr. Thurber's office, an IEP meeting on December 13, 2001 which the Parent also attended, and the October 15, 2001 meeting which the Parent did not attend.

25. The District invited Dr. Thurber to submit a written opinion to append to the Reevaluation Report to voice her dissent, if any, to the Reevaluation Report and in particular to the selection of the Health Impaired funding category. Dr. Thurber elected not to do so.

26. In bringing the evaluation to a close, on November 8, 2001, Ms. Waterstrat wrote to the Parent and included a copy of the final report with the corrections, additions, and suggestions made by the Parent and Dr. Thurber. Ms. Waterstrat's letter requested the Parent to: (a) review the report for accuracy and provide the District with any additional input she might have; and (b) if she desired an additional reevaluation-related meeting that she request it in writing and explain: (i) the reason such a meeting in her view would be needed or appropriate; (ii) the issues she would like to address; (iii) the people she would have attend; and (iv) the dates and times she would be available for a meeting.

27. The Parent did not respond, provide additional input, nor request any additional meetings.

28. In mid 2001, the Parent filed a Citizen Complaint with OSPI regarding the District's reevaluation. She asserted that the District had not afforded her the opportunity to participate and had not otherwise followed the required reevaluation procedures.

29. Diana Waterstrat, director of special services for the District, oversaw the reevaluation for compliance purposes and kept OSPI informed of its progress. In response to Ms. Waterstrat's query, on December 11, 2001, OSPI wrote to inform the District and Parent, based on information provided, that the District had completed the reevaluation and provided the Parent an opportunity to participate within the meaning of the special education law.

Eligibility Category

30. Medical doctors, psychologists and social workers doing clinical psychiatric or psychological work are appropriately credentialed to diagnose disorders using the DSM-IV (Diagnostic Statistical Manual - 4th edition).

31. Since February 1999, Deborah Thurber, M.D., board certified in psychiatry (children and adults), has been the child and adolescent psychiatrist overseeing the delivery of mental health services by therapists at [REDACTED]. In that capacity, she has seen the Student approximately 3 to 4 times a year except in the last year when there have been fewer visits due to the Student's lengthy hospitalizations. The purpose of the Student's visits to Dr. Thurber was/ is to monitor medications.

32. [REDACTED] served the Student for some time prior to Dr. Thurber's arrival in February 1999. As of October 18, 1999, [REDACTED] staff had diagnosed the Student with [REDACTED] and [REDACTED]. At the Parent's request, Dr. Thurber undertook a comprehensive review of records, to determine whether, as the Parent strongly suspected, the Student had [REDACTED] rather than [REDACTED]. After that review process, Dr. Thurber changed her diagnosis from [REDACTED] to [REDACTED].

33. In relevant part, a diagnosis of [REDACTED] requires, according to the DSM-IV "Diagnostic criteria for 299.00 [REDACTED] Disorder" requires six or more items in three categories. The three categories are: (1) qualitative impairment in social interaction, (2) qualitative impairments in communication, and, (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities. In addition, the person must have delayed or abnormal functioning in at least one of the following areas, prior to age 3: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play. The criteria do not refer to, or include, aggressive behavior.

34. Dr. Thurber's diagnosis of [REDACTED], as distinguished from [REDACTED] requires finding that the Student had an onset of symptoms before age 3. Dr. Thurber did not have developmental histories of the Student taken between birth to age three. She relied on later developmental histories taken at hospitals and treatment facilities, which were based largely on information provided by the Parent. A parent is the typical source for developmental history. Dr. Sulzbacher would be reluctant to rely on histories provided by the Parent because he suspects that the Parent shapes the history to increase the likelihood of an [REDACTED] diagnosis - a topic which she has thoroughly researched.

35. In relevant part, the Student must have a gross and sustained impairment in the criterion areas of social, spoken language, and behavior and activities function. It is a subjective measure based on clinical observations and a comparison to same age and cognitive level peers.

36. In July 2001, the parties agreed that Stephen Sulzbacher, Ph.D. (special education), would conduct an evaluation of the Student for the District. Dr. Sulzbacher has extensive and lengthy experience as a children's psychologist and educational consultant.

37. Dr. Sulzbacher conducted a clinical interview and a comprehensive records review. He also had some limited clinical experience with the Student when the Student spent several months, in 2002, at [REDACTED], where Dr. Sulzbacher is an attending psychologist. In his records review, Dr. Sulzbacher relied most heavily on the Student's hospital discharge summaries, because the 24 hour a day observations for extended periods of time by professionals were more likely to provide a clear picture of the Student. Dr. Sulzbacher found the [REDACTED] release summary to be quite significant because the Student's stay was recent, was for nearly four months, and Dr. McClellan is the author of the discharge summary. Dr. McClellan has an international reputation as an expert in psychiatry and is a senior faculty member at the University of Washington, where Dr. Sulzbacher is an assistant professor.

38. Dr. McClellan's discharge summary reports: The Student has longstanding aggressive behaviors and has a major problem with being difficult, of a parent/child interaction problem and parent difficulty in managing and rescuing the child. He also concluded that the Student has insight and can and should be held accountable. He opined that until that occurs he will not get better. He diagnosed the Student with [REDACTED] - Not otherwise specified [REDACTED] and [REDACTED]. Dr. McClellan also reported the Student made tremendous progress in non-compliance problems and that the Parent removed the Student from [REDACTED] against medical advice after an incident in which the Student was arrested, taken to juvenile detention and returned to [REDACTED].

39. Dr. Thurber is of the view that the Student meets the "gross and sustained" [REDACTED] criteria. She found the Student to be verbal and responsive to questions but unable to ever engage in reciprocal conversation. Dr. Sulzbacher disagrees. Based on the comprehensive records review and clinical interview, Dr. Sulzbacher concluded, that the Student met the minimum of six DSM-IV TR criteria for a diagnosis of [REDACTED], but not for [REDACTED]; the Student's performance at [REDACTED] and with Dr. -Sulzbacher, lead Dr. Sulzbacher to conclude that the Student is capable of reciprocal social interaction on occasion as opposed to other patients who have few moments where symptoms do not appear and/or interfere with the ability to communicate. Dr. Sulzbacher considers the Student much more functional than other patients who meet the gross and sustained impairment criteria.

40. Dr. Sulzbacher's and Dr. Thurber's clinical experiences are different and largely form the basis for their difference of opinion as to what amounts to "gross and sustained."

41. It is not appropriate to rely on Dr. Rimlin's diagnosis of [REDACTED] because its sole basis is a Parent completed questionnaire mailed to Dr. Rimlin's organization which was scored on its own criteria rather than the DSM-IV.

42. Dr. Thurber and Dr. Sulzbacher agree that underlying the Student's [REDACTED] or [REDACTED] is a [REDACTED] that science is yet unable to identify. Both professionals use the DSM-IV as the appropriate tool for identifying the Student's [REDACTED].

43. Dr. Thurber does not make multiple diagnoses when a certain characteristic/behavior fits under more than one DSM-IV category. Rather, she chooses only the most appropriate category. In this instance, Dr. Thurber determined it was appropriate to also diagnose the Student with [REDACTED] in spite of the fact that some of the Student's [REDACTED] is attributable to [REDACTED]. Dr. Thurber opines that the Student's argumentativeness, refusal to follow directions, quick irritability, and annoyance with others are symptoms of [REDACTED]. She feels the Student's aggression and temper tantrums are better explained by his [REDACTED].

44. Dr. Sulzbacher, on the other hand, diagnosed the Student with a [REDACTED], based on the longevity of the [REDACTED] diagnosis and the Student's increasing level of aggression and intimidation.

45. The record contains at least two instances where the Student was arrested for assaultive behavior: Once at [REDACTED] and once at [REDACTED]. The police were also called on or about December 27, 1999, during a family vacation in [REDACTED] in order to commit the Student to the hospital. At [REDACTED] and [REDACTED] the Parent removed the Student from the facility as a consequence of the staff calling the police. These criminal law interventions lend weight to the diagnosis of [REDACTED] as it involves law-breaking behavior.

46. Dr. Thurber finds the Student's aggressive behaviors secondary to his [REDACTED] in that he misinterprets language pragmatics and cues, and that his aggression only meets one of three necessary criteria for diagnosis under the DSM-IV [REDACTED].

47. Dr. Sulzbacher finds, as between the [REDACTED] and [REDACTED] diagnoses, the most relevant diagnosis which provides the best description of the Student for special education purposes is [REDACTED]. The Student's threats of aggression and refusal to participate and/or cooperate define the necessary educational setting - one that is clear cut, fair, stringent, consistent features of a residential program needed for Student. It is his recommendation that the Student be found eligible under [REDACTED]. He agrees that [REDACTED] is also an appropriate category.

48. Dr. Thurber has reviewed many children's IEPs but is only generally familiar with the eligibility categories for special education. Most of her clients have [REDACTED] eligibility based on [REDACTED] or [REDACTED]. In her opinion, the [REDACTED]

[REDACTED] category is not appropriate for the Student because the [REDACTED] category more aptly fits the Student.

49. As part of the reevaluation, the parties agreed that the District would fund a neuropsychological IEE with Lawrence Majovski, Ph.D., ABPP, to evaluate a wide range of brain-behavior functioning in several areas: cognitive, intellectual, sensori-motor/fine motor skills, perceptual organization skills, memory, attention/concentration skills, central executive functioning/higher order thinking skills, emotional/behavioral, and academic achievement skills. He conducted an extensive records review, interviewed and obtained information from the Parent, and administered thirteen tests and procedures, including the Rey Complex Figure and Rey Auditory Verbal Learning Test, Beery Visual Motor Integration Test, BASC-Parent Rating Scale, and Millon Adolescent Clinical Inventory (MACI).

50. Dr. Majovski identified the Student as having [REDACTED] and [REDACTED]. Also apparent was the Student's variability in attention/concentration, and the need for structure, routine, consistency and uniformity of tasks.

51. Dr. Majovski noted this in the scoring of the MACI:

. . . [The Student] presented himself with features that indicate that he is irritable, negative, hostile, and has inner tensions and conflict regarding his social and emotional behavioral expectations. He can present with defiant, hostile tendencies, as well as self-destructive elements, which have been noted in his past. These episodic behaviors indicate that he could care less about how he expresses his emotions in regard to consequence which his behavioral deeds create. Personality traits indicate histrionic and antisocial aspects, together with aggressive/sadistic features. His MACI profile best fits the category of [REDACTED] and [REDACTED].

52. Dr. Majovski identified the following DSM-IV diagnoses:

- 1) 294.9 [REDACTED]

- 2) 315.0 [REDACTED]
- 3) 312.9 [REDACTED]
- 4) 313.81 [REDACTED]
- 5) 312.0 [REDACTED], aggressive type behaviors
- 6) V71.02 [REDACTED]
- 7) [REDACTED] (previously diagnosed, and currently being treated).
- 8) [REDACTED] (previously diagnosed).

53. Although there is a question of fact as to whether the Student is more accurately diagnosed with either [REDACTED] disorder or [REDACTED] the evidence established one or the other of those diagnoses is correct. Based on the number of different professional opinions on the issue, it is most probably [REDACTED].

54. Although there is a question of fact as to whether the Student is more properly diagnosed with [REDACTED] or [REDACTED], the evidence established one or the other of those diagnoses is correct.

55. Although the Student has either [REDACTED] or [REDACTED] his educational performance is adversely affected primarily due to his behavioral problems which are not directly addressed in the [REDACTED] diagnosis or eligibility category but which are better described by the [REDACTED].

56. The Student's behavioral problems include an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; and a general pervasive mood of unhappiness or depression. The Student may have a tendency to develop physical symptoms or fears associated with personal or school problems.

57. The Student's complex neurological and mental health issues cause a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. This is demonstrated most clearly in Dr. Majovski's [REDACTED] [REDACTED] description and his synthesis of issues he describes as the Student's "cognitive sluggish tempo." (This is addressed later in these Findings of Fact under the topic of "Sleep Study".

58. The consensus of the team of professionals involved in the reevaluation was that [REDACTED] is the appropriate eligibility category for the Student. At the October 15, 2001 meeting, the following professionals expressed this opinion: Brian Johnson, SLP, Dr. Sulzbacher, Susan Palmer, Diana Waterstrat, Dr. Majovski, Susan Wolever, and Annette McNabb. The Parent and Dr. Thurber disagreed.

59. The educational programming and placement recommendations set forth in the Reevaluation Report and its attachments were not dependent upon or derived solely from the eligibility category because all programming and placement decisions were individualized to meet the Student's particular needs.

60. The Reevaluation Report and its attachments set forth numerous programming and placement recommendations consistent with the Student's [REDACTED] diagnosis. The Parent and Dr. Thurber provided input into those recommendations. There was no evidence presented supporting any allegation that the Reevaluation Report failed to adequately make autism-specific programming or placement recommendations.

Sleep Study

61. The Student has a history of sleep problems.

62. Sleep studies are within the practice areas of neurologists. In October 1999, Dr. Stobbe performed a neurological evaluation of the Student. Although Dr. Stobbe noted the Student's erratic sleep pattern, he did not recommend a sleep study, which indicates that a sleep study is not warranted.

63. Dr. McClellan's [REDACTED] discharge summary provides that the Student's sleep normalized in the structured routine inpatient environment. The Student's sleep problem is not an unexplained problem but is the product of the Student's unstructured time at home.

64. The Student's sleep problems were assessed in connection with the reevaluation, and appropriate recommendations were made. Dr. Majovski identified the Student's sleep problems as a strategy to tune out to avoid work when the Student has lost interest, become bored or frustrated with a task. The Student's distractibility, hypersensitivity and focus, boredom, and avoidance-by-sleep tactic combine to cause the Student's "cognitive sluggish tempo." To address this, Dr. Majovski recommends accommodations needed to encourage task completion, such as a mentor and a structured, consistent environment, where he can measure his progress, get immediate feedback, and be rewarded. Dr. Majovski did not identify the need for a sleep study.

65. There was no evidence as to what a "sleep study" constitutes and what educationally related benefits could result, nor that the District should have included a sleep study.

66. The evidence established that placing the Student in a structured, consistent environment outside the home, combined with medication such as [REDACTED] or the

homeopathic remedy, [REDACTED], has in the past, and would likely in the future, resolve his sleep problems.

Sensory Integration Evaluation

67. As part of the reevaluation, the District conducted occupational and physical therapy assessments. Kathryn Wynkoop, OTRL, and Penny Coyner, PT, conducted the assessments. They had planned to work together to trade off testing the Student and administering the parent information tool, School Functional Assessment (SFA). However, the Parent wanted to observe the testing of the Student, so the SFA was administered to the Parent while the Parent watched the Student's assessment.

68. The Parent is of the view that the District should have conducted a Sensory Integration (SI) assessment based on the way in which the Student receives sensory input from the environment. In earlier years, the District provided SI therapy strategies such as deep pressure brushing, vestibular and proprioceptive devices; such as a swing, and transitions and skill building for transitions.

69. "Sensory integration therapy" is a therapeutic method within the discipline of occupational therapy, and the determination whether a sensory integration evaluation is appropriate for a child is appropriately made by an occupational therapist. Sensory integration therapy is not the only method by which occupational therapists may treat a child's sensory issues.

70. Ms. Wynkoop holds an international certificate from Sensory Integration International in administering the Sensory Integration Praxis Test (SIPT), designed to identify and address sensory integration disorder (SI).

71. Ms. Wynkoop determined that evaluating the Student to determine whether he needed sensory integration therapy would have been inappropriate, given the Student's age. The standard sensory integration test, SIPT, is normed for children ages four to eight years 11 months. Because an individual does not achieve and maintain a certain level of 'sensory integration' normative skills over one's life, there is no basis on which to interpret the scores of a person outside the normed age levels.

72. SI treatment is founded upon the principle that it is possible to change the ability to process sensory information at the brain stem level which would then effect the higher reasoning level of the cerebral cortex. The goal, therefore, is to effect physical change in the brain to enhance functioning, motor skills and learning. The only window of opportunity for effecting this change is in the first decade of life when the brain has a certain plasticity.

73. The goal of conducting the SIPT is to recommend SI treatment. All OT/PT evaluations address life function and skills, sensory functioning, as in motor, balance, and coordination. SI is a theory and therapy and is not appropriate for someone of the Student's age.

74. In determining whether sensory integration therapy is indicated for a 15-16 year old, it is not relevant whether the child, at an earlier age, received and benefitted from sensory integration therapy because the 15-16 year old cannot benefit from SI therapy.

75. A child with [REDACTED] can have sensory processing problems. Assessment of sensory modulation and self-regulating behavior in order to intervene or identify alternative socially appropriate behaviors is a process that takes place over time. A child's sensory modulation, and sensory regulation fluctuates. Sensory registration deficit is an observation not a diagnosis. "How Your Engine Runs" is a method for learning where you are and how to get where you want to go. It is not the only means by which one seeks to identify a socially appropriate way to meet one's needs, and is not unique to SI therapy.

76. Ms. Wynkoop recommended that calming, arousing, and agitating stimuli and activities be identified in order to help the Student modulate his arousal levels for optimum performance and behavior.

77. Although the Student demonstrated some delays, Ms. Coyner and Ms. Wynkoop did not recommend occupational or physical therapy. The Student's deficits were not the result of physical disabilities requiring someone with OT or PT expertise to work with the Student. His deficits may be related to his sudden weight gain (approximately 100+ pounds) due to medications and his sedentary life style. His delays are better addressed by recommendations for adaptive PE, fitness, and endurance activities and accommodations as suggested by both the OT and Dr. Majovski's evaluations.

78. The Parent requested copies of Ms. Wynkoop's and Ms. Coyner's notes and test protocols. They agreed the Parent could have all the notes but refused the protocols for copyright reasons. The Parent was later provided a copy of the Student's answers/scores to questions without the copyrighted protocols, so that if one knows what the raw scores apply to, one would understand the outcomes. This would allow the Parent to seek outside review of the assessments.

79. Ms. Wynkoop recommended assistive technology in the form of a computer, acknowledging the Student's skill with the mouse and relative skill with typing also address This matched a similar recommendation by Dr. Majovski.

80. The Reevaluation Report and its attachments set forth numerous programming and placement recommendations relating to the Student's sensory issues. There was no

evidence presented supporting any assertion that the reevaluation failed to adequately make programming or placement recommendations relating to those sensory issues.

81. In relevant part, the Reevaluation Report Conclusions begins:

The general consensus of the team was that [the Student] presents with characteristics of [REDACTED]. However, because of the complex interplay of [REDACTED] serious [REDACTED] issues and previous [REDACTED] the category of [REDACTED] was determined to be the most appropriate eligibility category for him. All agreed that a residential school with the capacity, qualifications and expertise to educate adolescents with [REDACTED] [REDACTED] (particularly in the area of pragmatics), and [REDACTED] issues would be an appropriate placement for [the Student].

82. At the suggestion of Dr. Thurber, the Parent applied to Division of Developmental Disabilities (DDD) for financial assistance for the Student. A diagnosis of [REDACTED] not [REDACTED] [REDACTED] is required in order to be considered eligible. The Student was found not eligible, not on the basis of a disputed diagnosis but, on the basis that his verbal skills and language abilities were too high and he did not meet funding guidelines. The Parent appealed but, rather than have DDD formally deny the request for services, she withdrew her appeal. The Parent carefully notes that she is "unaware of any finding by a hearing officer in DDD contrary to eligibility."

CONCLUSIONS OF LAW

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 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-172 WAC.

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act) and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. *In Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had 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. 103 S. Ct. at 3051.

3. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA).

Parent Participation

4. Parent participation is a cornerstone of the IDEA which Congress has continued to enhance in its Reauthorization of the IDEA.² The Ninth Circuit Court of Appeals has also found parent participation fundamentally important, so that a procedural error that seriously infringes on a parent's participation in the IEP process denies the Student a FAPE. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992).

5. Here, the issue of parent participation arises in the context of the District's reevaluation of the Student. The reevaluation regulations do not require that a reevaluation team meeting be held in connection with the review of existing data. WAC 392-172-186(3). If the reevaluation team does hold a meeting, however, the "parents must have an opportunity to participate." WAC 392-172-186(3). Although parents must be afforded an opportunity to participate, unlike IEP meetings, there is no requirement that reevaluation meetings be scheduled at mutually agreed-upon times. Compare WAC 392-172-105 (evaluation meetings) and -186(3) (reevaluation meetings) to WAC 392-172-15700(1)(a) and (b) (IEP meetings).

6. In this case, the District provided the Parent ample advance notice of every reevaluation-related meeting, and provided her with the opportunity to participate in its reevaluation of the Student. The ALJ concludes that the District complied with the procedural requirements to seek and consider the Parent's participation.

7. On a substantive, as well as a procedural, basis the Parent availed herself of the opportunity to participate on many levels. These include her input on the scope of the evaluation, the selection of an IEE evaluator and outside SLP evaluator, her participation in the IEE, the inclusion of the Student's psychiatrist in the evaluation and team process,

² For example, see the 1997 IDEA Amendment, codified at 20 U.S.C.1414(b)(4), wherein the parent is added as a participant with evaluation team in making the eligibility determination.

her legal advisor's inclusion, and her own input into each individual assessment, the evaluation report and the team's recommendations. The Parent is very intelligent and able to convey her concerns well. That the District considered all of this input is self evident in the Reevaluation Report and the changes adopted by the evaluation team in drafting the report. The ALJ concludes that the District met its obligations under the IDEA to provide the Parent with participation in the Student's reevaluation.

Scope of Evaluation

Sensory Integration

8. A school district is required to evaluate a student in all suspected areas of disability. WAC 392-172- 106. It is not required to administer every possible test, particularly where there is no evidence that a particular test would be helpful from an educational standpoint. See *Baldwin County Bd. of Ed.*, 21 IDELR 311, 316 (ALA SEA 1994).

9. The Parent asserts that the District's evaluation should include a sensory integration evaluation. The Sensory Integration Praxis Test (SIPT) is conducted within the context of an Occupational Therapy evaluation. The SIPT and Sensory Integration therapy are only one means of addressing a student's sensory issues/needs. Aside from the efficacy issues related to SI therapy generally, the District's OTRL, who is qualified to administer the SIPT, found it specifically inappropriate for the Student because of his age: the test is not normed, nor the treatment efficacious, for a [REDACTED] year old student. Here, the District's OT evaluation and appropriately considered sensory issues and rejected administering the SIPT. The OT evaluation and Dr. Majovski's evaluation made recommendations to address the Students sensory issues/disability in the school environment.

Sleep Study

10. The District's reevaluation appropriately considered and addressed the Student's sleep problems as a behavior issue, most directly by Dr. Majovski. Neither has a professional identified the Student's sleep problem as a suspected disability and recommended further assessment, nor has the Student demonstrated the need for anything beyond a structured schedule and an over-the-counter remedy to address the problem as it arises. The District's reevaluation does not require a sleep study.

Generally

11. The Parent fully participated in the process of identifying the appropriate tests and scope of the evaluation. She did not request a sleep study or a sensory integration test. The District's proposed scope of the evaluation included all the suspected areas of disability at the time. At the conclusion of the individual assessments and the development

of the Reevaluation Report, no one asserted that further assessment should be done to complete an alleged incomplete picture of the Student's disabilities and needs. The ALJ concludes the scope of the evaluation was appropriate. It appears most probable that the Parent is seeking an IEE to address her primary concern as to the Student's eligibility category, not to address the scope of the evaluation. The eligibility category is addressed next.

Eligibility Category

12. The Student meets the threshold test for eligibility for special services under the "Autism" definition set forth in WAC 392-172-146, because he is properly diagnosed either as having Autism or PDD-NOS.

13. **WAC 392-172-146 Definition and eligibility for [REDACTED] provides:**

[REDACTED] means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a student's educational performance and requires specially designed instruction. If a student manifests characteristics of [REDACTED] after age three, that student still could be diagnosed as having [REDACTED] if the criteria in this section are satisfied.

Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines and unusual responses to sensory experiences.

The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional/behavioral disability, as defined in this chapter. The category of autism includes students with pervasive developmental disorders.

All students being considered for eligibility for special education and any necessary related services under this category shall be evaluated in all areas of suspected disability and in accordance with procedures in WAC 392-172-106 through 392-172-111.

14. Although the Student has [REDACTED] or [REDACTED] [REDACTED] is not the appropriate eligibility category for him because his educational performance is adversely affected primarily due to an [REDACTED]. The category of [REDACTED] as described above, does not sufficiently convey the behavior element of the Student's disabilities.

15. The Student is properly diagnosed either as having [REDACTED] or [REDACTED], both of which manifest themselves with markedly inappropriate behavior. The Student's inappropriate behavior is the primary impediment to his educational performance.

16. The Student falls within the [REDACTED] definition set forth in WAC 392-172-118, because he has exhibited over a long period of time and to a marked degree, the following characteristics which adversely affect his educational performance and requires specially designed instruction:

- (a) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (b) Inappropriate types of behavior or feelings under normal circumstances;
- (c) A general pervasive mood of unhappiness or depression; and
- (d) A tendency to develop physical symptoms or fears associated with personal or school problems.

17. Although this set of criteria clearly describe the Student, it is inappropriate to find a student eligible for special services under the [REDACTED] category where his behavioral problems are caused by underlying neurological and mental health issues. Instead, it is appropriate to find such a student eligible under the category [REDACTED] WAC 392-172-124.

18. **WAC 392-172-124 Definition and eligibility for [REDACTED]** provides:

Students with [REDACTED] are those who have limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment due to chronic or acute health problems, such as a heart condition, rheumatic fever, nephritis, asthma, attention deficit disorder or attention deficit hyperactivity disorder, sickle cell anemia, hemophilia, lead poisoning, leukemia, or diabetes, that adversely affect their educational performance and require specially designed instruction.

All students being considered for eligibility for special education and any necessary related services under this category shall be evaluated in all areas of suspected disability and in accordance with the procedures in WAC 392-172-106 through 392-172-111.

19. To qualify as [REDACTED] a student does not have to have any of the specific physical or mental health conditions listed in WAC 392-172-124, as indicated by the "such as" language modifying that list. Also, see *Letter to Anonymous*, Office of Special Education and Rehabilitative Services (OSERS), 16 EHLR 552 (1989).

20. In this matter, the Student's complex [REDACTED] and [REDACTED] issues cause a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, as described by Dr. Majovski as the Student's "cognitive sluggish tempo."

21. [REDACTED] is an appropriate eligibility category for the Student, as determined by the consensus of the group of professionals involved in the Student's reevaluation. The reevaluation team appropriately considered the dissenting views of the Parent and Dr. Thurber, but there is no requirement that the decision be unanimous. Moreover, Dr. Thurber admittedly has not read the eligibility regulations and is not knowledgeable about the interplay between eligibility categories as described above.

22. If the ALJ understands the Parent's analogy to DDD services correctly, the ALJ finds DDD eligibility somewhat analogous to the instant situation. That is to say that a student is not necessarily eligible for special education because of an identified diagnosis. The student's disability must also "adversely affect their educational performance and require specially designed instruction." WAC 392-172-124. However, apparently unlike DDD eligibility, once determined eligible for special education, the eligibility category does not define the scope of services. The important issues in reevaluation are the eligibility determination (not the category) and the provision of appropriate services. Special education services are to be designed to meet the unique needs of each student, not solely based on his eligibility category. WAC 392-172-045(1).

23. Here, the evaluation team had a thorough discussion and made a considered and thoughtful decision that Health Impaired most ably captured the Student in his educational environment. The reevaluation thoroughly addresses the complexity of the Student, including his [REDACTED] or [REDACTED] diagnosis and needs. To the extent the Student's [REDACTED] disorder adversely affect his educational performance, the Reevaluation Report and its attachments make appropriate programming and placement recommendations related to that issue.

Summary

24. The District complied with the IDEA and the implementing federal and state regulations when it conducted the Student's reevaluation. It appropriately involved the Parent, evaluated all suspected areas of disability, appropriately decided the Student's eligibility category, and made appropriate recommendations. The Parent thoroughly and meaningfully availed herself of the opportunity to participate in the process at every level. Accordingly, the ALJ concludes that the District's evaluation is appropriate. Therefore, the Parent is not entitled to an IEE at public expense pursuant to WAC 392-172-150.

25. Based on the foregoing conclusion, it is not necessary to reach the issue of whether the Parent is entitled to more than one IEE at public expense in one reevaluation period.

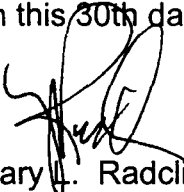
26. The ALJ has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

Findings of Fact, Conclusions of Law and Order

ORDER

1. The District's 2001 reevaluation of the Student is appropriate, including its scope and eligibility category.
2. The District appropriately provided the Parent participation in the reevaluation process.
3. The Parent is not entitled to an IEE at public expense.

Dated at Seattle, Washington this 30th day of April, 2002.


Mary L. Radcliffe
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a **petition for reconsideration** filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (I) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The **Petition for Judicial Review** of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

Certificate of Mailing

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 4/30/02, by depositing a copy of

same in the United States mail, postage prepaid, addressed to the following:



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