

MAILED

MAY 13 2011

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

SEATTLE-OAH

IN THE MATTER OF:

NORTHSHORE SCHOOL DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2010-SE-0081

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Bothell, Washington, on January 18 - 21, 25, March 3 - 4, 23 - 24 and 29, 2011. The Parent of the Student whose education is at issue<sup>1</sup> appeared and represented herself. During some, but not all of the hearing, the Parent was accompanied by Catalina Angel or Danielle Thomas. The Northshore School District (District) appeared through Carrie Matthews, director of secondary special education, and was represented by Christopher Hirst, attorney at law. The due process hearing was interpreted into Spanish for the Mother by Jeanine Horton or Claudia A'Zar, Washington court-certified Spanish interpreters.<sup>2 3</sup>

**STATEMENT OF THE CASE**

**Procedural History**

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 14, 2010, which was assigned Cause No. 2010-SE-0081. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered September 20, 2010, which assigned the matter to ALJ Andrea Conklin.

Prehearing conferences were held October 11, 25, November 24, and December 17, 2010, January 13, and February 11, 2011. Prehearing Orders were entered October 13, 20, 27 (granting Parent's motion for stay-put), and November 30, 2010 (in part granting Parent's motion to amend the Complaint to include whether the March 2010 evaluation of the Student was appropriate). A

<sup>1</sup> In the interest of preserving the family's privacy, this decision does not identify by name the parent(s), student or family members. Instead, they are identified as "Parent(s)," "Student" and "Sister" as needed. Unless otherwise expressly noted, "Parent" will be used to identify the mother of the Student.

<sup>2</sup> Ms. A'Zar is also certified as a Spanish interpreter in federal court.

<sup>3</sup> At the Parent's request, portions of the due process hearing were conducted entirely in English, with an interpreter present at all times to provide interpretation at the Parent's request. Some portions were conducted utilizing the interpreter's services to interpret only the Parent's questions from Spanish into English. Finally, some portions of the hearing were conducted utilizing simultaneous Spanish interpretation for all questions, argument and testimony.

Notice of Reassignment was entered November 30, 2010, reassigning the above matter to ALJ Wacker. Subpoenas were issued at the Parent's request on December 29, 2010. Finally, an Order Denying Supplemental Questions was entered April 19, 2011.

In order to accommodate the requested dates for due process hearing, the District moved to extend the due date for a written decision in the above matter to forty-five (45) calendar days after the last day of hearing. The motion was granted. The last day of due process hearing was March 29, 2011. Forty-five calendar days from March 29, 2011, is May 13, 2011. Therefore, the due date for a written decision in the above matter is **MAY 13, 2011**.

### **District's Objection to Parent's Closing Argument**

The Parent filed her Closing Argument & Final Declaration on April 25, 2011. The District filed its Post-Hearing Brief the same day. On April 28, 2011, the District filed its objection to those portions of the Parent's Closing Argument & Final Declaration which attempt to assert facts that are not part of the hearing record. Any facts asserted by the Parent in her Closing Argument & Final Declaration are not properly part of the record in the above matter. Any consideration of such asserted facts would be a violation of the District's right to confront and cross-examine witnesses. Washington Administrative Code (WAC) 392-172A-05100(1)(b). The District's objection is granted. No facts asserted in the Parent's Closing Argument & Final Declaration shall be considered unless those facts are supported by substantial evidence of record from the due process hearing, i.e. the testimony of the witnesses and the exhibits admitted.

### **Evidence Relied Upon**

#### **Exhibits Admitted:**

**Parent's Exhibits:** P1 - P18, P20 - P34, P38 - P39, P42 - P44, P47 - P49, P51 - P52, and P55 - P57.

**District's Exhibits:** D1 - D10, D12 - D15, and D17 - D100.

#### **Witnesses Heard (in order of appearance):**

Carol Ann Davis, Ed.D., District educational consultant.  
Doug Pierce, M.Ed., District school psychologist.  
Ann Uherek, Ph.D., clinical psychologist.  
Mark Dales, M.D., Student's surgeon.  
Andre Middleton, Louis Braille School teacher  
Carrie Matthews, M.A., District director of secondary special education.  
Marilyn Minkin, LMFT/MHC.  
Nola Marriner, Ph.D., speech pathology  
Kathee Scoggin, Washington Sensory Disabilities Services (WSDS).  
Marcia Meachum, District vision specialist.  
Darlene (Dar) Mikkelsen, OTR-L, occupational therapist.  
The Mother.

Jennifer Long, Au.D., District audiologist.  
Sonja Kohler-Gardner, M.A., District special education teacher.  
Barbara Thomas, District para-educator.  
Mary Ann Timeus, MSPA, District speech language pathologist.  
Dena Hunt, District special education teacher.  
Anne Cullum, M.A., District principal.  
Julie Elwell, M.A., District speech language pathologist.  
Jody Gustafson, M.Ed., District physical therapist.  
Erica Halverson, M.Ed., District learning center teacher.  
Michaela Trexel, M.Ed., District general education teacher.  
Andy Larson, M.A., District general education teacher.  
Carol Gilbert, District physical therapist.  
Amie Urlacher, District learning center teacher.  
Judith Harkess, R.N., District school nurse.  
Ed Koehl, M.A., District special education teacher, former District director of secondary special education.  
Alison Erlichman, former District school psychologist.  
Hannan Dal Masso, M.S., District occupational therapist.  
Jim Lord

## ISSUES

1. Did the District deny the Student a free appropriate public education (FAPE) during the 2008-2009, 2009-2010 and 2010-2011, school years by the following:

- a. Failing to consider the Parent's input in the preparation of the Individualized Education Programs (IEPs);
- b. Emphasizing independent living skills in the IEP rather than academic skills;
- c. Failing to consider the Student's cultural preference of living at home;
- d. Failing to administer testing in the Student's native language of Spanish;
- e. Failing to explore communicate devices for the Student;
- f. Failing to consider the Parent's input in the appropriate placement of the Student;
- g. Placing the Student in an inappropriate program that was not with her general education peers;
- h. Failing to consider the opinions of the Parent's experts.

2. Whether the March 2010 evaluation of the Student was appropriate; and

3. Whether the Parent is entitled to the requested remedies, or other equitable remedies, as appropriate, which includes private placement at Louis Braille School.

See, November 30, 2010, Prehearing Order.<sup>4</sup>

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<sup>4</sup> The Prehearing Order also identifies the determination of the Student's stay-put placement as an issue. That issue has already been heard and decided by ALJ Conklin in her October 27, 2010, Prehearing Order.

## FINDINGS OF FACT

### General Background

1. The Student has attended school and resided in the District during all periods material to resolution of the issues presented. The Student was determined eligible for special education and related services under the eligibility category "multiple disabilities" years prior to the period at issue. The Student has received special education and related services under an IEP during all periods material to resolution of the issues presented.
2. The Student was born with cerebral palsy and was compromised by twin-to-twin transfer syndrome. Exhibit D54, p. 4. The Student has a twin sister. The Student has a diagnosis of diffuse encephalopathy, spastic quadriplegia and associated neurologic concerns. Exhibit P28, p. 1. The Student is unable to walk, and has no volitional movement of her knees or feet. She has volitional movement of her head and arms, but very limited control for accuracy. The Student requires two-person assistance or use of a lift to transfer from her wheelchair to a stander or changing table. Exhibit P17, p. 3.
3. The Student has a significant visual impairment and mild to profound bilateral sensorineural hearing loss. Exhibit D54, p. 4, P20, p. 1. She wears corrective glasses and bilateral hearing aids, but these do not fully correct for her vision or hearing impairments.
4. The Student's multiple disabilities severely impact her activities of daily living. She is unable to feed, bathe or dress herself, and is incontinent. The Student is dependent upon care providers for essentially all her activities of daily living. The Student has an abdominal feeding tube in place for feeding and hydration, but is able to take some food orally with the assistance of care providers who have received special training in the Student's oral feeding.
5. It is difficult to determine her cognitive functioning due to the severity of her physical disabilities, but the Parent's expert, Ann M. Uherek, Psy.D., believes the Student has moderate to severe intellectual disabilities. The Student is non-verbal with a diagnosis of dysarthria. Exhibit P17, p. 3. She uses pre-symbolic communication strategies, including vocalizations, facial expressions, body postures/gestures and some picture communication. Exhibit P20, p. 1. The Student is [REDACTED] years old, but functions at pre-academic levels. Testimony of Marilyn Minkin. Despite many years of services and therapy from both District professionals and the Parent's third-party professionals, the Student does not have a reliable system to effectively communicate her needs to others. Testimony of Nola Marriner; testimony of Mary Ann Timeus.

### Student's Native or Primary Language; Use of Spanish by the District

6. Both of the Student's Parents are originally from Argentina. The Student's Parents and Sister are all bilingual, speaking Spanish and English.
7. The Parents identified English as the Student's primary language when they enrolled her in the District during 2004. Exhibit D2, p. 2.

8. The 2006 and 2008 Reevaluation Reports, signed by the Parent, identify English as the Student's primary language. Exhibit D3, p. 1.

9. The Student has received services and instruction from District staff exclusively in English since she began attending school in the District. The Parent has been fully aware of this at all periods at issue in this matter.

10. Nola Marriner, Ph.D. speech language pathologist (SLP), met the Student and her family when the Student was only two or three years old. Dr. Marriner has acted as a consultant for the Student, provided direct SLP services to the Student, and has worked with other service providers for the Student. Dr. Marriner has only used English when providing services to the Student; she has never used Spanish when providing services. The Parent has never stated any concerns or objected to Dr. Marriner's exclusive use of English with the Student. Testimony of Nola Marriner.

11. Darlene (Dar) Mikkelsen, occupational therapist (OT), first met the Student when she was three years old, and began providing OT services to the Student when she was four years old. Ms. Mikkelsen provides OT services to insure proper positioning of the Student in her wheelchair and proper oral feeding for the Student. Ms. Mikkelsen has trained all of the District staff and all of the Parent's in-home care providers how to orally feed and position the Student in her wheelchair. Proper training and care when orally feeding the Student is critical to prevent her from aspirating the food, which can lead to life-threatening situations. In Ms. Mikkelsen's experience, the majority of the Parent's in-home care providers speak English. Ms. Mikkelsen has always provided her services to the Student and training to staff and care providers in English. The Parent has never objected to Ms. Mikkelsen's exclusive use of English. Testimony of Darlene Mikkelsen.

12. The Student's plan with the Washington State Department of Social and Health Services, Division of Developmental Disabilities to provide services to the Student identifies her primary language as English. Exhibit P49, p. 1.

13. The Parent's expert, Steven Curtis, Ph.D., licensed child clinical psychologist, concluded it is not clear whether the Student's primary language is English or Spanish, but it is clear she has been exposed to both languages. Dr. Curtis' report goes on to state that, "[i]t may be worthwhile to attempt to incorporate some Spanish instruction to see how [the Student] responds." Exhibit P18, p. 5. This is the first evidence of record which raises any issue or question regarding instruction or evaluation of the Student in English versus Spanish.

14. During an IEP meeting on May 6, 2010, the Parent's attorney stated the Parent did not expect District staff to speak with the Student in Spanish, but to be sensitive to her multi-lingual family situation. Exhibit D56, p. 1.

### **Student's Cultural Preference of Living at Home**

15. In his March 27, 2010, Evaluation Report, Dr. Curtis states:

A second important note is that the...[Mother] is from Argentina. The father is from Argentina as well. The [Parents] has [sic] been in this country for quite some time. However, [the Mother] still

greatly identifies with the Latino culture. And, she is the primary caregiver. As frequently discussed in the literature..., people from more collectivist cultures (e.g. Latino culture) frequently have different ideas about how to best approach the care of a child with a disability than those from more individualist cultures...[P]eople with collectivist values think that "social relationships are the most important aspects of education..." For living arrangements, "reliance on external agencies is seen as shameful..." Those with disabilities "will be provided for, there is a role to be played within the familial community..." Based on [the Mother's] comments, she appears to have fully embraced this value system. This information is important to her. She does not see [the Student] becoming independent as she matures. Her main goal is to help [the Student] be happy and learn to better communicate with those around her. Having [the Student] remain in her current placement is more aligned with the [Mother's] goals/collectivist values. This placement also seems to be the best place to meet [the Student's] current IEP goals.

Exhibit P18, p. 6.

### **Failure to Explore Augmentative Communication Devices/Systems for the Student**

16. Dr. Marriner has provided the Student SLP therapy services, consultations and worked with the Student's other service providers for over ten years. The District has also provided SLP therapy and services through the Student's IEP since she began attending school in the District. Despite many years of services and therapy from both Dr. Marriner and the District SLP providers, the Student does not have a reliable system to effectively communicate her needs to others. Testimony of Nola Marriner; testimony of Mary Ann Timeus.

17. Dr. Marriner and the District have used picture choice with eye gaze, pictures on a voice-output device, pictures with auditory prompts set-up on a scanning system with switch access, a tech-talk device, yes/no cards with eye gaze, hand-under-hand and hand-over-hand systems to try to establish a reliable and effective communication system for the Student.

### **Consideration of the Parent's Input in the Preparation of the Student's IEPs**

18. The Parent was present at the IEP meeting on January 25, 2008, and signed the IEP. Exhibit D6, p. 1. The District provided advance written notice of the IEP meeting to the Parent. Exhibit D6, p. 19. The Parent has presented no evidence to find the District failed to consider any input she may have offered during the development of the Student's January 2008 IEP, or that she was excluded from participation in the development of the January 2008 IEP.

19. In an email dated November 6, 2008, Anne Cullum, principal of the Student's elementary school, informed other District members of the Student's IEP team that the Parent had requested the IEP team meeting be moved to December 8, 2008, to accommodate the Parent's schedule. Exhibit D17, p. 1. The meeting was moved to accommodate the Parent's schedule.

20. On December 1, 2008, Ms. Cullum responded to an email from the Parent. The Parent had expressed concern that there would not be time for outside service providers to observe the Student at school. Ms. Cullum assured the Parent the IEP team could consider any additional information the Parent might later obtain and update the Student's IEP if needed, but the District wanted to move forward because the Student was due for a new IEP in January 2009. Ms. Cullum also told the

Parent she would get a draft of the Student's new IEP to the Parent that same week for the Parent's review prior to the December 8<sup>th</sup> meeting. Exhibit D17, p. 1.

21. The Parent participated in a triennial reevaluation meeting as a member of the reevaluation team on December 8, 2008, and signed indicating her agreement with the reevaluation report. Exhibit D18, p. 3.

22. The Parent also participated in an IEP meeting on December 8, 2008. Exhibit D20, p. 1. The Parent has presented no evidence to find the District failed to consider any input she may have offered during the development of the Student's December 2008 IEP, or that she was excluded from participation in the development of the December 2008 IEP.

23. In an email dated May 14, 2009, to Carrie Matthews, District director of secondary special education, Ms. Cullum stated staff would not recommend the Student stay in her current placement at Westhill Elementary School, due to the amount of time she spent outside of her general education class every day. Exhibit D24, p. 1.

24. A meeting was scheduled to review the Student's placement, and then rescheduled to June 8, 2009, when the Parent had a work conflict. Exhibit D27, pp. 1-2. The Parent and her attorney, Jeanette Cohen, and the Father of the Student met with District staff on June 8, 2009. Exhibit D28.

25. On June 10, 2009, Ms. Matthews wrote a memo to the Parent and Ms. Cohen. Exhibit D29. In the memo, Ms. Matthews set out the IEP team's concerns about the appropriateness of the Student's current placement, and the team's conclusion the Student would be best served in a Contained Learning Center (CLC) at Woodmore Elementary School. The memo went on to state:

We have brought up the topic of appropriate placement several times over the past few years...Considering [the Parent's] reluctance to follow the recommendation and judgment of the team, we reluctantly offer the following placement...

Exhibit D29, p. 1.

26. The memo went on to offer the Parent a placement for the Student in a sixth-grade general education class at Westhill Elementary School, with related services and therapies continuing unchanged from the last IEP.<sup>5</sup> The memo noted the IEP team discussed the option of placing the Student in a CLC in Northshore Junior High School so the Student would be with age appropriate peers. Exhibit D29, pp. 1-2.

27. On June 11, 2009, Ms. Cohen sent an email to Ms. Matthews. In the email, Ms. Cohen stated the Parent's objection to a sixth-grade placement for the upcoming 2009-2010 school year, and the Parent's demand for a placement in a fifth-grade general education classroom so the Student could continue with the same students from the prior year. Exhibit D30.

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<sup>5</sup> The Student was held back earlier in her school history, making a sixth-grade placement for the 2009-2010 school year the grade-appropriate placement given the Student's chronological age.

28. On June 15, 2009, Ms. Matthews sent an email to Ms. Cohen. In the email, Ms. Matthews agreed to place the Student in a fifth-grade general education classroom at Westhill Elementary School for the 2009-2010 school year. Exhibit D30.

29. On September 15, 2009, the Student's December 2008 IEP was modified to reflect placement in a fifth-grade general education classroom per the Parent's request. Exhibit D31.

30. On October 26, 2009, Ms. Cullum sent an email to the Parent. The email was intended to begin the process of scheduling an IEP meeting regarding a new IEP which was due December 2009. Exhibit D39, p. 4.

31. Ms. Cullum and the Parent continued to exchange email about scheduling and preparing for the IEP meeting. Finally, on November 25, 2009, Ms. Cullum sent the Parent notice that the meeting would take place December 7, 2009. Exhibit D39, p. 1.

32. On December 7, 2009, an IEP meeting was held with both Parents in attendance. The Parent left the meeting when she disagreed with the team's plan to initiate a reevaluation of the Student, but later returned and participated in the discussion of the IEP's present levels of performance (PLOP) and goals and objectives. The Parent specifically asked the learning center (LC) teacher how she was working with the Student. All the team members except the Parent and Darlene Mikkelsen, the Student's private OT signed the IEP. Exhibits D41, D43.

33. The Student's December 7, 2009, IEP continued her placement at Westhill Elementary School in a fifth-grade general education class with pull-out services Exhibit D43, p. 1.

#### **The March 2010 Evaluation of the Student**

34. The District conducted a triennial reevaluation of the Student during December 2008. This reevaluation was a full triennial reevaluation of the Student. The Student's next triennial evaluation was due December 2011. Exhibit D18.

35. Concerned with the Student's lack of progress on many of her IEP goals and objectives, in November 2009, the District proposed reevaluating the Student. Exhibits D32, D37, D40.

36. The Parent refused to provide the District with consent to reevaluate the Student. The District filed a request for a due process hearing, seeking to override the Parent's refusal to consent to the reevaluation.

37. The District and Parent, both represented by legal counsel, participated in mediation during January 2010 in an attempt to resolve the District's desire to reevaluate the Student and the Parent's refusal to consent.

38. On January 14, 2010, a Mediated Settlement Agreement (the Agreement) was signed by a District representative, the District's attorney, the Parent, and the Parent's attorney, Jeanette Cohen. The Agreement set out the terms and conditions for the Student's reevaluation. D44.

39. The terms and conditions of the Agreement did not specify or require the reevaluation be conducted in Spanish or English.
40. The Agreement required the Student to wear her hearing aids during the evaluation, and prohibited any evaluation of the Student on a Monday. The Agreement identified each of the qualified professionals to complete the various components of the reevaluation. D44, pp. 2-4.
41. The Agreement identified the assessment tools and methods to evaluate the Student. These included: classroom, clinical and 1:1 observations of the Student, review of evaluations provided by the Parent's third-party service providers, completion of the Brigance Diagnostic Inventory of Early Development and the Scales of Independent Behavior-Revised (SIB-R) and Communication Matrix, and review of past evaluations and medical records. Exhibit D44, pp. 2-4.
42. The Agreement did not identify or require the use of any standardized tests for the evaluation. The Brigance and SIB-R are both observationally-based assessment tools completed by teachers, parents and others who know the Student. Use of these tests does not require any reliable response from the Student. The Communication Matrix is also not a standardized test.
43. The Parent's expert at hearing, Dr. Anne Uherek, clinical psychologist, agreed the use of any standardized tests to assess or evaluate the Student would entail "huge problems," given the severity of her disabilities and her inability to verbally communicate. Dr. Uherek did not use any standardized tests when she evaluated the Student in 2010.
44. The Agreement included a specific mechanism for the Parent and her third-party consultants and providers to provide input into the reevaluation and travel to the reevaluation feedback meeting at District expense. Exhibit D44, p. 4.
45. The District reevaluated the Student in accordance with the terms and conditions set out in the Agreement. A reevaluation report was prepared on March 29, 2010. Exhibit D54.
46. A reevaluation meeting was held on March 29, 2010. The Parent attended along with her legal counsel and Dr. Curtis. Exhibit D52. The District also had legal counsel at the meeting. The Parent, her legal counsel and Dr. Curtis participated in a discussion of the reevaluation results and recommendations for the Student's education.
47. The reevaluation report contained recommendations for the Student's education. These included: an educational setting that maximizes her opportunity to generalize her communication skills to multiple care givers and decreases potential auditory and visual distractions, continuing to work on an effective communication system, continuing to work on positioning and maintaining neutral head position, and continuing with inclusive contact to maintain social exposure, but not to the extent that it interferes with her ability to attain identified goals in communication and motor skills. Exhibit D54, p. 12.
48. The recommendations of the reevaluation team are generally consistent with the recommendations of the Parent's experts. All the Parent's experts emphasize the primary goal for the Student must be development of a reliable system to effectively communicate her needs to

others. The Parent's experts agree the Student requires an educational environment that reduces visual and auditory distractions. The Parent's experts agree the Student should have exposure to same-age peers. Testimony of Uherek, Marriner and Minkin.

49. The reevaluation team considered, and the reevaluation report reflects, the Parent's input at the meeting and her placement recommendation for the Student. Exhibit D54, p. 12. Ultimately, the team disagreed with the Parent's recommendation.

50. The team recommended the Student be placed in a highly structured environment, like a District CLC, for the majority of her school day, where she could work on communication, life skills, meaningful curriculum and concept development, and interact with same-age peers, both disabled and non-disabled. The Student would attend general education classes for art, music and physical education (PE). The Student would continue to have a dedicated 1:1 instructional assistant with her at all times to practice communication skills and social skills development. Exhibit D54, p. 13.

#### The Student's May 6, 2010, IEP

51. The District mailed the Parent and her attorney a draft of a new IEP on April 30, 2009. Exhibit P39.

52. The Student's IEP team held a meeting on May 6, 2010. Members present included:

Doug Pierce, M.Ed., District school psychologist  
Carrie Matthews, M.A., District director of secondary special education  
Christopher Hirst, District attorney  
Marcia Meachum, District vision specialist  
The Parent  
Jeanette Cohen, Parent's attorney  
Steve Curtis, Ph.D., licensed child clinical psychologist  
The Father  
A cousin of the Student  
Jennifer Long, Au.D., District audiologist  
Barbara Thomas, District para-educator  
Mary Ann Timeus, MSPA, District speech language pathologist  
Anne Cullum, M.A., District principal  
Julie Elwell, M.A., District speech language pathologist  
Carol Gilbert, District physical therapist  
Amie Urlacher, District learning center teacher  
Judith Harkess, R.N., District school nurse  
Alison Erlichman, former District school psychologist  
Hannan Dal Masso, M.S., District occupational therapist  
Barbara Thomas, Student's 1:1 instructional aide

Exhibit D56, p. 4.

53. The Parent, Dr. Curtis, the Student's cousin, the Parent's attorney and the District's attorney provided input for discussion during the IEP meeting. The IEP team discussed and considered Dr. Curtis' recommendation that the Student continue her placement in a general education classroom. Exhibit D56. The Parent's attorney indicated the IEP goals were agreeable.

54. After reviewing the Student's slow and inconsistent progress over the past several IEPs, the team determined the Student could no longer be appropriately served in a general education placement.

55. Dr. Curtis did not testify at the hearing. Consequently, the only evidence of record in support of his opinion that the Student remain in a general education placement is his evaluation of the Student. Exhibit P18.

56. Dr. Curtis is alone in his recommendation that the Student remain in a general education placement. Even the Parent's other witnesses, Dr. Marriner and Dr. Uherek, along with Carol Ann Davis, Ed.D., District consultant, all recommend the Student be placed in a structured environment that is able to minimize visual and auditory distractions. Accordingly, Dr. Curtis' opinion that the Student remain in a general education placement is not given substantial weight.<sup>6</sup>

57. The weight of the evidence in this case is clear; the Student functions at a pre-academic skill level. The Parent's expert witnesses, Dr. Marriner and Dr. Uherek, confirm that pursuit of an academically oriented program at school is more likely than not meaningless, and would not benefit the Student at the present time. Both District professionals and the Parent's witnesses agree that development of an efficient and reliable communication system, so the Student can communicate basic information such as when she is hungry or when she is in pain, is the most important goal for the Student.

58. The IEP goals do not include any formal academic goals. The IEP does include cognitive goals for the Student to demonstrate an understanding of targeted concepts; hot/cold, wet/dry, open/closed. Other IEP goals include self-help goals, behavior goals, social skills goals, adaptive PE goals, physical therapy gross motor goals, occupational therapy (fine motor) goals, and speech-language goals. D75, pp. 6-18. These types of goals are associated with independent living or life skills.

59. The IEP adopted by the team placed the Student in a CLC classroom at Skyview Junior High School (Skyview). Exhibit D57, p. 5. The Student would spend one hour per day in general education classes in areas that are meaningful for her: art, music, and PE. The District anticipated placing the Student in Dena Hunt's CLC classroom at Skyview.

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<sup>6</sup> Even the Parent appears to have abandoned pursuit of a general education placement for the Student. In the event she prevails in this matter, the Parent has requested as her remedy placement of the Student at the Louis Braille School (LBS). LBS is a private school for blind and visually impaired students that has no general education students/peers in daily attendance. Testimony of Middleton. LBS is not a general education placement.

### Ms. Hunt's CLC Classroom at Skyview

60. As a regular and routine part of every school day in her CLC at Skyview, Ms. Hunt is able to have volunteer same-age, general education students come in, interact and work with the CLC students.

61. Dr. Uherek visited Ms. Hunt's CLC at Skyview with Dr. Davis on November 8, 2010, and made observations between 8:30 and 10:00 a.m. The Student was not in attendance in the CLC classroom during Dr. Uherek's observations. Dr. Uherek's report included a description of the CLC classroom, and Dr. Uherek specifically addressed her observations of the CLC classroom in a letter to the Parent dated November 16, 2010. Exhibit P17. No detailed Findings of Fact regarding Dr. Uherek's observations or opinions are made or required in order to resolve the legal issues presented in this matter. See, Finding of Fact #62; Conclusion of Law #28.

62. In her testimony as well as her letter and report, Dr. Uherek offered her opinion regarding whether the CLC classroom could appropriately serve the Student's educational needs. Based upon her one observation of the CLC classroom, Dr. Uherek ultimately concluded she is "unsure" if the CLC classroom can provide the type of limited and controlled sensory environment the Student needs to focus and attend to instruction.

63. Dr. Davis has reviewed the Student's last three IEPs, including the May 6, 2010, IEP, the Student's March 29, 2010, Reevaluation Report, Dr. Revelli's report, Dr. Curtis' evaluation, and Dr. Uherek's evaluation report. Dr. Davis has made observations of the Student at Westhill, observed the CLC at Skyview, and visited the Louis Braille School.

64. Dr. Davis holds a doctorate in special education/educational psychology (Ed.D.) from the University of Houston, Texas. Her professional experience includes academic appointments at the University of Washington, University of Minnesota, and the University of Houston. Dr. Davis is the lead author of multiple peer-reviewed or refereed publications on subjects involving disabled children and their education. Dr. Davis' curriculum vitae is Exhibit D66. It is found that by virtue of her education, training and experience that Dr. Davis is qualified to offer an expert opinion on the appropriateness of the Student's May 6, 2010, IEP, and whether that IEP can be appropriately implemented in Ms. Hunt's CLC classroom at Skyview.

65. Based upon her review of the Student's reevaluation, IEPs, non-district evaluations and her observations at Westhill, Skyview and the Louis Braille School, Dr. Davis opined the Student's May 6, 2010, IEP is substantively appropriate and the IEP can be appropriately implemented in Ms. Hunt's CLC classroom at Skyview. Dr. Davis' opinion is credible, supported by substantial evidence of record, and adopted herein as a Finding of Fact.

66. Kathee Scoggin, Co-director for the Washington State Services for Children with Deaf-blindness, part of the Washington Sensory Disabilities Services (WSDS) and the Parent's witness, observed the Student in her placement at Westhill on February 25, 2010. Ms. Scoggin observed a CLC classroom at the District's Woodmore Elementary School and the CLC at Skyview on March 19, 2010. The Student was not in attendance at Skyview on March 19<sup>th</sup>. The District had requested Ms. Scoggin participate as a member of the Student's reevaluation team. Ms. Scoggin

sent an email to Ms. Matthews on April 2, 2010, describing her observations at Westhill and Skyview. Exhibit D54, pp. 39-44.

67. In her email, Ms. Scoggin prepared a table reflecting what she considered to be major educational program components for the Student. Ms. Scoggin compared her observations of the Student's placement at Westhill in a general education class, the Woodmore CLC and the Skyview CLC. D54, p. 41. Ms. Scoggin found the Skyview CLC was equal or superior to the two other schools in all the educational components for which she had sufficient observation.

68. Both Kathee Scoggin and Dr. Davis emphasized the importance of providing the Student with regular access to same-age, general education peers. Testimony of Scoggin and Davis.

69. The Parent filed a Due Process Hearing Request on September 14, 2010.

## CONCLUSIONS OF LAW

### Jurisdiction and Burden of Proof

1. OAH has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. §1401 *et seq.* (Individuals with Disabilities Education Improvement Act (IDEA), 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 burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 US 49 (2005). The party seeking relief in this case is the Parent. The Parent therefore has the burden of proof.

### Free Appropriate Public Education and Educational Benefit

3. A student determined eligible to receive special education and related services is entitled to a free appropriate public education (FAPE). FAPE means special education and related services that have been provided to the student at public expense and without charge, that meet State educational standards, and that are provided in conformity with the student's individualized education program (IEP). 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; WAC 392-172A-01080.
4. There are both procedural and substantive tests to determine if a school district has complied with the IDEA and provided a student FAPE. Reviewing courts must inquire:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

*Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982). "If a violation of the IDEA is found in either regard, the court shall 'grant such relief as [it] deems appropriate.'" *Hacienda La Puente Sch. Dist. of L.A. v. Honig*, 976 F.2d 487, 492 (9<sup>th</sup> Cir. 1992). In this case, the Parent has alleged both procedural and substantive violations of the IDEA.

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

5. Procedural violations do not automatically require a finding of a denial of FAPE. However, procedural violations that impede the student's right to FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit clearly result in the denial of FAPE. 34 C.F.R. § 300.513(a)(2); WAC 392-172A-05105(2).

6. The second prong of the *Rowley* test to determine whether a district has substantively complied with the IDEA and provided FAPE is whether the IEP was reasonably calculated to enable a student to receive educational benefit. *Rowley*, at 207. The standard is met if a district provides personalized instruction with sufficient supportive services to permit a student to benefit from the instruction. *Id.* at 189. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

7. A district is not obligated to provide the best instruction. FAPE does not mean the absolutely best or potential-maximizing education for the individual child. Districts must provide "'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.'" *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9<sup>th</sup> Cir. 1987), citing *Rowley*, 458 U.S. at 201. FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 160 (4<sup>th</sup> Cir. 1991), *affd.* 510 U.S. 7 (1993).

8. In the Ninth Circuit, educational progress is not only measured by a student demonstrating competence in the academic setting, but also by the progress a student makes on the central goals of the IEP. *County of San Diego v. Calif. Special Education Hearing Office*, 93 F.3d 1458, 1467 (9<sup>th</sup> Cir. 1996). Educational needs are to be construed to include not only a student's ability to score well on a test, but also "the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996).

9. The Parent asserts the District denied the Student FAPE during the 2008-2009, 2009-2010 and 2010-2011 school years for one or more reasons.<sup>7</sup> Each reason shall be examined in turn.

### **Failing to Consider the Parent's Input in the Preparation of the Student's IEPs**

10. School Districts must ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate. WAC 392-172A-03100. Parents are mandatory members of IEP teams. WAC 392-172A-03095. The right to meaningfully participate in the development of a student's IEP is a cornerstone of the procedural and substantive protections afforded parents by the IDEA. Failure of a school district to provide parents such an opportunity can result in procedural as well as substantive violations of the IDEA. Parent participation, however, is not equivalent to a parental veto. Parents do not have veto power over individual provisions of an IEP, or the right to dictate any particular educational program or methodology. *Ms. S. v. Vision Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003); Cert. denied 544 U.S. 928, 1255 S. Ct 1662 (2005). A school district must consider any information, evaluation, or other information a parent may bring. But the school district must provide a student eligible for special education with an education it determines appropriate even if a parent disagrees with the proposed educational placement. If an IEP team, including the parent, is unable to reach a consensus, the school district must implement the disputed IEP. The parents remedy is to request a due process hearing to contest the appropriateness of the disputed IEP.

11. The Parent simply has offered no evidence of record to establish the District denied her input into the preparation or development of the Student's January 2008, December 2008, September 2009 (revised) or December 2009 IEPs. The record is clear; the Parent attended IEP meetings and signed off on IEPs without indicating any disagreement. The District considered the Parent's input and, despite its misgivings and concern over the appropriateness of a general education placement, continued that placement for the Student, capitulating to the Parent's wishes. It is concluded the District has not denied the Student FAPE by failing to consider the Parent's input for the January 2008, December 2008, September 2009 (revised) or December 2009 IEPs.

12. The only remaining IEP during the period at issue is the May 6, 2010 IEP, which changed the Student's placement from a general education to a CLC classroom. The District provided the Parent a meaningful opportunity to offer input for this IEP and considered her input. The District provided the Parent and her attorney a draft of the IEP in advance of the IEP meeting for review. The Parent attended the IEP meeting with her attorney and an outside expert, Dr. Curtis. The team discussed multiple aspects of the draft IEP. The fact that the team ultimately did not agree with the Parent, her attorney or Dr. Curtis does not mean the District failed to consider the input. It is concluded the District has not denied the Student FAPE by failing to consider the Parent's input for the May 6, 2010, IEP.

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<sup>7</sup> The period at issue for any denial of FAPE is September 14, 2008, through September 14, 2010. This is the two-year period preceding the Parent filing her request for due process hearing. WAC 392-172A-05080; 34 C.F.R. § 300.507.

### **Emphasizing Independent Living Skills in the Student's IEP**

13. The only IEP during the period at issue to emphasize independent living skills or life-skills rather than academic goals and objectives is the May 2010 IEP. The evidence establishes the Student currently functions at a pre-academic skill level. The Parent's expert witnesses agree that pursuit of an academically oriented educational program is likely meaningless for the Student at the present time. Qualified professionals for the District and the Parent all agree the Student's IEP should emphasize goals and objectives to develop a reliable and efficient communication system so the Student can communicate basic wants and needs. The Student's May 2010 IEP identifies goals and objective to help the Student acquire such a communication system. The IEP also has a cognitive, as opposed to an academic goal. The cognitive goal is appropriate given the Student's pre-academic skill level. The components of the cognitive goal, understanding the concepts of hot/cold, wet/dry, open/close, coupled with development of a reliable communication system would provide a clear educational benefit for the Student. The remaining goals in the IEP similarly relate to the development of very basic skills which would enhance the quality of the Student's life, and provide educational benefit.

14. The lone dissenting opinion is held by Dr. Curtis, but his opinion is not given substantial weight as determined in the Findings of Fact. It is concluded the District has not denied the Student FAPE by emphasizing independent living skills in the Student's May 2010 IEP.

### **Failing to Consider the Student's Cultural Preference of Living at Home**

15. The only evidence of record produced by the Parent on this issue is Dr. Curtis' report. Dr. Curtis did not appear at the due process hearing. It is not at all clear how the Parent's cultural preference to have the Student reside with her and other family members rather than depend in some manner on external agencies is inconsistent with the goals, objectives and educational placement proposed in the May 2010 IEP. Development of a reliable communication system and some basic life-skills does not conflict with the Student eventually living with the Parent and other family members. The converse appears much more likely true; that such skill development will enhance the quality of the Student's life with her family members. It is concluded the Parent has failed to establish the District has denied the Student FAPE by failing to consider the Student's cultural preference of living at home.

### **Failing to Administer Testing in the Student's Native Language of Spanish**

16. The IDEA defines native language as:

(1) Native language, when used with respect to an individual who is limited English proficient, means the following:

(a) The language normally used by that individual, or, in the case of a student, the language normally used by the parents of the student, except as provided in (b) of this subsection.

(b) In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or *learning environment*.

(2) For an individual with deafness or blindness, or for an individual with no written language, the

mode of communication is that normally used by the individual, such as sign language, Braille, or oral communication.

WAC 392-172A-01120, emphasis added. The Student is non-verbal and uses pre-symbolic communication strategies, including vocalization, facial expressions, body postures/gestures and some pictures to attempt communication. It is unclear how the Student's intellectual disabilities impact her receptive and expressive language abilities. And while neither deaf or blind, the Student has significant visual and auditory impairments. Given the IDEA definition of native language, it is unclear whether Spanish, English, or any spoken language is the Student's native language.

17. The Parent was aware the District conducted all evaluations and provided all the Student's special education and related services exclusively in English throughout the Student's attendance in the District. The Parents represented to the District that the Student's primary language was English throughout her attendance in the District. The Parent's outside service providers, including Dr. Marriner and Darlene Mikkelsen, provided all their services for the Student exclusively in English for many years. Under these facts, the Student's native language may be English because that is the only language normally used by the Student in her learning environment; the District's classrooms and related services providers. WAC 392-172A-01120(1)(b), above.

18. The earliest evidence of any question regarding the Student's primary language in relation to her education is Dr. Curtis' March 2010 report. Subsequent to Dr. Curtis' report, the Parent's attorney confirmed the Parent was not requesting the District provide services for the Student in English. Considering all the evidence, it is concluded the Parent's argument the District denied the Student FAPE by failing to administer testing in Spanish to the Student is not credible, and it has no factual or legal merit. It is concluded the District has not denied the Student FAPE by failing to administer testing in Spanish to the Student.

#### **Failing to Explore Augmentative Communication Devices for the Student**

19. Over the course of the Student's enrollment, the District has participated in the use of multiple augmentative communication devices, techniques and systems for the Student. The Parent has offered no evidence to conclude the District has failed to appropriately explore augmentative communication devices for the Student. It is concluded the District has not denied the Student FAPE by failing to explore the use of augmentative communication devices.

#### **Failing to Consider the Parent's Input in the Appropriate Placement of the Student**

20. The design of a student's educational program and the decision to place a student in a particular educational placement, for example a general education classroom, resource room or learning center, or self-contained classroom, is made by a student's IEP team. As discussed above, parents are mandatory participants on a student's IEP team. The Parent has fully participated as a member of the Student's IEP team during the period at issue in this matter. There is no evidence to suggest the Parent has been excluded from or prevented from participating in the IEP meetings as a member of the team. On the contrary, the evidence establishes the Parent has been a vocal and zealous advocate for the Student during team meetings. As discussed above, however, *consideration* of the Parent's input on the IEP team does not mean the team has to *agree*

with or adopt the input. The Parent does not have veto power over the IEP team's decision where the Student will be placed any more than she has veto power over the team's decision to adopt goals and objectives for the Student's IEP. It is concluded the District considered the Parent's input regarding the Student's placement, and the District has not denied the Student FAPE by failing to consider the Parent's input when determining the Student's placement.

### Placing the Student in an Inappropriate Program Without her General Education Peers

21. The IDEA requires a school district to implement an eligible student's IEP in the student's least restrictive environment (LRE). Inclusion in a general education classroom is presumed to be a student's LRE.

22. A student's right to placement in his/her LRE is both a procedural and substantive right. Substantively, it is independent of the obligation to provide FAPE and is not amenable to the FAPE analysis put forth in *Rowley, id.*, and its progeny such as *Target Range, id.* See *Greer by Greer v. Rome City Sch. Dist.* 967 F.2d 470 (11<sup>th</sup> Cir.1992). School district failures to provide a student FAPE in the least restrictive environment have routinely resulted in determinations that a placement was not appropriate. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994).

23. WAC 392-172A-02050 provides that a school district shall ensure that the provision of services to each student eligible for special education shall be provided:

[T]o the maximum extent appropriate in the general education environment with students who are nondisabled...and [s]pecial classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F. 3d 1398 (9<sup>th</sup> Cir.), *cert denied*, 114 S. Ct. 2679 (1994), the court applied a four-part test to determine the student's LRE:

- (1) the educational benefits available to the student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom;
- (2) the non-academic benefits of interaction with children who were not disabled;
- (3) the effect of the student's presence on the teacher and other children in the classroom; and,
- (4) the cost of mainstreaming the student in a regular classroom.

Later the same year, in *Clyde K. ex rel. Ryan K. v. Puyallup School District*, 35 F.3d 1396 (9<sup>th</sup> Cir. 1994), the court applied the same four-part test and found that the least restrictive environment

for the student was a self-contained special education classroom. Unlike the student in *Holland*, the student was diagnosed with Tourette Syndrome and Attention Deficit Hyperactivity Disorder (ADHD), was frequently disruptive to the class, engaged in name-calling, sexually explicit profanity, as well as kicking and hitting classroom furniture. At the time of the hearing he had been involved in two violent confrontations and removed from the regular education classroom.

The court noted that the student's behavior largely prevented him from learning, and that an aide would not have made a meaningful difference. In addition, the student did not model his behavior on that of his non-disabled peers, he was socially isolated and suffered a great deal of stress from teasing by the other students. The student's presence in the regular education classroom had an overwhelmingly negative effect on teachers and other students, interfering with their ability to learn. The court further stated: "Disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate. See, 34 CFR § 300.552, Comment."

24. The evidence does not support a finding the Student has obtained any meaningful educational benefit from her placement in a fifth-grade general education classroom. Functioning at a pre-academic level, the Student is presently incapable of benefitting from a fifth or sixth-grade curriculum. Attempting to modify a fifth or sixth-grade curriculum to pre-academic levels would render that curriculum unrecognizable. Such is not required of the District. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1035, 1048 (5<sup>th</sup> Cir. 1989). It is concluded a general education classroom will not offer the Student a meaningful educational benefit.

25. While non-academic benefits, such as friendship and social interaction are important, the IDEA is primarily concerned with the long-term educational welfare of disabled students. *Poolaw v. Bishop*, 67 F.3d 830, 836-837 (9<sup>th</sup> Cir. 1995). The opportunity for a disabled student to interact with non-disabled peers is not a sufficient reason for mainstreaming where the disabled student can grasp little of the curriculum in his placement. *Daniel R.R.*, 874 F.2d at 1051. The evidence is clear in this case that the Student does not currently have the ability or skills to benefit from an age-appropriate general education curriculum. Any opportunity for social interaction with age-appropriate general education peers is outweighed by the Student's need to obtain an educational benefit. Furthermore, the District's proposed placement in the Skyview CLC will provide the Student daily interaction with age-appropriate general education peers.

26. Given the above conclusions regarding the first two *Rachel H.* factors, it is not necessary to consider the remaining two factors.<sup>8</sup> Whether the Student is disruptive in her general education classroom of her own volition or as the involuntary result of her disabilities is a moot point. The fact she is unable to obtain a meaningful educational benefit in a general education classroom and will have daily opportunities to interact with non-disabled general education peers in the Skyview CLC outweighs is determinative. It is concluded the District's proposed placement in the Skyview CLC is the least restrictive environment where the Student can obtain a meaningful educational benefit.

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<sup>8</sup> The District has not argued the fourth *Rachel H.* factor, the cost of mainstreaming the Student, is relevant in this matter.

### Failing to Consider the Opinions of the Parent's Experts

27. The only two possible instances where it can be argued the District failed to consider the opinions of the Parent's experts are during the March 2010 reevaluation and the development of the May 2010 IEP.<sup>9</sup> The District carried out the March 2010 reevaluation pursuant to the mediated settlement agreement. There is no evidence of record to support a finding or conclusion the District did not fulfill all the terms and conditions of the agreement. The Parent attended the reevaluation meeting with her attorney and Dr. Curtis. There is simply no evidence to support a conclusion the reevaluation team did not consider the opinion(s) of the Parent's experts during the reevaluation. The fact the reevaluation team did not adopt or agree with any of the experts' opinions does not mean those opinions were not considered. It is concluded the District considered the opinions of the Parent's experts and did not deny the Student FAPE during the March 2010 reevaluation.

28. The Parent, her attorney and Dr. Curtis attended the May 6, 2010, IEP team meeting. The record reflects discussion and consideration of many concerns and subjects at the meeting. It is concluded the District considered the opinions of the Parent's experts and did not deny the Student FAPE during the development of the Student's May 2010 IEP.

29. Dr. Uherek gave testimony regarding her observations of the Skyview CLC classroom. No detailed Findings of Fact were made regarding this testimony. Based upon her observations of the CLC classroom and her evaluation of the Student, Dr. Uherek opined she is "unsure" if the CLC classroom can provide the type of environment the Student requires. Assuming for sake of argument Dr. Uherek intended to assert she was unsure if the CLC classroom was an *appropriate* educational placement for the Student, it is concluded such a qualified opinion does not warrant as much weight as Dr. Davis' firm and unambiguous opinion based upon her education, training, experience, observations and knowledge of the Student.

### Whether the March 2010 Reevaluation of the Student was Appropriate

30. WAC 392-172A-03020 is applicable and provides:

Evaluation procedures.

(1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010, that describes any evaluation procedures the district proposes to conduct.

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

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<sup>9</sup> As noted earlier, through the December 7, 2009, IEP, the Parent received what she advocated for - placement of the Student in a general education classroom.

(i) Whether the student is eligible for special education as defined in WAC 392-172A-01175; and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education and for determining an appropriate educational program for the student; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a student:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable. If properly validated tests are unavailable, each member of the group shall use professional judgment to determine eligibility based on other evidence of the existence of a disability and need for special education. Use of professional judgment shall be documented in the evaluation report;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(d) If necessary as part of a complete assessment, the school district obtains a medical statement or assessment indicating whether there are any other factors that may be affecting the student's educational performance.

(e) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(f) Assessments of students eligible for special education who transfer from one school district to another school district in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(g) In evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(h) Assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student.

The Parent argued the March 2010 reevaluation of the Student was not appropriate, thereby denying the Student FAPE. Specifically, the Parent argued the reevaluation was flawed because it was not conducted in Spanish, did not consider the Parent's cultural preferences for the Student's future and did not consider the Student's most basic need; a communication system. The Parent also argued the District failed to show the validity of the data collected for the reevaluation. See, Parent's Closing Argument & Final Declaration, pp. 3 and 8.

31. The Parent's arguments regarding the use of English during the reevaluation, the Parent's cultural preferences, and the Student's compelling need to develop a reliable communication system have already been considered and ruled upon above, and need not be reconsidered in the context of the March 2010 reevaluation. The Parent misplaces the burden of proof to show the District's data is not valid. The Parent is the party who requested the due process hearing. Therefore, the Parent has the burden to show the District's data is not valid. The Parent has not carried her burden. The Parent argued the District did not use any standardized assessment tools during the reevaluation, and therefore any data cannot be relied upon as valid. The Parent's own experts, however, agree that use of standardized assessment tools is not practical and would likely not produce reliable results if used to assess the Student due to her inability to reliably communicate her responses and her unknown cognitive disabilities. And while not controlling, the District conducted the reevaluation in conformity with the mediated settlement agreement. The Parent and her attorney agreed to the format for the reevaluation. Even were it concluded the reevaluation was flawed because it did not use any standardized assessment tools, the circumstances would likely warrant no remedy for the Parent absent far more egregious facts than are present in this case. It is concluded the Parent has failed to establish the March 2010 reevaluation of the Student was not appropriate or that the reevaluation denied the Student FAPE.

### The Parent's Requested Remedies

32. The Parent has failed to establish any violation of the IDEA and any denial of FAPE for the Student by the District. Accordingly, the Parent's requested remedies should be denied.

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

ORDER

1. The Parent has failed to establish any violation of the Individuals with Disabilities Education Act and has failed to establish any denial of a free appropriate public education for the Student.
2. The Parent's requested remedies are denied.

Signed at Seattle, Washington on May 13, 2011.



MATTHEW D. WACKER  
Administrative Law Judge  
Office of Administrative Hearings

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. 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

Parent



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cc: Administrative Resource Services, OSPI  
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator