

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

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OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF
EVERETT SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NOS. 2004-SE-0096
and 2004-SE-0099

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Janice E. Shave at Everett, Washington, on September 9, 10, 14, 16, 17 and 24, 2004. The Parents of the student whose education is at issue in this proceeding (hereinafter Parents and Student) appeared and were represented by Howard Powers, attorney at law. The Everett School District (hereinafter School District) was represented by James Dionne, attorney at law. Also participating on behalf of the School District were Kristine McDowell, executive director of special services, and Amy Jesse, director of secondary special services and out of district placements.

Pursuant to the request of the Parents, the decision due date was extended for good cause, over the objection of the School District. The decision due date was set as the close of the record plus thirty days. The record first closed October 21, 2004. The parties submitted proposed Findings of Fact and Conclusions of Law post-hearing. The Parents then submitted additional legal argument, following issuance of a Ninth Circuit Court of Appeals decision, which the Parents wished to have considered. The submission was treated as a request to reopen the record. The School District was offered time to submit written response. The record then closed November 24, 2004, and the written decision due date was shortened from thirty days after the close of the record to December 3, 2004.

The following exhibits were admitted: Parents' Exhibits P 1, 3 - 9, 13 - 15, 17-19 and School District Exhibits D 101 (for limited purposes) - 123, 127 - 129, 131 - 134, and Court Exhibits C1 and 2 (requests for hearing).

Following review of the pleadings, admitted exhibits, testimony and arguments of the parties, the following order is entered:

STATEMENT OF THE CASE

The Parents filed an appeal with the Office of Superintendent of Public Instruction (OSPI) on July 16, 2004, regarding the School District's proposed new placement for the Student for the 2004-2005 school year. The then-current placement was in a private day school four days per week plus one day per week at . The School District's proposed placement was at full time.

ISSUES

Issues and Remedies

The issues for hearing are:

- (a) Whether the Student's IEP for the 2004/2005 school year, which proposes to change the Student's placement from the 2003/2004 school year placement of a combination of Dartmoor School and to solely is appropriate or would the proposed placement deny the Student a Free and Appropriate Public Education (FAPE).
- (b) Whether the School District properly evaluated the Student prior to proposing to change the Student's placement for the 2004/2005 school year.
- (c) Whether the School District properly completed the IEP process and afforded adequate participation and input into the decision prior to proposing to change the Student's placement for the 2004/2005 school year.

FINDINGS OF FACT

1. The Student is years old. resides with his Parents within the School District boundaries and has done so at all times material to this matter. The Student has been diagnosed with left-hemiplegia (decreased range of motion, increased muscle tone, fine and gross motor delays), aphasia (impaired or absent communication by speech, writing, or signs due to dysfunction of brain centers in the dominant hemisphere), and mild visual difficulties (nystagmus, cataracts, far-sightedness, astigmatism).

2. The Student was first found to be eligible for special education at age in September 1991, under the eligibility classification of developmentally handicapped. His eligibility was changed to health impaired in or about first grade. The parties agree he continues to be eligible for special education services under the health impaired category.

3. The Student is very social. He is eager to learn, and to interact with teachers and students alike. He gets along well with his teachers. He has an exceptionally positive attitude, and is eager to contribute in class. The Student has no behavioral problems at school.

4. From all the evidence presented at the hearing, it is clear that the Student is a pleasure for a teacher to have in class. He is motivated, attentive, socially active and involved in the classroom. He does outside reading on subjects of interest to him and shares special knowledge he has that may be of interest to the larger group. He is not a behavior problem.

5. The Student has attained the rank of Eagle Scout. His father is actively involved in the scouting troop, also. The Student has been able to achieve the Eagle Scout status through participation in regular scouting activities, apparently with re-teaching of specific topics. The Student participates in annual scout functions, such as camping trips. His ability to attain an unusually high scouting ranking is evidence that the Student is able to function in group settings for acquisition of the skills and for social purposes, when motivated to do so.

6. In the lower elementary school years, the Student was placed in a mainstream classroom, receiving academic support in a resource room. The Student was home-schooled by his Mother during the third grade. The Student made significant math progress during that school year, and his Parents sought to replicate the home-schooling model (one adult to one student, completely personalized in every way) in his return to public school.

7. In June of 1998 the School District provided an independent educational evaluation (IEE) at public expense. The IEE centered around the Student's diagnosed aphasia, and was provided by a speech and language pathologist (SLP), Amy Flaherty. The IEE resulted in a report that found the Student had marked difficulties in processing speed, accuracy of interpretation and recall of auditory information. He had word retrieval deficits, poor grammatical mechanics and limited expressive organization. He also had impairments in reading and written language, and was noticeably distractable. The delayed processing made it difficult for the Student to attend to, interpret and retain information. The Student has received significant assistance with these deficits at least since 1998, but still has difficulties and is expected to continue to have difficulties. These are the primary deficits which affect his education, significantly more than his left-hemiplegia or eyesight.

8. He returned to public school in the fourth grade and was placed in a general education classroom with a full-time instructional assistant (IA) assigned to him. His placement was changed during that school year to a self-contained special education classroom.

9. However, beginning in February 2000, the Student was unilaterally placed at _____ in Woodinville, Washington. During the fourth-grade school year, the School District agreed to pay for the private placement at _____, including the provision of transportation. The Student's education at _____ consists of four hours of one-to-one instruction per day, four days per week.

10. _____ owned by _____ earned a Bachelor's degree in elementary education, reading and language, from a school in Minnesota in 1962 and her Master's degree in curriculum and instructional design in 1975 (University of St. Thomas.) She worked in public education in Minnesota from 1962 to 1979. She then went to work for the Minnesota Educational Computing Consortium. She worked on implementation of federal and Minnesota State laws relating to education. She moved to the Seattle area in 1986 and worked on some political campaigns, also for an educational publisher in marketing. She received her General Education Certificate for either K-12 or K-3 (she is not certain which) in the State of Washington. _____ does not currently and has not ever instructed the Student.

11. _____ has four different campuses throughout the Greater Seattle and Eastside areas. _____ currently instructs approximately 400 students at all four locations anywhere from a minimal amount (one to two hours per week) to full-time (four hours per day, four days per week). The Student is one of very few full-time students at any of the Schools.

12. The Woodinville _____ School is not a traditional school location. It is a small group of rooms/offices located in a strip mall in Woodinville, and shares its building with other commercial businesses, including insurance offices and a dog-grooming establishment. Instructional services occur in a single large room which has been divided into small cubicles. Instruction also takes place in a small computer room. There is a small entrance area where the Student sits to eat his lunch. _____ described the instruction that takes place in the cubicles

as "a one to one tutorial coaching situation." The staff at the Woodinville site try to keep the Student physically separated as much as possible from other students, twenty to thirty feet or so. According to [redacted], there are currently over 100 students attending the Woodinville site. The site manager, [redacted], stated there are around 30 Woodinville students.

13. Instruction at [redacted] is always provided on a one-to-one basis, except where instruction is provided by a computer program, and then the one-to-one teacher merely sits by and provides and acts as an instructional aide (IA). On a few occasions throughout the year the Student is required to present a report to the teacher and the Parents, but generally not to or with other students.

14. The Student has been taught by various instructors while at [redacted], the Woodinville site manager, has been his instructor for several classes. [redacted] has a Bachelor's degree in political science and a Master's degree in public policy. She has worked in a variety of places, and does not have any teaching experience other than [redacted] and no formal education or certification in education or special education. She has taught the Student math, writing, Washington State history, life science and American history. The Student's favorite academic subjects are science and history. He is highly motivated to learn both of those subjects. [redacted] has not received any college or graduate school training to teach any of the general education subjects she taught to the Student. [redacted] instructed the Student in mathematics, science and history during the 2001-2002, 2002-2003, and 2003-2004 school years. She has never taught in a public school.

15. During the 2000-2004 school year, [redacted] employed 16 teachers. Three have Washington State General Education teaching certificates. No certificated teachers were at the Woodinville site. [redacted] is approved by the Office of the Superintendent of Public Instruction (OSPI) as a non-public agency for the delivery of special education pursuant to the Washington Administrative Code (WAC) 392-172-222. During the 2003-2004 school year, [redacted] did not have any employees certificated to teach special education.

16. Oversight of the Student's education was provided by a School District certificated special education teacher ([redacted] during 2000-2003 and [redacted] during the 2003-2004 school year). The School District's teacher of record traveled to [redacted] several

times per school year to observe the Student and monitor his Individualized Education Program (hereinafter, IEP) progress. During the 2003-2004 school year, the Student received his instruction at [redacted] from non-certificated teachers. Those individuals may have obtained certification for the 2004-2005 school year.

17. The Student receives his mathematics instruction at [redacted] from the "PLATO" computer program. His instructor sits next to him, functioning as an IA. The Student has had a great deal of difficulty mastering and retaining math facts. Even when he learns a subject or a function, such as addition, subtraction, multiplication or division, [redacted] finds it necessary to spend supplemental time with him, revisiting prior lessons every week.

18. For reading, [redacted] utilizes the SRA system, which is a completely scripted program, where each interaction between a student and teacher is scripted down to the last word. SRA is also sequential, and a student may not move on until he has mastered the earlier steps in exact order. After at least three years of utilizing the SRA program, in late May, 2004, the Student was at the level B2, lesson #52, in the SRA decoding workbook and level B1, lesson 50 in the comprehension workbook. It is anticipated that a student can complete a decoding and a comprehension lesson in one class period. The Student has spent four and one-half years in the SRA system at [redacted] and has not completed the program. This is an exceptionally long time to remain in the SRA program. The Student has not made significant progress in reading during his four and one-half years at [redacted]

19. [redacted] records show limited academic progress during the four and a half years the Student has attended school there. Exhibits D 103 through 106. His IEP goals and objectives have changed little over the past two school years while he has been at [redacted] instructors are required to re-teach material every few days to the Student.

20. The School District spent approximately \$425,000.00 educating the Student at [redacted] (tuition, materials, transportation and consultation time for School District IEP meetings, and so forth) during the past four and one-half years.

21. During the 2003-2004 school year, the Student was the only student at [redacted] for part of the morning, then one other child arrived, who also received one-on-one instruction in a small cubicle in the single classroom [redacted] has. Three other children

attended school later in the day, each taught one-on-one by a separate instructor in an individual cubicle. The Student ate his lunch by himself. The other students at _____ are placed there because they cannot succeed in a regular school setting, and do not provide appropriate social models for the Student.

22. The owner and director of _____, _____, and the manager of the Woodinville site and teacher of the Student, _____ disagree on whether any testing of the Student has been done. According to _____ no testing has been done of the Student during the four and one-half years he has attended _____ because the Parents asked that no such testing be done. _____ testified _____ assesses each student every year with the NEAT Achievement Test. There was also a conflict in the evidence regarding whether such testing was done on two or three dates in July of 2004 or on two dates in August of 2004. The record is not clear whether the testing was ever done prior to 2004, since _____ did not provide any information about earlier testing to the School District when it was requested in March 2004.

Reevaluations

23. The School District conducted a reevaluation in the Spring of 2001 at the end of _____ grade. School District psychologist Tulin Idemen included in her report a concern expressed by private practitioners, _____ School, and School District staff that the Student's independent working behaviors, and exposure to peers, including those with similar disabilities, needed to be reviewed with the goal of promoting delivery of academic intervention in as natural an educational setting as possible. Exhibit D-107, Re-evaluation Report of May 24, 2001. The Parents and the School District disagreed about some aspects of the reevaluation report, and the disagreement was contained in annotations to the reevaluation report from the May 24, 2001 reevaluation meeting. Exhibit D 107.

24. The reevaluation considered a speech and language pathology (SLP) evaluation completed in 1998 which contained many, many specific recommendations. Exhibit P 5. Among them, the evaluator, a private SLP at Children's Hospital and Regional Medical Center, recommended that adults working with the Student:

- Alert him to the importance of the incoming information to assure his attention is focused appropriately;

- Provide short breaks, especially when he is expected to be concentrating to learn new material;
- Call attention to critical details to aid his general comprehension and his ability to follow directions;
- Simplify language used with him;
- Avoid the use of figurative language, imbedded phrases, complex linguistic structures or ambiguous language as much as possible;
- Allow additional time to process incoming information;
- Organize information into small "chunks" when presenting it to him, and pause in between those chunks of information so he has time to process each new piece of information;
- Use visual information to support information presented verbally to allow for multi-modality information processing (e.g., written pictorial outlines of lecture materials and/or key word/topic lists for verbally presented lessons);
- Provide short, simple and concrete directions; Demonstrate directions or provide visual models in addition to verbalizing directions;
- Use "verbal confirmation" to assure that the Student properly understands the intended message. Have him repeat back to the speaker what he thinks the speaker is saying or requesting of him. This will confirm for the speaker that the Student correctly understood, and will also assist with the Student's auditory memory;
- Compile a list of significant details/facts/information or an outline prior to a lecture.

25. To address the Student's difficulty with expressive language, the SLP recommended that adults working with him:

- Allow the Student extra time when asked to recall information to answer specific questions;
- Give the Student extra time to organize his thoughts into sentence, paragraph, and story format and encourage him to plan verbal responses independently before delivering information out loud. [p.15]
- if the Student is trying to tell a story about something that has happened and it is difficult to follow him, help him become more specific and organized by asking "wh-" questions;
- If the Student should get "off-topic" mid-story with an irrelevant interjection, verbally cue him back to the original topic.

26. To address the Student's cognitive-communication difficulties, the SLP recommended that adults working with him:

- Eliminate potential visual/auditory distractors within his work environment;
- Frequently repeat activities, given the Student's memory limitations;

- Review previously learned information frequently, (e.g. on a weekly/monthly basis), to ensure that the Student retains it over long periods of time;
- For multi-step tasks, develop task analysis sheets. Have the Student generate a list of all the necessary steps in order, prior to the beginning of the activity, to make sure he understands each thing he will need to do.

Exhibit P 5.

Kevin Johnson, M.S. CCC Independent Language Evaluation

27. In or about 1998, the Parents contacted Kevin Johnson, M.S., CCC, to evaluate and provide services to the Student. Mr. Johnson is a private SLP therapist. He made many very specific recommendations. In his July 27, 1998 language/learning evaluation, Mr. Johnson confirmed the Student's difficulty at maintaining focus on difficult tasks. Exhibit P 5. To address the Student's difficulty with auditory comprehension and memory, Mr. Johnson recommended that adults teaching the Student:

- Monitor his attention and provide frequent breaks;
- Vary the amount of cueing;
- Modify verbal output to maximize the Student's comprehension;
- Decrease their rate of speech;
- Provide pause between main ideas;
- Provide opportunities for and encourage the Student to put new information into his own words;
- Have the Student answer specific questions to monitor his comprehension;
- When providing instructions, provide the Student with a model of the completed task, then give him one step at a time as he completes the task;
- Limit auditory and visual distractions;
- If verbal responses are correct, rephrase the verbal input and refocus the Student's thoughts regarding the topic;
- Provide frequent opportunity to review and rehearse information that has been previously taught to ensure mastery;
- Supplement auditory information with visual input;
- Encourage the Student to visualize representations of events (e.g. in social studies);
- Reinforce the Student's attempts to seek clarification of verbal information.

Exhibit P 4 at p. 7

28. To address the Student's difficulty with expressive language, including word retrieval and organizing ideas on higher level language tasks, Mr. Johnson recommended that adults teaching him:

- Provide the Student time when formulating verbal response so he can formulate his ideas;
- Reinforce the Student for attempting to use strategies to compensate for word retrieval difficulties;
- Use a metalinguistic approach, directly discussing and illustrating language components;
- In any verbal task, provide cueing to help the Student formulate his response.

Exhibit P 4 at p. 8.

29. To address the Student's difficulty with decoding, Mr. Johnson recommended that adults teaching him:

- Use "shadow" or "choral" reading, in which an adult reads along out loud with the Student;
- Reinforce the Student for attempting to correct decoding errors, such as when the Student realizes sentence makes no sense.

Exhibit P 4 at p. 9.

30. To address the Student's difficulty with writing skills, including difficulty with spelling, sentence structure, and written organization, Mr. Johnson recommended that adults teaching him:

- Read back written work to the Student to provide him the opportunity to correct errors;
- Brainstorm ideas before writing a paragraph to map ideas;
- Create a simple mnemonic for a step-by-step approach to writing process.

Exhibit P 4 at p. 10.

31. Mr. Johnson recommended a classroom with a low student-teacher ratio (no more than 5 students and 1 teacher), to allow the Student to seek clarification of information and allow an instructor to monitor his comprehension and retention of new information. Exhibits D-107 and P 4.

32. In January 1999, Mr. Johnson began providing language pathology services to the Student at School District expense. The Student made good progress working with Mr. Johnson, and the Parents valued Mr. Johnson's work.

33. The Parents privately hired Mr. Johnson to perform standardized testing which was completed on or about February 19, 2002. Exhibit D 109, page 30, *et seq.* The purpose of the testing conducted by Mr. Johnson was to answer the Mother's questions regarding the

Student's levels of functioning, and whether the Student exhibited a central auditory processing disorder. Mr. Johnson's testing results indicated a standard score (SS) in reading word identification of 70, in passage comprehension an SS of 64, and grade equivalent (GE) of 2.1, and in written language a SS of 77. The Parents declined to provide Kevin Johnson's evaluation report to the School District. These scores demonstrated the Student had a significant problem with reading comprehension. Exhibits D 109, at p. 35 and D 108 at p. 6.

September 2002 IEP

34. In the present levels of performance portion of the Student's September 2002 individualized education program (IEP), the School District noted its concern that the Student was not truly mastering academic skills, but instead was too dependent on instructors. Exhibit D 114. Exhibit D 108. That reevaluation contained estimates, only, of the Student's academic achievement rather than data from testing, because the Parents did not allow the Student to be tested utilizing standardized methods.

September 18, 2003 Reevaluation

35. On May 21, 2003 (the end of grade) the School District proposed to reevaluate the Student. The proposal was made during a meeting between the Parents, (School District special education "teacher of record" at for the three previous school years), (Director of Secondary Special Services), (school psychologist), (the Student's SLP service provider during grade) and (i). The parties discussed existing assessment data, information from teachers and other service providers, and information from the Parents. The parties agreed that special education eligibility was not at issue, and that further information was needed to determine the Student's previous levels of performance, necessary special education and related services. Exhibit D 109, pages 1 through 5.

36. The School District agreed to do an item analysis of test responses to determine the Student's learning style and his academic strengths and weaknesses. All participants at the meeting signed their agreement. Exhibit D 109 at page 5. The Parents also signed their consent to the mutually agreed upon plan for evaluation, including a list of each area

the parties agreed to have assessed, and the corresponding test or evaluating procedure the parties agreed to implement. Exhibit D 109 at page 6.

37. The Parents agreed to provide SLP Johnson's 2002 private evaluation to the School District including his February 2002 standardized test scores, and to allow standardized testing to be administered for the 2003 reevaluation, but not to be reported or used for "placement." Exhibit D 109 at p. 4. The Parents also required the School District to delete a reference to using the test results to compare the Student to the normative population group. Exhibit D 109 at pages 2 and 6.

38. As part of the September 2003 reevaluation, school psychologist administered the Differential Ability Scales (DAS) cognitive test, because it is not timed. felt the DAS would not penalize the Student for the fine motor limitations caused by his cerebral palsy. The Buros Mental Measurements Yearbook, which is a compilation of professional evaluations of psycho-metric tests, states the DAS normative population sample includes special needs students at approximately their statistical distribution within the U.S. population, and the Buros Yearbook states that the particular test is useful for language-disordered students. The Student is language-disordered.

39. also administered the Wide Range Assessment of Memory and Learning (WRAML). The Student scored better with visual learning skills than oral skills. He remembered information better when oral information was presented with visual support, and presented in context, rather than standing alone or with rote repetition of verbal instructions only.

also administered the Woodcock-Johnson Test of Achievement - Revised and the Oral and Written and Language Scales (OWLS) and portions of the Process Assessment of Learning (PAL). The achievement test scores were consistent with the Student's below average cognitive test results. They indicated the Student needed specially designed instruction in reading, writing, mathematics and language in order to make progress in general education. Although the tests were administered, standard scores of the tests were not reported in the reevaluation report.

40. Hede Schlacht was the Student's School District SLP for the three school years prior to 2003-2004. Ms. Schlacht advised the reevaluation team that the Student's

receptive language was close to normal. SLP Kevin Johnson's standardized testing confirmed this opinion, since the Student achieved receptive language test scores within the normal range. According to the uncontroverted testimony of SLP Johnson, a standard score (SS) is considered average if it is in the range of 85 to 115, the average scaled score range for a subtest is 7 to 13, and an average percentile range is the 16th through 84th percentiles. According to SLP Johnson's test results, the Student's score on the "listening to orally read paragraphs" subtest of the CELF Test was 8, which placed him at the 25th percentile, at the low end of the average range. The Student also received an average score of 87 SS on the PTVT-3 test which measures comprehension of spoken vocabulary. According to SLP Johnson, receptive language is a relative strength for the Student. The Student's main language problems were determined to be related to expressive language and word finding, as well as failing to elaborate sufficiently when speaking, such that the listener would have difficulty understanding the intended message. The Student also demonstrated greater difficulty with more complex and lengthy receptive and expressive language.

41. The DAS Cognitive Test, the OWLS and the WJ-R Achievement Tests are all listed on the current list of approved, standardized testing published by OSPI for use in special education. Exhibit D 133.

42. The School District completed the reevaluation within 35 school days of the time it was proposed and agreed to. A meeting was held September 18, 2003, to finalize the evaluation report. The report recited that the Student received his education at _____, but attended _____ (a public school within the School District) for physical education, speech and keyboarding classes. Exhibit D 109. The 2003 evaluation noted the Student should receive "small group/individual instruction in reading, math, and written language." Exhibit D 109 at page 17.

43. Under the section of the evaluation report dealing with placement recommendations and location of services, the report provided as follows:

[The Student] would benefit from small group/individual instruction to provide specially designed instruction in reading, math and written language.

Exhibit D 109. There are no small-group class options at

44. The 2003 evaluation report also addressed the Student's transition into a more general education setting as follows:

As [the Student] begins to participate more in larger group academic settings, it will be important for him to occupy a seat near the center of the first row . . . The IEP team may wish to explore more general education exposure in classes such as history, social studies, or in a class of interest to [the Student] such as computers.

Exhibit D 109 at page 17. The standardized test scores which the Parents did not want to have utilized to make placement recommendations were not included in the reevaluation report, and there was no evidence that the School District utilized those scores to make placement recommendations.

45. Members of the evaluation team included [redacted] School [redacted] Special Education teacher), [redacted] (school psychologist), (Assistant Principal at [redacted] SLP), [redacted] Director of Secondary Special Services), [redacted] School District special education teacher who provided input but did not attend the 09/18/03 evaluation meeting), [redacted] (SLP -- provided input, but did not attend the 09/18/03 evaluation meeting), [redacted] and [redacted] ([redacted] owner and Woodinville site manager, respectively), the Parents and the Student. All participants agreed with the final evaluation report. The evaluation of the Student was not objected to or listed as an issue in this due process hearing.

46. Also at the September 18, 2003 meeting, the parties discussed the draft of an IEP which had been prepared by [redacted] prior to the meeting. The IEP meeting reconvened the following day, September 19, 2003, to continue the discussion. The September 2003 IEP is not at issue in this proceeding. It called for the Student to remain at [redacted]

47. The members of the September 2003, reevaluation team who were employed by the School District originally recommended the Student receive special education services on Fridays (only) at [redacted], to supplement the education the Student received at [redacted] four hours a day, Monday through Thursday. The School District continued to propose the Student receive his education at [redacted] on Fridays during a November 5, 2003 IEP meeting. However, [redacted] staff stated that it was too difficult to continue to provide information to the School

District every Thursday to coordinate the [redacted] and [redacted] special education. Exhibit D 116 at page 2. The IEP team agreed the Student would enroll part-time at [redacted] for general and special education (vocational only) classes, and [redacted] would not be required to coordinate its education with [redacted].

48. The Student enrolled part-time at [redacted] beginning with the start of the second semester of the 2003-2004 school year. [redacted] classes included a general education Introduction to Art class, which met each morning (Monday through Friday). After that art class, he received one half hour of SLP services (Monday through Thursday), then proceeded to [redacted] for four hours of one-to-one instruction. On Fridays, the Student attended classes at [redacted] all day, including art, junior reserve officer training corps (NJROTC), study skills (a study hall to assist him with his [redacted] classes), photography and print shop (to teach vocational skills). He was initially scheduled to have a library class period. However, library was changed to a second hour of general education NJROTC at the Parents' request. The School District provided a one-to-one IA to the Student throughout his Friday school day and art class.

May 27, 2004 IEP Meeting

49. On May 7, 2004, notice was sent to the Parents of a proposed IEP meeting to review and revise the Student's IEP for the 2004-2005 school year. Exhibit D 120. The Parents agreed to the meeting time and date. The meeting took place as scheduled on May 27, 2004. Parents and [redacted] staff participated in the meeting, along with School District staff. The School District provided an agenda for the meeting, which provided thirty minutes to discuss "program placement" toward the end of what was planned as a two hour meeting. Exhibit D 121. The Parents were only able to stay for an hour and one-half.

50. The School District presented a draft IEP for the 2004-2005 school year. IEP team members employed by the School District recommended the Student continue at [redacted] for the remainder of the 2003-2004 school year and during summer term. Exhibit D 120 at page 121. They also recommended the Student attend [redacted] full-time for both special education and general education courses for the 2004-2005 school year. However, discussion of the proposed IEP took longer than expected, and therefore discussions regarding the specific location (placement at [redacted]), did not take place until a few minutes before the Parents had to leave the

meeting. The Parents expressed reservations about the proposed change before they left. The parties agreed to schedule another IEP meeting for further discussion.

51. The May 2004 IEP provided for specially designed instruction in the following areas of academic/pre-academic functioning: reading, written expression, mathematics, communication skills and pre-vocational/vocational skills. Exhibit D 120 at page 17. The draft IEP also provided specific goals and objectives in each of these areas. Exhibit D120 at pages 4 through 12. It did specify extended school year (ESY) services would be provided at for 2004.

52. The May 27, 2004 IEP goals and objectives were based upon the 2003 evaluation report, as updated based on data gathered after the 2003 evaluation, including progress reports and observation data.

June 16, 2004 IEP Meeting

53. A follow-up IEP meeting was held June 16, 2004. The Parents attended and participated in discussions. The School District did not invite anyone from or ensure participation. The evidence is not clear whether the Parents invited staff. staff did not attend. The School District IEP team members were , school psychologist), (Assistant High School Principal), (SLP), (general education teacher), (Director of Secondary Special Services), and (School District special education teacher of record for the Student at). Exhibit D 122 at page 4. By the end of the June 16, 2004 meeting, each of the IEP team members from the School District present recommended the Student attend full time for the 2004-2005 school year.

54. IEP team members from the School District based their decision on the following input:

- (1) Observations and notes of observations at progress and notes and charts for the prior three school years;
- (2) School District evaluation reports from May 24, 2001, June 14, 2002, and September 18, 2003, including assessment information in the areas of cognitive functioning, academics, communication skills, physical ability, vision/mobility, and vocational ability;
- (3) Prior IEPs and IEP progress reports;
- (4) teacher report;

- (5) Continuance of the least restrictive environment (LRE) requirement;
- (6) The ability of _____ to provide the IEP goals and objectives; and
- (7) The Student's history of success at _____ and School District staff's understanding that he had expressed a desire to attend _____ full-time.

Exhibit D 122, at page 5.

55. No evidence was offered during the hearing that the Student had significantly changed from the time of the 2003 evaluation to the time of the May and June 2004 IEP meetings.

56. The Parents disagreed with the School District's proposed placement at _____ for the 2004-2005 school year, and filed a due-process hearing request with the Office of Superintendent of Public Instruction (OSPI), which was received July 16, 2004. The issues originally stated by the Parents were:

- (1) A determination that the School District improperly proposed to change the Student's placement from _____ to _____ (full-time) without first conducting an evaluation on which to base the appropriateness of the proposal;
- (2) A determination that the School District improperly proposed to change the Student's placement from _____ to _____ (full-time) without first completing the IEP process and affording the Parents adequate participation and input into the decision; and
- (3) A determination that the School District's proposal to change the Student's placement from _____ to _____ (full-time) is inappropriate and would deny him the free, appropriate public education (hereinafter, FAPE) to which he is entitled under Individuals with Disability Education Act (IDEA) and state law.

57. The proposed IEPs both call for specially assigned instruction delivered by special education teachers with IA support for the academics. However, other information from the School District caused the Parents to be confused about whether the proposal was for a special education classroom or general education. The proposals included some general education classroom work, providing some room for miscommunication between the Parents and the School District.

58. Provision of notice of procedural safeguards is not at issue in this proceeding.

59. The School District proposed the Student be placed for the 2004-2005 school year with _____ a certificated special education teacher who was new to the School District but had many years of experience. _____ was assigned to the combined

resource room/self-contained-I (RR/SC 1) classroom proposed for the Student for the 2004-2005 school year. _____ uses a variety of approaches, including multi-sensory instruction, class projects, visual and audio presentations and computer presentations. While each student's education is required to be individualized, some activities are able to be done in a small group setting. The special education classes proposed for the Student for the 2004-2005 school year (_____ classroom) have in general no more than five students in them, without the Student. Additionally, the School District proposed to assign a full-time IA to the Student. The IA would be completely available to the Student, but would not be presented to the class as an aide assigned only to the Student. Instead, the School District's plan was to present the Student's IA as a general classroom IA, so that the Student did not feel the social stigma of having a one-to-one aide, but was able to fully benefit from the IA's attention as needed and when requested. This plan is consistent with the Parents' opinion that the Student needs a one-to-one model because of attentional issues, rather than specifically for direct instruction purposes. However, an additional reason the School District proposed a one-to-one IA for the Student was safety problems raised by the Parents. The Student fell twice in the hallways of _____ during the 2003-2004 school year. _____ was not aware of any safety issues for the Student at _____

60. _____ classroom is supported by one adult IA for the five students in the mathematics and reading classes. If the Student were assigned to that class, the full-time IA that would be assigned to him would result in two IAs and one special education certificated teacher for a total of six students for those two subjects. At the start of the 2004-2005 school year, the written language class had seven students, plus a certificated teacher (_____ and either one or two IAs.

61. The School District proposes to use _____ as the Student's IA for the 2004-2004 school year. _____ was the Student's EA for the 2003-2004 school year.

_____ demonstrated poor written language (including spelling) skills in her communication with the Parents. Exhibit P 13.

General Education Classes Proposed for the 2004-2005 School Year

62. The School District proposed a variety of general education classes for the 2004-2005 school year. It proposed two NJROTC classes because the Student had such a strong interest in all things Naval. His father is a former career Naval officer.

63. The Parents assert the Student will not be physically able to participate in the physical activities portion of NJROTC classes, which is one day per week. However, the NJROTC instructor who has worked most with the Student, believes the Student could participate in the physical activity portion of NJROTC, provided it was modified. Further, the Student has demonstrated he can participate in some significant amounts of physical activity through his out-of-school swimming lessons, tennis lessons, bicycling, hiking through scouts, artificial climbing walls (assisted), and horseback riding. The Student participates weekly in a therapeutic horseback riding program () in a nearby community. The Student loves the therapeutic riding program, and has become inspired to become a therapeutic riding instructor. He is able to groom and tack up his own horse, assist others, ride in his lessons, and participate in competitive riding events against other disabled riders.

64. The School District proposed placing the Student in an American Sign Language (ASL) class, in part to assist the Student with his expressive language disability, and in part because the Parents at one point expressed an interest in sign language for the Student. The actual class proposed by the School District for the 2004-2005 school year was visited by the Parents, staff and School District staff in early September 2004. However beneficial an ASL class might be theoretically, the specific ASL class proposed by the School District is inappropriate for the Student, as the pace is too rapid, there is inadequate space for all of the students in the classroom, there are too many students in the classroom, and the presentation is significantly more verbal and less organized than necessary for the Student to make progress. Those deficiencies in the specific classroom proposed by the School District were not apparent at the time the proposal was made in May and June of 2004.

65. The School District staff who participated in drafting the 2004-2005 proposed IEP considered the most recent evaluation of the Student, and their proposed placement was consistent with the 2003 evaluation. The School District's proposed placement for the 2004-2005 school year, in a small group setting within a self-contained special education classroom,

is consistent with the placement options contemplated within the language of the 2003 evaluation and within the scope of SLP Johnson's 1998 and 2002 evaluations, which recommended a small student-to-teacher ratio. Exhibits P 4 and D 132.

66. Because the May 2004 IEP meeting ended before significant discussion of the proposed placement change took place and because [redacted] did not attend the June 16, 2004 IEP meeting, no significant input from [redacted] was received regarding either the May or June 2004 proposed IEPs. The failure to have [redacted] staff present likely contributed to the failure of the proposed IEPs to include classes in the Student's favorite subjects, science and history. Further, School District staff were not knowledgeable about the Student's specific pre-vocational and vocational needs and preferences. Had [redacted] staff attended, the proposed IEPs might well have looked somewhat different for general education and vocational classes. For instance, the floral design class proposed is not of interest to the Student, and is not well-suited to his physical abilities.

School District Knowledge about Dartmoor Placement

67. The School District obtained its knowledge about the Student's placement through observations and monitoring of the Student over the four and one-half years he has attended [redacted]. Because [redacted] did not have any certificated special education teachers to deliver education to the Student, the School District assigned a special education certificated teacher to observe and monitor the Student's progress (teacher of record). These observations were somewhat difficult to carry out, however, because [redacted] would not allow the Student to interact with or see the School District's staff (the assigned teacher of record) during the observations. Instead, the teacher of record sat at a spot somewhat remote from the Student and his [redacted] instructor, out of his line of sight and behind a cubicle divider. Thus, the nature of the observation was auditory, and not visual.

68. The School District's teacher of record for the three school years prior to 2003-2004 was [redacted]. She made extensive notes of her observations. Exhibit D 101.

[redacted], the School District teacher of record for the 2003-2004 school year, also took extensive notes of her observations, and recorded the materials, curriculum, and computer programs used by [redacted] staff. [redacted] also reviewed [redacted] progress records, which were provided

to the School District on a regular basis. Exhibits D103, 104 and 105. asked
to provide current materials they were using with the Student and copies of the
Student's work. Exhibit D 119. prepared a chronological record of the Student's
history and progress at prior to drafting the May 27, 2004 IEP. Exhibit D 106.

69. School District Director of Secondary Special Services,
observed the Student three times at and reviewed his records. School District
psychologist, David Paratore, observed the Student one time at , and conducted all of
his testing of the Student at prior to recommending small group instruction in his
September 18, 2003 evaluation report.

Credibility

70. owner of Schools, and Woodinville
site director, have personal financial motivation to see that the Student remains at
According to the testimony of there is only one other student at
Woodinville who receives as many, or close to as many, tutoring hours at the school.
is paid by the amount of tutoring a student receives.

71. and did not demonstrate significant knowledge about
the Student. limited qualifications and expertise do not provide an adequate basis
for reliance upon her educational opinion, although as the student's actual instructor for many
classes over the past three years she has ample personal knowledge to offer factual testimony.

72. , educational and professional history is sufficient that her
testimony on educational matters would be accorded some weight. However,
provided testimony which calls her credibility as a witness into question. She has limited
knowledge of the Student's actual education, but does say hello to him frequently (once a week
or so), and does receive a frequent, brief summary about him. She receives a frequent (weekly)
brief summary about each of the more than 400 students. testified she
would not provide materials from the Student's education at to the School District.
This is unusual and unexpected, given that the School District had a contract with for
four and a half years, and paid for all of the Student's education and educational materials while
he has been at

General Education Classes 2003-2004

73. The Student participated in large (25 to 30 students) general education classes at [redacted] for art and Junior ROTC (NJROTC) during the 2003-2004 school year on Fridays when no classes are offered at [redacted]. He received educational credits for the classes he attended, and demonstrated his ability to work toward and meet academic graduation requirements, as modified for a special education student who attended school only one day per week. The Student acted in an independent manner in the NJROTC classes, answered questions, raised his hand and asked appropriate questions. He participated as other students do in class, and participated more than most students in [redacted] NJROTC class and in art class. He volunteered to read aloud in both classes, despite having a significant learning disability in reading. The Student also demonstrated that he learned through student-teacher discussions, including facilitated student discussions in NJROTC. The Student learned best in multi-sensory methods, rather than simple teacher-directed instruction, such as what he apparently receives at [redacted]. He was able to build a camera in his photography class at [redacted] with [redacted]. The instructions for building the camera were taken from the internet.

74. The Student has taken physical education classes, both through the School District (which were not very successful) and privately. He learned to swim in class with four to six other students, learned to play tennis with twelve other students and one instructor, and learned religion lessons in a weekend class.

75. Regarding scouting, the Student earned an environmental science merit badge with eight to twelve other boys. The instructor for that merit badge was from California, and was earning her teaching credentials. The Student not only obtained Eagle Scout rank, but also earned 31 merit badges, which is more badges than required, and he earned them at an earlier age than is typical for his Eagle Scout rank. According to the Father, the Student earned his Eagle Scout rank, and all of his merit badges, without asking for or receiving concessions. The Student also earned a "Citizenship in the Community", a "Citizenship in the State," and "Citizenship in the World" merit badges through group learning activities. According to the Mother, the Student did significant amounts of research on his own on topics that interested him,

including military ships and the Pentagon. He created his own notebook on ships from his independent research.

Attention and Distractability Issues

76. The Student did well at [redacted] in general education classes. He appeared to benefit significantly through his group activities. He was most distractable during the one-to-one study period when the Student continued to look at other students. At [redacted] the Student is alert to the actions of other students, even when isolated behind cubicle dividers in a one-to-one teaching arrangement with a single instructor. The Student demonstrated he was easily brought back to task at [redacted] when he did get distracted. The Student was able to obtain his teachers' attention, ask questions, and receive answers or redirection successfully.

77. During the 2003-2004 school year, the School District placed the Student in a pre-vocational activity class in the print shop. The goal of this class was not to assist the Student with obtaining a job in a photocopying office, but instead was to assist the Student with pre-vocational activities, such as showing up for work on a regular basis, interacting with co-workers and supervisors, and accepting and following through with instruction. The School District proposed returning to the print shop for the 2004-2005 school year, which the Parents vetoed. The School District also proposed a flower-arranging class for the Student. Given the Student's physical and visual limitations, and his complete lack of interest in the subject, this suggestion was not accepted by the Parents. The School District also proposed the Student work as a library assistant, checking books in and out and assisting other library student users. The Parents felt the library would be too distracting for the Student, because of the number of students coming and leaving. However, the Parents felt the library assignment was the best of the three vocational options offered to the Student. The Parents have not acknowledged the value of the pre-vocational skills (the print shop or proposed library placements) and instead are focused on their concern that the Student is college-bound and will not be working in a print shop or a library.

78. The Parents advised the School District for the 2003-2004 school year that it was unacceptable for the Student to have any homework assigned. The rationale for this is not clear, since general education students have homework assignments, and there is no

evidence that the Student would not be capable of completing some homework outside of the school day. Further, the Student has demonstrated he is capable of doing academic work while at home, to wit, his research on military ships and Pentagon, and his notebook on the same, as well as his Eagle Scouting activities. The refusal to allow homework did not allow the Student to practice and cement his skills, as other Students do, and further removed the Student from his peer group at [redacted], most of whom would ordinarily have homework to do and to discuss with each other.

2004-2005 Proposed IEPs

79. The School District's proposed IEPs for the 2004-2005 school year included the use, at least for the start of the school year, of the same curriculum materials and workbooks that [redacted] used so the transition would be easier for the Student. All of the materials utilized by [redacted] are available in the School District, although they were not already placed in [redacted] classroom as of mid-September, 2004, when the Parents observed the program, since the Student had not yet enrolled in those classes.

80. [redacted], the NJROTC instructor who taught both NJROTC and photography to the Student during the 2003-2004 school year, is the parent of a special needs child. He is familiar with the Student. [redacted] believes the Student will make educational progress at [redacted] and believes the Student did so already during the past school year (2003-2004). [redacted] (certificated school psychologist), [redacted] (certificated director of Secondary Special Services) and [redacted] (certificated special education teacher and the Student's 2003-2004 school year teacher of record) and [redacted] (SLP) all believe the proposed program and placement at [redacted] are reasonably calculated for the Student to make more than trivial educational progress.

Proposed General Education Classes

81. The School District's proposals for the 2004-2005 school year include vocational assessments of the Student's career interests and aptitudes. Exhibit D 120, at page 15. The School District's proposed IEPs include provisions which would require the Student to explore several new jobs during the school year. Exhibit D 120, at page 9.

82. The School District, the Parents and staff discussed vocational goals and objectives at the May 27, 2004 IEP meeting. Exhibit D 120, pages 9 and 10.

83. The School District's proposed IEP for the 2004-2005 school year, as well as the IEP for the 2003-2004 school year, contemplate the Student will not graduate from high school in four years, but instead will take six years.

Non-Academic Benefits

84. The placement at [redacted] is extremely restrictive and limiting to the Student. He has no classes with other students, and no group projects. He is virtually unable to obtain social benefit with disabled peers, and completely unable to obtain social benefit from non-disabled peers in the [redacted] placement. The [redacted] placement is restrictive in the extreme. The cubicles, coupled with lack of other students on the premises and preference to keep students as far as possible from each other amount to an educational placement that is very, very far from even a restrictive self-contained special education classroom. They appear more like an isolation chamber designed for a student who is a risk to himself or others, and not an educational placement for a friendly, social young man who will be expected to function in society after completion of school.

85. Placement at [redacted] would allow the Student to obtain non-academic benefits with normally developing peers in his general education classroom, during lunch periods, in the hallways, before and after school, and at typical high school social functions, such as assemblies, sporting events, school clubs, dances, and so forth. He would be able to obtain non-academic benefit from other special education students in those settings, as well as in his classroom, also. For instance, during the 2003-2004 school year, the Student attended the NJROTC Navy Ball with a date.

86. The Mother testified that she does not anticipate the Student will be able to be independently employed following completion of his academic career, and instead will need to be in some sort of supported employment.

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 Code of Federal Regulations (CFR) 300 *et seq.* and Chapter 392-171 WAC (or Chapter 392-172 WAC for cases arising after November 11, 1995).

2. The Individuals with Disabilities Education Act (IDEA) (formerly the Education for All Handicapped Children Act (EHA)) 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 (FAPE) consists of both the procedural and substantive requirements of EHA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

According to the definitions contained in the EHA, a 'free appropriate public education' consists of education instruction specifically 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 of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act. 103 S. Ct. at 3041, 3042.

Procedural Compliance

4. An inquiry must be made into whether a school district has met the "rigorous procedural requirements of the IDEA" and any "State standards that impose a greater duty." *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures in the IDEA and state laws, the question of whether its proposed program meets the substantive benefit test need not be addressed and the proposal must be deemed inappropriate. *W.G. v. Target Range School District No. 23 Board of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992). Washington has no state standard that imposes a greater duty.

September 2003 Reevaluation

5. The Parents assert the School District violated the procedural requirements of the IDEA and State law when it conducted the September 2003 reevaluation, because the results were eventually used as a factor in the School District's proposed placement change. This assertion is not adopted. The Parents do not assert the September 2003 IEP which continued the Student's placement at _____ was inappropriate.

6. There is no evidence the purpose of the 2003 reevaluation was to support a change of placement proposed eight months later. The Student was in an out-of-district placement _____, and observations were difficult. The School District was not allowed to actually observe, to see, the Student in his out-of-district placement _____ it was only allowed to hear him from a distance. The Parents had previously refused to allow the School District to conduct testing of the Student, and the Parents had not provided the School District with results of private testing done (SLP Johnson's). _____ either did not conduct any testing on the Student, depending on whether _____ or _____ is believed, or refused to disclose the existence of such testing to the School District. The Parents restricted and denied information about the Student to the School District while the Student has been at _____. It was appropriate and necessary for the School District to propose and to carry out the September 2003 reevaluation.

7. The September 2003 reevaluation team did not rely on the report of just one expert speaking from afar: it included members from the School District who had significant expertise; it included the well-educated, knowledgeable and highly motivated Parents; It also

included staff. The reevaluation team considered SLP Johnson's report, which was not the report of an outside expert called upon to render an opinion from afar. SLP Johnson had actually worked with the Student as his SLP. He was clearly knowledgeable about the Student, and knowledgeable about the Student's significant language needs. The reevaluation was sufficient in scope to develop an IEP, although that was not the immediate purpose of that reevaluation. Further, the evaluation would have supported the move from private tutorial instruction to a small group special education placement at the time it was written and agreed to by the Parents and by Both types of educational placements were within the scope of the wording of the reevaluation. The reevaluation team could have recommended the Student be returned to a small group setting at the School District based upon the language of the September 2003 reevaluation, as that would have been supported in the language. The team did not make that recommendation then, but it was not necessary to redo the reevaluation when a portion of the team later decided to change its recommendation for placement.

8. All IEPs are required to be based upon the most recent evaluation. 34 C.F.R. §346(a)(ii) and WAC 392-172-159(1)(b). It would be inappropriate for the School District to ignore the most recent evaluation when it drafted the September 18, 2003 IEP and the two subsequent evaluations, which proposed a change of placement.

September 2003 IEP

9. The appropriateness of the September 2003 IEP has not been raised by either party, and will not be addressed.

May 27, 2004 IEP

10. Parents are required to receive notice from a school district in advance of an IEP meeting so that parents are afforded the opportunity to participate in the meetings. WAC 392-172-15700(1). The Parents received three weeks' notice of the May 27, 2004, IEP meeting. The notice advised them the purpose was to discuss educational planning for the Student, and to review the IEP and revise as needed. The agenda provided in advance called for a half-hour to discuss program placement. The Parents were active participants at the May 2004 IEP meeting, and staff were there with them. The meeting ran longer on earlier portions of the agenda, and the parties did not have a full discussion of 2004-2005 school year placement

issues. No firm decision was made about placement at that meeting, except to have another meeting to discuss placement. So far, the process went well, and the School District followed procedural requirements such that the IEP team had appropriate information about the Student, and the team was composed of appropriate team members. However, it is at that point that the process broke down.

11. The June 2004 IEP meeting was a continuation of the earlier IEP meeting, specifically for the purpose of discussing placement.

12. The IDEA requires that parents be given the opportunity to actively participate in their disabled student's education, in both the formulation and review of the student's IEP. WAC 392-172-153, -15700 and -15705. The appendix to the Federal Regulations gives further definition to a parent's role in the process:

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

Fed. Reg. 64:48, p. 12473 (1999).

13. The Parents clearly were provided and exercised their right to actively participate in the IEP formulation and review, even where the School District arrived with a draft IEP to propose. A school district may propose an IEP for discussion and review at an IEP meeting. It need not arrive empty-handed at the meeting. Other individuals must also be present, however, to have an appropriately constituted IEP team.

14. Required members of an IEP team are identified in federal and state special education law. It is the responsibility of each school district to ensure the IEP team includes: (1) the parent(s) of the student; (2) at least one general education teacher of the student if the student is, or may be participating, in the general education environment; (3) at least one special education teacher of the student, or, if appropriate, at least one special education provider of the

student; (4) a representative of the school district who is qualified to provide or supervise provision of specially designed instruction to meet the unique needs of special education students, is knowledgeable about the general curriculum and about the availability of resources of the school district; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member described above; (6) at the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; (7) the student, if appropriate; (8) transition services participants. WAC 392-172-153.

15. The purpose of requiring the above-specified individuals to participate on the IEP team is to ensure persons who are knowledgeable about the student and his disability, and someone knowledgeable about the School District's range of possible options, are on the team. The Ninth Circuit Court of Appeals has held that a school district's failure to include a representative from a private school that a child is currently attending violates procedural mandates of the IDEA. *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Shapiro v. Paradise Valley Unified School District*, 317 F.3d 1072 (9th Cir. 2003). According to the court in *Shapiro*, the "IDEA requires the persons most knowledgeable about the child to attend the IEP meeting."

16. Those specified persons attended the May 2004 IEP meeting, but not the June 2004 IEP meeting.

17. Because the School District did not invite or ensure the participation of staff in the June 2004 IEP meeting, no teacher (or representative) from _____ was present during any part of a discussion concerning the merits of changing the Student's placement. This is a significant procedural violation. As noted in *W.G. v. Target Range*, 960 F.2d at 1484,

The school failed to make efforts to include [the student's] teacher in the process, as required by 34 C.F.R. § 300.344. Because [the student] was enrolled in a parochial school, Target Range was required to ensure participation by the private school in the formulation of the IEP. 34 C.F.R. § 300.348. Target Range made no effort to do so after its initial delegation of the duty to invite the parochial school representative to the October 5, 1987, IEP meeting.

As a result, in its decision to place [the student] in special education classes at Target Range and in the particular program there, Target Range did not consider the recommendations of persons "knowledgeable" about [the student], as required by 34 C.F.R. § 300.533. See *Taylor by Holbrook v. Bd. of Educ.*, 649 F.Supp. 1253, 1256-58 (N.D.N.Y.1986) (where school district failed to consider recommendations of persons "most knowledgeable" about the child, including his teacher and doctors, the IEP was not reasonably calculated to enable child to receive education benefits). Target Range did not attempt to reconvene the meeting in order to include the required participants.

See also *M.L. v. Federal Way School District*, 387 F.3d 1101, 2004 U.S. App. LEXIS 23269 (9th Cir., 2004).

18. The School District made no attempt to include a representative from Dartmoor at the June 2004 IEP meeting. The School District's position is that it was not necessary to have a representative present, as the School District had monitored the Student, and had better-qualified staff capable of providing a better education. As a result of the failure to include personnel, the teachers most knowledgeable about the Student's education levels and needs did not attend the meeting, in violation of the IDEA. The persons who met the definition of special education "teacher of the student" were not included.

was a teacher of the Student, and while her qualifications as a special education teacher are lacking, she none the less had factual, experiential knowledge of the Student, and that would have afforded a significant viewpoint. had quite limited factual knowledge of the Student, but had knowledge of the program and materials utilized by her school in providing tutoring to him.

19. was the teacher of record, but was not an actual teacher of the Student. That is, she never worked directly with the Student. The 'teacher of record' title is apparently designed to allow a special education student to attend a non-public school, which is not staffed by appropriately certificated teachers, to deliver education to the student. That title does not make that teacher of record that student's actual teacher. situation proves the point. She never actually even saw the Student in a lesson at . Neither did the School District's teacher of record for the prior three school years. They merely heard the lessons from a distance, behind a visual barrier. They did not interact with him in during

instructional time, and were not around him on a frequent basis to determine what his interests were. While it might be acceptable to merely listen to instruction in order to monitor it, it is clearly not ideal. The Student required a highly visual teaching style, and all of that was missed, as were the human interactions between School District staff and the Student that impart so much background knowledge about a Student's likes and skills. There is no question the School District staff were well qualified and appropriately certificated to provide the services they did. The question is rather one of sufficient factual knowledge to plan an appropriate education for the Student, including, for instance, understanding whether he would be appropriately assigned to a floral design class.

20. The Student's then-current private school teachers were not only not invited to attend the June 2004 IEP meeting where the specifics of the placement were to be discussed, they were not consulted. It is not sufficient under the IDEA for the School District to have done some sound 'observations' and obtained some test results from a poorly-regarded test (NEAT) plus progress reports, rather than the actual participation on the IEP team of the Student's then-current teachers. The Student had already been gone from the School District and enrolled at more than four school years at the time of the June 2004 meeting. Clearly no one, including [redacted] fulfilled the role of current teacher at the June 2004 meeting.

21. The reasoning of *Shapiro* is both logical and persuasive regarding the IDEA's requirement to include a present teacher of the Student, one who knows the Student, rather than someone who has merely occasionally observed him. This included a possible future teacher who, however well-educated and professionally qualified, does not actually know the individual. It is concluded the School District's failure to include [redacted] staff at the June 2004 IEP meeting resulted in a denial of FAPE.

22. The participation of [redacted] staff should, logically, have led to the drafting of a better IEP, one more closely tailored to the Student's interests. Although many of the proposed goals appear appropriate, and the program proposed by the School District might have provided the Student with educational opportunity to make more than trivial progress in a significantly less restrictive environment, the procedural flaw puts that determination of the appropriateness of [redacted] out of reach of this Decision. It was the process itself that was flawed.

23. In its post-hearing memorandum regarding the applicability of *M.L. v. Federal Way Sch. Dist.*, cited above, and *Ms. S. ex rel. G. v Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003), the School District asserts in essence that the proposed IEPs for the 2004-2005 school year should have been good enough for a transition back to HS, and could then have been amended. All IEPs are subject to being amended. That does not reduce a School District's obligation to convene an appropriately constituted IEP team for the purpose of proposing an appropriate IEP.

24. Not every procedural violation results in a denial of FAPE, however, under the circumstances of this particular case, including the failure to include on the IEP team or consult with a current teacher of a student who had been away more than four years resulted in a denial of the provision of FAPE. The result of the lack of a staff person or other actual teacher of the Student on the team was a loss of educational opportunity for the Student. This is true even where the School District members of the IEP team appeared better qualified to make professional recommendations about the Student's education than the Student's teacher, whose professional qualifications are light, in the extreme, and whose knowledge of the Student was limited to a weekly exchange of hellos, and a receipt of a brief summary of his work for that week, along with a report on 400 other students.

25. If the School District intends to change the placement of the Student to eliminate the excessively restrictive placement, it will need to reconvene an appropriately-constituted IEP team and go through the process again. The Student is lacking a current IEP, since the May IEP process was not concluded with an appropriate June 2004 meeting. It is appropriate for the team to reconvene to review the rest of the 2004-2005 school year, including a discussion about the least restrictive environment (LRE), which the School District is obligated by law to consider and implement.

26. The substantive test of *Rowley* does not require the absolutely best or 'potential-maximizing' education for the individual child. However, it requires that the student derive meaningful, or more than minimal or trivial, benefit from a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 160 (4th Cir. 1991), *affd.* 510 U.S. 7, 114 S.Ct. 361, 365, 126 L.Ed.2d 284 (1993); and *Seattle School*

Dist., No. 1 v. B.S., 82 F.3d 1493, 1500. It is noted the program is focused exclusively on academics, and not at all on the other purposes of public education, including social development of a child. However, because the School District is found not to have procedurally complied with the IDEA and State laws regarding the IEP team, the substance of the program it offered is not addressed.

27. The appropriateness of the placement is not at issue in this proceeding, so no further discussion of it will be included in this Decision.

ORDER

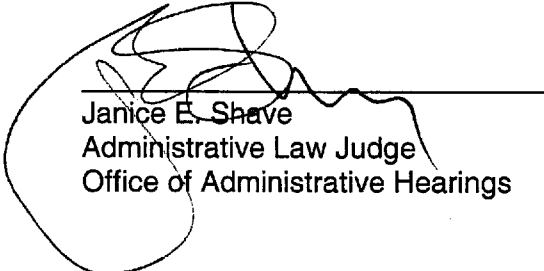
IT IS HEREBY ORDERED that the

1. The School District was not required to conduct a new reevaluation prior to proposing a change of placement in May and June of 2004. It appropriately relied upon the September 2003 reevaluation.

2. The School District committed a procedural violation by not including a representative from the Student's current private placement at the June 2004 meeting where the specifics of the proposed placement change for 2004-2005 were addressed. The violation resulted in a denial of FAPE to the Student.

3. The parties shall participate in an appropriately constituted IEP meeting to address placement, including LRE considerations, for the remainder of the 2004-2005 school year. The meeting shall occur within twenty-five school days of the mailing date of this Decision.

Dated at Seattle, Washington, on the date stamped above.


Janice E. Shave
Administrative Law Judge
Office of Administrative Hearings