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OFFICE OF ADMINISTRATIVE HEARINGS

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May 14, 2016

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In re: **Seattle School District**  
**OSPI Cause No. 2015-SE-0018**  
**OAH Docket No. 03-2016-OSPI-00023**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matters. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

MATTHEW D. WACKER  
Administrative Law Judge

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

MAILED

MAY 14 2016

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

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

OSPI CAUSE NO. 2015-SE-0018

OAH DOCKET NO. 03-2015-OSPI-00023

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

A due process hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Seattle, Washington, on March 1-4, 10, 16, and 18, 2016. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Howard C. Powers, attorney at law. The Seattle School District (the District) was represented by David T. Hokit, attorney at law. Also present intermittently for the District was Teresa Swanson, special education supervisor, or Andrea Schiers, assistant general counsel. The following is hereby entered:

**STATEMENT OF THE CASE**

*Procedural History*

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on March 2, 2015. The Complaint was assigned Cause No. 2015-SE-0018, and forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. On March 4, 2015 the Complaint was assigned OAH Docket No. 03-2015-OSPI-00023, and ALJ Michelle C. Mentzer was assigned as the presiding ALJ pursuant to a Scheduling Notice entered the same day.

The District filed its Response to the Complaint on March 12, 2015. The Parties executed a written waiver of the resolution meeting on March 12, 2015. The waiver was received at OAH on March 16, 2015. A prehearing conference was held before ALJ Mentzer on April 3, 2015. ALJ Mentzer entered her First Prehearing Order on April 6, 2015. A second prehearing conference was held before ALJ Mentzer on April 22, 2015. ALJ Mentzer entered her Second Prehearing Order on April 23, 2015. The Complaint was reassigned to ALJ Matthew D. Wacker pursuant to a Notice of Reassignment of Administrative Law Judge entered May 27, 2015.

The Parents filed an amendment of the Complaint on September 3, 2015. The District filed its Response to the Amended Complaint on September 21, 2015. The parties executed a written waiver of the resolution meeting regarding the Parents' Amended Complaint on

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

September 25, 2015. Prehearing conferences were held before ALJ Wacker on September 11, 18, and 25, 2015. ALJ Wacker entered the Third Prehearing Order on December 10, 2015.

#### *Decision Due Date*

On the last day of the due process hearing, the Parents moved to extend the due date for a written decision in the above matter to the close of record plus thirty (30) calendar days. The motion was granted. The parties also agreed to file written closing arguments by April 15, 2016. The record closes with the filing of written closing arguments. Thirty calendar days from April 15, 2016, is May 15, 2016. Therefore, the due date for a written decision in the above matter is **MAY 15, 2016**.

#### **EVIDENCE RELIED UPON**

Parents' Proposed Exhibit P35: On the last day of the due process hearing during the Mother's rebuttal testimony, the Parents offered proposed Exhibit P35; a copy of a draft reevaluation report dated June 8, 2015, prepared by District School Psychologist Ashley Burchett. This draft reevaluation report was identified by Parents' counsel as the draft presented to the Student's reevaluation team for consideration during the reevaluation meeting on June 8, 2015. The District objected to its admission, citing Washington Administrative Code (WAC) 392-172A-05100(1)(c), which provides that any party to a due process hearing has the right to prohibit the introduction of any evidence at hearing that has not been disclosed to that party at least five business days before the hearing.

The Parents argue that: 1) It was offered for the purpose of rebuttal evidence; 2) It had already been used to refresh the recollection of Ms. Burchett during her testimony; 3) It was a document created by the District and therefore there is no prejudice to the District if admitted; and 4) Based upon the District's prehearing stipulation of liability,<sup>2</sup> the Parents could not have anticipated it would be necessary to offer it at hearing. In light of the express language in WAC 392-172A-05100(1)(c), only the Parents' last argument merits consideration. Were there any evidence to suggest the timing of the District's notice to the Parents that it was not going to contest liability for some issues was intended to deceive the Parents or gain a tactical advantage at hearing, the undersigned would seriously consider admitting the Parents' proposed exhibit despite the clear language in the regulation. But there is no such evidence. Furthermore, there appears to be no prejudice to the Parents by excluding the proposed exhibit. The proposed exhibit was used to refresh Ms. Burchett's recollection during her testimony. Parents' counsel examined Ms. Burchett about the contents of the proposed exhibit. Her testimony regarding the proposed exhibit was included in the excerpts of the hearing transcript. Those excerpts have been carefully reviewed and considered. Accordingly, in light of the so-called five-day rule in WAC 302-172A-05100(1)(c), the District's objection is sustained, and proposed Exhibit P35 is excluded.

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<sup>2</sup> See the discussion of the District's stipulation of liability in the Issues and Remedies section, below.

The following exhibits were admitted into evidence:

Parents' Exhibits: P1-P4; P6-P32; and P36<sup>3</sup>.

District Exhibits: D1-D8; D9, pages 1 through 40;<sup>4</sup> and D10-D19.

The following witnesses testified under oath. They are listed in order of their appearance:

Rina Marie Leon-Guerrero, Ph.D, BCBA-D;  
Erin Milhem, Psy.D., clinical psychologist;  
The Mother of the Student;  
Alison Moors Lipshin, M.Ed. Psychology, clinical director, Academy for Precision Learning;  
Allison Brooks, Ph.D., clinical psychologist;  
The Father of the Student;  
Ashley Burchett, M.Ed. Counselling/Human Services, District school psychologist team lead; and,  
Catherine Cook, M.Ed. Special Education, District special education program specialist.

The Parties also entered into the following stipulation for the record of the due process hearing:

To facilitate scheduling of the hearing in this matter, the parties stipulate that the District will not present testimony from the District Occupational Therapist, Physical Therapist or Speech-Language Pathologist, and the Parents do not contest the appropriateness of the District's reevaluation or IEP with respect to proposed programming and services proved by specialists in these areas. (Executed by counsel on March 18, 2016)

## STATEMENT OF ISSUES and REMEDIES

### *The District's Stipulation of Liability*

The Third Prehearing Order in the above matter was entered on December 10, 2015. That order set forth the Amended Statement of Issues and Remedies for the due process hearing. In correspondence to Parents' counsel on February 19, 2016, District counsel stated in part:

If this matter proceeds to hearing, the District is not going to contest liability for claims prior to the [Individualized Education Program] IEP it proposed for the 2015-2016 school year. It will defend against all claims *related to* the program and placement it proposed for that

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<sup>3</sup> Exhibit P36 was submitted post-hearing by agreement of the parties. It updates and replaces proposed Exhibit P5, which was withdrawn by the Parents at hearing. Exhibit P36 was prepared by the Parents post-hearing and then reviewed by District counsel. The District does not object to its admission. Exhibit P36 is admitted for the truth of the matters asserted therein, not merely as a demonstrative exhibit.

<sup>4</sup> The District offered proposed Exhibit D9p41 at hearing on March 10, 2016. The Parents objected, the objection was sustained, and proposed Exhibit D9p41 was excluded.

year, and for prospective relief. I am informing you of that now so that you can adjust your preparation for hearing accordingly.

Emphasis added.

District counsel followed that correspondence with an email to Parents' counsel on February 29, 2016, the day prior to commencement of the due process hearing, stating in part:

I want to make sure my letter of Feb 19<sup>th</sup> was clear regarding which claims the District will contest liability and which not (sic). As I indicated, the District will contest liability regarding the 2015-2016 IEP, and as part of defending that IEP it will also be defending the appropriateness of the 2015 reevaluation that immediately preceded it. Let me know if you have any questions about that.

Parents' counsel responded by email the same day, stating in part:

Your letter of February 19...does not indicate that the District would defend against claims related to the reevaluation, a final version of which was sent to the parents substantially before the IEP was proposed in mid-August. We have prepared for the hearing accordingly, so we will need to resolve this tomorrow.

Counsel for the parties and the ALJ discussed the District's stipulation on March 1, 2016, the first day of hearing, to clearly determine the effect of the stipulation on the issues for hearing and the necessity of making an evidentiary record. Counsel for the District confirmed that even though the Parents bear the burden of proof to present sufficient credible evidence establishing facts supporting violations of the Individuals with Disabilities Education Act (IDEA), by stipulating it would not contest liability for claims prior to the IEP proposed for the 2015-2016 school year, there is no need to develop an evidentiary record regarding those issues.<sup>5</sup> Accordingly, this Final Order will not include detailed findings fact regarding the issues to which the District has stipulated it will not contest liability.<sup>6</sup>

The Parents argued that the express language of the District's stipulation precludes the District from contesting the appropriateness of its 2015 reevaluation of the Student because the reevaluation was completed prior to the IEP it proposed for the 2015-2016 school year. The District argued that the appropriateness of the reevaluation is "related to" the issue of whether the IEP proposed for the 2015-2016 school year is appropriate. The undersigned agrees with the District. It is difficult to conceive how a district could defend the appropriateness of an IEP while stipulating that the underlying reevaluation is not appropriate. It is concluded that the appropriateness of the proposed IEP is an issue inextricably related to the appropriateness of the 2015 reevaluation of the Student.

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<sup>5</sup> This is construed as legally equivalent to the District stipulating that the violations of the Individuals with Disabilities Education Act (IDEA) asserted by the Parents are in fact true and correct, and that those violations warrant the associated remedies requested by the Parents in their Amended Complaint.

<sup>6</sup> While evidence was presented at hearing regarding periods of time and issues that are no longer contested by the District, the evidence was heard for the purpose of providing relevant and material background for the issues remaining for adjudication.

Finally, the District argues that the issue of whether it denied the Student a free appropriate public education (FAPE) because it failed to consider the results of an independent educational evaluation (IEE) of the Student performed by Allison Brooks, Ph.D., is not included in the scope of its stipulation, and therefore remains an issue for adjudication. The difficulty in determining whether this remains an issue for adjudication in light of the District's stipulation lies in the less-than-precise wording of the Amended Statement of Issues and Remedies. That statement does not specify with respect to what action or legal duty the District failed to consider the IEE. The IEE was conducted over multiple days in June 2014. Therefore it could not be a failure to consider the IEE with respect to any action or legal duty prior to June 2014. As best can be determined from the record, there was no reevaluation or IEP developed for the Student between June 2014 and the 2015 reevaluation of the Student. A conservative interpretation of the language in the Amended Statement leads to the conclusion that it is the asserted failure of the District to consider the results of the IEE *with respect to the 2015 reevaluation* that was raised by the Parents. This is clearly an issue related to the appropriateness of that 2015 reevaluation. It is concluded that the issue of whether the District failed to consider Dr. Brook's IEE with respect to the 2015 reevaluation of the Student remains an issue for adjudication.

Accordingly, the Amended Statement of Issues and Remedies for adjudication is as follows:<sup>7</sup>

**1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:**

- a. **Failing to consider the results of an independent educational evaluation (IEE) performed by Alison Brooks, Ph.D., as part of the District's 2015 reevaluation of the Student.**<sup>8</sup>
- b. Failing to amend the District's June 2012 reevaluation of the Student to incorporate information later received from evaluations by Dr. Brooks and by Erin Milhem, Psy.D., thereby rendering the District's reevaluation inappropriate;
- c. Adopting an individualized education program (IEP) for the Student in September 2013 that was inappropriate in that it:
  - (1) Failed to identify all respects in which the Student's disability adversely affected his education, including his involvement and progress in the general education curriculum;
  - (2) Failed to include annual goals to (a) adequately address all respects in which his disability adversely affected his education, including his involvement and progress in the general education curriculum, or (b) require measurement or mastery of all skills the Student needed to improve;

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<sup>7</sup> The entire issue statement from the Third Prehearing Order is reproduced here. For clarity, the issues and remedies still to be adjudicated following the District's stipulation appear in **bold font**. All other issues and remedies that have been resolved by the District's stipulation appear in standard font.

<sup>8</sup> This clause is added to the issue statement given the above conclusions on the effect of the District's stipulation.

- (3) Failed to include a qualified expert in Autism Spectrum Disorder (ASD) as part of the Student's program, including ongoing staff training and supervision as a support for school personnel;
  - (4) Failed to include all program modifications and services to enable the Student to be involved in and progress in the general education curriculum, to be educated in the general education environment with students who are nondisabled to the maximum extent appropriate, or to attain his annual goals;
  - (5) Failed to include all services and equipment to address the Student's need for assistive technology and his sensory/motor difficulties;
  - (6) Failed to include an appropriate Functional Behavioral Assessment (FBA) and Behavior Intervention Plan (BIP);
  - (7) Failed to revise or amend the IEP (including the FBA and BIP) after initial adoption to appropriately address the above deficiencies as the need for them became even more apparent;
- d. Adopting an inappropriate functional behavioral assessment and behavior intervention plan in November 2013;
  - e. Failing to provide the Student with an appropriate education during the 2013-2014 school year due to a failure to appropriately reevaluate him, develop an IEP for him, or implement his IEP;
  - f. Failing to timely propose a successor to the September 2013 IEP by its annual review date and until August 14, 2015;
  - g. Adopting a reevaluation for the Student on or about July 3, 2015, that was inappropriate in that it:
    - (1) Failed to appropriately identify the effect of the Student's disability on his involvement and progress in the general education curriculum;
    - (2) Failed to make appropriate recommendations to the IEP committee with respect to:
      - (a) The special education services, including specially designed instruction, the Student needs;
      - (b) The related services the Student needs;
      - (c) Other information, as determined through the evaluation process and parental input, needed to develop an IEP, including program accommodations and modifications, supports and supplementary aids and services;
  - h. Adopting an IEP for the Student on or about August 14, 2015, that is inappropriate in that it:
    - (1) Failed to properly identify or address all of the Parents' concerns for enhancing the Student's education;
    - (2) Failed to properly identify all appropriate positive behavioral interventions, strategies, and supports needed to address the Student's behavior;
    - (3) Failed to properly state all of the Student's presents levels of performance and all respects in which his disability adversely affects his education, including his involvement and progress in the general education curriculum;

- (4) Contains some annuals goals with deficient baseline levels of performance, target performance levels, and mastery criteria;
  - (5) Failed to include all program modifications and services to enable the Student to be involved in and progress in the general education curriculum, to be educated in the general education environment with students who are nondisabled to the maximum extent appropriate, or to attain his annual goals;
  - (6) Failed to include an appropriate plan for staff training and supervision as a support for school personnel, including assurance of involvement by a Board Certified Behavior Analyst or equivalent;
  - (7) Included a Functional Behavioral Assessment (FBA) and Behavior Intervention Plan (BIP) that are in some respects deficient and would be unnecessary if the Student continued to attend the Academy for Precision Learning (APL);
- i. Proposing to place the Student at Salmon Bay K-8 School for the 2015-2016 school year instead of at APL, a proposal which is inappropriate in that:
    - (1) The Student cannot attend a District school beneficially or without a high risk of harm, due to anxiety resulting largely from his previous experience at Schmitz Park Elementary;
    - (2) APL, not Salmon Bay, is able to meet all of the considerations in selecting the Student's placement set forth in WAC 392-172A-02060(2);
    - (3) APL is located closer to the Student's home than Salmon Bay;
    - (4) The District improperly rejected placement at APL on the basis that academic benefit cannot be satisfactorily achieved there. Absent any indication of this view in the District's reevaluation or IEP and any discussion of this in which the Parents participated, the Parents were denied full participation in the placement decision;
2. Whether the services provided by the following private providers were appropriate for the Student: Yellow Wood Academy; Dr. Milhem; Ryther Aspiring Youth Program; and David Gillum;
3. Whether the Academy for Precision Learning (APL) is an appropriate placement for the Student;
4. Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate:
- a. As remedies for a denial of FAPE during the 2013-2014 school year, reimbursement of costs, including tuition and fees paid to:
    - (1) Yellow Wood Academy for instruction in language arts and math (March through July 2014) and in executive functioning (August 2014 through June 2015);
    - (2) David Gillum for paraprofessional assistance from mid-February through July 2014;
    - (3) Dr. Milhem for psychological counseling from January through September 2014;
    - (4) Pacific Science Center (or suitable alternative programing) for science instruction during summer 2015;
    - (5) Aspiring Youth Program (or suitable alternative programing) for social skills practice and instruction during summers of 2014 and 2015; and



- (6) Transportation costs to and from the programming and services set forth in this paragraph;
- b. **As remedies for a denial of FAPE during the 2014-2015 and 2015-2016 school years:**
- (1) **Development of an IEP that remedies the deficiencies alleged in the Parents' Amended Complaint;**
  - (2) **Placement of the Student at APL and reimbursement to the Parents for APL's costs through the date of the ALJ's order;**
  - (3) **Payment for the Student to continue counseling with Dr. Milhem, as set forth in the District's August 14, 2015, proposed IEP, and reimbursement for Dr. Milhem's counseling costs incurred through the date of the order;**
  - (4) **Provision of an assistive technology assessment as recommended in Dr. Brooks' IEE;**
  - (5) **Provision at APL of occupational therapy services as set forth in the District's August 14, 2015, proposed IEP;**
  - (6) **Payment of transportation costs to and from the programming and services set forth in this paragraph and reimbursement of costs incurred through the date of the order; and**
  - (7) **Reimbursement for the unpaid portion of Dr. Brooks' IEE.**

## FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. In addition, a more detailed analysis of credibility and weight of the evidence may be discussed regarding specific critical facts at issue.

### *General Background*

1. Although the timing of events is not entirely clear from the record, the Student was seen by a pediatrician as a preschooler. The pediatrician thought the Student might have an autism spectrum disorder (ASD). The Student was subsequently determined eligible to receive services, presumably under Part C of the IDEA, when he was almost 4 years old. Exhibit P16p6;<sup>9</sup> Testimony of Mother.<sup>10</sup>

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<sup>9</sup> References to the exhibits are by exhibit number and page number. Exhibit P16p6 is a reference to Parents' Exhibit P16 at page 6.

<sup>10</sup> Only a partial transcript of the due process hearing was available for review and preparation of this Final Order. Citation to witness testimony that is not included in the partial transcript will be identified as "Testimony of [witness name]". If the witness testimony appears in the partial transcript it will be identified as "Witness name T\_" where the transcript page number appears after "T".

2. Rina Marie Leon-Guerrero holds a Ph.D. in Early Childhood Special Education from the University of Washington, and is a Board Certified Behavior Analyst at the doctorate level (BCBA-D). She is a former special education classroom teacher, with over twenty years' experience involving children eligible for special education. From 2005 to 2008, she was the project coordinator for professional development at the University of Washington Autism Center. Since 2006, she has maintained a private practice as a behavioral therapist and educational consultant through her company, PEERS Play. Dr. Leon-Guerrero has worked with school districts, including Seattle Public Schools, providing teacher training, creating ASD programs, and reviewing IEPs. Exhibit P4; Testimony of Leon-Guerrero.

3. Dr. Leon-Guerrero began working with the Student at PEERS Play in a social-skills group when he was approximately three years old. She continues to work with the Student through the present time, seeing him once per month. Exhibit P16p6; Testimony of Leon-Guerrero.

4. The Student had a psychological diagnostic evaluation at the University of Washington CARE Clinic during the summer of 2010 when he was almost six years old. The Student was diagnosed with Asperger's Disorder. The Student was determined to be in the above-average to superior range for cognitive and academic performance. Given his profile of exceptional cognitive abilities along with areas of weakness, the Student was identified as "twice exceptional." Twice exceptional children have exceptional cognitive capabilities, but also demonstrate areas of deficit. The evaluation determined that the Student was at risk for depression, and had clinically significant difficulties in the areas of aggression and anxiety. The evaluation's recommendations noted that the Student's teacher would need to develop ways to intellectually stimulate him in the classroom, as he would likely move through academic material at a faster rate than his peers. Exhibit P6pp6-7.

#### *Schmitz Park Elementary School*

5. The Student began attending school in the District during November 2010 in kindergarten at Schmitz Park Elementary School (Schmitz Park). Exhibit P16p6. He continued attending school at Schmitz Park through February 6, 2014.

6. Over the course of third grade (the 2013-2014 school year), the Student began experiencing increasing levels of anxiety and emotional dysregulation. This was observed by the Parents, Dr. Leon-Guerrero, and Dr. Erin Milhem. At that time, the Parents became concerned over reports that the Student was being bullied at school. However, at the same time the Student became the subject of harassment, intimidation, and bullying (HIB) complaints at Schmitz Park. There was one female student in the Student's third-grade classroom with whom the Student had multiple interactions, leading to HIB complaints against the Student. See Exhibits P8 and P10.

7. Erin Milhem holds a Psy.D. in psychology from Antioch University with a concentration in child and family therapy, and is a licensed clinical psychologist. The focus of her professional work is twice exceptional children. Dr. Milhem began her training in ASD at the Autism Spectrum Treatment and Research (ASTAR) Center, and then moved on to the University of Washington CARE Clinic. She has maintained a private practice since July 2013. Dr. Milhem also works with school districts, including Seattle Public Schools, providing IEEs, consulting with

IEP teams about how to provide direct services to students and how to develop behavioral intervention plans (BIPs). Exhibit P1; Milhem T2-4, T67.

8. Dr. Milhem first met the Student while she was working at the CARE Clinic. After the CARE Clinic closed, she continued to see the Student in her private practice beginning in July 2013. She initially saw the Student once every other week, but then increased her treatment of the Student to once every a week during November 2013, due to the Student's increasing emotional dysregulation and anxiety at home and at school. Dr. Milhem continues to see the Student for cognitive behavior therapy once a week through the present time. The focus of her therapy with the Student is to provide him with strategies to regulate his emotions and manage his general anxiety about returning to school in the District. The Student has problems with transitions related to his anxiety and cognitive inflexibility. And while he has superior reasoning skills, the Student continues to exhibit social-emotional and executive functioning deficits.

9. After a series of HIB complaints against the Student, Schmitz Park developed a Targeted Student Support Plan for the Student on January 10, 2014. Exhibit P11. The Parents offered their input for a BIP to support the Student on February 2, 2014. Exhibit P12. The District in turn scheduled a behavioral intervention meeting for February 10, 2014. Exhibit P13.

10. After another incident with the same third-grade female classmate on February 6, 2014, the parents of the female classmate obtained a temporary restraining order (TRO) on February 7, 2013. Exhibit D19. The TRO ordered, in part, that the Student "is RESTRAINED from attending Schmitz Park Elementary School...and shall transfer to a different school." Exhibit D19p2, emphasis in original. The Parents subsequently obtained an order quashing the TRO. It is unclear from the record exactly how long the TRO was in effect, but it does not appear to have been longer than one or two weeks. Testimony of Father.

11. The Student has not attended school in the District since February 6, 2014. Exhibit P8; Testimony of Parents.

12. During the period of time the Student was restrained from attending Schmitz Park, the Parents consulted with Drs. Leon-Guerrero and Milhem. The Parents were advised not to return the Student to Schmitz Park at that time due to ongoing concerns that the behavioral supports offered by the school were not sufficient to protect the Student from further incidents like the one leading to the TRO. Exhibit P14; Testimony of Parents; Testimony of Leon-Guerrero; Milhem T20.

13. In a letter dated March 7, 2014, Dr. Milhem reviewed her concerns regarding the Student's program at Schmitz Park and the components of an educational plan the Student needed to be safe and successful. She concluded by stating her professional opinion that because those components were not available at that time, "I do not feel that Schmitz Park is an appropriate placement for [the Student] at this time." Exhibit P14. The Parents later provided a copy of Dr. Brooks' letter to the District. Testimony of Mother.

14. Based in part on the recommendation of Drs. Leon-Guerrero and Milhem, the Parents enrolled the Student at Yellowwood Academy, a private school, during March 2014. Testimony of Mother; Testimony of Leon-Guerrero; Milhem T22, T56.

15. To date, the Parents have never told the Student that he was unable to attend school at Schmitz Park due to the TRO. The decision not to tell the Student about the TRO was made by the Student's "team." The team consists of the Parents and Drs. Leon-Guerrero and Milhem. The team, including Dr. Milhem, determined that telling the Student about the TRO would be "an incredibly large trigger" for the Student's anxiety and emotional dysregulation. Milhem T65.

16. During the summer of 2014, the Parents enrolled the Student at the Ryther Social Skills Camp for Aspiring Youth to work on his social skills. Testimony of Mother.

*Dr. Brooks' Independent Educational Evaluation of the Student<sup>11</sup>*

17. The Student had an independent educational evaluation by Allison Brooks, Ph.D., during June 2014. Exhibit P16.

18. Dr. Brooks holds a Ph.D. in School Psychology from the University of Washington, and is a licensed psychologist in Washington State. Dr. Brooks has held professional positions including Clinic Director & Psychologist, Autism Center, University of Washington-Tacoma, Director of Professional Training and Psychologist, Autism Center, University of Washington, and Lead Psychologist, Interdisciplinary Diagnostic Clinic, Fetal Alcohol Syndrome Diagnostic and Prevention Network, University of Washington-Seattle. Since 2005, Dr. Brooks has been Co-Director and Psychologist with the Brooks Powers Group, Seattle, Washington. At Brooks Powers Group, Dr. Brooks conducts evaluations of children on the autism spectrum, and provides psychological and educational services for children and adolescents. The majority of her current work is conducting evaluations at the request of school districts, including Seattle Public Schools. She has appeared in special education due process hearings as a witness for both school districts, including Seattle Public Schools, and for parents of students. Exhibit P3; Testimony of Brooks.

19. During Dr. Brooks' assessment, the Student's "most notable challenge...was his difficulty regulating this emotional response when he felt challenged by an activity, or when he was worried that he was not performing well." P16p21. Dr. Brooks went on to note that the "etiology of his anxiety is something that should be addressed as part of a process that helps [the Student] understand his triggers, identify his emotions and state of regulation, and use tools and strategies to manage his emotional responses and advocate for his needs." Exhibit P16p22. Dr. Brooks' diagnoses for the Student were Autism Spectrum Disorder, Specific Learning Disorder with impairment in written expression, and Generalized Anxiety Disorder (GAD). Exhibit P16p20.

20. At hearing, Dr. Brooks remarked that during her evaluation of the Student any reference to the District or Schmitz Park caused him to become "extremely agitated extremely quickly." She opined that as of the time of her evaluation, a great deal of work would need to be done with the Student on an individual level in a counselling setting to build the Student's skills before he would be able to use those skills in a setting where there were more triggers for his anxiety. Testimony of Brooks.

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<sup>11</sup> Dr. Brooks' IEE was not publically funded, but rather paid for by the Parents.

21. The Mother sent the District a copy of Dr. Brooks' final report after she received it in August 2014. Testimony of Mother.

22. The Student continued at Yellowwood Academy until August or September 2014, when the Parents enrolled him at the Academy for Precision Learning (APL). Dr. Milhem recommended APL to the Parents. Testimony of Mother; Milhem T27. The Student continues to attend APL through the present time.

*The Academy for Precision Learning (APL)*

23. APL is a private, K-12 school that extensively utilizes Applied Behavioral Analysis (ABA) across all its classes and curricula. Its approximately 110 students include both disabled and typically developing students. In each of its K-8 classes, APL has a head teacher, one to two co-teachers, a board certified behavioral analyst (BCBA), and additional instructional assistants. There is monthly BCBA training for all classroom staff, and it utilizes a school-wide positive behavioral support "points" system (PBSS). Individual students may also have a PBSS as well. It employs annual progress tracking using the Woodcock-Johnson III assessment tool in combination with monthly or weekly curriculum based measurements (CBMs). It develops "data protocols" for each individual student, and the data is used to make decisions regarding each student's educational program on a weekly basis. Testimony of Lipshin.

24. APL develops a treatment plan for each student. This involves assessment of the student's academic achievement and creation of specific goals for the student. The goals are data-driven and measurable. Data is collected and charted daily by relevant team members. The development is supervised by a BCBA. Testimony of Lipshin.

25. Upon enrollment in APL, the Student was assessed and a treatment plan was developed. Exhibit P22. A behavior support plan was developed. Exhibit P23. A program of classroom supports was developed and implemented specifically for the Student to support his academic, written communication, and executive functioning, sensory processing, social/emotional and staff-training needs. Exhibit P24.<sup>12</sup>

26. The Student had a 1:1 paraeducator or instructional aide at APL during the 2014-2015 school year. Exhibit P24p2.

*The Student's Reevaluation<sup>13</sup>*

27. In January 2015, Ashley Burchett, District school psychologist, was assigned to lead the Student's triennial evaluation team.<sup>14</sup>

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<sup>12</sup> While APL utilized the classroom supports identified in Exhibit P24 throughout the 2014-2015 school year, the document itself - Exhibit P24 - was not created until sometime between the Student's two reevaluation meetings in 2015. It was created by APL at the request of the District to consider as part of the Student's 2015 reevaluation.

<sup>13</sup> Findings of Fact regarding the Student's reevaluation will not be set forth in as comprehensive a manner as would otherwise be typical because it is unnecessary to resolve the ultimate issue of whether the District's reevaluation of the Student was appropriate or denied him FAPE. See *infra*.

28. Ms. Burchett holds an M.Ed. in Counselling/Human Services, and an Education Specialist designation in School Psychology. She is nationally certified in School Psychology, and a licensed private counsellor in Idaho. Ms. Burchett is a "team lead" for the District, supervising 12 other District school psychologists in addition to her other job duties.

29. Once assigned to lead the Student's triennial evaluation, Ms. Burchett obtained consent to conduct the evaluation from the Parents. As part of their consent, the Parents requested that the Student be assessed in the following areas: Autism, Dysgraphia, Anxiety, and Executive Functioning. The Parents also requested that the reevaluation consider Dr. Brooks' 2014 evaluation of the Student. Exhibit D1p2.

30. Once she received the Parents' consent, Ms. Burchett obtained a copy of Dr. Brooks' evaluation report. Testimony of Burchett.<sup>15</sup>

31. As part of the reevaluation, Ms. Burchett obtained a copy of the Student's APL Classroom Supports for the 2014-2015 school year on April 27, 2015. Exhibit P24; Burchett T12.

32. As part of the reevaluation, Ms. Burchett created her own survey using a Likert scale to gather information from the Student's teachers at APL. This was not a standardized or otherwise validated assessment tool. Burchett T8.

33. Ms. Burchett visited APL on March 18, 2015, in part to administer the Wechsler Individual Achievement Test – Third Edition (WIAT-III) to the Student. Ms. Burchett was wearing her District identification badge when she first met the Student in person. Before Ms. Burchett could identify herself, the Student spontaneously remarked that she was in the "Mafia" because she worked for the District. Burchett T11.

34. As part of the reevaluation process and to gather relevant information regarding the Student, Ms. Burchett spoke with Dr. Milhem twice over the phone and exchanged emails. Milhem T33.

35. In addition to her own work on the Student's reevaluation, Ms. Burchett gathered information and assessment results from other members of the reevaluation team. As the reevaluation team leader, Ms. Burchett drafted a reevaluation report for the team to consider at a reevaluation team meeting.

36. The first reevaluation team meeting was held at APL on April 8, 2015. Exhibit D3. After considering the results of the reevaluation, the team determined it required an "assessment

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<sup>14</sup> Parents' counsel offered a standing objection to any opinion testimony from Ms. Burchett because the District did not exchange a *curriculum vitae* for Ms. Burchett five business days prior to the due process hearing. The objection was noted and preserved for the record.

<sup>15</sup> This testimony was developed during the District's direct examination of Ms. Burchett. The transcript excerpt of Ms. Burchett's testimony begins with the Parents' cross-examination of Ms. Burchett. Therefore, citations to the record for Ms. Burchett's testimony may reference her testimony generally, or may reference specific pages of the transcript excerpt.

revision" to complete a communication evaluation regarding pragmatic language, and an assistive technology (AT) consultation. Exhibit D3p25; Testimony of Burchett. Ms. Burchett obtained the Parents' consent for the additional work to complete the reevaluation. Exhibit D2p3. After gathering the additional information, Ms. Burchett re-drafted the reevaluation report and sent it by email to the other reevaluation team members on April 25, 2015. Exhibit D4pp2-3.

37. Via email on April 28, 2015, the Parents provided their feedback to the draft reevaluation report from Ms. Burchett. The Parents requested that recommendations for any supports or program modifications identified in the list of APL classroom supports not already part of the reevaluation report be added to it. They requested that training for all staff working with the Student be specified as a support for school personnel. They identified specific components for that staff training. And they requested support by a paraprofessional be included as a related service. Exhibit D4pp1-2.

38. A second reevaluation team meeting was held at APL on June 8, 2015.

39. At the due process hearing, the District offered a copy of a reevaluation summary or report with an evaluation group meeting date of June 8, 2015. Exhibit D9, p.1. However, the reevaluation report admitted as Exhibit D9 is *not* the draft of the Student's reevaluation report prepared by Ms. Burchett and considered by the team at the June 8, 2015, reevaluation meeting. This is immediately obvious by the inclusion of information in Exhibit D9 provided by Dr. Milhem to Ms. Burchett during a contact on June 25, 2015, *after* the second reevaluation team meeting. Exhibit D17p7. Under cross-examination at the due process hearing, Ms. Burchett also confirmed that Exhibit D9 is not her draft of the Student's reevaluation report which she provided to the team for consideration on June 8, 2015. See generally, Burchett T11-20.

40. The record does not include a copy of the draft reevaluation report prepared by Ms. Burchett and distributed to the team for consideration at the meeting on June 8, 2015. The record does not include a copy of that report because, as discussed at length above under **Evidence Relied Upon**, the Parents' proposed Exhibit P35 was excluded. However, the evidentiary basis for the following Findings of Fact regarding the contents of the draft reevaluation report prepared by Ms. Burchett and considered by the team on June 8, 2015, are based solely upon the testimony of Ms. Burchett at the due process hearing, and not any consideration of the Parents' excluded exhibit.

41. After the reevaluation team meeting on June 8, 2015, and at the direction of an individual the identity of whom she could not recall or would not reveal during her testimony, Ms. Burchett made material changes to the draft of the reevaluation report considered by the team at that meeting.<sup>16</sup> Burchett T17. Specifically, see Finding of Fact 43.

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<sup>16</sup> Ms. Burchett's testimony on this point merits further discussion. Ms. Burchett easily recalled speaking to both the SLP and the occupational therapist (OT) members of the team after the June 8, 2015, team meeting and the subjects of those discussions. Burchett T19-20. Yet for reasons unknown, Ms. Burchett was unable to recall, or would not reveal, the identity of the individual who directed her to make material changes to the draft reevaluation report considered by the team at the June 8<sup>th</sup> meeting. Given her experience and familiarity with conducting reevaluations, her education and credential as a nationally certified school psychologist, and her employment as a team leader supervising a dozen other District

42. At the June 8, 2015, reevaluation meeting, the team determined it would include the list of classroom supports for the Student at APL during the 2014-2015 school year as part of the team's recommendations to the IEP team as supplementary aids and services for the Student. Burchett T15. This is consistent with the recollection of the Mother. The Mother understood that the reevaluation team's recommendations to the IEP team would include as supplemental aids and services all the classroom supports the Student received at APL during the 2014-2015 school year. Testimony of Mother.

43. After the June 8<sup>th</sup> meeting and at the direction of an unidentified individual, Ms. Burchett removed the list of APL classroom supports from the recommended supplementary aids and services in the Student's reevaluation report. Burchett T15-16.

44. Although she was aware the Parents believed the Student required a paraprofessional as a related service, Ms. Burchett never made any attempt to determine if in fact the Student might require paraprofessional support. Burchett T23-24. There is no evidence of record the reevaluation team ever considered whether the Student might need paraprofessional support in order to benefit from his educational program.

45. Although she was aware that the Parents believed all of the staff working with the Student needed specific training, Ms. Burchett did not make any attempt to determine whether such staff training was necessary. Nor is she aware whether anyone else on the reevaluation team ever considered the need for such all-staff specific training. Burchett T22.

46. Ms. Burchett confirmed that the reevaluation team determined it was appropriate to recommend the Student have curriculum and instruction that was commensurate with his high cognitive ability and sophisticated interests so the Student would not become bored with the instruction. Despite this team determination, Ms. Burchett did not include it in any recommendation in the reevaluation report she altered after the June 8<sup>th</sup> reevaluation meeting. Ms. Burchett attributed her failure to include recommending such curriculum and instruction in the reevaluation report to the limitations of the software program used by the District to create reevaluation summaries or reports. Burchett T26-27.

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(FN 16 con't) school psychologists, it is extraordinarily difficult to find credible her assertion that she could not recall the identity of the individual who directed her to make the changes. Any reasonable school psychologist with Ms. Burchett's education, training, and experience would have to have recognized this unilateral directive from one individual fundamentally violated the reevaluation process and effectively usurped the reevaluation team's duty and responsibilities. The implications of such a directive would have been immediately apparent and profound to any reasonable school psychologist who leads a team conducting reevaluations under the IDEA. Under these circumstances, it is found as fact that Ms. Burchett's testimony that she could not recall the identity of the individual who directed her to make material changes to the draft of the reevaluation report considered by the team on June 8, 2015, is not credible. Providing such testimony which is not credible under oath or affirmation negatively impacts the remainder of Ms. Burchett's testimony. It is found that, other than statements against her own or the District's interests, the testimony of Ms. Burchett cannot be considered credible, and will be given no weight.



47. On July 3, 2015, Ms. Burchett emailed the reevaluation summary or report she materially altered after the June 8<sup>th</sup> reevaluation meeting to the Parents and other members of the reevaluation team. Exhibits D8, D9. The reevaluation summary or report included a prior written notice dated June 8, 2015.<sup>17</sup> Exhibit D9pp39-40.

48. In her email to the Parents and the other team members, Ms. Burchett states, in part:

The document from APL titled "[the Student's] Classroom Supports, 2014-2015 School Year" has been attached to final report (sic), as we discussed at the meeting on June 8. I want to clarify that the attachment of this document to the report is to reflect the supports/modifications that [the Student] is receiving now in his current setting at APL; it is not meant to signify the re-evaluation team's belief that all of the supports/modifications listed in the document are necessary for the student to receive FAPE. I see that some confusion could have been caused in this respect by including a reference to the list of classroom supports under "Supplementary Aids and Services" on page 10 of the report. To clarify this point in the report, that reference to the list of classroom supports has been removed from the "Supplementary Aids and Services" section and moved to the General Education Teacher Report section (on page 14) where the supports/modifications are summarized.

As to the requested support by a 1:1 (instructional aide or assistant) IA, the re-evaluation team does not believe the information available to it demonstrates the student requires a full-time 1:1 aide to access his education. The IEP team can consider [the Student's] need for adult support when it meets later this summer.

Exhibit D8pp1-2.

49. It is found as fact that Ms. Burchett's statement in her July 3, 2015, to the Parents and the other members of the reevaluation team is in direct conflict with her testimony given under oath or affirmation at the hearing, and is false and misleading. Specifically, Ms. Burchett attributes removal of the APL Classroom Supports document from the report's recommendations for supplementary aids and services as due to a decision made by the team on June 8<sup>th</sup>, when fact it was removed from the recommendations section of the reevaluation report after the team meeting at the express direction of an unidentified individual.

50. It is found as fact that Ms. Burchett's statement that the reevaluation team did not believe the available information demonstrated a need for a full-time 1:1 aide is false and misleading. As found above, Ms. Burchett never made any attempt to determine if the Student might require paraprofessional support, and there is no evidence of record it was ever considered by the team.<sup>18</sup>

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<sup>17</sup> Ms. Burchett and the Parents confirmed that although the PWN is dated June 8, 2015, it was not available to the reevaluation team on that date, and in fact was created sometime later. Burchett T28, Testimony of Mother.

<sup>18</sup> Ms. Burchett's false and misleading statements in her July 3, 2015, email only serve to further erode any credibility her testimony might have.

51. A substantially similar false and misleading statement regarding the APL Classroom Supports document appears in the PWN written by Ms. Burchett that accompanied the final reevaluation report emailed to the Parents and other team members on July 3, 2015. Exhibit D9p39.

52. Ms. Burchett identified the reevaluation summary or report as the "final report." Exhibit D8p1; Testimony of Burchett.

53. Ms. Burchett received emails from Dr. Milhem on July 24 and August 4, 2015. Exhibits D10, P19. The emails included Dr. Milhem's professional opinions regarding the Student's final reevaluation report, his educational service needs, her concern's for transitioning the Student from APL, and her opinion that the Student was not yet emotionally ready to transition back into the District. Ms. Burchett never shared either of Mr. Milhem's emails with other members of the Student's reevaluation team. She did share them with her supervisor, Spencer Pan, and the District's assistant general counsel, Andrea Schiers. Ms. Burchett asserted during her testimony she did not share Dr. Milhem's emails with the other reevaluation team members because at the time she received them she was no longer acting as the reevaluation team leader. It is found as fact that Ms. Burchett's asserted reason for not sharing Dr. Milhem's emails with the reevaluation team members is not credible.

54. The first draft and the final report of the Student's reevaluation each contain extensive reference to Dr. Brooks' IEE of the Student. See Exhibit D3p11, D9p12).

*The Student's Proposed IEP for the 2015-2016 School Year*<sup>19</sup>

55. Catherine Cook is a District program specialist assigned to the District's Northwest Region. The Northwest Region includes the District's Salmon Bay K-8 school. Testimony of Cook.

56. Ms. Cook was assigned to lead the Student's IEP team and develop the Student's proposed IEP for the 2015-2016 school year, relying on the results of the Student's just-completed reevaluation. She was responsible for creating the first draft of the Student's proposed IEP. Testimony of Cook.

57. Ms. Cook confirmed that, just as with the Student's reevaluation summary or report, the District's software program, IEP Online, imposed restrictions and limited her options for what she could include in the Student's proposed IEP. For example, Ms. Cook was unable to include goals or specially designed instruction in the Student's proposed IEP that did not appear in the Student's reevaluation. Testimony of Cook. The Parents do not recall ever being told that any software program limited what could go into the Student's proposed IEP. Testimony of Mother.

58. After drafting the Student's proposed IEP, Ms. Cook convened an IEP team meeting on July 30, 2015. Both the Parents attended. Exhibit D17p1.

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<sup>19</sup> Findings of Fact regarding the Student's proposed IEP will not be set forth in as comprehensive a manner as would otherwise be typical because it is unnecessary to resolve the ultimate issue of whether the District's proposed IEP was appropriate or denied him FAPE. See *infra*.

59. Based upon the IEP team's consideration and discussion of the draft IEP, Ms. Cook re-drafted the Student's proposed IEP after the meeting on July 30, 2015. See D17p23. The re-drafted IEP placed the Student at Salmon Bay K-8 for the 2015-2016 school year.

60. The IEP does not include a plan to transition the Student from APL back to any school in the District. It proposed to develop a transition plan at some later time with the "Salmon Bay team." Exhibit D17p23. The specific components of that transition plan would have to be worked out between the Parents and Salmon Bay staff. Testimony of Cook.

61. Ms. Cook appears to have completed her re-draft of the Student's proposed IEP on or about August 7, 2015, the date of the PWN which accompanied the re-drafted IEP.<sup>20</sup>

62. In an email to the District on August 5, 2015, the Father stated, in part:

We assume that the District's team will incorporate into [the Student's] IEP the information discussed at the June 30<sup>th</sup> meeting<sup>21</sup> and presented afterwards from APL and [the Student's] therapist, Erin Milhem, Psy.D, and then send us an up dated draft to review... Given the absence of a completed and satisfactory IEP coupled with our inability to tour Salmon Bay in full swing until school starts this Fall, *[the Student] will start the 2015-16 school year at Academy of Precision Learning... we plan to tour the school after classes have commenced and are settled in so that we are able to view a representative sampling of the environments in which [the Student] would participate.*"

Exhibits P20, D12, emphasis added.

63. On August 14, 2015, Spencer Pan, District special education supervisor, sent the Parents an email which stated in part that:

Attached is the finalized IEP for [the Student] with changes from the IEP meeting on June 30<sup>th</sup><sup>22</sup>... At this time the District is not anticipating scheduling a meeting to review the updates unless we hear otherwise from you. Accordingly, please let me know if you would like to reconvene the team to review these updates. We have received [the Father's] email on 8/5/15 indicating your plan to enroll [the Student] at APL for the 2015-2016 school year, the District's (sic) remains ready to welcome [the Student] to Salmon Bay in September.

Exhibit D13.

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<sup>20</sup>The IEP which appears in the record as part of Exhibit D17 is the IEP which Ms. Cook re-drafted after the IEP team meeting on July 30, 2015. Apparently due to the software program used by the District, although the IEP at Exhibit D17 was created after July 30<sup>th</sup>, it retains the date of Ms. Cook's first draft which she prepared prior to, and presented at the IEP meeting for the team's consideration on July 30<sup>th</sup>.

<sup>21</sup> The reference to a "June 30<sup>th</sup> meeting" in the Father's email appears to be a typographical error. There is no evidence of record regarding any meeting on June 30, 2015. This appears to be a reference to the July 30<sup>th</sup> IEP meeting.

<sup>22</sup> It appears that Mr. Pan carried over the typographical error from the Father's earlier email, and this is a reference to the July 30<sup>th</sup> IEP meeting.

64. On September 2, 2015, the Father sent an email to Assistant Principal Darren Frink at Salmon Bay K-8. The email stated, "(p)lease let us know some good dates and times to visit and tour Salmon Bay. We would like to do this while school is in session to have a representative sampling of the school and environment." Exhibit D18pp3-4.

65. The Parents toured Salmon Bay K-8 on September 30, 2015, along with Mr. Frink. Exhibit D18pp1-2.

66. As briefly noted above, the Student was assessed upon his enrollment at APL. APL assesses their students annually, and the Student was also assessed again before the beginning his second school year at APL. The Student was assessed both times using the Woodcock Johnson-III (WJ-III) Normative Update Tests of Achievement. Exhibits P21, P28. Dr. Brooks, eminently qualified by her education, training, and experience, opined at hearing and it is found as fact, that the results of the Student's annual assessments demonstrated he showed academic growth from the summer of 2014 when he entered APL, to the summer of 2015. Testimony of Brooks. The Parents have presented sufficient evidence, and it is found as fact, that the Student's academic achievement has continued to progress during the 2015-2016 school year at APL. Exhibit P31.

#### *The Parents' Requested Remedies*

67. The Parents have requested multiple remedies if it is determined that the District violated the IDEA and denied the Student FAPE with respect to the issues raised for hearing. The Parents' Exhibit P36 sets out the remedies the Parents request, the relevant periods of time, and the dollar amount of each remedy.<sup>23</sup> The District reviewed Exhibit P36 prior to its submission by the Parents, and had no objection to its admission.

### CONCLUSIONS OF LAW

#### *Jurisdiction and Burden of Proof*

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education 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) Part 300, 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, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

#### *The Individuals with Disabilities Education Act*

3. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's

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<sup>23</sup> There are only two remedies, the amounts of which are identified as "to be determined."

compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Rowley, supra*, 458 U.S. at 206-207 (footnotes omitted).

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

[A] "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

*Rowley*, 458 U.S. at 188-189.

5. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "[A] school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9<sup>th</sup> Cir. 2014) (internal citation and quotation marks omitted).

#### *Procedural Compliance with the IDEA*

6. Procedural safeguards are essential under the IDEA:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

*Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9<sup>th</sup> Cir. 2001).

7. Procedural violations of the IDEA amount to a denial of FAPE only if they:

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii); see WAC 392-172A-05105(2).

*Substantive Compliance with the IDEA*

8. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

"[S]pecial education and related services" need only be provided "in conformity with" the IEP. [20 USC §1401(9)] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

*Van Duyn, supra*, 502 F.3d at 821 and 822 (italics in original).

*Issues Raised in the Parents' Post-Hearing Brief*

9. The Parents raise multiple issues in their Post-Hearing Brief that were not raised in the Parents' Amended Complaint and are not included in the Statement of Issues and Remedies. These issues include failure of the District to ensure the reevaluation report was signed by the members of the reevaluation team, Ms. Burchett's unilateral revisions to the Student's reevaluation report, limitations imposed by the District's software program, the withholding of information by Ms. Burchett from the reevaluation team members, predetermination of the Student's placement at Salmon Bay K-8, restrictions on the Student's IEP due to the District's collective bargaining agreement with its certificated staff, misleading inclusion of IEP team member signatures on the IEP, and composition of the IEP team. The Parents argue they were unaware and could not have known about the circumstances comprising these asserted procedural and substantive violations until the testimony of District witnesses at hearing. Accordingly, the Parents argue it is proper to cite them now as violations in this Final Order. The Parents, however, cite no legal authority in support of their argument.

10. WAC 392-172A-05100(3) states that the "party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise." *Emphasis added*. The undersigned interprets this regulation to include a prohibition on raising issues *after* a due process hearing that were not raised in a party's due process hearing request. Given the Parents have cited no legal authority in support of their argument and the applicable regulation, it is concluded that the

Parents are limited to the issues raised in their Amended Complaint, and reflected in the Statement of Issues and Remedies herein.

### *Evaluation and Reevaluation of Students*

11. The administrative regulations governing evaluations and reevaluation of students are found at WAC 392-172A-03000 through 392-172A-03040. WAC 392-172A-03020 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 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.

See also 34 CFR §300.303.

#### *Ms. Burchett's Use of Her Own Survey*

12. As part of gathering relevant information for the Student's reevaluation from his teachers at APL, Ms. Burchett created her own survey using a Likert scale. This raises serious concerns. Districts are required to use technically sound instruments selected in a manner so as not to be discriminatory, administer them in a form most likely to yield accurate information, and use them for purposes for which the assessment or measure are valid and reliable. See WAC 392-172A-03020, *supra*. It cannot be concluded that Ms. Burchett's survey meets any of these conditions. The fact that the actual survey is not of record for examination is not determinative. The very fact that Ms. Burchett confirmed *her own creation* of this survey constitutes sufficient evidence to place the burden on the District to establish the survey meets all the requirements for use in a reevaluation under the IDEA. The District has not carried this burden. It is concluded that the District's use of Ms. Burchett's survey constitutes a procedural violation of the IDEA. Whether



that procedural violation warrants any remedy will be considered separately.

*Ms. Burchett's Unilateral and Material Changes to the Reevaluation Report*

13. After the second reevaluation meeting on June 8, 2015, Ms. Burchett made material changes to the reevaluation report at the direction of an individual whom she could not or would not identify at hearing, and completely unbeknownst to the other team members. She compounded this with false and misleading statements to the Parents and other members of the reevaluation team. It is difficult to conceive of a more egregious act during the reevaluation of a student under the IDEA. Perhaps the most fundamental guiding principal for reevaluations and development of IEPs is that the entire process is a *team* process. It is the team or group of qualified professionals, including a student's parents, who must consider the information and data obtained during the reevaluation. It is the team who must make an eligibility determination. It is the team who must make recommendations for the specially designed instruction, related services, and supplementary aids and services a student needs to obtain FAPE. *See generally* WAC 392-172A-03025 through -03040. Ms. Burchett's actions subverted the reevaluation process and procedures. It is concluded that Ms. Burchett's unilateral removal of the APL classroom supports as one of the team's recommendations for the Student's supplementary aids and services violated the IDEA.

14. However, the Parents did not raise Ms. Burchett's violation as an issue for hearing. And as concluded above, they cannot raise it now. But that is not the end of this legal analysis. By unilaterally removing the APL classroom supports from team's recommendations for supplementary aids and services, Ms. Burchett rendered the reevaluation report incomplete and both procedurally and substantively inappropriate under the IDEA. Because of her actions, the reevaluation report did not include appropriate recommendations for the Student's supplementary aids and services to the IEP team who would later consider the report. This is an issue that was properly raised by the Parents and before this Tribunal to adjudicate.

15. The reevaluation report is also procedurally inappropriate because, despite Ms. Burchett's statements to the contrary to the reevaluation team and the Parents, neither Ms. Burchett nor the team ever determined whether the Student required a 1:1 paraeducator or paraprofessional as a related service to obtain FAPE. This is despite the fact that Ms. Burchett and the team knew the Student had a 1:1 paraeducator or paraprofessional during the 2014-2015 school year at APL. Again, while this failure to consider the need for a 1:1 paraeducator or paraprofessional was not specifically raised by the Parents, the failure of the team to consider and make such a determination resulted in a reevaluation report that could not make appropriate recommendations for all of the Student's related services or supplementary aids and services. This was raised by the Parents.

16. In similar fashion, Ms. Burchett's, and by extension the reevaluation team's, failure to make any attempt to determine whether all of the staff who would work with the Student required the specific training advocated by the Parents renders the Student's reevaluation procedurally inappropriate. This is especially true in light of the team's knowledge of the APL classroom supports the Student received during the 2014-2015 school year.

17. The same is true with respect to the team's determination that the Student requires curriculum and instruction commensurate with his high cognitive abilities. There was no recommendation for this to the IEP team to consider, resulting in a procedurally and

substantively inappropriate reevaluation.

18. Finally, Ms. Burchett's failure to turn over Dr. Milhem's emails from July 24 and August 4, 2015 to the reevaluation team warrants brief discussion. Clearly these emails contained important and relevant information that the reevaluation team should have considered. Ms. Burchett's explanation why she shared them with Mr. Pan and the District's assistant general counsel, but not the other team members, is not compelling or credible. For all her experience, Ms. Burchett's failure to ensure the reevaluation team members had this information available to them, even shortly after the reevaluation was completed, is inexcusable. The fact that they could have been turned over by someone for the IEP team to consider does not mitigate this. It is the reevaluation team that is charged with making recommendations for the Student's educational program to the IEP team based upon an appropriate reevaluation.

19. As noted above, not all procedural violations deny a student FAPE. See WAC 392-172A-05105(2), *supra*. But in the Student's case, they clearly did. The Student was denied FAPE because the IEP team did not have all the reevaluation team's recommendations for the Student's related services and supplementary aids and services. The Parents were manifestly denied their opportunity to participate in the decision-making process when Ms. Burchett unilaterally removed the team's recommendation for the APL classroom supports it determined the Student needed. And as concluded above, the reevaluation report was also substantively inappropriate as well.

20. It is concluded that the District's reevaluation of the Student violated the IDEA, and denied him FAPE. However, that is not the end of the legal analysis regarding the effect of the Student's reevaluation.

*The District's Proposed IEP for the 2015-2016 School Year*

21. Under the specific facts in this case, and after careful deliberation, this Tribunal concludes that the reevaluation process and resulting reevaluation report, considered collectively, is so procedurally and substantively inappropriate that it cannot support the creation of a legally appropriate IEP. It is so fundamentally and fatally flawed that the IEP team cannot, with any measure of probability or certainty, rely on it to form the foundation of an appropriate IEP for the Student. The IEP team cannot rely on it to determine the Student's needs for related services, supplementary aids and services, program modifications in the form of potential classroom supports, or staff training, all issues raised by the Parents. It is concluded that the District's proposed IEP placing the Student at Salmon Bay K-8 for the 2015-2016 was inappropriate at the time it was created, and more likely than not would have substantively denied the Student FAPE.

*Whether APL is an Appropriate Placement for the Student*

22. The Parents have offered considerable and compelling evidence that APL has been an appropriate placement for the Student. In contrast, the District has offered almost no evidence that APL is not an appropriate placement. The Student has clearly progressed in his academic achievement over the course of his enrollment at APL. It is concluded that the Parents have established that APL is an appropriate educational placement for the Student.

*Whether the District Failed to Consider the Potential Harmful Effect on the Student Should he Return to Salmon Bay*

23. The Parents spent much time developing the record and arguing that the District failed to consider the potential harmful effect on the Student should he return to Salmon Bay, citing WAC 392-172A-02060(2)(d). Having concluded on independent grounds that the District's reevaluation of the Student and proposed IEP violated the IDEA and denied the Student FAPE, it is not necessary to resolve this issue, and this Tribunal declines to do so.

*Whether the District Considered the Results of Dr. Brooks' IEE with Respect to the District's 2015 Reevaluation of the Student*

24. As found above, the reevaluation drafts or report all contained substantial information from Dr. Brooks' IEE. Little evidence beyond the reevaluation reports themselves was presented on this issue. More importantly, the threshold for what constitutes "consideration" of information during the course of a reevaluation meeting is quite low. It is concluded that the Parents have not established that the District failed to consider Dr. Brooks' IEE as part of the Student's reevaluation.

*Parents' Requested Remedies*

25. The remedies in this case are more complicated than typical due to the District's stipulation of liability. As set forth earlier, the District has effectively conceded some issues and consequently some remedies requested by the Parents, as the District raised no objection to the admission of Exhibit P36 for the truth of the matters asserted therein. Parents' Exhibit P36 summarizes their requested reimbursements. As a purely demonstrative aid, attached to this Final Order and incorporated by reference herein is a copy of Exhibit P36 with the addition of a column on the left side to easily and clearly identify each separate line item for which reimbursement is sought by the Parents. Each line item will be identified by the letter designation in that left-hand column (e.g., remedy a., remedy b., etc.).

*Remedies Requested for Issues on Which the District has Stipulated Liability*

26. The Statement of Issues and Remedies section of this Final Order extensively discusses the effect of the District's stipulation on the issues for hearing, and will not be duplicated here. The parties should review that section in detail before reading further.

27. With respect to those issues on which the District has stipulated to liability, the Parents are awarded their proposed remedies a. through k. and m. through p. The Parents are not awarded their requested remedy l., as they have not prevailed on the issue of consideration of Dr. Brooks' IEE by the District.

28. The sum total of line items a. through k. and m. through p. is: **\$78,559.67**. This amount is awarded to the Parents for the issues on which the District stipulated to liability.

*Remedies Requested for Issues on Which the Parents Prevailed at Hearing*

29. With respect to those issues on which the District prevailed at hearing, the Parents are awarded their proposed remedies q., r., u., and v. The sum total of these line items is:

**\$43,205.15.** This amount is awarded to the Parents.

30. With respect to requested remedies s. and t., the amounts of which are to be determined, the District shall either pay for or reimburse the Parents for those services provided the Parents produce for the District reasonable documentation establishing the costs. The Parents are limited, however to the usual and customary costs for those services in the local professional community. In addition, the award of remedy t. is limited to the remedy requested in the Statement of Issues and Remedies; the occupational therapy services shall be provided at APL as set forth in the District's proposed IEP dated July 30, 2015, and received by the Parents on August 14, 2015.

31. The above award of remedies to the Parents is consistent with the continuing placement of the Student at APL through the end of the 2015-2016 school year, and it is so ordered.

32. In addition to the above remedies awarded to the Parents, the District shall commence, within 30 calendar days of receiving consent from the Parents, a new reevaluation of the Student that complies with all applicable requirements of the IDEA.

33. Upon completion of the new reevaluation, the District shall convene an IEP team and develop a new IEP for the Student that complies with all applicable requirements of the IDEA.

#### **ORDER**

The Seattle School District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set for in the above Findings of Fact and Conclusions of Law.

The Parents are awarded the remedies set forth in Conclusions of Law 27 through 33, herein.

Signed at Seattle, Washington on May 14, 2016.



MATTHEW D. WACKER  
Administrative Law Judge  
Office of Administrative Hearings

#### **Right To Bring A Civil Action Under The IDEA**

Pursuant to 20 U.S.C. 1415(l)(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. 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. *MDW*

Parents

[REDACTED]  
[REDACTED]

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