

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

IN THE MATTER OF:

COLVILLE SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2004-SE-0140

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

MAILED
APR 05 2005
Office of Administrative Hearing
Spokane

A hearing in the above-entitled matter was held before Administrative Law Judge Wynne O'Brien Persons in Colville, Washington, on February 23 through 25, 2005. The interested parent, (Parent) appeared with her representative, Cheryl Taylor, Attorney at Law. Colville School District (District) was attended by Michael Cashion, Assistant Superintendent for the District, and represented by Gregory Stevens, Attorney at Law. The record closed on March 11, 2005. 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

Prior to June, 2004, the Student at issue qualified as a student in need of special education.

The Student had been enrolled as a special education student in the District between 1996 through 2000. The Student was withdrawn by the Parent from the District in June, 2000.

The Parent provided homeschooling for the Student between June, 2000 and June, 2001. Applied Behavioral Analysis (ABA) therapy was privately provided to the Student between June, 2001 and January, 2002.

The Student enrolled in the Richland School District (RSD) in January, 2002. The Student attended RSD through June, 2004.

RSD drafted an Individualized Education Plan (IEP) for the Student on June 1, 2004. The Parent signed this IEP.

The Student reenrolled in the District in June, 2004.

The District developed an IEP for the Student on October 13, 2004. The Parent did not sign the IEP.

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The District filed a Request for Due Process Hearing on November 4, 2004 requesting a ruling on the appropriateness of the District's October 13, 2004 IEP.

Evidence Relied Upon:

Exhibits Admitted:

District Exhibits: D101, D102, D125, D130, D131, D134, D136, D140, D141 through D146, and D148.

Parent Exhibits: P206, P210, P216, P270, P282, and P293.

Witnesses Heard:

District: Michael Cashion, Assistant Superintendent; _____, Special Education Teacher and Autism Trainer; Laurie Anderson, Speech and Language Pathologist; _____, Special Education Teacher; Craig Figley, School Psychologist; Ken Emmil, Hofstetter Elementary School Principal; Dr. Marion Moore, Autism Consultant; Brenda Hollingsworth, Speech and Language Pathologist for the Richland School District; and Carol Johnson, Educational Specialist for the Richland School District.

Parent: Parent; Dr. Billie Jo Davis, Parent's ABA expert; Janet Thomas; and _____, fourth grade teacher.

Brenda Hollingsworth, Carol Johnson, Michael Cashion, _____, Ken Emmil, Laurie Anderson, Craig Figley, and Kay Barlow were also listed and testified as Student witnesses.

ISSUES

The issues for the hearing, as agreed to by the parties, and set forth in the amended Prehearing Order of January 11, 2005 are as follows:

- a. Whether the October, 2004 IEP developed by the Colville School District is appropriate.
- b. The areas in which the Parent disagrees with the Colville IEP are as follow:

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1. staff training in Applied Behavioral Analysis Therapy (ABA) is inadequate;
2. supervisory training in ABA is inadequate;
3. the parent wishes to retain the extra hour of after school services for the student provided by the Richland School District;
4. elimination of parent involvement;
5. reduction of consultation services for autism;
6. reduction of data collection for evaluation of the stated goals/services;
7. reduction of interaction with peers;
8. inappropriate placement. Placement requested at Fort Colville School;
9. requesting ABA services for 25/hours/week as a medical service;
10. elimination of articulation therapy services;
11. desire to retain stated goals/objectives as identified in the Richland IEP of June, 2004 (see parent letter of December 16, 2004);
12. removal of the following as stated goals/objectives in the Colville IEP (see parent letter of December 16, 2004):
 - a. Goal – Reading c-v-c and c-v-c-e words.
Objectives mastered: Nos. 1, 2, 3, & 4
 - b. Goal – Reading. Matching pictures and words/sentences.
Objectives mastered: Nos. 1 & 2
 - c. Goal – Math. Counting money.
Objectives mastered: Nos. 1 & 2
 - d. Goal – Math. Subtraction.
Objectives mastered: Nos. 1, 2, & 3
 - e. Goal – Math. Addition.
Objectives mastered: Nos. 1 & 2
 - f. Goal – Reading/Receptive Language.
Objectives mastered: No. 1
13. removal of parent concerns from the Colville IEP;
14. desires the Colville IEP to contain all testing scores that are currently identified in the Colville and Richland IEPs (see parent letter dated December 16, 2004);
15. desires the Colville goals/objectives to be evaluated through standardized tests;
16. desires the student to spend 90%+ of his school time with higher functioning, age equivalent peers;
17. whether Colville's failure to have a Richland School District representative familiar with the student present at the Colville IEP

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- meeting was a procedural violation and if so, was this violation so substantial so as to invalidate the Colville IEP; and
18. whether the parent was excluded from various District meetings which discussed the drafting of the student's IEP, evaluations, and placement, and whether such exclusion, if it did occur, results in a procedural violation. The parent has identified the following meetings as those at issue: September 21, October 13, October 27, October 3, November 3, November 10, and November 17, 2004. This list does not include all potential meeting dates.

FINDINGS OF FACT

1. The Student is a ten-year-old autistic student. The Student also suffers from mental retardation. (Ex. P216).
2. The Parent enrolled the Student in _____ Elementary School in the Colville School District (District) in June 2004. The Student had transferred from the Richland School District where he had attended school for several years.
3. The last Richland School District (RSD or Richland) IEP was dated June 1, 2004. (Ex. D102). The Parent agreed with the June 1, 2004 Richland IEP including the services, goals, and objectives.
4. The District offered to implement the Richland extended school year (ESY) summer program. (Ex. D130). The Parent did not make the Student available for the ESY school services.
5. The District prepared for the Student's ESY program by training a paraprofessional (instructional aide) to work with the Student. This training was performed by Kay Barlow, special education teacher for the District. Ms. Barlow is a certified special education teacher for the State of Washington with a Master of Arts degree with endorsements in Special Education, Reading K-12, and Elementary Education K-8. Ms. Barlow has participated in numerous trainings concerning autism, including 60-90 hours of Applied Behavioral Analysis (ABA) training. Ms. Barlow has 20 years of training paraprofessionals and 5 years of working daily with ABA. Ms. Barlow had worked as a paraprofessional for the District from January through June, 2000 and began working for the District as a special education teacher in September, 2000. (Ex. D146).

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6. Ms. Barlow trained the paraprofessional to work with the Student by providing training in ABA for four hours per day for five days. Ms. Barlow had planned to initially work with the Student using ABA, modeling the correct procedures for the paraprofessional. Ms. Barlow would then observe the paraprofessional and provide feedback until Ms. Barlow felt that the paraprofessional was adequately trained. Ms. Barlow anticipated that this on-hands training with the Student would last between 12-15 hours.

7. ABA services are typically provided by a trained paraprofessional. No evidence was submitted suggesting that a nurse or licensed physician was necessary for the provision of appropriate ABA services.

8. The Parent filed a citizen's complaint with the Office of the Superintendent of Public Instruction (OSPI) on August 12, 2004 alleging that the District did not have the staffing or program available to reasonably provide the ESY ABA services to the Student in accordance with the Richland IEP. On October 8, 2004, OSPI found that the District did have the staffing and ABA programming available to provide the Student with ESY services in accordance with the Richland IEP. OSPI specifically found: "The special education teacher and the educational assistant [paraprofessional] were each trained in ABA and qualified to provide special education services." (Ex. D130).

9. In September 2004, the beginning of the 2004-2005 school year, the District offered to implement or approximate as best it could the Student's June 1, 2004 IEP from the Richland School District. The District was able to provide all goals and services as defined within the Richland IEP but for the one hour of after school services found within the Richland IEP. The District does not have after school care as does the Richland School District.

10. The Parent chose not to have the Student attend school within the District beginning in September, 2004.

11. The District held IEP meetings with the Parent and IEP team on September 22 and October 13, 2004 to develop an educational program.

12. Michael Cashion, Assistant Superintendent for the District, interviewed Richland School District personnel who had attended to the Student prior to September 22, 2004. Dr. Cashion interviewed Kim Trusty (title unknown) and Carol Johnson, Educational Specialist who worked extensively in the development of the Student's program, on

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August 31, 2004; and Brenda Hollingsworth, Speech and Language Pathologist who had treated the Student prior to his enrollment in Richland and had worked in the development of the Richland IEP, and Diane Hartley, the Student's special education teacher, on September 1, 2004. (Ex. D140). These interviews were to provide the District with information from Richland staff necessary to ensure a smooth transition of services for the Student.

13. Present at the September 22, 2004 IEP meeting were Michael Cashion, Craig Figley, Ken Emmil, Suzi Jensen, Laurie Anderson, Barb Braff, Janet Thomas, Deanna Carnie, Dr. Billie Jo Davis, and the Parent. (Ex. P264). The implementation of the Richland IEP by the District was discussed as well as how to develop a current IEP within the District. The Parent was told that the Richland IEP would be in effect until the District developed a current IEP.

14. The Parent, her advocate Janet Thomas, and Dr. Billie Jo Davis, the ABA expert used by the Richland School District, all were given the opportunity to ask questions and make suggestions during the September 22, 2004 IEP meeting.

15. The District held a team meeting on October 9, to draft a proposed IEP. This proposed IEP was distributed to those planning to attend the October 13, 2004 IEP meeting prior to October 13. The Parent received the draft IEP on October 9, 2004.

16. Dr. Cashion and Dr. Marion Moore were part of the IEP team involved in the creation of the October 9, 2004 draft IEP. Both had served the Student during his previous school attendance at the District between 1998 and 2000.

17. The IEP team also reviewed the student's file, assessments from the University of Washington, and the Student's most recent Richland School District IEP when drafting the October 9, 2004 proposed IEP.

18. Dr. Cashion interviewed Dr. Davis by telephone on October 12, 2004. Dr. Davis was asked questions about the Richland IEP such as how the speech and language pathologist was involved and what was critical to keep in the IEP. Dr. Davis stated that speech and language was an important part of the IEP and social skill development within the regular education classroom was critical. (Ex. D140).

19. A formal IEP was developed at the October 13, 2004 meeting. Present at the October 13, 2004 meeting were Michael Cashion, Craig Figley, Suzi Jensen, Laurie Anderson, Barb Braff, Janet Thomas, Deanna Carnie, Dr. Billie Jo Davis, Dr. Marion

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Moore, the Parent, Gregory Stevens, the Colville School District attorney, and Christine Bess. Ms. Bess was attending for the Department of Social and Health Services who had been providing Medicaid services to the Student while in the Richland School District.

20. The Parent, her advocate Janet Thomas, and Dr. Billie Jo Davis, the ABA expert used by the Richland School District, all were given the opportunity to ask questions and make suggestions during the October 13, 2004 IEP meeting.

21. Two brief caucuses were held during the October 13 IEP meeting. The first occurred between the Parent and Dr. Davis. The second was convened by the District, with permission from the Parent, to discuss which ABA expert the District would prefer to use for the Student's IEP. The District chose Dr. Moore over Dr. Davis.

22. The Parent objected to the District's decision to include Dr. Marion Moore as the IEP consultant. The Parent felt more comfortable working with Dr. Davis and believed that Dr. Davis was more qualified due to the past involvement of Dr. Davis in working with the Student at the Richland School District.

23. Dr. Marion Moore is a psychologist and special education professor at Eastern Washington University. Dr. Moore has extensive experience with autistic students and the use of ABA. She received clinic training for three years, worked as a behavior analyst at Princeton University, and lived in a group home with autistic students after receiving her undergraduate degree. Dr. Moore also works with a number of Eastern Washington school districts as a consultant for their autistic students. The District has used Dr. Moore as their autism consultant for many years without difficulty. Dr. Moore observed the Student in the year 2000 in preparation for the Student's educational program within the District.

24. Dr. Billie Jo Davis is a clinical psychologist who had trained with Tristan Smith, a leading autism researcher. Dr. Davis worked first worked with the Student and the Colville School District as a graduate student when the Student was four years old. Dr. Davis then left the area, returning four years ago. Dr. Davis began to again work with the Student at the Richland School District. Dr. Davis has national certification in ABA therapy. Such certification is not required in Washington State.

25. Dr. Davis agrees that ABA therapy is to be provided by paraprofessionals. Dr. Davis believes that these paraprofessional (paraeducators or parapros) should receive 18 hours of training; 6 hours of classroom instruction and 12 hours of observation. Dr. Davis believes that ABA trainers should have 2 years of direct ABA experience that occurred with supervision to ensure that the therapy was being administered properly.

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26. Ms. Kay Barlow provided 20 hours of classroom instruction to the parapro and planned to provide 12-15 hours of observation instruction. Ms. Barlow has 60-90 hours of ABA training and 5 years of direct experience. It is unclear how much of Ms. Barlow's ABA training was supervised.

27. The District IEP would place the Student at _____ Elementary School, his neighborhood school. _____ is an elementary school for grades 2 through 4. The Student would be enrolled in the fourth grade.

28. The District IEP provides the Student with 6.5 hours of special education services 5 days/week assuming that the bus arrives at 7:45am each day. Normal school hours are from 8:00 am until 2:30 pm. These special education services were to occur within the general education setting and in the Learning Support Center (LSC). The special education teacher would be responsible for monitoring the progress of the Student within the stated goals and objectives with instruction being provided by the special education teacher, the general education teacher, the specialists, paraeducators, and consultants. The Student was to also receive 30 minutes of speech two times each week within the speech room, Learning Support Center, and general education environment. (Ex. D101, page 20).

29. The Student's special education teacher is _____ has training and experience with autism and ABA. _____ has been a special education teacher for 5 years and is certified in the State of Washington. _____ would spend 2 hours each day with the Student in the LSC. The other students in the LSC are second graders who are functioning at his expressive level. The remainder of the day would be spent with the general education population of 2nd to 4th graders who are functioning at higher expressive and receptive levels than the Student.

30. The Student's general education teacher is _____ is a certified elementary education teacher for the State of Washington. _____ attended both the September 22 and October 13, 2004 IEP meetings. _____ reviewed and signed the October 13, 2004 IEP. _____ is in agreement with the IEP. _____ has been holding a desk for the Student, with his name on it, since September, 2004.

31. The District IEP provides for Laurie Anderson, Speech and Language Pathologist, to provide speech assistance to the Student and to oversee the paraeducators in the administration of the ABA therapy. Ms. Anderson is certified and endorsed as a speech and language pathologist in the State of Washington. Ms. Anderson has experience working with autistic children. Ms. Anderson is a regional trainer for the Autism Outreach

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Project and has been involved in 130 hours of training regarding autistic students. Twenty-five to thirty of these 130 hours has been ABA training. Ms. Anderson has been using ABA therapy within the District. Ms. Anderson estimates that the Student would receive at least 3.5 hours of ABA therapy each day the Student attends school. (Exs. D145 and D101, page 20).

32. The District IEP allows for Dr. Moore to be consulted for ABA on an "as needed" basis. Dr. Davis would come to the District and work with Dr. Moore and District staff as an ABA consultant for one full school day to ensure a smooth transition into the District. (Ex. D101, page 20).

33. The District anticipates that the Parent will contact Dr. Moore through the District staff rather than directly to ensure that all parties involved with the education of the Student are aware of any student needs.

34. The paraeducator identified in the District's IEP would be trained by Ms. Barlow in the manner Ms. Barlow had used to train the ESY paraeducator. The paraeducator that had been trained by Ms. Barlow for ESY is no longer available.

35. The District's IEP allows for "at least" 3.5 hours of ABA therapy each school day, or 17.5 per week. This is the same amount of ABA therapy provided in the Richland IEP. (Ex. D101 and D102, respectively).

36. For each stated goal and objective, the District's IEP requires that the Student have 1:1 interaction with a paraeducator or work on the stated goals in a small group setting. The Richland IEP refers to 1:1 interaction with an "ABA trained EA." The District's Summary of Service Matrix identifies the 1:1 paraeducator be "ABA trained." (Ex. D101 and D102, respectively).

37. The District IEP does not specifically state the number of general education hours to be provided to the Student. The District assumed that it would just be the number of hours in the school day that the Student is not involved in the special education classroom, or LCS. If the school day is 6.5 hours and the Student is in the special education classroom 2 hours each day, the Student would be in the general education classroom the remaining 4.5 hours each school day. The Student would also be attending speech therapy one hour each week, reducing the total number of weekly general education hours to 21, or 4.2 hours each day. Testimony indicated that the actual number of daily hours would likely be between 2-3. The Richland IEP specifically states that the Student will

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spend 805 minutes each week in the general education classroom, or 13 hours each week, 2.6 hours each day. (Ex. D101 and D102, respectively).

38. The Student would be best served by spending 10-40% of his educational time with age equivalent peers with the remaining educational time being spent with higher functioning students. The Student is functioning receptively at a 3rd grade level and expressively at a kindergarten level. The District IEP places the Student with age equivalent fourth grade peers 2-3 hours each school day, which is 10-40% of the Student's educational time. The District IEP places the Student with second graders in the LCS. These second grade students are higher functioning students for expressive language. The Student may be functioning receptively at a grade level higher than these students.

39. The Student's progress under the District's IEP goals and objectives would be "through teacher observation, data collection, classroom based assessments, informal and formal assessments." (Ex. D101, page 19). Data collection would be taken daily. Classroom based assessments would occur periodically through actual classroom testing. Evaluation of the Student's progress under the Richland IEP was through "daily data collection based on IEP objectives" and report cards. (Ex. D102, page 4).

40. The District IEP would inform the Parent of the Student's progress "through phone calls, notes homes, progress reports, report cards, conferences, annual IEP meetings, and meetings as requested and agreed upon by parent and appropriate staff." (Ex. D101, page 19). The Richland IEP informed the Parent through teacher/parent conferences each trimester, immediate contact regarding any behavioral concern, bi-monthly core team meetings whose need will be reevaluated after the first trimester, and a bi-weekly one hour observation of the Student by the Parent. (Ex. D102, page 4).

41. There was no evidence presented to indicate that the District had ever refused access of the Student to the Parent during educational hours. There had been occasional difficulty in setting convenient times for meetings between the Parent and the District staff.

42. The Richland School District administered the Woodcock-Johnson III standardized test to the Student in April, 2004, to determine the Student's present levels of performance in reading, written language, and math. The assessment could not be standardized due to the modifications necessary to accommodate the Student. This lack of standardization invalidated the test scores. (Ex. D102).

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43. The University of Washington administered the Preschool Language Scale-4 assessment in April, 2004. The Student was 10 years old. (Ex. P216). The Richland IEP referenced this assessment as a means for measuring the Student's progress in the areas of receptive language and expressive language. (Ex. D102).

44. The Preschool Language Scale is valid only for students under the age of 7.

45. Both Drs. Moore and Davis agreed that there could be problems in administering standardized tests to children like the Student who suffer from autism. These standardized tests can often be inaccurate and underestimate the skill levels of the student due to the modifications that have to be made to administer the test. Also, these tests measure the student against students of comparable age which is inappropriate for a child with autism.

46. The District's IEP includes goals in the area of reading recognition, reading comprehension, written language, five goals on mathematics, two goals on social interactions, receptive language, expressive language, and articulation.

47. The District's IEP includes goals and objectives the Parent believes have been mastered by the Student under the Richland IEP. (See stated issues (b) (12)). All parties agree that the Student most likely has regressed in his academic skills since he last attended school in June, 2004. Such regression is typical for children with autism. No evidence was presented to indicate that the Student was still able to master these identified skills at the time of hearing.

48. The District's IEP has listed several goals and objectives in reading and math that build one upon the other. In each of those areas allegedly mastered by the Student appear as preliminary skills from which other identified goals and objectives are based. Therefore, even if the Student has mastered some of the identified goals and objectives, there are still others remaining for the Student to work on. (Ex. D101, pages 3, 4, 9, and 13).

49. The District's IEP includes articulation therapy for the Student based upon the University of Washington's April, 2004 assessment. (Exs D101 and P216, respectively). The University of Washington assessment concluded that the Student has difficulty with his /r/ and /l/ sounds. This difficulty could interfere with the Student's expressive language abilities and so was included in the District's IEP. Articulation therapy was not part of the Richland IEP.

50. The District's IEP does not include one hour of after school socialization therapy for the Student as did the Richland IEP. The District does not provide after school care as

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does the Richland School District and therefore, does not have a socialization environment available to the Student that is overseen by the District. None of the parties who testified could recall an IEP that they had helped to develop that included such an hour of after school care for an autistic student. The number of IEP's considered were extensive. It was acknowledged that socialization opportunities for the Student would be numerous throughout the normal 6.5 hour school day.

51. The Parent disputed a number of items within the District's IEP. Assistant Superintendent Michael Cashion wrote a letter to the Parent on November 1, 2004 in response to these concerns. (Ex. D136). Dr. Cashion explained that, although the IEP did not specify the Parent's right to visit the Student's classroom every other week, the building practice at _____ Elementary School would allow her to do this. (Ex. D136 p. 3). Dr. Cashion also addressed the Parent's concern regarding meetings between the Parent and staff regarding the Student's program. Dr. Cashion explained that the IEP provided for the Parent to meet with staff as needed. Dr. Cashion stated that he would anticipate that for the first couple months biweekly meetings would be appropriate and that the District would expect that after a few months such meetings may not be needed as frequently. Rather, information would be conveyed by notes home, conversations, and meetings scheduled at needed. (Ex. D136 p. 3).

52. The District's IEP does not contain specific notations of parent concerns as does the Richland IEP. None of the parties who testified could recall an IEP that they had helped to develop that included such parent concerns other than the Richland IEP. The number of IEPs considered were extensive. The Parent was told by the District that she was entitled to put her concerns in writing and that they would be placed in the student's file.

53. The District IEP states that the Student will be given the WAAS portfolio assessment to evaluate his reading, writing, and math skills. (Ex. D101, page 19).

54. The June 1, 2004 Richland IEP states that the Student's three year re-evaluation was due on November 29, 2004. (Ex. D102, page 1). On October 26, 2004, Dr. Cashion sent a letter to the Parent, with attached Written Notice and Invitation to Attend Meeting (Ex. D134), inviting the Parent to the School District's clinical evaluation team meeting on November 3, 2004 to discuss the student's re-evaluation. The District believed that November 3 was a date available to the Parent based upon prior correspondence and stated days of availability. The Invitation to Attend Meeting form, (Ex. D134 p. 3), included information regarding the purpose of the meeting, the time, location of the meeting, and

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who would be in attendance. The Parent did not attend this meeting. There is some confusion as to whether the Parent asked to participate telephonically.

55. The November 3, 2004 evaluation meeting resulted in a District decision to reassess the Student in a number of areas and with a number of different evaluation tools. The Parent was delivered notice of the District's desire to conduct this assessment and asking for the Parent's consent to do so. The Parent did not grant consent, but rather indicated her belief that the April 2004 University of Washington assessment constituted a complete three-year re-evaluation and that no further assessments were needed.

56. The District's student support team met on November 4, November 10 and November 17, 2004. This group discussed the status of a number of students. The Parent was not invited because students other than her child were discussed. The only discussion which occurred regarding the Student was to note that the team was still awaiting the Parent's consent for the re-evaluation.

57. All District staff testified that it was their professional opinion that the proposed District IEP provides the Student with appropriate goals and objectives, appropriate services, and otherwise constitutes an appropriate educational program. Richland School District staff members, Brenda Hollingsworth and Carole Johnson, testified that they had reviewed the District IEP and it was their professional opinion that the District IEP provides the Student with appropriate goals, necessary services, and a proper and appropriate education. The testimony of all these witnesses is deemed credible.

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:

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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.

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

According to the definitions contained in the (Education for All Handicapped Children Act) 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.

3. The Parent alleges a number of procedural errors. In M.L. v. Federal Way School District, 387 F.3d 1101 (9th Cir. 2004) the Ninth Circuit Court of Appeals clarified the impact of procedural errors. "Procedural flaws do not automatically require a finding of a denial of FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe on the parent's opportunity to participate in the IEP formulation process, clearly result in the denial of FAPE." M.L., 387 F.3d at 1111.

One of the parent's procedural claims is that the School District was required to have a Richland School District staff member at their IEP meeting. See Shapiro v. Paradise Valley Unified School District, 317 F.3d 1073 (9th Cir. 2003). In Shapiro, the school district failed to include a teacher from the student's private school on the IEP team. There was no indication from the facts in Shapiro that the school district had any prior involvement with or knowledge about the student's educational needs. The court in Shapiro found that the school district violated FAPE by failing to include the private school teacher on the IEP team.

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In this case, it is concluded that the District's failure to include a Richland School District staff on the District's IEP team does not constitute a denial of FAPE. Unlike the school district in Shapiro, the District was already familiar with the Student thereby diminishing the need for the attendance of a Richland staff member at the District IEP meetings. The District had information regarding the Student's prior educational program. The District had already been trained to develop an appropriate program for the Student. The District interviewed Richland staff members who had been actively involved in the development and implementation of the Student's prior educational program in the Richland School District and used that information in the development of the Student's IEP. The Student autism consultant, Dr. Davis, who was actively involved in the development of the Richland IEP, attended both the September 22 and October 13, 2004 District IEP meetings. The Parent was also in attendance at all IEP development meetings. Lastly, the Richland IEP, records from the Richland School District, and other assessments were extensively reviewed by the District's IEP team. All of these factors support a conclusion that a denial of FAPE did not occur when the District failed to have a member of the Richland School District staff present at the District September 22 and October 13, 2004 IEP meetings.

4. The Parent also claims that the general education teacher failed to participate in the development of the student's IEP, resulting in a procedural violation and a denial of FAPE. See M.L. v. Federal Way School District, supra. In M.L., an IEP was developed for a student without the presence of a regular education teacher at the IEP meeting and without a regular education teacher evaluating the facts to determine whether the IEP was reasonably calculated to provide the student with FAPE.

A general education teacher is required to participate in the development of an IEP "to the extent appropriate." WAC 392-172-15700(6). See also WAC 392-172-153. Unlike M.L., the student's assigned general education fourth grade teacher, was a member of the IEP team. She attended both IEP meetings and signed the October 13, 2004 IEP. Although actual involvement in the development of the IEP goals and objectives and specific services provided to the Student cannot be determined from the record, it is concluded that she participated in the development of the IEP "to the extent appropriate" and there has been no denial of FAPE. reasonably relied upon the expertise of others present at the IEP meetings and was present for the purpose of understanding her role in the implementation of the IEP. She was present during the development of the IEP to evaluate the facts and determine whether the IEP was reasonably calculated to provide FAPE. determined that the District's IEP was appropriate in providing FAPE to the Student.

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5. The other procedural errors alleged by the parent are also found to be without merit. Parents shall be afforded the opportunity to participate in any school meetings that address the "evaluation, educational placement and provision of a FAPE to the student," including IEP meetings. WAC 392-172-105(1). See also WAC 392-172-15700.

In this case, the Parent had significant opportunity to participate in the September 22 and October 13, 2004 IEP meetings. The Parent and her advocates asked questions and provided input at each meeting. Parental participation does not mean that parental input is automatically included in an IEP. The team makes the final determination as to what is educationally appropriate for the student. The team reached such a conclusion in this case with meaningful input from the Parent. The short caucus which the Colville School District IEP team took during the October 13, 2004 IEP meeting was taken with Parent's consent and did not result in the loss of educational opportunity for the Student or seriously infringe on the Parent's opportunity to participate in the IEP. No procedural violation has occurred.

Secondly, the Parent was properly notified of the November 3, 2004 evaluation meeting. WAC 392-172-15700. There may have been some confusion as to whether the Parent had requested appearance at this meeting by telephone. The District erred in failing to clarify the Parent's request to participate telephonically. However, it is concluded that the Parent's failure to participate in the November 3, 2004 evaluation meeting did not result in a denial of FAPE. The Parent was able to express her desires after the meeting. The evaluation could not proceed without the Parent's consent. No evaluation occurred when the Parent did not consent.

6. Parents shall be notified and given an opportunity to participate in all other meetings. WAC 392-172-105(2). The Parent be notified in accordance with WAC 392-172-15700. "A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." WAC 392-172-105(3).

It is unclear from the definitions found in WAC 392-172-105 whether or not the Parent should have received notification of the District's student support team meetings on November 4, 10, and 17, 2004. What is clear is that, even if the Parent should have received notification and did not, such failure is not a denial of FAPE. Numerous other students were discussed at these meetings. The Student was on the agenda only to clarify whether the District had received consent from the Parent to reevaluate the Student. There is no indication that if such consent had been received that the meeting would have continued to talk about the Student. It is surmised that such would not have occurred since the team had numerous other students to also discuss. Any failure of the District to notify the Parent of these meetings is not a denial of FAPE.

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7. The parents of a special education student shall be afforded “the opportunity to be members of any team that makes decisions on the educational placement of their student.” WAC 392-172-15705 (1). The educational placement of a special education student shall be based upon the student’s IEP, the least restrictive environment requirements, the probability of the student achieving their goals in this placement, and any harm that might occur within a placement. WAC 392-172-180. “Unless the IEP of the student requires some other arrangement, the student shall be educated in the school that he or she would attend if nondisabled (the neighborhood school).” *Id.* at (3), parenthesis added.

It is concluded that a denial of FAPE did not occur in the placement decision regarding the Student. The Parent had significant opportunity to participate in the placement decisions for the Student discussed at the September 22 and October 13, 2004 IEP meetings. The Parent and her advocates asked questions and provided input at each meeting. Again, parental participation does not mean that parental desires are automatically included in an IEP. The team makes the final determination as to what is best for the student. The team reached a placement conclusion in this case with meaningful input from the Parent. The team chose Elementary School, the neighborhood school, and reasonably considered the layout and age groups within the school. Also considered was the prior training of the staff at the neighborhood school in preparation for the Student’s attendance. The Parent failed to show that any harm would occur from such a placement. No procedural violation has occurred.

8. The Colville IEP of October 13, 2004 is appropriate and is clearly designed to offer the student educational benefit. WAC 392-172-160. It is concluded that the District staff identified to implement the goals and objectives in the Student’s IEP are all appropriately trained and competent, holding requisite certificates, endorsements, and training necessary to provide the services set out in the IEP. These staff members include Dr. Moore, the ABA consultant selected by the District. The Parent’s objection to the use of Dr. Moore is personal and not related to Dr. Moore’s qualifications to provide the ABA services. A parent is not entitled to choose or select the personnel that a District will use to implement a student’s IEP unless the parents can prove, by a preponderance of the evidence, that the selected personnel either interfered with the implementation of the student’s IEP or that the personnel was a danger to the student. See Freeport School District, 34 IDELR 104 (2000). There is no such evidence in this case.

9. An IEP need not delineate the parent’s opportunity to visit the school. “There is no statutory or regulatory authority that provides parents with an entitlement for either them or their professional representative to observe their child in the classroom or in a proposed educational placement.” Letter to Mamas, 42 IDELR 10 (2004).

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10. The autism consultant services provided to the student are appropriate in the District IEP. ABA services are not medical services under special education law. WAC 392-172-055(2)(d).

11. The number of ABA service hours provided to the Student each day under the District's IEP are appropriate. The District's IEP provides for 3.5 hours of ABA services each day. This is also the same number of daily ABA hours provided under the Richland IEP. The Parent and ABA experts were in agreement with the number of ABA hours under the Richland IEP. The Parent makes reference to the amount of daily ABA services paid for by Medicaid prior to June, 2004. Such information is not relevant for this decision.

12. The Student, in order to receive FAPE, does not require an extra hour of after school services. Adequate socialization opportunities exist within the regular school day along with appropriate opportunities to interact with the Student's peers.

13. The Colville IEP provides for appropriate goals and objectives, with adequate and appropriate data collection designed to evaluate the Student progress toward these goals and objectives. The data collection is objectively evaluated in accordance with the stated goals and objectives; for example, the Student will respond in a certain manner 8 out of 10 times. Many of the goals and objectives found in the District's IEP were adopted from the Richland IEP. The Parent argues that these goals and objectives have been met by the Student. They may have been while the Student was attending school in Richland. However, evidence presented at hearing amply supports the conclusion that autistic students such as Student lose progress gained if they don't continually practice the skills learned. The Student has been out of school since June, 2004. It is more likely than not that the Student has lost some of his skills mastered in June, 2004. It is not unreasonable for the District to include these skills as review in the IEP to insure that such mastery still exists. The District then included supplemental skills so that, if these skills were indeed mastered, the Student would still be able to work toward other goals and objectives. Further, despite the Parent's disagreements, the IEP can be amended at a later date depending upon the progress of the Student.

14. Standardized testing is not required to identify the Student's progress toward goals and objectives identified in the District's IEP and may even be invalid for this Student. Both experts agreed that there could be problems in administering standardized tests to autistic students such as Student. It is concluded from expert testimony that such tests can often be inaccurate and underestimate the skill levels of the student due to the modifications required to administer the test. Further, such tests may also be invalid since the test

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results are compared to non-autistic, comparable age students rather than other autistic students.

15. The parent is to be informed of the Student's progress. WAC 392-172-160(g). The IEP identifies that the Parent will be informed of the Student's progress through "phone calls, notes home, progress reports, report cards, conferences, annual IEP meetings, and meetings as requested and agreed upon by parent and appropriate staff." (Exhibit 101, page 19). These contacts are appropriate.

16. The inclusion of articulation therapy goals and objectives and their implementation is appropriate. The University of Washington recommended the inclusion of articulation therapy in the Student's IEP. The District incorporated that recommendation into the IEP and established goals and objectives. This therapy is either to be given by the qualified speech language pathologist or by a paraeducator under the supervision of the pathologist.

17. The IEP need not include specific notations of parent concerns. The Parent is free to express her concerns to the District in a manner suggested by the District.

18. The IEP need not specify the specific amount of time that the autism consultant will spend assisting the District with the Student. Given the level of expertise among District staff it is appropriate to access Dr. Moore's services on an "as needed" basis. Further, it is appropriate that the District act as the intermediary in the Parent's communication with Dr. Moore. This insures that the District is informed of any issues regarding the Student that may interfere with or promote the Student's educational needs. It is understood that the term "as needed" is vague. However, there is no evidence that operation under such term deprived the Student of educational opportunity.

19. The Colville IEP provides sufficient and appropriate educational opportunities with higher functioning students. Due to the student's language and academic deficits it is not necessary that the student spend the majority of his time with age equivalent peers. The IEP provides sufficient general education inclusion opportunities with typical fourth grade peers.

20. The District's IEP does contain present levels of performance set out at the beginning of the IEP. See WAC 392-172-160(1)(a). Many of these levels of performance were adopted from the Richland IEP. Included within these present performance levels are references to prior standardized testing scores and the April 6, 2004 University of Washington assessment.

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21. The District IEP states that the Student will be given the WAAS portfolio assessment to evaluate his reading, writing, and math skills in accordance with WAC 392-172-160(e). The District has provided for individual modifications of district and state wide standardized testing.

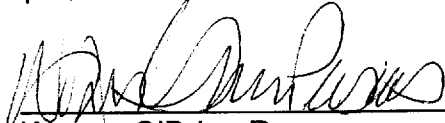
22. The District IEP specifies under each targeted area of performance that the specially designed instruction for each area shall be given through "1:1 or small group settings." The specially designed instruction does not specify one-to one (1:1) ABA therapy or additional ABA therapy in small groups. It is noted that the IEP does contain reference that all 1:1 paraeducators be ABA trained and there is an assumption that the paraeducator will use such therapy in their 1:1 interactions with the Student. Although the appropriateness of the IEP does not fail due to these exclusions, it is suggested that the term "ABA" be included for clarity under each targeted area such that the Student will be provided with 1:1 ABA therapy and ABA therapy in small group settings.

23. The District IEP does not specify the number of hours each day that the Student will spend in the Learning Support Center (LSC) and in the general education classroom. Testimony indicated that the Student would spend 2 hours each day in the LSC with the remaining school hours in the general education classroom. The IEP should be amended to include a statement regarding the anticipated number of hours that the Student will spend in the LCS and general education classroom each day. It is acknowledged that these hours may vary depending upon the school day so the statement shall be written as a guideline rather than a hard and fast rule. See generally WAC 392-172-160(1).

ORDER

The Colville School District's October 13, 2004 IEP provides the student with a free appropriate public education. No procedural errors occurred which denied the student an appropriate education.

Dated at Spokane Washington, this 5th day of April, 2005.



Wynne O'Brien Persons
Administrative Law Judge
Office of Administrative Hearings

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