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SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SECTION

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

IN THE MATTER OF

FEDERAL WAY SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2011-SE-0013

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Steven C. Smith in Federal Way, Washington on March 22, 28 and 29, and April 26, 2011. Mother of the Student whose education is at issue¹ appeared at all sessions and was represented by attorney at law Randall Brown, (hereafter, Mother and Parent are used interchangeably). Father of the Student also attended most, but not all, sessions. Father was not a direct party to this matter (hereafter, for legal clarity he will only be referred to as Father²). Student attended only on March 22, 2011. The Federal Way School District (District) appeared through Christopher Willis (Willis), Director, Student Support Services, Secondary, who appeared at all sessions. District was represented by attorney at law Jeffrey Ganson.

STATEMENT OF THE CASE

Procedural History

On February 7, 2011, pursuant to Individuals with Disabilities Education Improvement Act of 2004 (IDEA), Parent filed a Due Process Hearing (DPH) Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) via fax and US mail; OSPI assigned Cause Number 2011-SE-0013. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered on February 11, 2011 which assigned the matter to ALJ Steven C. Smith. On February 16, 2011, District filed its Response to Complaint denying therein all material allegations of the Complaint; District did not challenge the sufficiency of the Complaint.

1 In the interest of preserving the family's privacy, this decision does not identify by name the parents or student. Instead, they are identified as "Parent(s)," "Mother", "Father" and "Student", as needed.

2 No disrespect toward Father, or challenge to Father's relationship with Student, is intended. However, Mother is named as "legal guardian", Father was not named as a party in the Due Process Hearing Request, was not named as a client by Mother's attorney in any communication from the attorney, and did not appear or otherwise participate in any proceeding leading up to this due process hearing. For these reasons, "Parent", as the complaining party herein, refers only to Mother.

A telephonic prehearing conference (PHC) was held March 3, 2011. Following the PHC, a written Prehearing Order was entered March 4, 2011. By agreement of the parties at the PHC, a DPH was set for March 22, 28 & 29, 2011. The DPH began on March 22, 2011, as scheduled. On March 28, 2011, the parties jointly moved to continue the DPH to: allow for an additional full testimonial hearing day beyond the scheduled final hearing date of March 29, 2011; to allow for post-hearing submissions; and, to extend the due date for written decision to accommodate the additional hearing day and post-hearing submissions. The motion was granted on the record at the DPH.³

By agreement of the parties the additional hearing day was scheduled for, and held on, April 26, 2011. It was further agreed by the parties, and thereupon ordered that: the DPH record would, (and it did), close May 10, 2011; and, the new due date for the written decision would be June 13, 2011. Therefore, **the due date for a written decision in this matter is June 13, 2011.**

District's Opposition to the Statement of Issues

Due to the length of the Complaint, and its lack of readily identifiable and discrete issues for DPH (that is, many prospective issues appeared to have been conflated), the attorneys for the parties agreed to meet to attempt to offer an agreed statement of the issues and proposed remedies. On March 14, 2011, Mother's attorney submitted Petitioners' Statement of Issues for Hearing, which provided, in relevant part, that Mother offered "the following statement of issues for consideration by [the ALJ] during the [DPH]." The submission did not purport to be an agreed statement of issues. Accordingly, specification and clarification of issues was among the first matters of business at DPH.

On March 22, 2011, at the DPH, District agreed to the issues as set out below in the section headed "Issues", except as to the Mother's contention that her proposed issue number 1 included, by reasonable implication, a challenge to the validity of District's evaluation process by failing to have "a mental health professional" on the evaluation/re-evaluation team and subsequent Individualized Education Program (IEP) team. To this, District specifically objected. Mother's contention was based on the argument that the following language, when coupled with the Complaint and law was all encompassing and included any concern about the evaluation process. Specifically, "[d]id [District] fail or refuse to address all of [Student's] identified and/or suspected educational, social/emotional, behavioral, and developmental disabilities, such that he was not offered [Free Appropriate Public Education (FAPE)] ...?" Mother saw "address" as a term of art that included "evaluate" as part of "address" and "identify", hence putting at issue, the appropriateness of the evaluation team and process.

District contended that the language of issue number 1 was not as broad as Mother contended, and that, in any event, District had already objected to such language

³ A written *Order of Continuance of Prehearing Conference and Due Date for Written Decision*, confirming the March 28, 2011 oral order at DPH was issued April 4, 2011.

in an email exchange with Mother's attorney which included removal of the first instance of the word "identify" in Mother's originally proposed issue number 1. (Exhibit D26.) Mother's attorney then replaced "identify" with the word "address", just as had been used in the Complaint. Specifically, "Petitioners ... allege that [District] has failed to address all of [Student's] identified and/or suspected educational, social/emotional, behavioral, and developmental disabilities in order to appropriately address his current needs. ... As a direct result of [District's] failure and/or refusal to properly identify and address [Student's] identified and/or suspected [disabilities] ... [Student has been denied FAPE]." (Complaint, Section III.)

Mother's attorney's argument that "address" was a term of art that would include appropriateness of an evaluation in the same way that he felt "identify" would, and that the Complaint was broad enough in any event, was partially supported by the e-mail exchange itself. District's counsel wrote, "I don't believe identification of disabilities or needs (i.e., evaluation) is specifically raised in your complaint ..." (Exhibit D26.) In other words, "identify" was impliedly acknowledged as equivalent to "evaluation". With that acknowledgment, and the above-quoted portion of the Complaint, Mother's contention that the Student's evaluations were an issue for the DPH prevailed. Mother had alleged District's "failure and/or refusal to *properly* identify and address [Student's disabilities]." When the term "identify", acknowledged by District to be synonymous with "evaluation", is considered in the context of the specific and detailed evaluation criteria set forth in WAC 392-172A-03020, it is reasonable to conclude that all allegations that an evaluation was not "properly" undertaken would inherently include any material failure to meet the specified WAC criteria. In this case, although inartfully drafted (ambiguous), the Complaint was broad enough in its allegations to include a challenge to the District evaluations of Student, within the relevant two-year statute of limitation on IDEA claims. In the absence of a timely challenge to the sufficiency (ambiguity) of the Complaint, the District's objection to issue number 1 was overruled. It was ordered that Mother would be given the opportunity to prove, as set out in her opening statement, that a "mental health professional" was necessary to the Student's evaluation team, was not on the team, and that as a result, Student suffered harm that amounted to a denial of FAPE.

On March 23, 2011, District filed a motion for reconsideration as related to the above-discussed issue number 1. On March 28, 2011, District's motion for reconsideration was undertaken and denied. In that regard, it should be noted, to the extent that District, despite its acknowledgment of the synonymous meanings of the terms "identify" and "evaluation", and the comprehensive language of WAC 392-172A-03020, was nonetheless surprised by Mother's broadly intended allegations, District was not harmed, in that it had over one month between the March 23, 2011 order allowing Parent's issue number 1, and the final hearing day of April 26, 2011, to prepare and present any defense that District deemed necessary in light of the ruling against its objection.

District's motion for reconsideration also included a concern that any evaluation that might be the subject of challenge in the DPH be within the two-year statute of

limitation for IDEA claims. That concern had already been addressed in the PHC Order which stated, "Whatever the agreed issues, the parties are respectfully reminded that they have agreed on the record that the two-year statute of limitations for federal IDEA claims applies to this case; therefore, issues shall only relate to the two years preceding February 7, 2011." (Order Following Prehearing Conference of March 3, 2011.)

Evidence Considered:

Exhibits Admitted: The Administrative Law Judge admitted into evidence and considered the following exhibits:

Parents' Exhibits: P1-P2, P4, P5 (pp. 14-15 withdrawn), and P6-P20.

District's Exhibits: D1-D24 and D26-D27.

Witnesses Heard (in order of first appearance): Administrative Law Judge heard and considered the sworn testimony of the following witnesses:

Barbara Blywise, LMHC, Licensed mental health counselor/therapist (Private Practice)
Brian Robert Lemoi, Teacher New Horizon School, Renton, Washington (Private School)
Marla L. Veliz, Administrator of New Horizon School, Renton, Washington
Student Whose Education Is At Issue
Mother of Student Whose Education Is At Issue
Vincent P. Blauser, M.Ed. Principal, Sequoyah Middle School (District School)
Alexander W. Clauson, Assistant Principal, Sequoyah Middle School
Clarissa J. Parnell, Ph.D., Program Specialist/School Psychologist for District
Mary The. Kinerk, M.S., SLP, Speech-Language Pathologist, Sequoyah Middle School
Michael R. Alvick, M.A., Teacher, Sequoyah Middle School
Kimberly M. Wagner, M.A., Special Education Teacher, Sequoyah Middle School
Christopher C. Willis, M.S., Director, Student Support Services – Secondary, for District

Non-Evidentiary Documents Considered: The Administrative Law Judge reviewed and considered the following non-evidentiary documents:

Due Process Hearing Request (Complaint)
Prehearing Order
Petitioner's [Mother's] Post Hearing Memorandum Brief
District's Closing Brief

ISSUES⁴

1. Did District fail or refuse to properly address all of Student's identified and/or suspected educational, social/emotional, behavioral, and developmental disabilities, such that Student was not offered an appropriate special education program and the necessary related services that Student required to derive meaningful educational benefit during the 2009-2010 and 2010-2011 academic school years, and thereby deny Student a free and appropriate public education (FAPE)?
2. Did District fail to develop, offer, and implement an appropriate special education program and related services to Student during the 2009-2010 and 2010-2011 academic school years, such that Student failed to make meaningful academic progress on his IEP goals in reading, writing, and math skills, and thereby deny Student FAPE?
3. Did District fail to develop, offer, and implement an appropriate special education program and related services to Student during the 2009-2010 and 2010-2011 academic school years, such that Student failed to make meaningful progress on his IEP goals in his social and interpersonal skills with peers and adults, and thereby deny Student FAPE?
4. Did District fail to respond to, and protect Student from, unprovoked bullying and harassment at school during the 2009-2010 and 2010-2011 academic school years, such that Student was deprived of the safe and secure educational environment he required in order to make meaningful academic progress on his IEP goals in reading, writing, and math, and thereby deny Student FAPE?
5. Did District fail to conduct a proper assistive technology (AT) evaluation, and thereafter, fail to develop, offer, and provide appropriate AT devices and services to Student during the 2009-2010 and 2010-2011 academic school years, and thereby deny Student FAPE?
6. Whether Parent is entitled to the following requested remedies on behalf of Student:
 - a. Two years of compensatory educational instruction and services.
 - b. Out-of-District, private educational placement of Student at New Horizon School in Renton, Washington, at public expense.
 - c. Other equitable remedies deemed appropriate.

⁴ The parties' issues have been restated for clarity and continuity of discussion, as well as Parent and Student privacy; they have not been materially or substantively altered.

FINDINGS OF FACT

General Background

1. Student is a teen boy who, at the conclusion of the DPH, was approximately 15 years, 9 months of age. At all times herein relevant to resolution of the issues presented, Student has resided within the boundaries of the Federal Way School District. Further, during the relevant period, through the end of the 2009-2010 SY (June, 2010) student attended District schools. As discussed in more detail below, mother unilaterally withdrew Student from District schools following written notice of June 8, 2010.
2. At all times herein relevant, Student has been qualified for special education services under the eligibility category of Health Impairment (Attention Deficit Hyperactivity Disorder (ADHD) inattentive type). Student's initial qualification for special education services was established in preschool due to developmental delays in communication, cognitive ability, and gross and fine motor skills deficits. (Exhibit D14.)
3. Student's triennial evaluations of 2002, 2005, and 2008, and his out-of-year 2010 reevaluation⁵, revealed continuing cognitive difficulties, primarily as to his ability to either sequentially or simultaneously process information. All measures of cognitive ability reaffirmed cognitive challenges for Student. However, the 2008 evaluation revealed that Student "benefits greatly from his capacity to profit from experience and thus be able to predict or plan when presented with stories or patterns." Both the 2008 and 2010 evaluations revealed significant educational progress, as did related IEP's. (Exhibits D2, D4, D7, D14 & D16; Testimony of Clarissa Parnell, PhD⁶.)
4. Throughout his schooling, Student has consistently demonstrated significant challenges in expressive and receptive communication, reading, writing, math, work completion issues, "attentional focus", and the need for small group intensive instruction. (Exhibits D2, D14; Testimony of Clarissa Parnell, PhD.)

November, 2008 Triennial Evaluation

5. During November, 2008, student underwent a comprehensive triennial evaluation. The evaluation team participants, in addition to Student, included Mother, a general education teacher, a special education teacher, a speech and language pathologist, an occupational therapist, and a school psychologist. (Exhibit D2.) At the time, Student was

⁵ The terms "evaluation" and "reevaluation" are used interchangeably throughout this Order and have the same meaning, but do not include "initial evaluation." (WAC 392-172A-03000 through WAC 392-172A-03040)

⁶ Clarissa J. Parnell, PhD, at all relevant times was a school psychologist for District. She was an evaluation team member and the Evaluation Case Manager for the October, 2010 Reevaluation of Student. (Exhibit D14) Further details of Dr. Parnell's credentials are discussed below where necessary. Her full resume was received into evidence as Exhibit D23, pp. 9-11.

13 years, 4 months of age and in the first semester of seventh grade. The 2008 evaluation revealed continuing communication deficits (significantly, an inability to properly interpret peer remarks and difficulty expressing himself), low ability to hold information in his immediate awareness and use the information within a few seconds of acquiring it, poorly developed reading skills, extremely low range mathematical performance, difficulty writing, and other lesser, but important, challenges. It also provided a significant baseline for Student's below-discussed October, 2010 out-of-year reevaluation. (Exhibit D14.)

6. On the positive side, the November, 2008 triennial evaluation confirmed that Student had progressed to the point that he no longer needed occupational therapy to help him with fine motor skills. Also, Student did well as to his social/emotional assessment, regarding which the report stated: "[Student] has been participating in a social skills class as he struggles at times with handling the emotional and behavior issues due to his distractibility. Sometimes [Student] doesn't appear to read social cues in his environment. The social skills class *appears to have an overall positive affect regarding his social interactions with others*, communication skills and his self-confidence." (Exhibit D2, p.5; emphasis added.) Further, despite the continuing deficits described above in Findings of Fact No. 5, the November, 2008 evaluation established that Student's computer keyboarding had also improved, and that he had met or made significant progress toward all of his IEP goals.

7. Mother reviewed the November, 2008 evaluation, as evidenced by her certification signature. Immediately above Mother's signature is the statement, "[t]he following signatures certified that each participant has had the opportunity to consider and review all relevant factors of this evaluation. If participants do not agree with the results of this evaluation, they must submit [a] separate written statement presenting their rationale." (Exhibit D2, p.13.) Mother presented no evidence of any written dissent to the November, 2008 triennial evaluation. Further, there was no evidence presented of any objection to the composition of the triennial evaluation team. Mother is therefore deemed to have agreed with both the team composition and the evaluation. This discussion of the November, 2008 triennial evaluation is not intended to imply an expansion of the applicable two-year IDEA statute of limitation; rather, is to provide the necessary background to the development of the February, 2009 IEP.

February, 2009 IEP

8. On February 11, 2009, District conducted an IEP team meeting and established a new IEP for Student, effective February 12, 2009 through February 11, 2010. The February, 2009 IEP team included Mother, a special education teacher, a general education teacher, a speech and language pathologist, the school nurse, and the school psychologist. (Exhibit D4.) The IEP team drew from the November, 2008 evaluation in fashioning Student's February, 2009 IEP. The new IEP appeared to deal with all of Student's special education needs, including, among other items, detailed statements of Student's present levels of educational performance, annual measurable goals and objectives, Student's strengths, specially designed instruction, adverse educational

impact, assistive technologies and curricular adaptations, all in relation to Student's reading, math, writing, communication (receptive and expressive language), social skills and motor skills. Further, the February, 2009 IEP set out special curricular accommodations to assist Student in accessing his educational opportunities, and specified the special education services to be provided by District by type, provider, duration and frequency, and responsible District personnel. Finally, all of the foregoing were considered with regard to the least restrictive environment (LRE) in which Student would receive his educational services. Mother signed the February, 2009 IEP, without indication of any dissent. Further, there was no evidence presented of any objection to the composition of the IEP team. Mother is therefore deemed to have agreed with both the team composition and the IEP. Student continued his education at District's Sequoyah Middle School pursuant to the February, 2009 IEP.

February, 2010 IEP

9. On February 10, 2010, District conducted an IEP team meeting and established a new IEP for Student, effective February 11, 2010 through February 10, 2011. The February, 2010 IEP team included Mother, Father, two general education teachers, a special education teacher, a speech language pathologist, a school psychologist. (Exhibit D7.) Both Mother and Father signed the IEP, without any indication of dissent as to the IEP's final form. Further, there was no evidence presented of any objection to the composition of the IEP team. Mother, as the only parental party in this case (see footnote 2) is therefore deemed to have agreed with both the team composition and the IEP.

10. As with the February, 2009 IEP, the February, 2010 IEP appeared to deal with all of Student's special needs, including detailed statements of student's present levels of educational performance, annual goals and objectives, Student's strengths, specially designed instruction, adverse educational impact, assistive technologies and curricular adaptations. Further, the February, 2010 IEP set out special curricular accommodations to assist Student in accessing his educational opportunities, and specified the special education services to be provided by District by type, provider, duration and frequency, and responsible District personnel. Finally, all of the foregoing were considered with regard to providing Student with access to his educational opportunities in the LRE.

11. Significantly, a comparison of the present levels of performance indicated on the February, 2009 IEP (Student in mid-7th grade) and on the February, 2010 IEP (Student in the mid-8th grade), established that Student had received meaningful educational benefit

7 As regards assistive technologies, the February, 2010 IEP has an internal inconsistency. At Exhibit D7, p.9, under the heading "Special Factors," is the remark "Assistive technology?: No, [Student] does not require assistive technology services or devices." However, the balance of the February, 2010 IEP is replete with references to the assistive technologies that were actually being provided to Student. For example, "alphasmart" (Exhibit D7, p. 7), "... [Student] is trying a different word processing device that has word prediction and will allow him to hear what is typed so he can hear if what he has written makes sense," and, "[Student] is functioning within the school environment with the use of some assistive technology device[s]." (Exhibit D7, p. 8)

in reading fluency moving from 75 words per minute at the third grade level in 2009 to 93 words per minute at the fifth grade level in 2010. (Exhibits D4, p. 2 & D7, p. 2.)

12. In math, the February, 2009 IEP stated, “[Student] is able to add and subtract with regrouping. He is able to work problems with and without manipulatives. *[Student] is able to represent some fractions, but struggles with others.*” The February, 2010 IEP stated, “[Student] is able to add and subtract with regrouping. He is able to work problems best with manipulatives. *[Student] is able to represent most common fractions and has memorized many common equivalents for fractions, decimals and percents.*” (Exhibit D4, p. 3; Exhibit D7, p. 3; emphasis added.)

13. Further, in math, the February, 2009 IEP stated, “[Student] does know some of his multiplication facts and is working on learning simple division problems.” The February, 2010 IEP stated, “[Student] does know many of his addition, subtraction and multiplication basic facts and is working on learning the steps for simple multiplication (2 digit by 2 digit) and division (1 digit by 3 digit) problems.” (Exhibit D4, p. 3; Exhibit D7, p. 3; emphasis added.)

14. Both the February, 2009 and February, 2010 IEP teams attributed some of Student’s math difficulties to his reading difficulties. As he has made progress in his reading, so too he has made progress, albeit slowly, in math.

15. In the February, 2009 IEP, Student’s writing Annual Goal 1 was, “[Student] will apply writing conventions (indenting, using beginning, middle, and conclusion paragraphs) in writing ... from beginning standard @ 4th grade to meeting or exceeding standard @ 4th grade ... by 2/11/210. (Exhibit D4, p. 4.) By February, 2010, the new writing Annual Goal 1 increased, “[Student] will apply writing conventions ... from beginning standard @ 4th grade to meeting or exceeding standard @ 5th grade ... “ (Exhibit D 7, p. 5.) To be sure, the balance of the discussion in each of the IEP’s as to writing reaffirmed Student’s ongoing struggles in this area of his special education. However, as with reading and math, Student had made meaningful educational progress.

16. The February, 2010 IEP also remarked about Student’s Social, Emotional & Behavioral development.

“[Student] has difficulty with concentration and is easily distracted. He also struggles with handling his emotional and behavioral issues due to his easy distractibility. Sometimes [Student] doesn’t understand certain ‘social’ cues that would help him to read situations that could be a distraction to others. He would benefit from receiving specially designed instruction and social skills class. *This is an area of power for [Student] as he still struggles with some social and emotional issues ... But he is making strides.* He needs to continue working on strategies to help him cope with conflicts and social and academic situations.” (Exhibit D 7, p. 6; emphasis added.)

17. The February, 2010 IEP team also noted regarding Student's Communication, "[Student] has made nice progress on his language goals. He is answering inferential questions taken from his resource room classroom text with 70% accuracy (7/10 opportunities). He is understanding and explaining dual meaning sentences with 50% accuracy (5/10 opportunities). ..." (Exhibit D7, p. 6; emphasis added.)

18. Finally, under "Summary and Recommendations", The February, 2010 IEP team stated, "[Student] is functioning within the school environment with the use of some assistive technology device. He has met his IEP goals and objectives. [He no longer requires] specially designed instruction in the area of fine motor. He may require accommodations already in place for time and length of writing assignments." (Exhibit D7, p. 8; emphasis added.)

19. Although as found above, Parents signed the February, 2010 IEP without dissent, notes taken by an IEP team member (Exhibit D8), did establish that Mother and Father expressed concern at the February 10, 2010 IEP meeting that Student was being "bullied" consistently and there did not appear to Parents that there was a plan in place to stop the bullying. According to the notes, "Mr. Blausen"⁸ had met with both the reported bully and Student; the reported bully had indicated that he also felt bullied. Further, Mr. Blausen was reported as needing Student to come to him "in the heat of the moment", and that "[Student had] approached [Mr. Blausen] 3-4x". It was further noted that Mr. Blausen wanted to set up a meeting with Student, Parents and himself regarding the issue. The notes indicated that Student had been given an assigned seat at lunch, presumably to avoid bullying that Mother had reported as occurring during lunch with regard to Student's food. The IEP notes further indicated that Mr. Blausen would meet again with Student and the reported bully. In the IEP notes, Mother was reported as having stated that Student "mentions suicide", that Mother "wants action", that she was concerned about depression and was getting Student into counseling "asap." Mother further advised that the Parents were "currently separated." The notes ended with the remark, "Mom/Dad agreed with Shannon"⁹ that adults need to have increased contact/closer proximity to [Student] so [Student] won't be such a target."

20. In light of the foregoing notes and the language of the February, 2010 IEP, the weight of the evidence was that Parents introduced their concerns of reported bullying of Student to the rest of the IEP team at the February 10, 2010 IEP team meeting. The team discussed the Parents' concerns. The lack of any written dissent by Parents to the final form of the IEP established that the Parents were satisfied at that time that the bullying issue was being properly handled by the combination of Mr. Blausen's interventions with Student and the reported bully, the assignment of Student to a particular luncheon seat;

⁸ Vincent P. Blausen, Med., was Principal of Sequoyah Middle School at all relevant times. Further details of his credentials are discussed below where necessary. His full resume was received into evidence as Exhibit D23, pp.1-3.

⁹ "Shannon" refers to IEP team member and general education teacher Shannon Painter.

the requested meeting of Parents, Student and Mr. Blauser to further discuss the issue, the concurrence of IEP team members that Student should have "increased contact/closer proximity" to adults, and the IEP's addressing of Student's social, emotional and behavioral circumstances through annual goals and objectives in the area of "Personal Development-Social Skills." (Exhibits D7, pp. 5-6, and D8.)

21. Following the February, 2010 IEP meeting, Student continued his education at Sequoyah Middle School, pursuant to the IEP, through the end of the 2009-2010 SY.

22. At about the same time as the February 10, 2010 IEP meeting, and for a few days of overlap, Mother exchanged various e-mails with Student's special education teacher for reading, writing and social skills, Kimberly Wagner,¹⁰ regarding Student and bullying concerns over several student peers reportedly calling Student names, begging Student for Student's food, then trying to take or destroy his food. As soon as she learned of the lunch concerns, Ms. Wagner acknowledged and expressed regret: "I am sorry to hear that [Student] is being bullied at lunch." Ms. Wagner advised Mother that Student had not informed Ms. Wagner of the events reported by Mother. Ms. Wagner also attempted to reassure Mother by informing her that one of the reportedly involved peer students would be changing lunch periods. (Exhibits P10, D9, D10.)

23. Ms. Wagner also expressed support for Student and hoped to encourage him, as his social skills teacher, to be more assertive: "I hope that [Student] realizes that there are a lot of staff willing to help [Student] but if he doesn't tell us that something is happening we cannot do anything. I hope he realizes that he can stand up to these bullies and stop the behavior either by moving away and/or talking to staff." Ms. Wagner concluded her response by thanking Mother for having let her know of the circumstances. Further, upon receiving the e-mail concerns from Mother, Ms. Wagner told lunch staff of the circumstances so they would be aware. (Exhibits P10, D9, D10.)

24. Mother became upset and wrote, "That doesn't mean it's not happening Kim. You can't justify [Student] not talking to you." (Exhibits P10, D9, D10.)

25. Ms. Wagner again responded and attempted to clarify: "I never stated verbally or in a letter that the bullying never happened. I just stated that [Student] has never let myself or my para know so we could let the administration know that there was a problem or to be on the lookout at lunchtime. ... It is just hard to deal with the situation to help remedy it and devise a plan when we are unaware that a problem has occurred. ... I am trying to prepare [Student] for high school. If he can't be assertive in a situation or setting that he has been out for 3 years he will not be able to adjust well to high school. I am not minimizing his hurt feelings or the bullying. I am actually advocating for [Student] to help him by having him use the strategies I taught him for 2 years as well as what he is learning in social skills now and advisory [an anti-bullying class] to help him in these difficult times

10 Kimberly M. Wagner, Master of Arts in Special Education. Ms. Wagner was also Student's special education case manager at Sequoyah. Her full resume was received as Exhibit D23, pp. 14-15.

to deal with this and become stronger and more capable of handling taunts, name-calling etc. He can do this by leaving the area, getting in their face and telling them to get lost, move to a table closer to staff or with other students and/or then immediately talk to any staff. I have repeatedly told the students that telling a staff when someone bullies you is not snitching but keeping you and others safe and making our school safe and comfortable school to be in. ..." (Exhibits P10, D9, D10.)

26. Later, Mother apologized to Ms. Wagner, "... I apologize for being rude and angry towards you. ... I was terribly wrong to put that anger on you and make you wrong. You have always been a strong advocate to [Student] and have taught him well. I do not want to undermine that or diminish the fact that you are an amazing teacher for him. He respects you and admires you and that is what is important. ... I lean on you mainly for support because you get my son more than anyone else. You connect with him and he trusts you. ... I am also working hard preparing [Student] for high school and I think it is important that we work together. ... I respect your opinion and feelings and I am truly sorry for being so out of line." (Exhibits P10, D9, D10.)

27. Throughout the foregoing events (the reported bullying and the follow-on e-mail exchanges) Ms. Wagner acted professionally; attempted to reassure Mother and affirm her commitment to Student, while also emphasizing the importance for Student, then approaching high school transition, to exercise some level of self-protective assertiveness; in short, she took steps to empower Student. She also properly notified Sequoyah lunch staff of the situation so they could protect Student.

28. During the latter half of the 2009-2010 SY, in furtherance of protecting Student, Student was accompanied by a para-educator during all passing periods. (Exhibit D14, p.2.)

29. Although there were also brief discussions at the DPH of bullying that involved physical conflict, the evidence of when such bullying occurred, was ambiguous. The weight of the evidence was that most conduct which could be deemed a physical conflict occurred more than two years prior to the filing of the instant Complaint; that is, prior to February 7, 2009. For example, Mother notified Ms. Wagner, among others, that "... in case you have not heard ... [Student] was attacked physically by another student. He was then harassed and threatened yesterday by the student and [this student's] friends." This e-mail was sent by Mother in October, 2008, when the incident occurred. Although when she received Mother's e-mail, District personnel were already aware of the circumstances, Ms. Wagner nonetheless responded with concern and support for Student. (Exhibit P12; Mother's testimony at deposition, Exhibit D21. pp. 32.) Other such reported serious physical events apparently occurred during Student's sixth grade SY, even longer before the filing of the instant Complaint than the October, 2008 above-described event. (Testimony of mother; testimony of Student.)

30. The combination of deposition testimony of Mother and Student (Exhibits D21 & D22), the above-described IEP's and triennial evaluation, and testimony of virtually all

witnesses at DPH, well-established that Student had difficulty discerning social cues. The weight of the evidence was that many, but not all, of the complaints by Student of bullying and harassment were misperceptions of normal middle school sarcasm and teasing between peers that Student was unable to properly understand, and therefore misinterpreted. However, the evidence, taken as a whole, overwhelmingly established that whether the concerns and complaints of Student were valid, or invalid, Sequoyah took each of the reported matters seriously. The administration, teaching staff, and para-educator staff, affirmed student, investigated all reported matters, took appropriate disciplinary measures against offending peers when bullying or harassment actually occurred, strove to help Student understand the circumstances when Student had misperceived the situations, and worked throughout his entire enrollment at Sequoyah to help him become more self-confident and properly assertive with regard to such circumstances. Mother presented no credible evidence of Sequoyah or District ignoring any reported instance of bullying or harassment of Student.

31. Examples of Sequoyah and District taking action on behalf of peer misconduct toward Student include the short term suspensions of two male students in December, 2008, as documented in Exhibits D3 & D4.

32. Principal Blausler was reported by Student in Student's deposition as "very nice and [helping] me a lot" with regard to any student peer who was troubling Student. Furthermore, as regards the above-discussed suicide remarks made by Student and reported by Mother, student identified Principal Blausler as "giving me a strategy not to do that." (Exhibit D22, pp.10-11.)

33. Physical education teacher Michael Alvick¹¹, who saw significant social growth in Student over the course of time that Mr. Alvick taught Student, was reported by Student as "[helping] me during the bullying," and telling Student's peers who were acting inappropriately, "stop that or you are going to go to detention or ISS [in-school suspension]." (Exhibit D22, p.8.)

34. So too, with teachers Ms. Blunden, Ms. Reid and Ms. Loranger, each of whom Student specifically identified as standing up for Student and telling Student's peers to stop whatever inappropriate conduct the peers were directing toward Student. (Exhibit D22, pp.8-9A.)

35. On one occasion of an unspecified date, but occurring while Student was attending Sequoyah, a student peer reportedly grabbed Student's shirt and told Student to pick up trash when a teacher had told the peer student to pick up the trash. Student told the peer student, "... I don't listen to you. I only listen to the teacher." That ended the immediate confrontation with the peer student. However, Student then reported the matter to

¹¹ Michael Roy Alvick, Master of Arts (Teaching-Physical Education), was Student's health and fitness (physical education) teacher and wrestling coach. His full resume is Exhibit D27.

Assistant Principal Alexander Clauson¹². Student testified at deposition that when he reported the matter, Mr. Clauson "told Officer Wilson to go grab [Student's peer and] put him in ISS." (Exhibit D22, pp.13-14.)

36. Principal Blauser and Assistant Principal Clauson interacted with Student virtually daily. They took great effort to help Student with any of his concerns and to encourage him to bring to their attention any perceived bullying or harassment. They were particularly vigilant during lunch periods which was the timeframe during which most of the reported incidents occurred. In fact, they gave Student an open invitation to come to either of their offices anytime Student "felt picked on"; and, Student was invited to bring a friend if he did not want to eat in the common area. (Testimony of Principal Blauser and Assistant Principal Clauson.)

37. By the eighth grade, Student had progress in his social skills such that he had made friends (deposition testimony of Mother, Exhibit D21, p.37; deposition testimony of Student, Exhibit D22, pp. 11 & 22), and had developed an increased sense of empowerment which enabled him to confront at least one perceived bully as above-discussed. (Testimony of Student.)

38. The June 10, 2010 IEP Progress Report for Student showed continuing, although slow, progress in most areas, consistent with the foregoing. Importantly, a hindrance to his improving social skills appeared to be family issues related to the separation of his Parents. "[June 10, 2010: Student] has become more depressed and not willing to share due to family issues at home. He also is becoming more tardy to class where he misses key instructions which cause him to lag behind. He is struggling socially in class and it shows. He is lagging behind academically due to personal issues." (Exhibit D11, p.1.)

39. On June 8, 2010, notwithstanding the foregoing Findings of Fact, through her attorney, Mother gave written notice to District of her intention to unilaterally withdraw Student from District schools and to place him in an out-of-district, private placement at New Horizon School in Renton, Washington. (Exhibit P15.) Mother's stated reasons for withdrawing Student from District schools are best summarized as her opinion that Student was being subjected to "unabated" bullying and harassment from his classmates and peers, and that District had failed to provide Student with an appropriate educational program which resulted in Student's failure make meaningful educational progress, and therefore, a denial of FAPE. (Exhibits P15, D21; Testimony of Mother.)

40. At the time of her notice to the school, it was Mother's intention to place Student in the private New Horizon School (New Horizon) in Renton, Washington. The evidence was unclear as to whether Mother intended Student to begin New Horizon in summer, 2010, or fall, 2010. Whatever Mother's intention, she had anticipated receiving a tuition

12 Alexander W. Clauson, Master of Ed. (Administration), Assistant Principal, Sequoyah Middle School. Mr. Clauson's full resume is Exhibit D 23. Pp. 4-5.

scholarship for Student. The scholarship did not materialize and student did not attend New Horizon. Mother did not return Student to any District school for the 2010-2011 SY.

41. From that time through conclusion of the DPH, Student attended neither a District school, nor New Horizon, nor any school. (Exhibit D21, D14 and testimony of Mother, Student and Dr. Parnell.)

The October, 2010 Reevaluation

42. Following her withdrawal of Student from District schools, Mother filed a request for an IDEA due process hearing (First IDEA Complaint). Mother dismissed her First IDEA Complaint shortly before its scheduled DPH. As a result of the First IDEA Complaint, the parties agreed to submit Student to an early (out-of-year) triennial evaluation – the October, 2010 Reevaluation. The scope of the October, 2010 Reevaluation and the people who would be invited to participate were detailed for Mother in the written Out-of-Year Reevaluation Consent that she signed to initiate the reevaluation. Mother, who was then represented by legal counsel, signed the Consent for the evaluation, without dissent or request for any additional or alternate participant. (Exhibit D13; Testimony of Mother.)

43. At the time of the October, 2010 Reevaluation, Student was aged 15 years, 4 months, and in the ninth grade, although he had been withdrawn from school by Mother and had not actually attended the ninth grade. (Exhibit D14.)

44. Case evaluation manager, overall reevaluation supervisor and major test administrator was school psychologist Dr. Clarissa Parnell. Dr. Parnell was a well-qualified mental health professional who had undergone a school psychology internship, a bilingual Fellowship and internship, a pre-doctoral mental health internship and a postdoctoral internship and had “hands on” special education experience as a special education program specialist. Dr. Parnell’s unrefuted testimony was to the effect that based on her training and experience, she was well-qualified to interpret the results of the October, 2010 Reevaluation, as well as the November, 2008 triennial evaluation and all relevant IEP’s. Dr. Parnell’s testimony was given great weight. Because of her overall supervision and administration of the October, 2010 Reevaluation, its contents were also given great weight. (Exhibit D14, D23, pp. 9-11, testimony of Dr. Parnell.)

45. Significant participation in and interpretation of the October 2010 Reevaluation was also undertaken by speech-language pathologist Mary V. Kinerk.¹³ At the time of the DPH, Ms. Kinerk had been a speech pathologist for just under two decades. She had clinical experience as both an intern and a clinician at Good Samaritan Hospital, Puyallup, Washington. She had been a speech language pathologist with the District since 2002. She was well-qualified to interpret the results of the November 2010 Reevaluation as to Student’s speech and language challenges, deficits and progress;

¹³ Mary V. Kinerk, M S (Speech-Language Pathology); Ms. Kinerk’s full resume is Exhibit D23.

arguably Student's most significant area of special needs in that his communication difficulties had interfered with his social skills, reading, writing and math development. Ms. Kinerk's testimony was given great weight. (Exhibit D14, D23, testimony of Ms. Kinerk and Dr. Parnell.)

46. The October, 2010 Reevaluation was comprehensive, and as internally stated, was conducted pursuant to WAC 392-172A-03025. It included a relevant background summary and statements of present levels of performance. It identified the areas of evaluation as reading, math, and written language, cognitive, social, emotional and behavioral, communication, and motor. These areas of evaluation were determined to be necessary after a review of the existing data regarding Student. Standardized tests included the Kaufman Assessment Battery for Children, Second Edition (measures processing and cognitive abilities in children); the Wechsler Individual Achievement Test-Second Edition (measures current skills and abilities into reading, math and writing); and, Behavior Assessment System for Children-2 (measures adaptive behavior). Additionally, informal assessments were undertaken including, importantly, Speech Language Pathology Clinical Observations. Student was also given the Test of Language Competence-Expanded Edition and the Comprehensive Evaluation of Language Fundamentals, Fourth Edition (both tests provide comprehensive assessment of receptive and expressive language skills). (Exhibit D14, testimony of Dr. Parnell and Ms. Kinerk.)

47. In most areas tested, Student showed modest improvement over the 2008 triennial evaluation. However, there were some unexplained regression areas. For example, in word classes (total) Student regressed from a standard score of 6 in 2008 to a standard score of 4 in 2010. The same held true for word classes (receptive) and (expressive). It should be noted that as regards receptive word classes, the percentile scores showed the 85th percentile in 2008 and 2nd percentile in 2010. This was an obvious typographical error. It is most likely that the 2008 score was 8th percentile. Such would comport with the remainder of the word class scores for both 2008 and 2010. (Exhibit D14, testimony of Dr. Parnell and Ms. Kinerk.)

48. Having considered the historical data regarding Student and the results of the tests, the October, 2010 Reevaluation multidisciplinary team discussed their varying viewpoints.

49. Mother reported that Student required small group instruction and an even more highly specialized program than he had in the eighth grade at Sequoyah Middle School where all of his classes, except for health and physical education, were special education. Parents were reportedly concerned with Student's depression and anxiety, as well as the increasing time he had spent out of school. Mother expressed the belief that he missed school because he was a victim of school bullying.

50. Student's teachers reported that Student continued to interact with and be friendly to the students that he had reported as having bullied him. The speech and language

pathologist noted that Student had ongoing difficulties in determining the intent of ambiguous social interactions. Some team members noted that perhaps Student's Parents' divorce may have had an effect on Student's overall happiness and well-being.

51. Ultimately, members of the multidisciplinary team, including the school psychologist, reported that Student would benefit from placement in a program in his home high school or other high school within District, with continued small group instruction for core academic skills, but also increasing opportunities to interact with typically developing peers. The suggestion was that Student would benefit from participation in afterschool clubs geared towards Student's interests in gaming and music. It was noted that Student had friends at his home high school. Further, his home high school used a "small-school model." Student would choose an Academy and would be in a setting similar to an elementary school as regards student school population size. It would be anticipated that Student would get to know his teachers over the course of his high school career and would have the opportunity to interact with typically developing peers who attended his small Academy and lived in his neighborhood. (Exhibit D14, testimony of Dr. Parnell and Ms. Kinerk.)

52. Mother signed the October, 2010 Reevaluation underneath the statement, "The following signatures certified that each participant has had the opportunity to consider and review all relevant factors of this evaluation. If participants do not agree with the results of this evaluation, they must submit separate written statement presenting their rationale. Mother presented no statement of disagreement. (Exhibit D14, testimony of Mother.) Mother is therefore deemed to have agreed with the October, 2010 Reevaluation. Further, the October, 2010 Reevaluation team included, in addition to Mother, special education teacher Kimberly Wagner, speech and language pathologist Mary Kinerk, program specialist and school psychologist Dr. Parnell, program specialist Lorna McElany, Occupational therapist Cara Newlun, General education teacher Michael Alvick and District special-education director Christopher Willis. There was no evidence presented that Mother or her attorney, who was also present, objected to the composition of the Reevaluation team as then assembled. Therefore, Mother is deemed to have accepted the composition of the October, 2010 Reevaluation team. (Exhibit D14, testimony of Mother.)

The November, 2010 IEP

53. Following the October, 2010 Reevaluation, an IEP team was assembled by District, and IEP meeting held November 1, 2010. The IEP team participants included Mother, special education teacher Kimberly Wagner, LEA Rep. Lorna McElaney, speech and language pathologist Mary Kinerk, special education director for District Christopher Willis, program specialist and school psychologist Dr. Clarissa Parnell, and general education teacher Michael Alvick. Mother signed the November, 2010 IEP, without written dissent as to either the final language of the IEP or the makeup of the IEP team. Mother testified that she did not interpose any written or oral objection to the IEP team composition. Mother is therefore deemed to have accepted the composition of the IEP.

team. However, following the November, 2010 IEP team meeting and Mother's signature on the final IEP document, Student did not return to attendance at a District school. Therefore, by her continuing conduct of withholding the attendance of Student from any District school, Mother is deemed to have rejected the IEP as a suitable offer of FAPE. (Exhibit D16, testimony of Mother, testimony of Student.)

54. At the time of the November, 2010 IEP meeting, Student was 15 years, four months of age and scheduled to attend the ninth grade at his home school, Todd Beamer High. (Exhibit D16.)

55. An overview of the November, 2010 IEP revealed that it appeared to deal with all of Student's special needs, including detailed statements of student's present levels of educational performance, annual goals and objectives, Student's strengths, specially designed instruction, adverse educational impact, assistive technologies¹⁴ and curricular adaptations. Further, the February, 2010 IEP set out special curricular accommodations to assist Student in accessing his educational opportunities, and specified the special education services to be provided by District by type, provider, duration and frequency, and responsible District personnel. Finally, all of the foregoing were considered with regard to providing Student with access to his educational opportunities in the least restrictive environment (LRE).

56. As to the LRE, the IEP team, with Mother in disagreement, selected the Academy concept of Todd Beamer High, with appropriate general classes, including in-class special education services and pull-out special education services, and special education classes with integration into general class and/or community. The November, 2010 IEP drew largely upon the October, 2010 Reevaluation and its recommendations, as well as discussion and consideration at the November, 2010 IEP meeting of input and concerns of all IEP team members, including Mother and her concerns about school size, prospective bullying, and the social, emotional and psychological well-being of Student. (Exhibit D16, testimony of Dr. Parnell, Mr. Willis.)

57. The November, 2010 IEP team, as a whole, excluding Mother, rejected Mother's requested private placement of Student at New Horizon School at public expense. New Horizon was determined by the IEP team to be at minimum, too restrictive an educational environment. The IEP team, as a whole, again excluding Mother, determined that Student had been, and could continue to be, provided with appropriate special education services through the implementation of the November, 2010 IEP, which included student contact

14 As regards assistive technologies, the February, 2010 IEP has an internal inconsistency. At Exhibit D7, p.9, under the heading "Special Factors," is the remark "Assistive technology?: No, [Student] does not require assistive technology services or devices." However, the balance of the February, 2010 IEP is replete with references to the assistive technologies that were actually being provided to Student. For example, "alphasmart" (Exhibit D7, p. 7), "... [Student] is trying a different word processing device that has word prediction and will allow him to hear what is typed so he can hear if what he has written makes sense," and, "[Student] is functioning within the school environment with the use of some assistive technology device[s]." (Exhibit D7, p. 8)

with typically developing peers, and the full, necessary range of special education services available through District. Accordingly, the November, 2010 IEP, with placement of Student at Todd Beamer High School, was the District's offer of FAPE, should Student resume District schooling. (Exhibit D16, testimony of Ms. Kinerk, Dr. Parnell, Mr. Willis.)

The Mental Health Professional Requirement

58. No legal authority, or credible factual evidence, was presented by Mother that "a mental health professional" should have been included as a member of Student's evaluation and IEP teams as contended by Mother in her opening statement and post-hearing brief. However, to the extent any reviewing authority might determine to the contrary by holding that a mental health professional was required, the evidence firmly established that "mental health professionals" were a part of the compositions of each of the relevant evaluation and IEP teams. Specifically, the November, 2008 triennial evaluation team (discussed only because that evaluation informed the February, 2009 IEP team), the February, 2009 IEP team, the February, 2010 IEP team, the October, 2010 Reevaluation team, and the November, 2010 IEP team, all had as one of their members a school psychologist. The evidence established that in each instance, the school psychologist on the relevant team played an active and integral part of the evaluation and IEP development process for Student.

Mother's Opinion Witness

59. In support of her contention that Student was denied FAPE as a result of peer student bullying, Mother presented her opinion witness Ms. Barbara Blywise, LMHC (Licensed Mental Health Counselor). Ms. Blywise's involvement with Student was limited to treatment which Student began approximately November, 2010. (Testimony of Ms. Blywise and Mother.)

60. Although the precise scope of Mother's intended use of Ms. Blywise's opinion evidence was unclear, Mother argued in her post-hearing brief, with citation to the testimony of Ms. Blywise, that Student's "ability to function in his special education program and placement has also been adversely affected by the bullying and harassment that [student] has repeatedly been subjected to while at [District] school." The evidence did not establish Ms. Blywise's qualifications to render opinion evidence regarding Student's ability to function in his special education program District, or otherwise. There was no evidence that Ms. Blywise had any training or experience in special education or its delivery. Further, Ms. Blywise testified that she had not viewed Student in his school setting. Nor, was there evidence that Ms. Blywise was qualified to, or reviewed, Student's relevant triennial evaluations and relevant IEP's. (Testimony of Ms. Blywise.) The testimony of Ms. Blywise as to Student's ability to function in any particular special education setting was given no weight.

61. As to Student's psychological health, Ms. Blywise testified that, as an LMHC, she was qualified to make a psychological evaluation, but had not diagnosed Student. She

opined that Student had post-traumatic stress disorder-like (PTSD) symptoms, but that she had made no actual diagnosis of PTSD for Student. She also offered that Student did not have acute stress, but had "signs" of acute stress. Further, Ms. Blywise testified that she was treating Student using "thought field therapy" incorporating "energy work". When asked to describe what she meant, and how it worked, she said no one was exactly sure how thought field therapy worked, but that the method involved a sequence of tapping movements on various parts of Student's body to equalize his energy. No credible evidence was presented by Ms. Blywise, or otherwise, that thought field therapy incorporating energy work by sequentially tapping various parts of a patient's body to equalize the patient's energy is generally accepted by the relevant scientific world. (Testimony of Ms. Blywise.) In light of the lack of any formal diagnosis of Student, and the lack of any evidence that Ms. Blywise was engaged with Student in a treatment process generally accepted by qualified mental health practitioners, the testimony of Ms. Blywise as to Student's psychological health, with regard to his special education placement, was given no weight.

Appropriateness of New Horizon School for Student

62. Mother wants the best for Student, and is therefore, to be commended. In that regard, Mother determined that New Horizon School would be the best placement for her son. Mother believes that the small size of New Horizon (approximately 70 students), the fact that virtually all of the students at New Horizon have learning disabilities, attention deficits, and other learning differences, like or similar to Student, and that New Horizon advertises itself as "an environment of trust and acceptance that is physically and emotionally safe where students can reach their academic, social, emotional and behavioral potential," would ensure Student an ideal learning environment. Therefore, based on Mother's concerns regarding District's schools and her understandable desire to maximize Student's educational opportunity, Mother seeks placement of Student, at public expense, at New Horizon. (Exhibit P5, testimony of Mother.)

63. Likely, New Horizon is, in general terms, a fine school. However, Mother presented no credible evidence that Student's unique needs would be met at New Horizon, if District's schools were determined to be inappropriate for Student. For example, Student's special educational needs include intensive speech language therapy. The evidence did not establish that New Horizon had, or could provide, the intensive speech language therapy resources and services needed by Student. Further, there was no credible evidence presented to refute District's credible evidence that Student will require regular interaction with typically developing peers, in order to practice and learn the social skills that will be necessary for Student to become reasonably independent over the next few years. In light of New Horizon's advertised student population characteristics, the weight of the evidence was that Student would have no meaningful opportunity to develop the necessary social skills to become a reasonably independent adult living and working among a population of typically developed adults, if placed at New Horizon. (Testimony of Dr. Parnell, Ms. Kinerk, Mother and Student.)

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. §1401 *et seq.* (Individuals with Disabilities Education Improvement Act IDEA, sometimes referred to as IDEIA, formerly Education for All Handicapped Children Act EHA), 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, 126 S. Ct. 528, 163 L. Ed. 2d 387, 44 IDELR 150 (2005). The party seeking relief in this case Mother, as the Parent of the Student whose education is at issue. Therefore, Mother 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, 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:

5. 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?

6. *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 (9th Cir. 1992). In this case, the Parent has alleged both procedural and substantive violations of the IDEA.

7. 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 (9th 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 (9th Cir. 1992).

8. 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 cause 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).

9. 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 (9th Cir. 1999). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

10. 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 (9th 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 (4th Cir. 1991), *affd.* 510 U.S. 7 (1993).

11. 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 (9th 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 (9th Cir. 1996).

12. Mother asserts the District denied Student FAPE during the 2009-2010 and 2010-2011 school years.¹⁵ Examination of her contentions follows.

¹⁵ The period at issue for any denial of FAPE is February 7, 2009 through February 7, 2011. This is the

ISSUE ONE: Did District fail or refuse to properly address all of Student's identified and/or suspected educational, social/emotional, behavioral, and developmental disabilities, such that Student was not offered an appropriate special education program and the necessary related services that Student required to derive meaningful educational benefit during the 2009-2010 and 2010-2011 academic school years, and thereby deny Student a free and appropriate public education (FAPE)?

13. 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: (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

two-year period preceding the Mother filing her request for due process hearing. WAC 392-172A-05080; 34 C.F.R. § 300.507.

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.

14. Mother contended that District failed to properly address all of Student's educational needs, as stated in Issue One, in that District failed to provide a "mental health professional" as a team member for the relevant evaluation and IEP teams. Pursuant to the foregoing Findings of Fact, Mother has provided no legal authority requiring a mental health professional be on either type of team. Further, despite the lack of legal authority requiring a mental health professional to have been on either type of team, the evidence firmly established that District, nonetheless, provided a mental health professional as a team member for each of the herein discussed evaluation and IEP teams during the relevant period. That mental health professional, in each instance, was a school psychologist.

15. Further, as to each relevant team, the school psychologist actively participated. The evaluation and IEP teams actively considered Student's identified and suspected educational, social/emotional, behavioral, and developmental disabilities. Mother has provided no specific, credible evidence that any identified or suspected disability of student was not considered by either type of team. Moreover, as to each of the relevant

teams, Mother was a member. As a member of each relevant evaluation and IEP team, Mother interposed no objection to, and made no request for modification of the composition of any of the teams. She was therefore deemed to have agreed with the appropriateness of each team.

16. The evidence further established that District offered Student an appropriate special education program and the necessary related services during all relevant periods.

17. Accordingly, Mother has failed to meet her burden of proof that District denied Student FAPE pursuant to Issue One.

ISSUE TWO: Did District fail to develop, offer, and implement an appropriate special education program and related services to Student during the 2009-2010 and 2010-2011 academic school years, such that Student failed to make meaningful academic progress on his IEP goals in reading, writing, and math skills, and thereby deny Student FAPE?

18. Pursuant to the foregoing legal authorities, *Rowley, Adams, Gregory K., Florence County, County of San Diego and Seattle*, the correct question is not did Student fail to make meaningful academic progress; rather, were the relevant IEP's "reasonably calculated to provide educational benefit." Further, such calculation is to be measured at the time the IEP was developed. Here, based on the foregoing Findings of Fact, the evidence well-established that all relevant IEP's were reasonably calculated to provide educational benefit. Mother presented no credible evidence to the contrary.

19. Additionally, the evidence established that District did also offer and implement an appropriate special education program and related services to Student during all relevant times, excepting insofar as District was precluded from implementing Student's offered special education program and related services as a result of Mother's withdrawal of Student from attendance at District schools following the conclusion of the 2009-2010 SY.

20. Importantly, the evidence also established that Student actually made meaningful academic progress on his IEP goals in the areas of reading, writing, and math skills during all relevant periods, excepting insofar as Student's progress was inhibited as a result of Mother withholding Student from attendance at any school following the conclusion of the 2009-2010 SY.

21. Accordingly, Mother has failed to meet her burden of proof that District denied Student FAPE pursuant to Issue Two.

ISSUE THREE: Did District fail to develop, offer, and implement an appropriate special education program and related services to Student during the 2009-2010 and 2010-2011 academic school years, such that Student failed to make meaningful progress on his IEP goals in his social and interpersonal skills with peers and adults, and thereby deny Student FAPE?

22. Again, as with Issue Two, pursuant to the foregoing legal authorities, *Rowley, Adams, Gregory K., Florence County, County of San Diego and Seattle*, the correct question is not did Student fail to make meaningful academic progress; rather, were the relevant IEP's "reasonably calculated to provide educational benefit." Again, based on the foregoing Findings of Fact, the evidence well-established that all relevant IEP's were reasonably calculated to provide educational benefit. Mother presented no credible evidence to the contrary.

23. Again, the evidence established that District did offer and implement an appropriate special education program and related services to Student during all relevant times, excepting insofar as District was precluded from implementing Student's offered special education program and related services as a result of Mother's withdrawal of Student from attendance at District schools following the conclusion of the 2009-2010 SY.

24. Importantly, the evidence also established that Student actually made meaningful academic progress on his IEP goals in the areas of social and interpersonal skills during all relevant periods, excepting insofar as Student's progress was inhibited as a result of Mother withholding Student from attendance at any school following the conclusion of the 2009-2010 SY.

25. Accordingly, Mother has failed to meet her burden of proof that District denied Student FAPE pursuant to Issue Three.

ISSUE FOUR: Did District fail to respond to, and protect Student from, unprovoked bullying and harassment at school during the 2009-2010 and 2010-2011 academic school years, such that Student was deprived of the safe and secure educational environment he required in order to make meaningful academic progress on his IEP goals in reading, writing, and math, and thereby deny Student FAPE?

26. *M.L. v. Federal Way Sch. Dist.*, 394 F3d 634, 105 LRP 13966 (9th Cir. 2005) is applicable, and provides, in relevant part relating to a school district's liability for the misconduct of one student toward another:

The Appellants further assert that ML was denied a FAPE because the FWSD failed to take action to prevent other students from teasing ML. The Appellants argue that there is uncontradicted evidence in the record that the FWSD was deliberately indifferent to [Parent's] reports that her child was being teased. They

maintain that the teasing resulted in a denial of a FAPE. Neither the statute nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE.

...
Under the IDEA, a disabled child is guaranteed a FAPE, 20 USC 1412 (1), which [provides educational benefit to the handicapped child]. *Gregory K.*, 811 F 2D 1314 (quoting *Rowley*, 458 US at 201, (further citations omitted)). If a teacher is deliberately indifferent to teasing a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. (Emphasis added.)

27. Based on the foregoing Findings of Fact, the evidence was overwhelming District and its staff were not indifferent to the claims of peer student bullying and harassment of Student. Rather, District undertook at least the following actions regarding such claims: (1) undertook an investigation and determination of the validity of each claim of bullying and harassment immediately following notification of the claim; (2) where appropriate, imposed discipline on the offending peer students; (3) provided Student with a para-educator to escort Student through the school during passing periods; (4) provided Student with special social skills training to address and improve his apparent inability to understand various social cues, so that some of the circumstances of which he complained, might be avoided; (5) as most of the concerns involved the lunch period, provided student with assigned lunchroom seating, gave him an open invitation to eat his lunch in the office of the Principal or Assistant Principal at any time Student felt "picked on", and even invited him to bring a friend if he chose; (6) taught Student methods of dealing with offending peer students, such that by the eighth grade, Student, by his own testimony, had stopped a peer student from any further harassment of Student. Further, Student's social and emotional circumstances in relation to the harassment and bullying claims were taken into consideration and addressed by the relevant evaluation and IEP teams.

28. Further, the weight of the evidence established that Student made meaningful educational progress during all relevant periods, excepting insofar as such progress may have been impeded by Mother's unilateral withdrawal of Student from school following the end of the 2009-2010 SY.

29. Accordingly, Mother has failed to meet her burden of proof that District denied Student FAPE pursuant to Issue Four.

ISSUE FIVE: Did District fail to conduct a proper assistive technology (AT) evaluation, and thereafter, fail to develop, offer, and provide appropriate AT devices and services to Student during the 2009-2010 and 2010-2011 academic school years, and thereby deny Student FAPE?

30. WAC 392-172A-01030 (Assistive Technology Service) applies:

Assistive technology service means any service that directly assists a student eligible for special education in the selection, acquisition, or use of an assistive technology device. The term includes:

(1) The evaluation of the needs of a student, including a functional evaluation of the student in the student's customary environment;

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students eligible for special education;

(3) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(5) Training or technical assistance for a student eligible for special education or, if appropriate, that student's family; and

(6) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

31. As set forth in the foregoing Findings of Fact, during all relevant times, District conducted proper evaluations of Student. Those evaluations, and the relevant IEP's considered Student's need for assistive technology. Pursuant to Student's needs, he was provided with at least the following assistive technologies: (1) special keyboard training to assist him with his handwriting difficulties; and, (2) special computer software to assist him with composing his writing by providing such tools as next word prediction and audio playback. Mother presented no credible evidence that Student was denied any necessary assistive technologies. Further, Mother was a team member of all relevant evaluation and IEP teams, but presented no evidence that in her team member capacity, she dissented as to the assistive technologies offered student.

32. Accordingly, Mother has failed to meet her burden of proof that District denied Student FAPE pursuant to Issue Five.

ISSUE SIX (Parent's Requested Remedies): Whether Parent is entitled to the following requested remedies on behalf of Student:

- a. Two years of compensatory educational instruction and services.
- b. Out-of-District, private educational placement of Student at New Horizon School in Renton, Washington, at public expense.
- c. Other equitable remedies deemed appropriate.

33. Parent (Mother) 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 shall be denied.

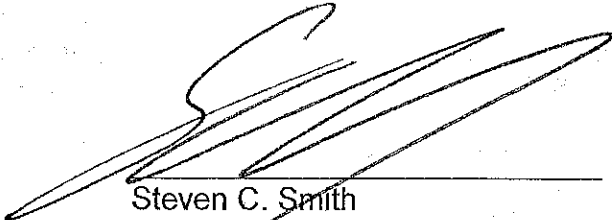
34. All arguments made by the parties have been considered. Arguments that are not specifically addressed have been duly considered but were found to have no merit or to not substantially affect the party's rights.

ORDER

1. The Parent (Mother) 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 Tacoma, Washington on June 13, 2011.



Steven C. Smith
Administrative Law Judge
Office of Administrative Hearings

FURTHER APPEAL RIGHTS FOLLOW ON NEXT PAGE

Final Decision

Further Appeal Rights: Information About Your Right To Bring A Petition For

Reconsideration And Your Right To Bring A Civil Action

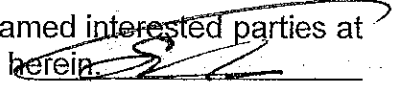
Reconsideration

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. 

Parent



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