

MAILED

AUG 19 2011

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION SEATTLE-OAH

IN THE MATTER OF:

LAKEWOOD SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2011-SE-0036

**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 Marysville, Washington, on July 6, 20, and 27, 2011. The Parents of the Student whose education is at issue¹ appeared and were represented by the Mother.² The Mother was accompanied by Senior Chief Petty Officer Matt Thackery on July 20, 2011, and Chief Petty Officer John Rodriguez on July 27, 2011. The Lakewood School District (District) appeared through Joyce Scott, special services director, and was represented by David Hokit, attorney at law.

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 May 17, 2011, which was assigned Cause No. 2011-SE-0036. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered May 18, 2011, which assigned the matter to ALJ Matthew D. Wacker.

Prehearing conferences were held June 17, July 1 and 8, 2011. Prehearing Orders were entered June 21 and 27, 2011. The District moved to extend the due date for a written decision to August 10, 2011. The motion was granted. The Parents subsequently moved to extend the due date to August 19, 2011. The motion was granted.³

The due date for a written decision in the above matter is **AUGUST 19, 2011.**

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¹ In the interest of preserving the family's privacy, this decision does not identify by name the parent(s) or student. Instead, they are identified as "Parent(s)" and "Student. Unless expressly stated otherwise, the mother of the Student shall be identified as the "Parent."

² The Father of the Student appeared on July 6th, but was unable to appear on July 20th or 27th.

³ See, Prehearing Order entered June 27th and Order entered July 8, 2011.

Evidence Relied Upon

Exhibits Admitted:

Parent's Exhibits: P4 - P12, P15 - P30.

District's Exhibits: D1 - D27.

Witnesses Heard (in order of appearance):

Lisa Burns, Student's physical therapist
Sandra Kaminski, Student's occupational therapist
Mary Quehrn, Student's social worker
Carol Lorioux Loup, Student's feeding therapist
Joyce Scott, District director of special education
The Parent
Cyndie Geddes, Student's nursing supervisor
Kristine Sorrenson, District developmental preschool teacher
Anne McCrea, District school nurse
Yvonne Swinth, Ph.D., special education/rehabilitative medicine
Anna Gibson, lead family resource coordinator, Sherwood Family Services
Jim Roan, District school psychologist
Kathryn Nagorka, former District occupational therapist (By telephone)
Barbara Sifferman, occupational therapist, Sherwood Family Services
Cindy Jo Rowley, speech-language pathologist, Sherwood Family Services
Richard Kreider, District speech-language pathologist

ISSUES

The issues for the due process hearing are:

- a. Whether the District denied the Student a free appropriate public education (FAPE) by:
 - i. Failing to appropriately evaluate the Student in all suspected areas of disability;
 - ii. Failing to use appropriate assessment tools to evaluate the Student;
 - iii. Failing to include a diagnosis for the Student in the evaluation report;
 - iv. Failing to determine the Student is eligible for special education and related services through an individualized education program (IEP) under the category of other health impairment;
- b. Whether the Student requires specially designed instruction (SDI) to receive an educational benefit;

- c. Whether the Student qualifies for special education and related services under the category of other health impairment;
- d. And, whether the Parent is entitled to the requested remedies;
 - i. An order that the Student is eligible to receive special education and related services through an IEP under the category of other health impairment;
 - ii. Or other equitable remedies, as appropriate.

See, June 21, 2011, Prehearing Order.

FINDINGS OF FACT

Stipulations at Hearing

1. During the due process hearing, the parties entered into two stipulations, and the undersigned finds as facts, that: the Student has a condition that places her at risk of aspiration at any time, thereby endangering the Student's safety; and the District appropriately evaluated the Student's expressive and receptive language skills, those skills are within normal limits, and no further speech-language services are recommended for those skills.

General Background

2. The Student was determined eligible to receive early intervention services under Part C of the Individuals with Disabilities Education Act (IDEA) on November 4, 2008, when she was approximately two months old. Exhibit D2, p. 11. The services have been, and continue to be, provided through Sherwood Community Services' ExCel Program, and include speech and occupational therapy services. Exhibit D16. The Student also receives feeding and physical therapy services from other private agencies.

3. The Parent was aware the Student would have to be evaluated to determine her eligibility to transition to services under Part B of IDEA once she turned three years old.

4. Although the Student would not turn three years old until September 2011, the Parent first contacted the District during May 2010, because she was concerned that the complexity of the Student's medical conditions would require additional time to evaluate. The Parent wanted to provide the District with as much information as soon as possible.

5. The District requested copies of medical records for the Student from Providence Physicians Group Mill Creek Pediatrics. Medical records from Providence Physicians Group were mailed to Joyce Scott for the District on August 10, 2010. Exhibit P10. The Parent also mailed copies of the Student's medical records to the District on August 12, 2010. Exhibit P30.

6. The Parent met with Joyce Scott, District special services director, on October 15, 2010, to discuss the Student's evaluation and transition from Part C to Part B services.⁴ At that time, Ms. Scott "skimmed" through the Student's medical records provided by the Parent.

7. On October 28, 2010, the Student's Individualized Family Service Plan (IFSP), under which the Student received Part C services, was annually reviewed and revised. Exhibit D2.

The Student's Medical Conditions

8. The Student's pediatrician is Dr. Celia Dastvan. Dr. Dastvan has provided care and treatment for the Student since at least October 2008, when the Student was approximately one month old. Exhibit P24, p. 3.

9. The Student has many medical conditions and symptoms, but to date her medical providers have been unable to identify any one definitive diagnosis responsible for most or all of her symptoms.

10. The Student has dysphagia, delayed bone growth, short stature, poor muscle tone and poor muscle strength, low vitality, an unspecified respiratory issue and an unspecified neurological issue. Her neurological issue causes the Student's nervous system to always be in a relaxed state, which frequently affects her alertness level to her surroundings. The Student has a feeding or g-tube, and receives all of her fluids and part of her nutrition through her g-tube. She receives three to four bolus feeds and at least twelve 60-milliliter sterile water flushes per day. The Student has had a fundoplication and so cannot burp. She must be vented from her g-tube every thirty minutes to prevent excess gas buildup. Exhibit P4, p.1.

11. The Student requires about three to four g-tube interventions per hour while in school, which will require up to thirty minutes or more per day of time when she will have to be removed from a classroom. The Student requires at least thirty minutes for each snack and up to one hour for a meal due to the requirements of her g-tube and limitations from dysphagia. In addition, she will have to be removed from a classroom for any nebulizer treatment or suctioning. Exhibit P4, p. 2.

12. The Student's dysphagia and g-tube feedings require any individual feeding the Student to receive specialized training before feeding the Student or administering water flushes. Exhibit P5, pp. 2-4.

13. Due to the Student's delayed bone growth and resulting short stature, many sinks, chairs, and tables in a classroom would not be a size appropriate for the Student. The Student is physically incapable of sitting, standing, or playing for extended periods of time without having to rest or change position, making participation in activities extremely difficult without assistance. Exhibit P4, p. 3.

⁴ There may have been additional District staff present at the October 15, 2010, meeting, but, if so, their identities are not clear from the record.

14. The Student has a weakened or compromised immune system, making her prone to infections such as flu or common colds. Precautions must be taken by anyone working with the Student, including hand washing on an hourly basis. Anyone with a cough or other symptom of illness must not work with the Student until they are symptom free for 48 hours. Exhibit P5, p. 1. Once ill, the Student requires more time than is typical to recover. Exhibit P4, p. 3.

15. The Student's balance is also compromised by her medical conditions. She must have a one-to-one aide within arm's length of her at all times while walking or on any playground. The Student requires a registered nurse to ride with her on any school bus. Exhibit P5, p. 2.

16. The Student's medical symptoms cause her to fatigue easily. During physical therapy and occupational therapy sessions the Student can begin to fatigue anytime after 10-15 minutes, while at other times the Student is able to participate in therapy for up to 30 minutes before fatiguing. When the Student becomes fatigued, her balance is further compromised, her risk of aspiration increases, her attention span decreases and she tends to exhibit task-avoidance behaviors, although she can easily be redirected.

17. In December 2010, Dr. Dastvan remarked in the Student's medical records that she "should be in a regular class for preschool as [she] is not developmentally delayed." Exhibit P8, p.

Evaluation of Student

18. The Parent met with Ms. Scott, Jim Roan, District school psychologist, and Richard Krieder, District speech-language pathologist (SLP), on January 5, 2011. The Parent gave the District a letter from Dr. Dastvan. Exhibit P5. After discussion, it was agreed that the Student's private feeding therapist would continue to provide feeding services to the Student until such time as Mr. Krieder could get additional training. No final decision was reached on who would provide the Student feeding services if she were eventually determined eligible for Part B services and started attending the District's developmental preschool when she turned three years old.

19. On February 17, 2011, the District mailed a Meeting Notice and Invitation to the Parent, inviting her to attend a transition planning meeting on March 1, 2011. Exhibit D3.

20. The Parent met with the District's Professional Evaluation Group (PEG) on March 1, 2011. The PEG is a group of District staff and professionals charged with evaluating students for eligibility under the IDEA.

21. Concerned she might not agree with any plan the District would propose to evaluate the Student, the Parent completed a Due Process Hearing Request form and delivered it to Dennis Haddock on March 1, 2011, prior to the PEG meeting that same day. Exhibits D1, D4, p. 2.

22. The PEG reviewed the Student's then current program at Sherwood ExCel, and the private physical therapy and occupational therapy services the Student received. The Parent requested additional testing for the Student's feeding, swallowing and adaptive skills. The Parent also requested academic testing of the Student even though she did not have any concerns regarding the Student's academic skills. The Parent wanted academic testing merely to establish a baseline

for later comparison to help determine if the Student's health/social issues were impacting her academic progress. Exhibit D4, pp. 1-2.

23. Based on the information known to the Parent and the PEG as of March 1, 2011, the meeting included discussion of whether the Student might not qualify for Part B services under the category of developmental delay. The Parent requested the PEG consider the category of other health impairment for the Student. The District requested the Parent provide it with a diagnosis or written explanation from the Student's doctor, stating how the Student's health conditions might impact her academic progress. Exhibit D4, p. 1.

24. The PEG and the Parent agreed the Student's evaluation would consist of the following. Staff at Sherwood ExCel familiar with the Student would evaluate her using the Developmental Assessment of Young Children (DAYC). The Student's private physical therapist, Lisa Burns, would evaluate the Student's motor skills using the Peabody Developmental Motor Skills-2 (PDMS-2), with the District's occupational therapist, Kathryn Nagorka, observing. Mr. Kreider would evaluate the Student's receptive and expressive communication skills using either the Preschool Language Scale-4 (PLS-4) or the Clinical Evaluation of Language Fundamentals-Preschool (CELF-Preschool). Exhibit D4, pp. 1-2.

25. After the PEG team, including the Parent, identified the plan to evaluate the Student, the Parent told the team it could disregard the Due Process Hearing Request form she delivered to Ms. Haddock earlier that day. Exhibit D4, p. 2.

26. Mr. Kreider also observed the Student at her feeding group at Sherwood ExCel on March 24, 2011, and observed her with her private swallowing therapist on May 5, 2011.

27. Staff familiar with the Student at Sherwood ExCel evaluated the Student using the DAYC on May 3, 2011. The DAYC produces more accurate results when administered by qualified individuals who are familiar with the child. Accordingly, the staff at Sherwood ExCel were more likely than not the most qualified individuals to evaluate the Student using the DAYC. The DAYC is a standardized and widely-accepted tool to assess the development of young children. The Student was evaluated using the DAYC in five areas of development: cognitive, communication, social-emotional, physical and adaptive. The Student's scores in all five areas were within normal limits for children the student's age. Exhibits D16 - 17.

28. Although still within normal limits for children her age, the Student's score on the adaptive section of the DAYC was her lowest score. Barbara Sifferman, OT, is employed by Sherwood ExCel and assessed the Student using the adaptive section of the DAYC. Ms. Sifferman has provided OT services for the Student focusing on swallowing, feeding and gross motor skills since she began receiving services at Sherwood ExCel, and is very familiar with the Student. Ms. Sifferman scored the Student a "0" for feeding because, although she can place food in her mouth, the Student is not able to safely chew and swallow food, or feed herself a meal. Ms. Sifferman opined, and it is found as fact, that the Student's score on the adaptive section of the DAYC is an accurate reflection of the Student's adaptive development.

29. Mr. Krieder assessed the Student's receptive and expressive communication and speech production skills on May 9 and 10, 2011. Exhibit D7. The assessment by Mr. Kreider to some extent duplicated or replicated the assessment of the Student's communication skills using the DAYC. This was in direct response to the Parent's request at the March 1, 2011, PEG meeting.

30. Mr. Kreider used the PLS-4 and the Goldman Fristoe Test of Articulation to assess the Student's communication and speech production skills. The Student scored in the high average range on both tests. Exhibit D7.

31. Ms. Burns, the Student's private physical therapist, assessed the Student's motor skills or abilities on May 2, 2011, using the PDMS-2, a standardized test composed of six subtests that measure interrelated motor abilities in children from birth through six years of age. Exhibit D15, p. 1. Based on the PDMS-2 results, the Student demonstrated below average to mid-average gross motor skill acquisition and mid-average fine motor skill acquisition when compared to age-matched peers. Exhibit D15, p. 2. Ms. Burns agrees that the Student's scores on the PDMS-2 do not qualify her for Part B IDEA services under the developmental delay category.

32. On April 29, 2011, the District mailed a Meeting Notice and Invitation to the Parent, inviting her to attend a meeting on May 17, 2011, to review the Student's test results and discuss eligibility for Part B services. Exhibit D5.

33. The Parent and the PEG team met on May 17, 2011. Results of the DAYC, PDMS-2, PLS-4, and Goldman Fristoe were discussed. The Student's medical records were considered, including information about the Student's g-tube, swallowing and feeding problems, the latest swallow study for the Student from November 2010 (Exhibit D10), and the letters from Dr. Dastvan. Although the PEG recognized the Student has significant medical problems, it determined the resulting physical limitations were not impacting the Student academically and she did not require specially designed instruction. The PEG considered the Student's physical limitations and determined they could be addressed with a 504 Plan, setting out the accommodations the Student would require in school. These accommodations would include excusing absences due to health reasons, the need to stand and move around in class instead of being required to sit for long periods, a footstool so her feet would not dangle while sitting, breaks when needed due to fatigue, and a modified chair or desk. Exhibit D4.

34. After the PEG discussion, the group members, including the Parent, signed and dated an Evaluation Report Signature Page. Exhibit D8, p. 5.

35. The Parent filed a Due Process Hearing Request on May 17, 2011.

36. Sometime after the PEG meeting on May 17, 2011, Jim Roan, District school psychologist, wrote an Evaluation Report, attached the signature page previously signed by the PEG members, and sent a copy of the report and signature page to the Parent. Exhibit D8.

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The Parents' Opinion Evidence

37. Three individuals opined the Student is eligible to receive Part B IDEA services under the category of other health impairment. Each of the individual opinions shall be discussed separately.

38. After setting out the Student's medical conditions and resulting limitations, Dr. Dastvan wrote:

[The Student] is qualified for an IEP under other health impairment and should be enrolled in the developmental preschool to keep her from falling drastically behind. The law clearly states, it is the school districts [sic] responsibility to recognize and identify the long term effects this will have throughout her academic life and to do anything within their power to prevent this travesty from occurring.

Exhibit P4, p. 4, March 1, 2011, letter.

39. Dr. Dastvan did not appear at hearing to offer any testimony. While Dr. Dastvan is qualified to provide a medical opinion regarding the Student's medical diagnoses or conditions and the resulting physical or other limitations, there is absolutely no evidence of record to find Dr. Dastvan has the education, training, or experience to offer an opinion how any such limitations would impact the Student's education. There is no evidence of record upon which to find Dr. Dastvan has any education, training or experience in IDEA eligibility or special education law. There is no evidence of record to find Dr. Dastvan has any familiarity with early childhood education. Further, the tenor of Dr. Dastvan's letter reflects a tone of advocacy rather than medical objectivity. For all these reasons, Dr. Dastvan's opinion the Student qualifies for an IEP is given little weight.

40. Lisa Burns, the Student's private PT, wrote a letter dated March 28, 2011, in which she states:

[The Student's] developmental and health issues will likely require her to miss a fair amount of school time and her time in school will be more challenging for her to engage with her peers and keep up with age appropriate learning activities. [The Student] qualifies for an IEP under other impairment and her school environment should be appropriately modified to meet her needs.

Exhibit P6.

41. Ms. Burns appeared at hearing and offered testimony under oath. Her observations of the Student and opinion regarding the Student's fatigue have already been incorporated in the above Findings of Fact. Ms. Burns has never worked in a school setting. Ms. Burns admitted to knowing "very little" about qualifying for special education, stating she believes special education is for children who require accommodations or changes in the school environment. Ms. Burns wrote the March 28th letter at the Parent's request, and understood the purpose of the letter was to get the Student on an IEP so she could safely participate in school. Ms. Burns was not asked to opine if the Student qualified for special education. The basis for Ms. Burns statement the Student qualifies for an IEP was a discussion or communication with her colleague, Sandra Kaminski. For all these reasons, the opinion of Ms. Burns that the Student qualifies for an IEP is given little weight.

42. Sandra Kaminski is the Student's current treating OT. In a letter signed March 31, 2011, Ms. Kaminski summarily describes the Student's health issues and motor delays, and then states:

These issues will adversely impact her education... She fatigues very quickly and she will require many modifications in her school day to keep up with her peers... [The Student] will need extra time to eat which will impact her school day and her participation in school activities... [The Student's] health issues will impact her ability to engage in age appropriate play and most likely she will miss much time in school. [The Student] clearly qualifies under Other Health Impaired as her condition causes adverse educational impact.

Exhibit P7.

43. Ms. Kaminski appeared at hearing and offered testimony under oath. Her observations of the Student and opinion regarding the Student's fatigue have already been incorporated in the above Findings of Fact. Ms. Kaminski works for the Mukilteo School District as an OT, and has participated as an evaluation team member for that school district (the equivalent of the District's PEG). She has fourteen years experience providing pediatric OT services. She has provided swallowing, feeding, core-strengthening, and adaptive skills services for the Student since January 2011. Ms. Kaminski wrote her March 31, 2011, letter at the Parent's request. The Parent asked her to write a letter explaining why Ms. Kaminski thought the Student would benefit from an IEP. Ms. Kaminski chose the other health impairment category because she knew the Student would not qualify under developmental delay, and other health impairment is a common eligibility category used when children do not qualify under developmental delay. Ms. Kaminski was not able to clearly articulate the criteria for qualifying under other health impairment. Ms. Kaminski opined the Student requires specially designed instruction with respect to a feeding goal to be addressed by an SLP with support from an OT. After careful consideration, Ms. Kaminski's opinion the Student requires specially designed instruction for a feeding goal is given some weight.

The District's Opinion Evidence

44. A number of District staff appeared at hearing and offered their opinions regarding the Student's eligibility for special education under the other health impairment category with respect to their own area of education, training and experience. The most compelling testimony, however, was provided by Dr. Yvonne Swinth.

45. Dr. Swinth holds post-graduate degrees in rehabilitation medicine and a doctorate from the University of Washington through a joint program between special education and rehabilitation medicine. Dr. Swinth has been a professor in the School of Occupational Therapy at the University of Puget Sound since 2005. She has taught advanced courses in special education under the IDEA. She has been licensed as an occupational therapist in Washington State since 1985. Since 2000, Dr. Swinth has been a member of a national, multidisciplinary Cadre that provides inservices and training on the IDEA. She is the founding editor of the Journal of Occupational Therapy in Schools and Early Intervention: Innovations in Practice, Theory and Research, a quarterly journal. Dr. Swinth has worked with children from as young as newborns on oral-motor and jaw control for nursing, to high school age children with swallowing problems, oral-sensitivity issues and feeding groups. Dr.

Swinth has authored an extensive collection of peer-reviewed research articles. Her curriculum vitae appears at Exhibit D24, pp. 1-30. Based upon her education, training and experience, it is found that Dr. Swinth is the individual most qualified to offer an opinion regarding the effects of the Student's medical conditions and limitations on her educational performance, the Student's eligibility under other health impairment, and any need for specially designed instruction. Dr. Swinth's opinion testimony is given great weight, and is the principal basis for the following Findings of Fact.

46. Dr. Swinth was provided and reviewed the following documents prior to the hearing: Exhibits D2, D7, D8, D10, D11, and D13 through D17.

47. While the Student clearly has very significant medical conditions and resulting limitations, the limitations identified by Dr. Dastvan in her letters (Exhibits P5/D12, P4/D13 and D11) are able to be addressed by accommodations in a school environment. Such accommodations could be included in a 504 Plan for the Student. None of the limitations identified by Dr. Dastvan require the Student to receive specially designed instruction. For example, the Student's fatigue and any resulting loss of time in school in a general education classroom could be accommodated through provision of a home tutor for the Student; it would not require any specially designed instruction in order for the Student to benefit from her education. A 504 Plan could provide the Student with frequent breaks, opportunities to lay down rather than sit at all times, and opportunities to get up and move around a classroom. A specially trained, one-to-one aide is available as an accommodation to insure the Student's safety at school. A 504 Plan could provide the Student with appropriately-sized desks, chairs and other equipment at school.

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 Parents. The Parents therefore have 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 (9th 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 (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).

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. WAC 392-172A-03020⁵ 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;

⁵ See also, 34 CFR § 300.304.

(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.

Failing to Appropriately Evaluate the Student in all Areas of Suspected Disability

7. The Parents asserted the District failed to appropriately evaluate the Student in all areas of suspected disability. The District conducted a comprehensive assessment of the Student's developmental status using the DAYC. This included five areas of development: cognitive, communication, motor, social-emotional, and adaptive. At the Parent's request, the District to some extent duplicated the evaluation by agreeing to have Mr. Kreider assess the Student's receptive and expressive communication and agreeing to have Lisa Burns assess the Student's motor development. The PEG had the most recent statements from the Student's treating pediatrician. Those statements did not suggest or recommend the Student be evaluated further because the pediatrician suspected another area of disability.⁶ The PEG had the latest swallow study, and there is no evidence of record to find any suspicion the Student's swallowing problem had materially changed since that study. In short, the Parents have not presented sufficient credible evidence to establish either the Parents or the District had reason to believe the Student had any other area(s) of suspected disability which required evaluation. It is concluded the District's evaluation was sufficiently comprehensive to identify all of the Student's special education and related services needs, and the District did not deny the Student FAPE by failing to evaluate the Student in all suspected areas of disability.

Failing to use Appropriate Assessment Tools to Evaluate the Student

8. The District used a variety of assessment tools to evaluate the Student, and did not rely on any single measure or assessment as the sole criterion for determining the Student's eligibility. These tools are technically sound instruments and were administered by trained and knowledgeable

⁶ It is clear from the Student's medical records and the pediatrician's letters that it is still unclear if there is one heretofore unidentified medical condition underlying most or all of the Student's symptoms. For purposes of deciding the issues in this matter, it is not necessary to speculate, nor is it a compelling argument that the District should have attempted to evaluate the Student further in an effort to identify any such undiagnosed condition which has eluded her medical professionals for years. Diagnoses or labels, as such, do not drive the eligibility determination so much as a clear evaluation of whatever *limitations* a child has, what *educational impact* those limitations impose on a child, and whether those limitations can only be addressed through *specially designed instruction*. For this Student, it is not the fact she may have some as yet undiagnosed medical condition that is relevant. Rather, it is the nature, extent and severity of her limitations, fatigue, swallowing, feeding, short stature, etc., that must be evaluated and understood to determine if the Student is eligible for special education under Part B.

personnel from the District, Sherwood ExCel and the Student's private service providers. It is concluded the District used appropriate assessment tools to evaluate the Student.

Failing to Include a Diagnosis for the Student in the Evaluation Report

9. The Parents asserted the District's failure to include a diagnosis in the Student's evaluation report denied the Student FAPE. There is no express requirement to include a specific diagnosis in an evaluation report. WAC 392-172A-03035. This is best illustrated with the other health impairment eligibility category. Under other health impairment, there is no requirement to list a specific diagnosis. Rather, it is defined by reference to limited strength, vitality, or alertness. These are not medical diagnoses but functional descriptors. The Parent spent considerable time at hearing on this point, but it is not legally relevant to resolution of the issues. It is concluded the District did not deny the Student FAPE by failing to include a diagnosis in the evaluation report.

10. WAC 392-172A-01035⁷ is applicable and provides in relevant part:

Child with a disability or student eligible for special education.

(1)(a) Child with a disability or as used in this chapter, a student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: Intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional behavioral disability, an orthopedic impairment, autism, traumatic brain injury, an **other health impairment**, a specific learning disability, deaf-blindness, multiple disabilities, or for students, three through eight, a developmental delay and who, because of the disability and **adverse educational impact**, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and **needs special education** and related services.

(b) If it is determined, through an appropriate evaluation, that a student has one of the disabilities identified in subsection (1)(a) of this section, but only needs a related service and not special education, the student is not a student eligible for special education under this chapter. School districts and other public agencies must be aware that they have obligations under other federal and state civil rights laws and rules, including 29 U.S.C. 764, RCW 49.60.030, and 43 U.S.C. 12101 that apply to students who have a disability regardless of the student's eligibility for special education and related services.

...
(j) **Other health impairment means** having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

⁷ See also, 34 CFR § 300.8.

(ii) Adversely affects a student's educational performance.

Emphasis added.

11. WAC 392-172A-01175⁸ is also applicable and provides in relevant part:

(1) **Special education means specially designed instruction**, at no cost to the parents, to meet the unique needs of a student eligible for special education, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.

(3) The terms in this section are defined as follows:

(c) **Specially designed instruction means** adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction:

(i) To address the unique needs of the student that result from the student's disability; and

(ii) To ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students.

Emphasis added.

12. The record in this case is manifestly clear that the Student has multiple and very significant medical conditions, not all of which have yet been adequately diagnosed. It is equally clear these conditions result in very significant limitations for the Student. More than this, however, is needed before the Student can be determined eligible for Part B IDEA services. Reading the above two regulations in conjunction, eligibility for Part B IDEA services requires three elements. First, a child must have a disability in one of the identified eligibility categories. Second, that disability must have an adverse educational impact on the child. And finally, the adverse educational impact must be such that the child has unique needs that cannot be addressed without special education, which means specially designed instruction. If a child has a disability which results in an adverse impact on the child's education, but the child's needs can still be addressed through the use of individual accommodations, that child is not eligible for Part B IDEA services.

Whether the Student Requires Specially Designed Instruction to Receive an Educational Benefit

13. This issue is the third element of the eligibility determination, and is the crux or lynchpin in this case. The record is clear the Student suffers from multiple medical conditions, the symptoms of which limit her strength, vitality and alertness. It is clear these symptoms would have an adverse impact on the Student's educational performance. Based upon the best evidence of record, however, it is equally clear the adverse educational impact of these symptoms can be addressed through the use of extensive accommodations, and therefore the Student does not need special

⁸ See also, 34 CFR § 300.39.

education. The best evidence of record by far was the testimony of Dr. Swinth. Dr. Swinth has the education, training, and experience to provide the type of expert opinion connecting the Student's symptoms and limitations to an appropriate accommodation. Dr. Swinth reviewed the most relevant records, in particular the statements of Dr. Dastvan, Lisa Burns, and Sandra Kaminski, and the results of the District's evaluation. Dr. Swinth's analysis and explanations of what kind of accommodations would address the Student's limitations was thoughtful and compelling. The opposing evidence presented by the Parents was deficient in one more or respects for all three of the individuals who opined the Student was eligible for an IEP or special education. Dr. Dastvan did not appear, and there is just no evidence to find she has any qualifications to determine the *educational implications* of the *medical* conditions and limitations about which she is qualified to offer an opinion. In short, a medical doctor cannot prescribe special education. The IDEA requires a full review by an evaluation team. *Marshall Joint Sch. Dist. No. 2 v. C.D. by Brian and Traci D.*, 54 IDELR 307, 110 LRP 44405 (7th Cir. 2010). The opinion of Ms. Burns does not warrant any significant weight, and that of Ms. Kaminski warrants little more for the all the reasons already discussed. It is concluded that the adverse educational impact of the Student's medical conditions, symptoms and resulting limitations can be addressed through the use of extensive accommodations in a general education class, and therefore the Student does not require specially designed instruction.

Failing to Determine the Student is Eligible for Special Education Under Other Health Impairment⁹

14. As discussed above, a child must satisfy all three elements of the definition of a "child with a disability or student eligible for special education" in order to be eligible for special education. The Student in this case meets the first two elements of the definition, but does not require special education or specially designed instruction to address the adverse educational effects of her disabilities. It is concluded the District did not deny the Student FAPE when it determined she was not eligible for special education under the other health impairment category.

15. 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.

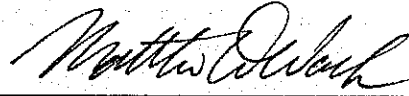
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⁹ Resolution of this issue, Issue a(iv) from the statement of the Issues herein, is legally equivalent to resolution of Issue c. As such, resolution of Issue a(iv) and Issue c are combined in this Conclusion of Law.

ORDER

1. The Lakewood School District has not denied the Student a free appropriate public education.
2. The Student is not eligible for special education under Part B of the IDEA.
3. The remedies requested by the Parents are denied.

Signed at Seattle, Washington on August 19, 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.

