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

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RECEIVED

IN THE MATTER OF:

SPECIAL EDUCATION
CAUSE NOS. 2008-SE-0095 and
2008-SE-0103
SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SERVICES

SOUTH KITSAP SCHOOL DISTRICT

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Port Orchard, Washington, on April 27, April 28, May 26, and May 27, 2009. The interested Adult Student¹ was represented by John Groseclose, attorney at law. The South Kitsap School District (District) was represented by Lance Andree, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The District filed a due process hearing request on September 22, 2008 in cause no. 2008-SE-0095. The Parents filed a due process hearing request on October 9, 2008 in cause no. 2008-SE-0103. The cases were consolidated for purposes of hearing in the First Prehearing Order of October 10, 2008. Additional prehearing orders were issued on October 16, and November 14, 2008, and January 8, February 19, April 6, and May 20, 2009. Two post-hearing orders were issued on July 28, 2009.

The Student turned [REDACTED] old in May 2009, while the hearing was ongoing. The Student chose to continue the case in her own name. Her exhibits were denominated as "Parent" exhibits because they were submitted before she turned [REDACTED]

Evidence Relied Upon

Exhibits Admitted:

Court Exhibits C-1 and C-2.

Student/Parent Exhibits P-1 through P-16; P-18; P-20 through P-21; P-24, pages 1 through 9 only; P-25; portions of P-29²; portions of P-30³; portions of P-33⁴; P-34; P-36; and P-37.

¹ In the interest of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parents," "Mother," "Father," and "Student."

² Exhibits P-29, P-30 and P-33 are portions of the report of proceedings (RP) from the hearing in cause no. 2008-SE-0047, which involved the same parties as the present case. The following portions of P-29 were admitted:

District Exhibits D-1 through D-28; D-30 through D-49; D-57 through D-63; and D-65 through D-72.

Witnesses Heard: Eugene Johnson, Ed.D.; Mandy Wood (general education teacher); Todd Olson (general education teacher); Judith Rutberg-Self, Ph.D.; Martha Hammann (special education case manager); Neal Perrine (school psychologist); Rita Reandeau (director of special education); Gregory Albertson (assistant director of special education); the Father; the Student; and the Mother.

ISSUES

As set forth in the Second Prehearing Order issued October 16, 2008, the issues for hearing are as follows:

- a. Was the District's August 2008 evaluation of the Student appropriate under WAC 392-172A-05005 and 34 CFR §300.502?
- b. Where the Mother stated at an evaluation review meeting on August 28, 2008, that the District should have performed further testing, but she declined to allow it, should the Parents be required to consent to further evaluation by the District before an independent educational evaluation (IEE) is ordered at public expense?⁵
- c. Are the Parents entitled to an IEE of the Student at public expense?

RP 40, line 21, through RP 57, line 20.

RP 63, lines 9 through 24.

RP 67, line 11, through RP 68, line 9.

RP 72, line 15, through RP 73, line 20.

³ The following portions of P-30 were admitted:

RP 262, line 17, through RP 264, line 3.

RP 286, line 8, through RP 287, line 2.

RP 317, line 5, through RP 318, line 7.

RP 319, line 22, through RP 320, line 7.

RP 321, line 12, through RP 327, line 8.

RP 352, lines 3 through 16.

RP 380, line 20, through RP 387, line 4.

RP 393, line 24, through RP 394, line 25.

RP 396, lines 6 through 25.

⁴ The following portions of P-33 were admitted:

RP 876, line 8, through RP 920, line 1.

RP 940, line 4, through RP 944, line 12.

RP 949, line 25, through RP 953, line 20.

RP 962, lines 4 through 10.

⁵ This sentence rewrites the one in the Second Prehearing Order to improve grammar and clarity. The meaning is not changed.

d. Did the District violate the Individuals with Disabilities Education Act (IDEA) and deny the Student a free and appropriate public education (FAPE) by finding in August 2008 that the Student was no longer eligible for special education?

e. Are the Parents entitled to the following requested remedies, or other equitable remedies as appropriate:

- (1) An IEE of the Student at public expense;
- (2) The provision by the District of special education and related services to the Student;
- (3) The provision by the District of specially designed instruction (SDI) to the Student in reading, writing, and math; and
- (4) The delivery of a portion the Student's SDI during Tutorial period and/or that one of her elective classes be replaced with smaller group, similarly-situated SDI.

FINDINGS OF FACT

1. The background facts relevant to this case were set forth in the decision in cause no. 2008-SE-0047, issued March 11, 2009, which involved the same parties as the present case. That decision is in evidence as Exhibit D-71 in the present case.

2. The Parents requested an IEE in the spring of 2008. The District contacted a number of possible providers, including the ones suggested by the Parents, and looked for providers who could do an evaluation within a reasonable time frame.

3. The Parents declined to select an IEE provider from the list the District assembled, and decided to look for a different provider. The District needed to complete its triennial evaluation of the Student by November 2008. It was interested in completing the evaluation sooner in the hope that the parties might resolve their impasse. The District believed it was best to use an outside provider rather than one of its own school psychologists because of the Parents' lack of trust in the District. Among the providers on the IEE list, only Dr. Eugene Johnson of Central Washington University was available within a reasonable time frame. The others had 6 -12 month waits. The District therefore asked him to proceed with the evaluation.

4. Dr. Johnson obtained his Ed.D. in school psychology from the University of South Dakota in 1979. He has been a professor of psychology at Central Washington University for several decades, where he also directs the School Psychology Training Program for graduate students. While Dr. Johnson has not performed work for this District before, he has done evaluations for four small, rural school districts in central Washington that apparently do not have their own school psychologists on staff. D32.2; RP 16.

5. Dr. Johnson has never testified in a special education case. He has testified as a guardian ad litem and expert witness in marital dissolution cases. Dr. Johnson considers himself an impartial

investigator focused on the best interests of the child, both in his work as a school psychologist and in dissolution cases.

6. Dr. Johnson performed a classroom observation of the Student in June 2008, but the Parents did not agree to his administering standardized tests at that time. In August 2008, the Parents agreed, and the testing was done. Dr. Johnson issued his evaluation report later that month. D-31.

7. The IEP team met on August 28, 2008 to review Dr. Johnson's report. Dr. Johnson did not participate in the meeting. The team also reviewed an Evaluation Report Summary by District school psychologist Neal Perrine. D-31; D-39.

8. Both Dr. Johnson and Mr. Perrine concluded that the Student no longer needed special education. The District issued a written notice to that effect on August 28, 2008. However, the notice stated that special education services would continue under "stay-put" conditions pending resolution of the due process hearing in cause no. 2008-SE-0047. D-40.2.

9. The Parents disagreed with Dr. Johnson's evaluation. The Mother told the team on August 28, 2008 that the Student had not been tested sufficiently in reading fluency, writing organization, or math. She also stated, among other things, that the Student had to spend many more hours on reading and homework than her peers. This led to the Student taking fewer difficult classes in 11th grade (2008-09) and more electives, in order to reduce stress.

10. The District offered to have further testing conducted in the areas the Mother specified. The District offered its own school psychologists, or would have used Dr. Johnson again if the Mother preferred. The Mother refused to allow the District to conduct any further testing. D-40.1.

11. On September 11, 2008, the Parents again requested that the District fund an IEE. On September 22, 2008, the District filed for a due process hearing to defend its August 2008 evaluation.

12. On October 9, 2008, the Parents filed for a due process hearing to challenge the District's decision that the Student was no longer eligible for special education.

13. The Parents retained Dr. Judith Rutberg-Self to perform an IEE. They paid for Dr. Rutberg-Self's services and are seeking reimbursement of those costs from the District. On December 1, 2008, Dr. Rutberg-Self issued her evaluation report. D-61.

14. On January 27, 2009, the IEP team met to reconsider the Student's eligibility in light of Dr. Rutberg-Self's IEE. Dr. Rutberg-Self was not available on that date, so a telephone conference was held on February 5, 2009 with both Dr. Rutberg-Self and Dr. Johnson participating. D-68 - D-70.

15. On March 3, 2009, the IEP team reaffirmed its August 2008 decision that the Student was no longer eligible for special education. The District issued a Written Notice declining to change that decision. D-69 - D-70.

School District Evaluation

16. The District's evaluation set out to answer three questions: First, whether the Student has a disability; second, whether that disability has an adverse impact on her ability to progress in the general education curriculum; and third, whether the Student needs SDI in order to benefit from instruction.

17. The Student has been diagnosed with attention deficit hyperactivity disorder (ADHD). Her special education eligibility, however, was always based on a specific learning disability (SLD).

18. Dr. Johnson's starting point in determining whether the Student had an SLD was to determine her intelligence quotient (IQ). He then looked at whether there was a severe discrepancy between her intellectual ability (IQ) and her performance on academic achievement tests. A severe discrepancy would indicate the Student has an SLD.

19. To determine the Student's IQ, Dr. Johnson used the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III). He found that the Student's full scale IQ (FSIQ) was 105. His testing yielded a 95 percent confidence level that her IQ falls between 101 and 109. D-31.3.

20. For persons with an IQ of 105, a severe discrepancy between ability and achievement is established if their standard score on an achievement test is 86 or lower. Eighty-six is referred to as the criterion discrepancy score for persons with this IQ. D-38.21.

21. Dr. Johnson observed the Student in her Clothing class in June 2008. It was one of the last days of the school year and the Student had completed all of her assignments. She received permission to copy a pattern that she wanted to work on over the summer. The Student was focused, quiet, and worked intently throughout the period, despite others around her socializing and talking loudly. Dr. Johnson wanted to observe the Student in Language Arts class, but the schedule was unusual in the last few days of school and he was unable to do that.

Reading

22. To determine the Student's academic achievement in reading and other subjects, Dr. Johnson used the Wechsler Individual Achievement Test - Second Edition (WIAT-II). The Student's Reading Composite standard score (SS) was 106. This falls in the average to high average range when compared to same-age peers. D-31.4. The score of 106 is above 86, so no severe discrepancy in reading was established.⁶

23. Dr. Johnson also considered other sources of information on the Student's reading ability. First, the Student achieved grades of C, C+ and B- in general education Language Arts for the three trimesters of her 10th grade year, respectively (2007-08). D-71.9, .13 and .17.

⁶ Within the Reading Composite score, the Student's subtest scores were: Word Reading SS 99 (average); Reading Comprehension SS 119 (high average); and Pseudoword Decoding SS 105 (average). D-31.4.

24. Second, the Student's Language Arts teachers for 2nd and 3rd trimesters of 10th grade reported that her skill level was average to above average compared to her general education peers. D-58.2 and 4; D-46.2.⁷ Her Language Arts teacher for 3rd trimester, Lora-Jean Piper, reported that the Student assisted others in class when they were confused. Ms. Piper saw no need for special education for the Student in reading or writing. D-58.4; D-18.

25. Third, the Student's score on the 10th grade Washington Assessment of Student Learning (WASL) in Reading was 427. The passing level was 400. The Student scored in the highest level, which is Level 4 (Exceeds Standard).

26. "Reading fluency" is a new area of qualification for SLD as of 2004. It is measured by accuracy, rate, and prosody. Accuracy is the ability to decode words without error. Rate is the number of words read per minute. Prosody is the use of appropriate phrasing and expression, and is believed to be an important factor in comprehension. D-38.4.

27. Dr. Johnson did not do further testing in reading to focus on reading fluency because he considers the goal of reading to be comprehension, and the Student had good comprehension skills. He concluded that any problems in fluency did not adversely impact her ability to function in school and could be accommodated by extra time to read.

28. Dr. Johnson recommended the accommodation of extra time to complete assignments and tests that require extensive reading or writing. He made a number of other recommendations, discussed below, that pertain to written expression and math.

29. The District cited more recent information as reinforcing Dr. Johnson's August 2008 evaluation of the Student's reading skills. Her reading fluency was assessed in January 2009 using four curriculum based measurements (CBM). One of the reading passages was at an 11th grade level, one at 12th grade level, and the other two were at college level. D-67. The Student had not previously read any of the passages, according to both her and her case manager, Martha Hammann, who administered the CBMs.

30. The Student's rate of speed on the CBMs was quite slow, averaging 58 correct words per minute. D-67; D-68.7.⁸ The average reading rate for 11th graders at South Kitsap High School is 162 correct words per minute, as established by school psychologist Neal Perrine in 2005. The Student's accuracy level on the CBMs was high, averaging 97 percent. *Id.* The Student had good prosody according to Ms. Hammann.

⁷ The Student had different Language Arts teachers each trimester of 10th grade. There is no evidence in the record from her 1st trimester teacher.

⁸ In the same month that Ms. Hammann administered the CBMs (January 2009), she wrote that the Student's reading rate was 52.75 words per minute on an 11th grade passage. D-66.6. However, the CBMs do not reflect that rate, either individually or averaging the four of them. Ms. Hamman must have been referring to something other than the CBMs when she wrote this. All but one of the CBM passages was above the 11th grade level, and the individual scores were 56, 63, 51.5 and 61.5 correct words per minute. D-67; D-68.7. The average of those four scores is 58.

31. Additional information came from the Student's 11th grade (2008-09) Language Arts teacher, Mandy Woods. Ms. Woods taught the Student for 2nd and 3rd trimester. At the time Ms. Woods testified in April 2009, the 2nd trimester had been completed and the 3rd trimester was underway. On the common assessment (final exam) for 2nd trimester, the Student received the highest grade in her class of 30 students. This was an average-level class compared to Ms. Wood's 11th grade classes over her eight years at the high school. For 2nd trimester the Student earned a B+, which was close to the highest grade in the class. Ms. Woods does not grade on a curve.

32. The only special education the Student received in reading in 11th grade was 30 minutes every other week. Ms. Hammann delivered this to the Student, as she had in the latter part of 10th grade. However, as 11th grade went on the Student no longer found it helpful, as she had found it to be in 10th grade. They continued to practice the same type of material: individual multi-syllabic words. Ms. Hammann concurred with the Student on this, and knew that the Parents wanted more focus on the Student's rate of speed in reading. In January 2009, Ms. Hammann drafted new reading goals to improve the Student's speed by practicing oral reading of whole passages. D-66.6. The new goals were not adopted because the prior IEP was the Student's stay-put placement.⁹

33. Some of the literature the Student read for her Language Arts classes in 10th and 11th grade were: *The Great Gatsby*, *The Scarlet Letter*, *The Catcher in the Rye*, *Of Mice and Men*, *The Things They Carried* and *The Crucible*. When asked if she was successful in 11th grade Language Arts, the Student said she was "kind of successful. I think I could do better on essays and tests."¹⁰ To the same question regarding 11th grade History, she responded: "Yes. But I think I could do better." RP 834. The Student reported it takes her twice as long to do her reading and homework as it takes her friends; she has to read things several times in order to remember them; she spells poorly; and she gets sidetracked and forgets things. The Student would like to have one period a day at school working with someone one-on-one on reading aloud and fluency. The Student intends to pursue a career in graphic arts.

Written Expression

⁹ "Stay put" conditions exist while a due process hearing is pending. It essentially means that no changes may be made to the Student's existing placement or IEP unless all parties agree. See 20 USC § 1415(j); Washington Administrative Code (WAC) 392-172A-05125; 34 CFR §518. In this case, the Parents agreed to an IEP amendment during stay-put on October 17, 2008, to add the accommodation of using a calculator in math class.

The January 2009 draft IEP was prepared prior to the January 27, 2009 IEP meeting, but was not distributed to the Parents because that meeting never got past the issue of eligibility. In late-March or early April 2009, the District mailed the January 2009 draft IEP to the Parents. The Parents did not recognize it as a proposal to amend the IEP because they did not receive a written notice or invitation to a meeting.

¹⁰ At the time the Student testified that she was "kind of successful" in Language Arts, she had recently completed the 2nd trimester of 11th grade. In that trimester she got the highest grade in her Language Arts class on the final exam (common assessment), and nearly the highest grade in her class for the trimester as a whole.

34. On the Written Expression subtest of the WIAT-II, the Student scored SS 106 (average). On the Spelling subtest she scored SS 76 (borderline).¹¹ Her Written Language Composite score combined these subtests, and was SS 89 (average to borderline). The composite score was brought down by her poor spelling. No severe discrepancy in written expression was established because her composite score was above 86. D-31.4 - .5 and .11; RP 197.

35. Dr. Johnson considered the reports from the Student's Language Arts teachers, mentioned above, that she performed average to above-average compared with her peers. He also considered the fact that the Student passed the Writing WASL with a score of 18, where the passing score was 17.

36. After Dr. Rutberg-Self's IEE was completed in December 2008, Dr. Johnson also considered the Student's good performance on the Writing Sample section of the Woodcock-Johnson III Tests of Achievement that Dr. Rutberg-Self administered. The Student scored at college level even though Dr. Rutberg-Self mistakenly failed to give her more test items that could have raised her score higher.

37. Dr. Johnson also considered the WIAT-II Written Expression Prompt A that he administered and the Prompt B that Dr. Rutberg-Self administered. These are 15-minute writing samples in which students are asked to express whether they are for or against a physical education requirement (Prompt A) or a school uniform requirement (Prompt B), and to support their position with three arguments. The Student's Prompt A had clear writing, adequate punctuation and capitalization, but had spelling errors and was only supported by two arguments instead of three, according to Dr. Johnson. (His test protocols were destroyed, so Prompt A is not in evidence.) The Student's Prompt A was somewhat better than the Prompt B she wrote for Dr. Rutberg-Self, according to Dr. Johnson.

38. Later evidence was cited by the District as reinforcing Dr. Johnson's view that the Student no longer needed SDI in writing. In 11th grade Language Arts, all but one essay per trimester was written in class, with no guidance from the Parents. The Student earned nearly the highest grade in her class for 2nd trimester, largely based on her written work, and scored the highest in her class on the written final exam (common assessment). When her Language Arts teacher, Ms. Wood, testified at the hearing in April 2009, the Student was continuing with similar performance in the 3rd trimester.

39. The Student achieved these results with almost no SDI: As mentioned above, she averaged only 15 minutes per week of reading instruction (30 minutes every other week), and that instruction was on outdated goals due to the stay-put status of the IEP. The Language Arts paraeducator reported to the Student's case manager that the Student refused her help 99 percent of the time. The Student therefore received virtually no SDI in writing in 11th grade, though she did receive accommodations. She received copies of the paraeducator's notes taken for all five of the IEP students in the class. The Student's case manager, Ms. Hammann, testified without contradiction that note-taking is an accommodation; it is not SDI.

¹¹ There is no explanation in the record of the term "borderline" in the WIAT-II scoring levels. It is clear the term indicates a low score.

40. Dr. Johnson recommended the following accommodations for the Student in written expression: Extra time to complete assignments and tests that require extensive reading or writing; answering test questions orally rather than in writing, when appropriate; not being penalized for spelling errors; being allowed to use a spellchecker; and extra time to copy information from an overhead or board, or else providing copies of that information to her in writing. D-31.12.

Mathematics

41. On Math Reasoning in the WIAT-II, the Student's SS of 95 was in the average range. However, in Numerical Operations, her SS of 77 was in the borderline range. There is a severe discrepancy between the Student's intellectual ability and her achievement in numerical operations. Dr. Johnson explained:

In the area of mathematics, [the Student's] Math Reasoning skills fell within the Average classification. She was able to correctly use grids and graphs to make comparisons and draw conclusions, use theoretical and experimental probability to draw conclusions and answer questions, and work with quantities less than a whole. However, in areas dealing with Numerical Operations, [the Student's] score fell within the Borderline classification. While she was able to correctly solve simple algebraic equations and perform multiplication and division problems with multi-digits and regrouping, [the Student] made errors on easier problems including those that required subtraction with multi-digits and regrouping and subtraction utilizing decimals. She also displayed difficulty with multiplication and basic facts. It appears that while [the Student] has the ability and reasoning skills to complete more advanced problems, she may have some gaps in her ability to complete the four basic functions. This result is consistent with [the Student's] score of 368 on the Math WASL which placed her below a Basic level.

D-31.4 - .5.

42. The passing score on the Math WASL was 375. The Student's score of 368 was below that. The Student is in a graduating class that will not need to pass the Math WASL in order to graduate. However, she took a class in 11th grade called Segmented Math for those who did not pass the Math WASL. The 'segments' in the class are: algebraic sense; geometry and measurement; and probability, statistics and number sense. The class worked on 10th-grade level skills, not the lower-level basic operations on which the Student made the most errors. The Student was very successful in the class, according to teacher Todd Olson. (There are no grades in this class other than pass/fail).

43. In her 10th-grade math class, Advanced Algebra, the Student's grades were C for the 1st and 2nd trimesters, and C- for the 3rd trimester. D-71.9, .13, .17.

44. The Student explained that she makes mistakes in calculations because she has forgotten some of the simple math she learned in junior high and elementary school. She took Math Analysis

in 11th grade, which is a college-level course. She did not continue with Math Analysis past 2nd trimester in because it became too difficult for her and she was getting D's and F's on tests.

45. Dr. Johnson recommended the Student be allowed to use a calculator on math problems, and that she receive tutoring or take a remedial math class to fill in the gaps in her knowledge. The Student has forgotten some of the basic skills she learned in earlier years. She needs to re-learn and practice these skills. Dr. Johnson concluded that her successful completion of courses in Geometry and Advanced Algebra indicate she does not need special education in math.

District's Conclusions on Eligibility

46. After reviewing Dr. Johnson's report, the District issued its conclusions in the August 28, 2008 Notice of Evaluation Results and Evaluation Report Summary prepared by school psychologist Neal Perrine. D-40.2; D-39.

47. The District concluded first, that the Student has a disability: She does not have an SLD, but she does have ADHD. Second, this disability adversely affects the Student's ability to progress in the general education curriculum, and therefore she continues to need accommodations.¹² Third, the Student does not need SDI in order to benefit from instruction.¹³

48. Regarding the functional implications of the Student's disability and her needs for accommodations, the Evaluation Report Summary stated:

Functional Implications: [The Student's] difficulties in with [sic] attention is likely to slow her down significantly in comparison with her peers during educational situations that are timed. In addition, poor spelling and organizational struggles may affect her ability to complete in-class tasks at the same rate as her peers.

D-39.5. The District's report also noted the severe discrepancy in numerical operations that Dr. Johnson found, and agreed with his recommendations on how to address it. *Id.*

49. In his testimony, Mr. Perrine made a number of points regarding the District's decision to reaffirm its eligibility determination after considering the IEE. First, Mr. Perrine pointed out that typically spelling is not considered writing. There is no SLD category that would allow an evaluator to qualify a student for spelling. Poor spelling is consistent with the Student's diagnosis of ADHD-inattentive type. (This last point was made by Dr. Rutberg-Self as well.)

50. Second, at a high school level, reading fluency comes about by expanding one's reading vocabulary, and that is expected of all students. The Student needs to continue to read more, and

¹² Mr. Perrine testified there is a typographical error in the conclusions section of his report. It should say "Yes" instead of "No" next to "2) This disability adversely affects [the Student's] involvement and progress in the general education curriculum." D-39.5; RP 607.

¹³ Dr. Johnson answered the second question differently, saying the Student's disability does *not* adversely affect her progress. However, he came to the same conclusion as Mr. Perrine: The Student continues to need accommodations (but not SDI) due to her disability of ADHD. D-31.11 - .12.

this will help her read at a faster rate. While reading faster is definitely an advantage, comprehension and the ability to use the language are even more important. It is very common for people to be extremely slow readers but be very high achievers. It just takes them more time to do tasks.

51. Third, regarding high and lower test results obtained for the same student, one can always have a bad day, but it is hard to have a good day that lets you score much higher than your actual ability. If someone has truly low abilities, they are never going to be able to obtain an average score on the achievement tests that Dr. Johnson and Dr. Rutberg-Self administered.

52. Fourth, Mr. Perrine agrees with Dr. Rutberg-Self's recommendations for how math should be taught to the Student. P-1.16 - .18. It is what good teachers should be doing, and as far as he is aware, they are doing. It is not SDI.

53. Finally, the fact that a person works hard and spends significantly more time on homework than her peers would be an important eligibility factor if she were barely passing her classes. In that case, she would need special help. However, "[i]f the person is getting a B minus, well, good for them. They should be studying hard; and if they weren't, they would probably do worse. But they are making adequate progress in the general education curriculum without support." RP 686. Mr. Perrine also stated that hard work is one of the strongest indicators that a student will do well in the future.

Dr. Johnson's Test Protocols

54. As discussed in the Order on Parents' Motion in Limine of July 28, 2009, Dr. Johnson has a practice of destroying the underlying test protocols after he completes an IEE, because he does not maintain a secure storage facility. When he performs an evaluation for a school district, he turns over his test protocols to the school district for preservation. There is a debate in the school psychologist community concerning whether test protocols should be destroyed or preserved.

55. The District initially contacted Dr. Johnson about doing an IEE of the Student. The District agreed to pay for the IEE, as the Parents requested. When the District later retained Dr. Johnson to evaluate the Student, Dr. Johnson thought he was doing the IEE. For this reason he titled his report "*Independent Evaluation Report*". D-31.1 (italics added).

56. Dr. Johnson did not realize the District had retained him to do its own evaluation. If he had known this, he would have turned over his test protocols to the District after completing his report, as is his practice. However, he believed he was doing an IEE, so he destroyed the test protocols after completing his report, as is his practice. The test protocols were therefore unavailable to be examined for errors as Dr. Rutberg-Self's test protocols were examined for errors.¹⁴

57. The District neither intended that Dr. Johnson dispose of his test protocols, nor knew he had done so. The District preserves its own test protocols, and assumed Dr. Johnson did the same.

¹⁴ Because of this, the Order on Parents' Motion in Limine shifted the burden of proof on all elements of the consolidated cases to the District.

It did not occur to Greg Albertson, the assistant director of special education who dealt with Dr. Johnson, that he needed to instruct Dr. Johnson to preserve them.

58. As set forth below, Dr. Rutberg-Self's evaluation is found to contain a large number errors and to be less than impartial. It will not be presumed, simply because Dr. Rutberg-Self's work suffers from these problems, that Dr. Johnson's work suffers from them as well. There is no basis for that presumption, and there are the following indicia of reliability for Dr. Johnson's work.

59. Dr. Johnson has been a professor of school psychology for several decades. He teaches graduate students how to administer psychometric tests and perform special education evaluations. When he evaluated the Student, he believed he was doing an independent evaluation, not that he had been hired by one party or another. He never performed work for this District before, and has only performed work for a few districts near his university that are too small to employ their own school psychologists. Dr. Johnson had never testified in a special education case before. When hired once as an expert witness in a marital dissolution case, Dr. Johnson concluded that it was in the best interests of the child not to live with the party who had hired him, and he told this to the court. Finally, he brought to light errors in Dr. Rutberg-Self's report that both raised and lowered the Student's scores when the errors were corrected.

Independent Educational Evaluation

60. Dr. Rutberg-Self received her Ph.D. in school psychology from the University of Washington in 1998. Prior to that she worked as an occupational therapist. Dr. Rutberg-Self has taught as adjunct faculty in school psychology at the University of Washington. She has been in private practice as a psychologist since obtaining her doctorate in 1998. P-36. Dr. Rutberg-Self has performed 15 to 20 special education eligibility evaluations over the course of her career. She performs 10 to 15 evaluations per year that involve educational testing.¹⁵

61. Dr. Rutberg-Self found the Student eligible for special education based on SLDs in three areas: reading fluency, reading comprehension and math operations. She found the Student in need of SDI in reading fluency, reading comprehension, and writing. P-1.12 - .13. Her report was unclear as to whether she believed the Student also needed SDI in math operations, but at the hearing Dr. Rutberg-Self clarified that she believes the Student does need this.

62. Dr. Rutberg-Self's conclusions are not found to be reliable for a number of reasons. First, she made a very large number of errors in the administration and scoring of her assessments. Dr. Rutberg-Self did not dispute any of the errors set forth in this decision.

63. Beginning with the errors that cannot be corrected by re-scoring her tests after the fact, they are as follows. In the Verbal Comprehension section of the Woodcock-Johnson III Tests of

¹⁵ Dr. Rutberg-Self's testimony on the approximate number and type of evaluations she performs was confusing. RP 433 - 436. These findings reflect what appears to be her meaning.

Cognitive Abilities (WJ-III-Cognitive), Dr. Rutberg-Self mistakenly thought a basal¹⁶ had been established in the Synonyms test. She therefore did not administer three test items that were required to be administered. The Student's true score on Verbal Comprehension is therefore unknown. D-62.14; RP 88 - 89.

64. In the Writing Sample section of the Woodcock-Johnson III Tests of Achievement (WJ-III-Achievement), if a student scores over 18 points on a certain set of items, the next more difficult set of items must be administered. Here, the Student scored 24 points – significantly above the minimum required to move on to the next set – but Dr. Rutberg-Self mistakenly did not administer the next set. Even without the next set, the Student's score was in the college-level range. RP 429. Dr. Rutberg-Self realized she had spoiled the test by not administering the next set. She therefore did not report any score for the Writing Sample test. D-62.45; RP 91 - 93, 343, 428. It is therefore unknown how the Student would have scored if the test had been properly administered.

65. In the Reading Vocabulary test of the WJ-III-Achievement, Dr. Rutberg-Self mistakenly thought a basal had been established in the Synonyms section. She did not go back and administer earlier questions, as required. The Student's true score is therefore unknown. D62.46; RP 106 -108.¹⁷

66. In the Multiplication and Division section of the KeyMath test, Dr. Rutberg-Self made the same type of basal error. The Student's true score is therefore unknown. D-62.59; RP 121.

67. The same basal error was made in the Algebra section of KeyMath, so that true score is unknown as well. D-62.56; RP 122.

68. Also in the Algebra test, Dr. Rutberg-Self did not recognize that a ceiling had been established. She administered 10 more items after the ceiling was reached and counted them in the Student's score. Once a ceiling is established, the evaluator is required to stop administering further items. D-62.56; RP 122 - 123.

69. The reason this error cannot be corrected by re-scoring after-the-fact has to do with fatigue and standardization requirements. Ignoring a ceiling lengthens the test and creates fatigue, which can impact portions of the test given later. Also, a nationally normed test must be given under

¹⁶ A basal is established when a student gets a certain number of correct answers in a row, unpunctuated by any incorrect answers. Because the questions get more difficult as they go along, the test manual suggests what question to start with, given the student's age. If the student gets a certain number of answers in a row correct, it is assumed she would get the earlier questions correct as well. However, if a basal is not established, the evaluator must go back and administer those earlier questions.

¹⁷ This is a different error than she made in the Synonyms section of the *cognitive* test, discussed above. Both errors involved synonyms and basals, but one error was in an IQ test while the other was in an achievement test.

standardized conditions if the student is to be validly compared with others who have taken the same test. RP 126 - 127.¹⁸

70. In the Multiplication and Division section of the KeyMath test, Dr. Rutberg-Self again ignored a ceiling that was established. She administered 12 test items after the ceiling had been reached. D-62.59; RP 126.

71. In the Geometry section of KeyMath, Dr. Rutberg-Self failed to administer one test item (or else administered it but failed to record the answer). Because the missed item came early in the series, one cannot know whether a basal was established. It is therefore unknown whether earlier questions in the series should have been administered. D-62.57; RP 125 - 126.

72. Turning to the errors that can be corrected after the fact, some background information is necessary. The WJ-III-Cognitive that Dr. Rutberg-Self used to assess the Student's intelligence uses the term General Intellectual Ability (GIA) instead of full scale IQ.

73. Dr. Rutberg-Self's report states there is a 95 percent probability that the Student's true GIA falls within the range of 92 to 106. D-61.4. However, that is the range for a GIA score of 99. D-62.10. Dr. Rutberg-Self found the Student's GIA as 97, which would have a different range.¹⁹

74. Dr. Rutberg-Self then ignored her own GIA score of 97 and used Dr. Johnson's score of 105 to determine whether there was a severe discrepancy between the Student's intellectual ability and her academic achievement. P-1.12.²⁰ Using a higher IQ score makes it more likely one will find a severe discrepancy. A severe discrepancy indicates a student has an SLD and is therefore eligible for special education.

75. There was no acceptable reason for Dr. Rutberg-Self to use Dr. Johnson's IQ score of 105 instead of using her own lower score to determine whether the Student had an SLD. She did not use Dr. Johnson's achievement scores, which were generally higher than her own, but only his IQ score.

76. Using her own GIA score of 97, the criterion level is 80, meaning that a standard score on an achievement test would have to be 80 or below in order to find a severe discrepancy. Using

¹⁸ If an evaluator believes a student is capable of correctly answering additional, more difficult questions beyond the ceiling, they may test their hypothesis by administering these questions after the test is complete. This could give the evaluator a basis for stating that the student may be capable of more than appears from the test results. However, it is inappropriate to administer these additional questions *during* the test. It is also inappropriate to count the answers to them in the student's test score. Dr. Rutberg-Self did both of these things. RP 123.

¹⁹ This error appears to have occurred because Dr. Rutberg-Self first found the Student's GIA to be 99 (D-62.8), then corrected some errors and found it to be 97. She may have put the probability range into her report based on the GIA of 99, then neglected to change it when she recalculated the score to be 97.

²⁰ Dr. Rutberg-Self mistakenly wrote that Dr. Johnson used the WISC (Wechsler Intelligence Scale for Children), when he actually used the WAIS (Wechsler Adult Intelligence Scale). P-1.12.

Dr. Johnson's IQ score, the criterion level for finding a severe discrepancy is 86. This means the Student could score up to 86 and still be found to have a severe discrepancy. D-38.21.²¹

77. Using Dr. Johnson's criterion level allowed Dr. Rutberg-Self to establish a severe discrepancy in Math Operations that she could not otherwise establish, because the Student's standard score on the KeyMath assessment was 82 -- too high for Dr. Rutberg-Self's criterion level of 80, but below Dr. Johnson's criterion level of 86. It also caused the size of the alleged severe discrepancies in Reading Comprehension and Reading Fluency to appear larger than they were. (As explained below, when a particular error in Dr. Rutberg-Self's achievement testing is corrected, the severe discrepancy she found in Reading Comprehension disappears.)

78. Dr. Rutberg-Self wrote that her testing conditions were good, the Student worked hard, and the assessment was a valid representation of the Student's abilities. P-1.3. Given this, Dr. Johnson and Mr. Perrine found it professionally inappropriate that she used Dr. Johnson's score instead of her own. Dr. Rutberg-Self could give no explanation for why she did this, and said she probably should have used both. RP 402.

79. In the Reading Vocabulary test of the WJ-III-Achievement, in the Analogies section, Dr. Rutberg-Self failed to give credit for six items. She did not recognize that a basal had been established at item 7, and so did not give credit for items 1 through 6. D-62.46. She found the Student had a reading vocabulary at the 7th grade level, whereas the correct score put the Student at the 10th grade level. This changes the Student's overall Reading Comprehension score from 80 to 86. RP 109 - 114. There is no longer a severe discrepancy in Reading Comprehension using Dr. Rutberg-Self's GIA score, because the Reading Comprehension score of 86 is above her severe discrepancy criterion of 80.

80. Another error concerning Reading Comprehension occurred in Dr. Rutberg-Self's evaluation report. She assigned a 1st percentile designation to a standard score of 80. Eighty is actually the 17th percentile, not the 1st percentile. As stated above, however, 80 is the wrong standard score. The correct standard score for this test was 86. P-1.7; RP 120 - 121.

81. In the Measurement test in KeyMath, Dr. Rutberg-Self made an error in adding the number of correct answers. The actual raw score is 35, not 34. D-62.57; RP 126.

82. In the Test of Word Reading Efficiency (TOWRE), Dr. Rutberg-Self made an error in adding the number of correct answers in the Phonemic Decoding Efficiency subtest. The correct raw score is 17, not 13. D-62.61, .63 - .64; RP 127 - 129.

83. In the Gray Oral Reading Tests (GORT-4), Dr. Rutberg-Self incorrectly transcribed the number of correct answers the Student obtained on one part of the test. The Student answered 3 questions correctly, but Dr. Rutberg-Self wrote 4 on the score sheet. D-62.65 and .69; RP 129 - 130.

²¹ The numerical criteria for establishing a severe discrepancy are determined by regulations issued by the Office of the Superintendent of Public Instruction (OSPI). See WAC 392-172A-03065 and -03070. OSPI also publishes a table listing the criterion scores for each IQ level. D-38.21.

84. In the Sound Blending test of the WJ-III-Cognitive, Dr. Rutberg-Self entered the wrong raw score into the software scoring program. The raw score was 33. The incorrect score entered into the scoring program was 28. D-62.8 and .17; RP 74 - 75.

85. Also in the Sound Blending test, the (incorrect) raw score of 28 yielded an SS of 112. Dr. Rutberg-Self mistakenly put in her report that the SS was 115 instead of 112. This was a separate error. P-1.5; D-62.8; RP 75 - 77.

86. In the Concept Formation test of the WJ-III-Cognitive, Dr. Rutberg-Self entered the wrong raw score into the software scoring program. The raw score was 23-E. The incorrect score entered into the scoring program was 25-E. D-62.8 and .18; RP 77 - 79.

87. In the Incomplete Words test of the WJ-III-Cognitive, Dr. Rutberg-Self again entered the wrong raw score into the software scoring program. The raw score was 29. The incorrect score entered into the scoring program was 30. D-62.8 and .22; RP 79 - 80.

88. In the Auditory Working Memory test of the WJ-III-Cognitive, Dr. Rutberg-Self incorrectly added the Student's answers to come up with a raw score of 22, and entered this into the scoring program. The actual raw score was 24. D-62.8 and .23; RP 82 - 83.

89. In the Retrieval Fluency test of the WJ-III-Cognitive, Dr. Rutberg-Self miscounted the hash marks she had written for the last third of the test. The Student got 24 items correct in that part of the test, not 23. Her total score on Retrieval Fluency was therefore 75, not 74. D-62.25; RP 84 - 85.

90. In the Pair Cancellation test of the WJ-III-Cognitive, Dr. Rutberg-Self miscounted the number of items that the Student had correctly circled. There were 64 correct circles, not the 61 that Dr. Rutberg-Self entered into the scoring program. D-62.7 - .8; RP 85 - 87.

91. Although more minor in impact, Dr. Rutberg-Self recorded wrong numbers in her evaluation report (rather than in the tests themselves) in three places. In the CTOPP test, the percentile scores for Rapid Letter Naming and Rapid Digit Naming should both be 5 instead of 15 and 25, respectively. P-1.5; RP 419. In the GORT test, the standard score and percentile are reversed for the Oral Reading Quotient. P-1.6; RP 348 - 349.

92. It is found that Dr. Rutberg-Self's testing is so fraught with errors that it is unreliable. Dr. Johnson pointed out that if these simple errors were made, one must ask what kinds of errors were made during test administration. He could only address errors that were apparent from the face of the documents.

93. There are additional reasons why Dr. Rutberg-Self's evaluation is deemed unreliable. First, for the reasons set forth above, it is found that she substituted Dr. Johnson's IQ score for the one she had found in order to more easily establish severe discrepancies and make the Student eligible for special education. This shows a lack of impartiality.

94. Second, Dr. Rutberg-Self did no classroom observation of the Student. She testified classroom observation is crucial to an evaluation, and there is no way to substitute for it, but she was unable to do it due to personal circumstances.

95. Third, Dr. Rutberg-Self did not speak with any of the Student's teachers. They are the ones who see how the Student functions every day in class, and who read her work product. Dr. Rutberg-Self knew that she had access to the teachers but did not take advantage of it, despite being unable to do any classroom observation.

96. Fourth, Dr. Rutberg-Self discounted all evidence of the Student doing well in written expression, and focused on one writing sample where she did not do as well. Dr. Rutberg-Self discounted the Student's success at *sentence-level* writing in the WJ-III-Achievement because it was not composition-level writing. (The Student scored at the college level on this sentence-level writing, even though Dr. Rutberg-Self mistakenly failed to administer additional, more difficult items on which the Student could have earned additional points.) On the other hand, Dr. Rutberg-Self discounted the *composition-level* writing the Student did on the WASL. The Student not only passed but exceeded the passing score.

97. Dr. Rutberg-Self testified that the Student was taught to the WASL test. However, WASL writing prompts are broad and open-ended. An example that Dr. Rutberg-Self herself read into the record was:

Think of someone, classmate, friend, relative, teacher, or someone else you would like to see again. Write a multiple-paragraph essay for your teacher in which you identify whom you would like to see again and explain why you would like to see him or her again.

RP 431. The WASL is a state-wide test on which the Student's scores were compared with others in her same grade. If the Student was taught to the test, so were others, yet she did well compared with them. According to Dr. Johnson, it is both appropriate and useful in later life to teach test-taking strategies. That would seem especially true for essay-writing, which can be used by the Student in college and beyond.

98. When told at the hearing the Student earned nearly the highest grade in her Language Arts class for the 2nd trimester of 11th grade, Dr. Rutberg-Self wondered how much scaffolding, help, and direction the Student received in order to get this grade. However, the Student receives the same in-class help as all the other students: There is a paraeducator in the class, but as mentioned above, the Student refused help from her 99 percent of the time.

99. The writing sample Dr. Rutberg-Self focused on was Prompt B from the Wechsler Individual Achievement Tests II (WIAT-II). The Student was given 15 minutes to write a letter to the editor on whether uniforms should be required at school, and to support her position with three arguments. The Student stopped writing early and came up with only two arguments. She left a blank space for a third, but explained that she could not think of a third one. Her spelling on the writing sample was poor, a weakness that all parties agree the Student has.

100. Dr. Rutberg-Self put a large amount of weight on this one writing sample. P-1.7 - .8. However, she acknowledged that there are reasons the Student may do better on one essay than another, such as whether she is interested in the topic, the ups and downs of ADD on a particular day, and "any number of things." RP 464. The fact that the Student stopped writing early and only

produced two ideas instead of three indicates she may have been uninterested in the topic and/or distracted.

101. The Student's writing is significantly better on the rough draft she wrote on the topic of friendship in the novel *Of Mice and Men*. The rough draft was done entirely in class, over a few class periods. It was later reviewed and corrected by others, but the handwritten rough draft is the Student's own product. D-68.4 - .5. This essay and Prompt B were written within a few weeks of one another, but show a large difference in quality.

102. For all of the reasons mentioned above, the IEE performed by Dr. Rutberg-Self is not found to be reliable.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 USC §1401 *et. seq.* (Individuals with Disabilities Education Improvement Act (IDEA, sometimes referred to as IDEIA), formerly Education for All Handicapped Children Act), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) § 300 *et. seq.*, and Chapter 392-172A Washington Administrative Code (WAC).

2. The IDEA 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.

Rowley, supra, 458 U.S. at 207; 103 S. Ct. at 3051.

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

Id., 458 U.S. at 188-189; 103 S. Ct. at 3041-3042.

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.*, 458 U.S. at 200 - 201; 103 S. Ct. at 3048. The educational benefit must be a "meaningful" one. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1501 (9th Cir. 1996).

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The party seeking relief in cause no. 2008-SE-0095 is the District. The party seeking relief in cause no. 2008-SE-0103 is the Student. However, as set forth in the Order on Parents' Motion in Limine, due to the destruction of Dr. Johnson's test protocols *the burden of proof on all elements of both cases has been shifted to the District.*

6. For the reasons set forth in the section titled "Dr. Johnson's Protocols," above, the District has rebutted the presumption that the missing test protocols were destroyed in order to conceal a weakness in Dr. Johnson's evaluation or in the District's case. Their destruction was innocent. Concerning the evidentiary inference in spoliation cases, the court in *Henderson v. Tyrrell*, 80 Wn. App. 592, 609, 910 P.2d 522 (1996) stated: "[U]nless there was bad faith, there is no basis for 'the inference of consciousness of a weak cause.' [citation omitted]". However, the District retains the burden of proof in this case because the destruction of the test protocols deprived the Parents and Student of an opportunity to find errors in Dr. Johnson's testing and cross-examine him more effectively.

Was the Parents' request for an IEE premature?

7. Parents and adult students who disagree with a school district's evaluation have the right to an IEE at public expense, subject to certain conditions. WAC 392-172A-05005; see 34 CFR §300.502.

8. A request for an IEE at public expense is premature if the school district has not yet completed its evaluation. Pursuant to WAC 392-172A-03025, the IEP team must review existing evaluation data on the student, and:

On the basis of that review, *and input from the student's parents*, [the IEP team must] identify what additional data, if any, are needed to determine . . . [w]hether the student is eligible for special education services . . . or [i]n case of a reevaluation, whether the student continues to meet eligibility . . .

WAC 392-172A-03025(2) (italics added); see 34 CFR §300.305(a)(2). Thus, a district's evaluation is not complete until it has obtained input from the student's parents and identified what additional data are needed to determine eligibility.

9. Here, the IEP team met on August 28, 2008 to review the District's reevaluation of the Student. The Mother stated that the evaluation was inadequate because it did not include certain testing. The District offered to keep the evaluation open and conduct the additional testing the Mother requested. The Mother refused to allow the District to conduct any further testing of the Student. Two weeks later, the Parents requested an IEE at public expense.

10. In *Lake Washington School Dist.*, 107 LRP 63157, 2007-SE-0079/0080 (WA SEA 2007),²² the mother stated that the district's evaluation was inadequate because it did not consider certain information from health care providers. The district agreed to keep its evaluation open to obtain and consider this additional information. However, the mother declined to sign release forms so the district could obtain it. The district denied the mother's request for an IEE because it did not have an opportunity to complete its evaluation by obtaining the additional information the mother wanted considered. The ALJ concluded:

Here, Parent's right to an IEE is not triggered until the District has completed its evaluation. The preponderance of evidence establishes the District was in the process of finalizing the evaluation by discussing the results of the evaluation testing and report with both Mother and Father. However, once Mother brought additional information to the attention of the evaluation team on July 13, 2007, the evaluation was not finalized, and the District took steps to obtain the information Mother referenced. Mother asserts the District completed its evaluation because the report referred to the testing "results", and used headings referencing the report's "Decision" and "Summary." However, the evidence is clear the evaluation report was a draft report which was not finalized because Mother brought additional relevant information to the attention of the evaluation team. Therefore, because the District did not complete its evaluation, Parent's request for an IEE is premature.

Id. Likewise in the present case, the Parents' request for an IEE at public expense was premature because they did not allow the District to obtain the additional assessments they asserted were missing from the District's evaluation.

11. The District has established that the Parents are not entitled to reimbursement for the IEE they obtained from Dr. Rutberg-Self.²³

²² The version of this decision in the LRP reporter has serious technical problems. A true copy of the decision can be found on the OSPI website at the following address:
www.k12.wa.us/ProfPractices/adminresources/SpecEdDecisions/2007/2007-SE-79-80.pdf

²³ Because the Parents' request for an IEE was premature, it is unnecessary to address Issue (a), set forth at the beginning of this decision: Whether the District's evaluation of August 2008 was appropriate under WAC 392-172A-05005 and 34 CFR §300.502.

Did the District violate the IDEA by determining the Student was no long eligible for special education?

12. A student is eligible for special education if she:

has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: . . . an other health impairment, [or] a specific learning disability . . . and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services.

WAC 392-172A-01035(1)(a).

13. The parties agree the Student has at least one disability, ADHD, which is an "other health impairment". The Student and Parents believe she continues to have another disability, a "specific learning disability." *Id.*

14. The parties further agree there is an "adverse educational impact" on the Student from the disability (or disabilities) so that she needs accommodations. *Id.*

15. The parties disagree, however, as to whether the Student "has unique needs that cannot be addressed exclusively through education in general education classes with . . . individual accommodations, and needs special education and related services." *Id.*²⁴ The District believes the Student's needs can be addressed by accommodations under a section 504 plan (section 504 of the Rehabilitation Act of 1973, 20 USC §794). The Student and Parents believes her needs cannot be met without special education.

16. In deciding this question, and other questions discussed below, no weight can be given to Dr. Rutberg-Self's IEE. The IEE was so fraught with errors that one must ask, as Dr. Johnson did, what errors were made during test administration that are not visible from the face of the documents. The IEE cannot be relied upon as having been based on required test administration procedures. Dr. Rutberg-Self also showed a lack of impartiality in the method she used to find severe discrepancies, as explained above.²⁵

17. Turning to the relevant case law, in *Hood v. Encinitas Union School Dist.*, 486 F.3d 1099, 107 LRP 26108 (9th Cir. 2007), a 10-year old student had a full scale IQ of 121 and achieved average

²⁴ A finding of SLD, or any other disability, does not by itself establish eligibility for special education. The additional determination quoted in text must be made in order to establish eligibility. WAC 392-172A-01035(1)(a).

²⁵ It is noted that the District did fulfill its duty to consider Dr. Rutberg-Self's IEE, pursuant to WAC 392-172A-05005(5); see 34 CFR §300.502(c). The IEE was carefully considered in documents (D-68.7 - .10), and at meetings on January 27, and February 5, 2009, before the District decided to reaffirm its eligibility determination on March 3, 2009. Dr. Rutberg-Self was unavailable for the January 27 meeting, but participated in the February 5 meeting.

or above-average grades. On standardized achievement tests she scored average or better, except in math fluency, where she scored in the low average range. She consistently had difficulties completing tasks, turning in homework on time, and keeping her belongings organized. The parents argued that special education was needed to narrow the mathematical discrepancy between the student's achievement and her intellectual potential.

18. The parties in *Hood* disputed whether the student had a severe discrepancy for purposes of establishing an SLD, and whether she could establish eligibility via her ADHD or seizure disorder. The Ninth Circuit, however, focused on whether her impairment could be accommodated in the general classroom.

We need not consider whether Anna satisfies the calculation [the mathematical standard for severe discrepancy]. . . . [E]ven assuming the existence of a severe discrepancy, the law does not entitle Anna Hood to special education if we find that her discrepancy can be corrected in the regular classroom.

To attempt to accommodate Anna, in spite of her medical conditions, in the general classroom is consistent with the concept of mainstreaming, an objective that the school district is legally bound to pursue.

Hood, supra, 486 F.3d at 1106, 1110.²⁶

19. *Hood* held that the *Rowley* standard applies to eligibility cases. See also *Ashli C. v. Hawaii Dept. of Education*, 2007 U.S. Dist. Lexis 4927, at 24 - 26, 47 IDELR 65 (D. Haw. 2007). *Hood* therefore sought to determine whether the instruction and services provided to the child "permit the child to benefit educationally from that instruction." *Id.* at 1107 (quoting *Rowley*, emphasis added in *Hood*). Applying this benefit standard to the facts of the case, the court stated:

As the hearing officer noted, "[i]t [is] virtually undisputed in this case that Anna has been progressing in the general curriculum along with her peers." She received nearly uniformly average or above average grades.

²⁶ The California regulations applied in *Hood* differ from the Washington regulations applicable here. However, eligibility under both requires not only the showing of a disability, but one that cannot be successfully addressed in the general classroom. *Hood* affirmed the district court decision, and stated:

The district court expressly stated that "[f]ortunately for this Court, this Court need not attempt to assess the accuracy of either side's §3030(j) [severe discrepancy] calculation . . . because both sides ultimately focus on the last part of the §56337 test[,] that is, whether the discrepancy could be corrected in the general classroom.

Hood, supra, 486 F.3d at 1106 (brackets and ellipsis in original). Regarding "other health impairments", the court stated:

Similarly, we need not determine whether Anna has an "other health impairment" in the form of a seizure disorder or attention deficit disorder, as, even assuming this to be true, we conclude that the law would not entitle Anna to benefits because it was reasonable for the hearing officer to conclude that any impairment can be accommodated in the general classroom. The school district determined that a Section 504 plan would be sufficient to serve Anna's special needs.

Id. at 1110.

[I]t appears that the hearing officer was justified in concluding that Anna is receiving the requisite benefit from her education such that the school district is in compliance with the law.

Hood, supra, 486 F.3d at 1108. The court noted that under *Rowley*, states are obligated to provide "a basic floor of opportunity" rather than a "potential-maximizing" education. *Id.* at 1107.

20. The Ninth Circuit has also held that the "some benefit" standard of *Rowley* was modified to a "meaningful benefit" standard by the 1997 amendments to the IDEA. *N.B. v. Hellgate Elementary School Dist.*, 541 F.3d 1202, 1213 (9th Cir. 2008). The ultimate question, then, is not whether a student would learn more or perform better if provided with SDI. The question is whether the student needs SDI in order to receive meaningful benefit from his or her education. As the court noted in *Hood*, arguably all students would perform better with more services. *Id.* at 1108.

21. In the present case, as in *Hood*, the parties have focused much attention on whether a severe discrepancy and an SLD have been established. However, as in *Hood*, the proper focus should be whether the Student's unique needs can be addressed in the general education curriculum with appropriate accommodations. If the Student is able to receive meaningful benefit from her education with such accommodations, then she does not require special education.

22. The District has carried its burden of proving that the Student can receive meaningful benefit from the general education curriculum with accommodations. She performed at average or above-average levels in her general education classes, both in 10th grade when she received a small amount of special education,²⁷ and in 11th grade when she received almost none.²⁸

23. In Reading and Written Expression, the standardized achievement tests administered by Dr. Johnson show the Student in the average range, except for a borderline score on the subtest in Spelling. On the 10th grade Reading and Writing WASL, the Student exceeded the passing scores, and did so by a large amount in Reading.

24. The Student received average grades in 10th grade Advanced Algebra. The Student did not pass the Math WASL in 10th grade, so she took Segmented Math in 11th grade to help her pass it.²⁹ In 11th grade she also took the college-level class Math Analysis. She was unable to succeed in that class and did not go past the 2nd trimester. On the Math Reasoning achievement test Dr. Johnson

²⁷ The Student's GPA for 10th grade was 2.489. D-35. She earned A's, B's and C's in all of her classes except for a D in weightlifting one trimester, and a D in second-year German one trimester. D-71.9, .13, .17.

²⁸ The Student's 11th grade year (2008-09) occurred *after* the August 2008 eligibility decision at issue here. Pursuant to *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999), later evidence is not as relevant as the information available at the time of the decision (August 2008). Later evidence "may shed light on the adequacy" of a prior decision, though it is not "outcome determinative". *Id.*

²⁹ The Student was among the 47.5 percent of Washington 10th graders who did not pass the Math WASL that year. D-71.16.

administered, the Student scored in the average range. In Numerical Operations she scored in the borderline range.

25. The District has established that accommodations can address the Student's unique needs within the general education curriculum, so that she does not need special education. The accommodations her in February 2008 stay-put IEP, as amended by mutual agreement in October 2008, are as follows:

- Extra time
- Tests read aloud
- Written assignment broken into chunks
- Use of planner to record important dates
- Check her planner at the beginning of the day, and have the Student document what she works on, who she asks for help
- Use of a calculator in math class.

See D-9.6; D-49.5. The District's August 2008 evaluation recommended the following list of accommodations, many of which are already in place:

- Provide her with extra time to complete assignments and tests that require extensive reading or writing
- Allow her to take state and District tests in an alternative setting
- Allowed her to answer test questions orally rather than in writing, when appropriate
- Do not penalized her for spelling errors
- Allow her to use a spellchecker
- Allow her to use a calculator when working on math problems
- Provide her with extra time to copy information from overhead or board, or provide her with written versions of this information.
- Enroll her in a remedial math class or tutoring so that she can be re-taught and practice the subtraction, multiplication and division skills she has forgotten from earlier years

See D-31.12.

26. If it were necessary to decide whether the Student has an SLD in addition to ADHD as her disabling condition, the District would be found to have established that she does not have an SLD.

27. The only subject in which the Student has a severe discrepancy is Numerical Operations (This is referred to as "Mathematics calculation" in the SLD regulation, WAC 392-172A-03055(1); see 34 CFR §300.309(a)(1).) Subpart (2)(b) of that regulation provides that, if a severe discrepancy exists, before deciding whether there is an SLD, the evaluation team

may also consider whether the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, and through review of existing data.

WAC 392-172A-03055(2)(b); see 34 CFR §300.309(a)(2).

28. Pursuant to this, the evaluation team considered that the Student successfully completed a year of Advanced Algebra without any SDI. While she did not pass the Math WASL in 10th grade, she successfully completed Segmented Math in 11th grade, which is aimed at bringing those who did not pass the Math WASL up to standard. In terms of a pattern of strengths and weaknesses, the Student's Math Reasoning score was in the average range. This, together with her successful completion of Geometry and Advanced Algebra, led the evaluation team to conclude she does not have an SLD. Rather, she has forgotten basic skills in the four operations that she learned in junior high and elementary school, and needs to be re-taught and to practice those skills. The District endorsed the accommodations recommended by Dr. Johnson (D-69.2), which include providing the Student with a remedial math class or tutoring to address her deficiency in numerical operations.

29. As Dr. Rutberg-Self noted, people who have attentional disorders, like the Student, can have trouble remembering things like math facts and spelling patterns. RP 359. The school psychologist, Mr. Perrine, concurred (he did not discuss math facts, but mentioned spelling). RP 630. It is not only SLDs that can cause these problems; ADHD can cause them as well.

30. Regarding reading fluency, the Student has good skills in two of its three components: accuracy and prosody. She is quite weak in the third component - rate of speed. The accommodation of being able to take extra time on assignments and tests, together with the Student's choice to spend extra time on homework reading, allowed her to be successful in her two 11th grade classes that required significant reading: Language Arts and History. Despite her slow speed, the Student's Reading Composite score on the WIAT-II was average to high average. All of her subtests in reading were average or better.

31. OSPI and the Washington State Association of School Psychologists jointly issued a document titled: *Questions and Answers about Reading Fluency – A new Area of Qualification for Specific Learning Disabilities*. P-21.³⁰ It states, in part:

Once a picture of the child's performance on the three fluency factors [rate, accuracy and prosody] is constructed, a decision will need to be made regarding the extent of deficit and impact of the low fluency (i.e., is it affecting comprehension sufficiently to interfere with reading progress?)

Reading Fluency can be an area of qualification independent of other possible skills (reading or otherwise). However, evaluation and IEP teams should always consider the adverse impact of the disability on school performance and the need for specially designed instruction before making the determination that a student is eligible under SLD. In many cases low fluency alone may be a deficit that can be accommodated without need for specially designed instruction, or the skill may be addressed with interventions available through general education used for all students. Poor fluency may not necessarily have a direct, adverse impact on the student's ability to perform in school.

P-21.1 and .2.

³⁰ The copy of P-21 in the record is undated.

32. Dr. Rutberg-Self acknowledged that "at this point it's [reading fluency] not holding her back." RP 446. Dr. Rutberg-Self immediately added: "but in the future, as she moves on to more difficult reading and has more requirements, she will start to have more increasing difficulty." *Id.*

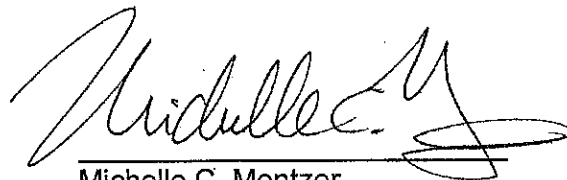
33. The Student has already read novels or plays by F. Scott Fitzgerald, Nathaniel Hawthorne, J.D. Salinger, John Steinbeck and Arthur Miller in her Language Arts classes. She will read more such challenging material in her last year of high school. Her reading in the future might not be a lot more difficult than these examples, depending what form of higher education and what career she chooses. As Mr. Perrine explained, at the high school level, reading fluency comes about by expanding one's vocabulary and continuing to read more. The Student will do that during her 12th grade year and beyond.

34. For all of the reasons set forth above, the District has carried its burden of proving that it did not violate the IDEA or deny the Student a FAPE by determining in August 2008 that the Student was no longer eligible for special education.

ORDER

1. The Student is not entitled to an IEE at public expense.
2. The District did not violate the IDEA or deny the Student a FAPE by determining in August 2008 that the Student was no longer eligible for special education.
3. No remedies are awarded because no violation of the IDEA was established.

Signed at Seattle, Washington on July 31, 2009.



Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

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Final Decision

**Further Appeal Rights: Information About Your Right To Bring A Petition For
Reconsideration And Your Right To Bring A Civil Action**

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. A copy of the petition must be provided to OSPI, Administrative Resource Services. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. lan

Parents

[REDACTED]

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cc: Administrative Resource Services, OSPI
Janice E. Shave, ALJ, OAH/OSPI Education Caseload Coordinator