



STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
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August 31, 2018

**In re: Everett School District**  
**Cause No. 2017-SE-0100**  
**Docket No. 10-2017-OSPI-00418**

MAILED  
AUG 31 2018  
OAH - SEATTLE

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. 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,

A handwritten signature in black ink that reads "Matthew D. Wacker".

MATTHEW D. WACKER  
Administrative Law Judge

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

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Superintendent of Public Instruction  
Administrative Resource Services

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Superintendent of Public Instruction  
Administrative Resource Services

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

MAILED  
AUG 31 2018  
OAH - SEATTLE

IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0100

EVERETT SCHOOL DISTRICT

OAH DOCKET NO. 10-2017-OSPI-00418

**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 Everett, Washington, over four days on June 4 - 7, 2018. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Angela Shapow, attorney at law. The Everett School District ("the District") was represented by Carlos Chavez, attorney at law. Rebecca Clifford, District executive director of special services, also appeared for the District. The following is hereby entered:

**STATEMENT OF THE CASE**

The Parents filed a Due Process Hearing Request ("the Complaint") on October 16, 2017. A Scheduling Notice was entered on October 17, 2017. The Scheduling Notice, in part, assigned ALJ Michelle Mentzer as the presiding ALJ, set a prehearing conference for November 13, 2017, and a due process hearing for November 29, 2017. On October 23, 2017, the District filed a Motion of Prejudice, requesting that the above matter be reassigned to a new ALJ. On October 24, 2017, an Order of Reassignment was entered which granted the District's Motion of Prejudice and reassigned the above matter to ALJ Anne Senter. The Order of Reassignment also set a prehearing conference for November 13, 2017, and a due process hearing for December 5, 2017, while striking the earlier prehearing conference and due process hearing. The District filed its Response to the Complaint on November 6, 2017.

On November 13, 2017, the Parents filed a Motion for Disqualification, seeking to disqualify ALJ Senter and reassignment of the above matter to another ALJ. On November 17, 2017, ALJ Senter entered an Order Granting Motion for Disqualification. On November 20, 2017, a Notice of Reassignment was entered, reassigning the above matter to ALJ Matthew D. Wacker. The Notice of Reassignment set a prehearing conference for November 27, 2017, and a due process hearing for December 15, 2017.

On November 28, 2017, an Order Continuing Prehearing Conference was entered, setting another prehearing conference for December 1, 2017, because the parties had not timely received the Notice of Reassignment due to the intervening holidays. The prehearing conference was held on December 1, 2017, and on December 4, 2017, a Prehearing Order was entered

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

which in part extended the due date for a written decision in the above matter to the close of record plus thirty (30) calendar days on the Parents' motion. The Prehearing Order also set another prehearing conference for January 3, 2018.

The January 3, 2018 prehearing conference was subsequently continued and held on January 4, 2018. On January 5, 2018, an Order Setting Prehearing Conference was entered, setting another prehearing conference for January 25, 2018. On January 19, 2018, the parties filed an agreed Stipulation for Protective Order, addressing the discovery of certain copyrighted test protocols. The prehearing conference set for January 25, 2018 was held, followed by another prehearing conference on February 8, 2018.

At the February 8, 2018 prehearing conference, the parties requested a schedule be set to hear and decide whether the Parents were entitled to have their expert conduct observations in a District first grade general education classroom as part of that expert's evaluation of the Student. On March 9, 2018, an Order Denying Parents' Motion for Classroom Observations was entered, denying the requested classroom observations.

After another prehearing conference on April 2, 2018, the Second Prehearing Order was entered on April 6, 2018, which in part set the due process hearing for May 14 – 18, 2018. On May 23, 2018, the Third Prehearing Order was entered. That order struck the hearings dates in May 2018 due to the unavailability of Parents' counsel, and set the hearing for June 4 – 7, 2018. On May 29, 2018, the Fourth Prehearing Order was entered. That order noticed the withdrawal of two of the Parents' issues for the due process hearing, and denied the District's motion to consolidate the above matter with another Due Process Hearing Request filed by District and involving the same Parents.

#### Due Date for Written Decision

The due date for a written decision in the above matter was extended to thirty (30) calendar days after the close of record on the Parents' motion. See December 4, 2017 Prehearing Order. The record in the above matter closed by agreement of the parties with the filing of written closing arguments postmarked by August 1, 2018. Therefore, the due date for a written decision in the above matter is **August 31, 2018**.

#### **EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Parents Exhibits:<sup>2</sup> P1-P3, P4 (pages 1-10 only), P5-P7, and P9-P24.

District Exhibits:<sup>3</sup> D1, and D3-D95.

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<sup>2</sup> Parents offered proposed Exhibits P25 through P31 at the due process hearing. The District objected, the objection was sustained, and the proposed exhibits were excluded pursuant to Washington Administrative Code (WAC) 392-172A-05100(1)(c), and 34 Code of Federal Regulations (CFR) § 300.512(a)(1).

<sup>3</sup> District's Exhibit D96 was admitted at the due process hearing. By letter received August 3, 2018, counsel for the District informed the Parents and the ALJ that the District offered Exhibit D96 in error, and

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

Amy Melick, PhD., counselling psychologist;  
The Mother of the Student;  
Ilene Schwartz, PhD., psychologist;  
The Father of the Student;  
Robin Arnold, District school psychologist;  
Lurie Muller, District speech-language pathologist;  
Cynthia Stoppelmoor, District occupational therapist;  
Rebecca Clifford, District executive director of special services; and  
Heather Brown, District associate director of special services.

### ISSUES AND REMEDIES

The statement of the issues and requested remedies for the due process hearing is:

1. Whether the Everett School District Procedurally Violated the IDEA:
  - a. By failing to fund the Student's placement in a regular early child program for the 2016-2017<sup>4</sup> school year; or
  - b. By failing to implement the Student's IEP in his LRE during the 2016-2017 school year; and,
  - c. Whether as a result of either failure the Parents are entitled to reimbursement for tuition and expenses paid to Immaculate Conception.
2. Whether the Everett School District Procedurally Violated the IDEA during the 2017 Evaluation by:
  - a. Failing to evaluate a suspected need for special transportation;
  - b. Failing to evaluate the Student's transition needs.
3. Whether the Everett School District failed to appropriately evaluate the Student in 2017 by:
  - a. Failing to test the validity of the teacher's score responses on the SSIS;
  - b. Failing to consider inconsistencies in the teacher's response pattern on the SSIS in evaluating the Student's social needs;
  - c. Failing to consider the Student's hearing impairment as a factor in assessing the

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Exhibit D96 was actually the 2017-18 school year calendar for a *different* school district. District's counsel requested that Exhibit D96 be withdrawn. Having received no objection from the Parents, it is ordered that Exhibit D96 is stricken from the record. Accordingly, the ALJ takes judicial notice that the first day of the District's 2017-18 school year was September 6, 2017. See: <https://docushare.everett.k12.wa.us/docushare/dsweb/Get/Document-70165/2017-18%20student%20calendar.pdf>

<sup>4</sup> The Parents' statement of the issues included a typographical error (2016-1017 school year) which is corrected in this Statement of the Issues and Remedies.

validity of the social assessments.

4. Whether the District is responsible for funding the Student's private placement for the 2017-2018 School Year.
5. Whether the Everett School District Denied parental participation by:
  - a. Failing to disclose that the Teacher Scale Validity Index on the SSIS required those scores to be viewed with "caution;"
  - b. Failing to provide the Student's parents with his complete educational records, including testing protocols, at the Parents' request prior to the 2017-2018 IEP development process;
  - c. Refusing to define the term "signing environment" at the Parents' request;
  - d. Inappropriately and inaccurately reporting the Student's social and behavioral needs;
  - e. Providing Prior Written Notice that is inconsistent with the Student's 2017-2018 IEP;
  - f. Drafting an internally inconsistent IEP for the 2017-2018 School Year;
  - g. Unilaterally removing the Student's fine motor goal on Sept 9, 2016;
  - h. Denying the Parents' requests to discuss unilateral changes to the information on the Student's social functioning in the 2017 evaluation report.
6. Whether the Everett School District Procedurally violated the IDEA by failing to have an IEP in effect at the beginning of the 2017-2018 School Year.
7. Whether the Everett School District substantively violated the IDEA by:
  - a. Failing to provide a stay-put placement for the Student between October 16, 2017 and January 2018;
  - b. Failing to Implement the Student's IEP during the MMR outbreak;
  - c. ~~Failing to provide appropriate interpreter services during the 2015-2016 school year.~~<sup>5</sup>
8. Whether any procedural violations of the IDEA resulted in a denial of FAPE.
9. Whether the Everett School District substantively violated the IDEA:
  - a. ~~By failing to identify a regular early childhood program as the Student's LRE from October 16, 2015 to September 9, 2016;~~
  - b. By failing to plan for transitioning the Student from his private preschool placement to a general education kindergarten setting in his IEP when the District was unable to implement his IEP at the natural start of the school year;

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<sup>5</sup> Issues 7(c) and 9(a) were withdrawn by the Parents prior to the due process hearing. See May 29, 2018 Fourth Prehearing Order. Those issues appear above struck-through rather than omitted in order to preserve the sequencing of the remaining issues.

- c. By unnecessarily requiring a full-time 1:1 para-professional in the 2017-2018 school year IEP;
  - d. By inappropriately requiring Occupational Therapy, Speech-Language therapy, social, hearing and communication services minutes in a special education environment when inclusive services are appropriate;
  - e. Failing to offer or provide an ASL interpreter in the Student's private placement during the 2016-2017 SY;
10. And whether the Parents are entitled to their requested remedies:
- a. Declaratory relief that the District denied the Student FAPE;
  - b. An order requiring inclusion training for staff and administration;
  - c. An order requiring the District to provide the Student with compensatory education and related services according to his needs;
  - d. An order requiring an appropriate IEP and placement for the 2017-2018 school year;
  - e. An order requiring reimbursement for Parent expenditures, including tuition for the Student's private programs; and,
  - f. Other relief deemed appropriate according to proof at hearing.

See Parents' Statement of the Issues received April 12, 2018, and Parents' Complaint filed October 16, 2017.

### 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. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

#### General Background

1. The Student was first determined eligible to receive special education and related services under Part B of the Individuals with Disabilities Education Act (IDEA) based upon an evaluation conducted in August 2014, when the Student was almost 3 years old. D1.<sup>6</sup> The Student was determined eligible under the Developmental Delay (DD) eligibility category. *Id.* at p1.

2. The Student's disabilities negatively affect his receptive and expressive communication. The Student's fluctuating hearing loss affects his receptive communication, and his mild apraxia of speech affects his expressive communication. The Student relies upon a combination of American Sign Language (ASL) and oral language to communicate his wants and needs. *Id.* at pp3-4. The Student also has deficits in his gross and fine motor skills. *Id.* at pp5-6. Based upon

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<sup>6</sup> Citation to the exhibits of record are to the exhibit (D1) and as necessary to a specific page or pages within an exhibit, e.g., D1pp2-3 would be a citation to pages 2 and 3 of Exhibit D1.

his evaluation, the Student was determined eligible to receive specially designed instruction and related services in the areas of communication and gross and fine motor skills. *Id.* at p13.

### 2014-15 School Year

3. The Student attended a developmental preschool in the morning at the District's Lowell Elementary School during the 2014-15 school year. Arnold 6/6: T11-T12.<sup>7,8</sup> The Student had a District-provided ASL interpreter, but no District paraeducator assigned specifically to him (a "1:1" paraeducator) during the school year. Mother 6/4: T134-T137.

4. In a September 11, 2014 Prior Written Notice (PWN), the District proposed initiating an Individualized Education Program (IEP) for the Student that provided special education and related services in the areas of communication and motor skill development. D2.

5. On June 15, 2015, the Student's IEP team developed a new IEP for the Student for the 2015-16 school year. D3.

6. On August 31, 2015, the Mother sent an email to District School Psychologist Robin Arnold.<sup>9</sup> The Mother requested that the District place the Student in an afternoon developmental preschool class for the 2015-16 school year. D4p1.

7. Ms. Arnold replied to the Mother's email later the same day, stating that she would contact the Mother later that week once the District had the information it needed to discuss a possible switch to an afternoon developmental preschool classroom. *Id.*

8. The District ultimately declined the Parents' request to place the Student in an afternoon developmental preschool classroom due in part to the availability of an interpreter in the morning developmental preschool classroom at Lowell Elementary School. Arnold 6/6: T11-T12; Brown 6/7: T9-T10; D5pp1, 5. The Parents, in turn, did not allow the Student to attend the morning developmental preschool upon commencement of the 2015-16 school year.

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<sup>7</sup> Citation to the testimony of witnesses at the due process hearing is by last name of the witness, date of the testimony, and page number(s). For example, citation to Arnold 6/6: T11-T12 is citation to the testimony of Robin Arnold on 6/6/18 at pages 11 and 12.

<sup>8</sup> When the hearing transcript was prepared, rather than using consecutive page numbering across the entire four days of testimony, the court reporter began the transcript of each day's testimony with page 1. Due to this error, it is necessary to cite to the *date* of a witness' testimony as well as the page number(s) in the transcript for that day.

<sup>9</sup> Ms. Arnold is a school psychologist. She earned her master's degree in school counselling and an educational specialist degree from Seattle University. She completed a mentorship program at the Social Thinking Institute in San Jose, California, and was awarded the Washington State School Psychologist of the Year in October 2017 by the Washington State Association of School Psychologists. In 2018, Ms. Arnold was presented with an Outstanding Advocate award by the Everett Public Schools Special Education PTSA. She has 13 years' experience as a school psychologist, the last six with the District. Arnold 6/7: T7-T8. Ms. Arnold also holds National Board Certification in exceptional needs early childhood specialization. *Id.* at 6/6: T128.

2015-16 School Year

9. After continuing to communicate with the District about the Student attending the afternoon developmental preschool (See D5) and then a meeting between the Parents and District staff on October 2, 2015, the District finally determined it would allow the Student to attend the afternoon developmental preschool at Lowell Elementary School. Arnold 6/6: T15, T17; Mother 6/4: T138; D7. However, the decision to allow the Student to attend the afternoon developmental preschool class was made with the understanding that an educational interpreter<sup>10</sup> would not be available for the Student in that class. Mother 6/4: T138; 6/5: T92.

10. The Student's developmental preschool teacher was Margo Gough. Ms. Gough did not sign. Mother 6/4: T138. The Student had an agency interpreter<sup>11</sup> in Ms. Gough's afternoon developmental preschool classroom. *Id.* The Student did not have a 1:1 paraeducator assigned to him, but there was a paraeducator in the classroom. *Id.* There were between 6 and 10 other students in the Student's classroom, all of whom had disabilities. *Id.* at T139.

11. The Student continued to receive speech-language pathology (SLP), physical therapy (PT), and occupational therapy (OT) services during the 2015-16 school year in a "pull-out" model, where the Student received those services by being pulled-out of the developmental preschool classroom to work individually with those service providers. *Id.* at T139-T140.

12. The Parents were not satisfied with the 2015-16 school year. The Student's agency interpreter was not always the same person, and therefore did not always understand the needs of a preschooler who used signing. There were no typically developing peers in the Student's developmental preschool classroom, and the Student had no other exposure to typically developing peers at Lowell Elementary School. *Id.* at T142.

13. In January 2016, the Parents were looking for other preschools for the Student and first came to learn of Immaculate Conception & Our Lady of Perpetual Help Catholic School ("ICOLPH") when they went to an open house. *Id.* at T143.

14. On January 12, 2016, the Mother sent an email to Ms. Gough and Laurie Muller,<sup>12</sup> the District SLP who provided the Student's pull-out SLP services.<sup>13</sup> The Parents wanted to update some of

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<sup>10</sup> An "educational interpreter" is an individual who is capable of ensuring a student can access the "language" of the student's learning environment or program. Brown 6/7: T30, T33. In the Student's case, this involved using ASL interpretation.

<sup>11</sup> An "agency interpreter" is an interpreter provided by the District under a contract with an outside agency.

<sup>12</sup> Ms. Muller earned her master's degree in speech-language pathology from Eastern Washington University, and holds a national Certification of Clinical Competence (CCC) through the American Speech-Language-Hearing Association (ASHA). She has over 30 years' experience as an SLP with multiple school districts, the last 16 years with the District. She first became involved with the Student's educational program in 2014. Muller 6/6: T137-T139.

<sup>13</sup> The Mother is also an SLP. She earned her master's degree in speech-language pathology from Gallaudet University, holds a national CCC through ASHA, is licensed as an SLP in Washington State, holds an Educational Staff Associate Certificate to provide SLP services in a school setting, and has



the goals in the Student's IEP based on what the Parents had observed vis-à-vis the Student's progress at home and in the classroom. D12. Ms. Muller believed the Student was making progress with his speech. Muller 6/6: T145.

15. On February 9, 2016, the Student's IEP team amended his IEP because the Student had already met his annual goals. Arnold 6/6: T15. The amendments includes changes to the Student's present levels of performance (PLOPS) and his annual goals. The IEP was also amended to provide the Student with extended school year (ESY) services. D15.<sup>14</sup>

16. On February 22, 2016, the Mother received an email from Kimberlie Kilroy, the principal at ICOLPH. The email stated:

It was nice talking to you this evening to discuss ICOLPH School as an option for your family. Attached is the preschool and prekindergarten paperwork. As mentioned on the phone, I am available to arrange a classroom visit March 7-10. Once you have a chance to look at your schedule let me know what works best for you.

D16.

17. On May 11, 2016, the Mother received an email from Elisa Whitehouse, an administrative assistant at ICOLPH. The email stated in part:

Thank you for calling the school today. We are thrilled that both [the Student's older sibling] and [the Student] will be joining our preschool program next fall. We are saving a place for each of them through next Tuesday.

D25.

18. The Parents registered and paid for the Student and his sibling in order to save places for them at the ICOLPH preschool for the coming school year. Mother 6/5: T102-T103, T175.

19. On May 16, 2016, the Student's IEP team met to conduct an annual review of his IEP. D28p3 (See box checked for "IEP Annual Review"); D28p31 (PWN: The IEP team convened for part two of the IEP meeting (first meeting held on 5/16/2016)). The Parents attended and participated as members of the IEP team. D28p26. However, the team did complete the annual review.

20. The Student's IEP team reconvened on May 25, 2016. D28p3 (Date of IEP Meeting: 05/25/2016); D28p33. Ms. Arnold was one of the IEP team members who attended the meeting. The Mother also attended and recalled this meeting. Mother 6/5: T98.

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extensive experience working with deaf and hard of hearing children across multiple settings, including multiple school districts. Mother 6/4: T110-T118. While the Mother is "proficient" in ASL (*id.* at T112), she is "not an interpreter." Mother 6/5: T82. The Father is an attorney. He earned his undergraduate degree at the University of Washington, and his law degree from Georgetown University Law Center. Father 6/5: T203.

<sup>14</sup> There appear to be typographical errors on the Amended IEP. The ESY services are identified as starting July 6, 2015. D15p21. This would predate the Amended IEP. In addition, the Mother confirmed that the Student only ever received ESY services during the summer of 2015. Mother 6/4: T166. Whatever the errors, they are not material to resolution of the issues presented.

21. The Parents did not raise any concerns about the Student's access to typically developing peers during the course of the team reviewing his IEP. Arnold 6/6: T21.

22. At the meeting, the Parents were "demeaning toward our IEP team members, and name calling, and yelling...." Arnold 6/6: T20-T21. As a result, Ms. Arnold held a "civility meeting" with the Mother to discuss her concerns about the Parents' conduct. *Id.*

23. Ms. Arnold held the civility meeting with the Mother sometime before June 8, 2016. *Id.* Ms. Arnold specifically told the Mother that the sole purpose of the meeting was to discuss the Parents' conduct at the IEP meeting, and her discomfort with the way the "team members were characterized, and name called and yelled at...." *Id.* at 6/6: T91.

24. The IEP team completed their review of the Student's IEP and developed a new IEP for the Student. D28p3. In addition to developing a new IEP, the team proposed a new comprehensive reevaluation of the Student, in part to make a determination about services for him regarding use of sign language in the classroom environment as well as utilization of an ASL interpreter. D28pp31-32.

25. On June 8, 2016, the Student's new IEP was amended to add program modifications or support for District personnel without reconvening the IEP team for a meeting. The Mother participated in the amendment. D28pp1-2.

26. After receiving an email from ICOLPH regarding orientation for new families, the Mother responded with an email on July 29, 2016, stating, "Thanks so much for this email. We will definitely be attending the new family orientation. Since we are still trying to sort everything out, I wanted to confirm that the first tuition payment is due September 1<sup>st</sup>. Is this correct?" D31p1.

27. In an email to the District on August 29, 2016, the Mother stated, "We wanted to let you know that we have enrolled [the Student] in the Pre-K class at Immaculate Conception & Our Lady of Perpetual Help School (ICOLPH)...[The Student's] class is a morning class, so he can still participate in his therapies at Lowell in the afternoon. I understand that we will need to set up an IEP amendment meeting to address this change." D32.

28. The Mother testified the Parents did not make any final decision about the Student attending ICOLPH rather than returning to the District until after the District's 2015-16 school year ended. Mother 6/5: T175. But she also testified she did not "remember exactly when we enrolled" the Student at ICOLPH. *Id.* at T101. The Mother testified that the Parents "informed them (the IEP team) that...we might be going to a community preschool." *Id.* at T102. Ms. Arnold does not recall any discussion with the Parents about the Student not returning to the Lowell preschool program prior to the Mother's email on August 29, 2016. Arnold 6/6: T27. After careful review of the Mother's testimony, Ms. Arnold's testimony, and the earlier emails between the Parents and ICOLPH, it is found that Ms. Arnold's testimony is more logically compelling and deserving of greater weight than the Mother's testimony. Ms. Arnold was a member of the Student's IEP team that developed and later amended the Student's IEP during the spring and early summer of 2016. Had, as the Mother testified, the Parents informed the IEP team that they might enroll the Student in a private preschool rather than returning him to Lowell's developmental preschool, it likely would have been a matter of quite some interest and perhaps concern to the other IEP team members, including Ms. Arnold. It is similarly likely that any such information or notice given to the IEP team would have resulted in some mention in the District's documentation of the IEP

team's work. However, there is no such mention in any documentation of record, and Ms. Arnold does not recall any information or notice concerning ICOLPH until August 29, 2016. It is concluded that the Mother's testimony that the Parents informed the IEP team that the Student might not be returning to the District is not credible. Accordingly, it is found as fact that the Parents provided no notice to the District in any manner prior to August 29, 2016, that the Student might not be returning to the District, or that the Student would be attending ICOLPH. Furthermore, it is found as fact that because the Mother's testimony regarding notice to the District is not credible, the remainder of the Mother's testimony must also be viewed with reasonable skepticism as well.

29. Ms. Arnold replied to the Mother's notice regarding ICOLPH via email the next day. D33p1. Ms. Arnold stated that she would look for some dates when the team was available and send the dates to the Mother. Ms. Arnold confirmed her understanding that the Parents wanted the District to provide the Student with only "direct therapy time" for his SLP, OT, and PT specially designed instruction going forward. *Id.*

#### 2016-17 School Year

30. The decision to place the Student at ICOLPH was "definitely" the Parents' choice. Mother 6/5: T106. The Student attended a half-day program at ICOLPH in the morning. ICOLPH is a Catholic school serving preschool through eighth grade. *Id.* at T111. The Student's teacher at ICOLPH was Jenny Hendry. *Id.* at T130.

31. The Mother testified the Parents asked the District to provide sign interpreting at ICOLPH, but "they said no." And the District did not give a "clear cut reason." Mother 6/4: T179. Ms. Arnold testified that the Parents never contacted her during the 2016-17 school year about wanting an interpreter at ICOLPH. Arnold 6/6: T29. Heather Brown,<sup>15</sup> District director of special services, testified that she does not recall and does not believe the Parents ever asked the District to provide an interpreter for the Student at ICOLPH. Brown 6/7: T20. Given the Mother's vague assertion, which lacks reasonably expected detail, such as specifically who the Parents asked at the District, the testimony of Ms. Arnold and Ms. Brown which independently corroborate each other, and the Mother's already less-than-credible testimony concerning the Parents' alleged notice to the District that the Parents were considering placing the Student outside the District, it is concluded that the Mother's testimony on this point is also not credible. It is found as fact that the Parents never requested that the District provide an ASL interpreter or sign interpreting at ICOLPH for the 2016-17 school year.

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<sup>15</sup> Heather Brown is one of three directors in the District's Department of Special Services. She has held that position for three years. Ms. Brown holds a master's degree in teaching, and an administrative credential. She has endorsements for special education, early childhood, and elementary teaching. She has experience as both a paraeducator and special education classroom teacher. Prior to her employment with the District, Ms. Brown worked for the Seattle School District for 16 years, where her positions included special education department head, resource room teacher, inclusion teacher for over five years, and program specialist. Ms. Brown completed American Sign Language Parts I – IV as part of an interpreter-training program at Seattle Central Community College. She has supervised the District's Deaf and Hard of Hearing (D/HH) Program for three years, as well supervising the D/HH program at the Seattle School District for two years.

32. On September 9, 2016, the Student's IEP team met to amend the Student's IEP. D34pp1, 23. The IEP team included the Parents, Ms. Arnold, Ms. Muller, Ms. Gough, and District Occupational Therapist Grace Jarchow.<sup>16</sup> D34p2.

33. It is Ms. Arnold's understanding that "the IEP amendment that was completed in September in response to the change from Student attending developmental preschool to being a walk-in SLP/OT student only with enrollment at Immaculate." Arnold 6/6: T27-28.

34. Rebecca Clifford,<sup>17</sup> the District's executive director of special services, understood that the Parents had placed the Student in a private preschool and wanted "walk-in services" in the afternoon. Clifford 6/7: T17.

35. The team amended the Student's IEP to provide him with SLP, OT, and PT services with District service providers at two District Schools: Lowell Elementary School twice each week for SLP services (total 60 minutes), and Hawthorne Elementary School once each week for OT and PT services (total 55 minutes). Mother 6/5: T112; D34p18. The District SLP, OT, and PT staff provided all of these services to the Student in a 1:1 setting.

36. Under the "Least Restrictive Environment" section of the amended IEP it states:

[The Student] will attend a private Regular Early Childhood (REC) program for 12 hours per week at Immaculate Conception Our Lady of Perpetual Help. He will received (sic) his OT/PT and Communication therapy services elsewhere in the Special Education setting.

D34p19.

37. The PWN associated with the amended IEP states:

As [the Student] is now enrolled in a private school pre-kindergarten program (Immaculate Conception) parents have requested to discontinue classroom communication and classroom motor services.

LRE change from separate class to REC >10 hours per week(.

D34p22.

38. In response to a leading question during direct examination at the due process hearing, the Mother confirmed she interpreted the District's amendment of the Student's IEP as the District

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<sup>16</sup> There is another signature of a team member that may be the signature of Jenny Hendry, the Student's teacher at ICOLPH, although it cannot be determined with certainty.

<sup>17</sup> Ms. Clifford earned her bachelor's degree in exceptional education and elementary education from Buffalo State, and a master's degree in leadership and instruction in inclusive classrooms from Utica College of Syracuse University. She attended the University of Washington Danforth school administration program, and holds a principal certificate and a program administrator certificate. Ms. Clifford recently completed her educational doctorate in leadership and policy studies at the University of Washington. She has experience as a paraeducator in a special education classroom, and as a special education teacher in a self-contained classroom for students with emotional and behavioral disabilities.

agreeing to the Parents' placement of the Student at ICOLPH. Mother 6/4: T177. On cross-examination, the Mother stated that the IEP team "did not disagree with the placement" at ICOLPH. *Id.* at 6/5: T106. Summing up her belief, the Mother stated:

[T]hey (the District) did not disagree with it (the Parents' placement of Student at ICOLPH). We said we want to put him at Immaculate and they didn't say, "No, no, we think that's a bad idea." They had no disagreement with our desire to place him at Immaculate. So, you can interpret that as agreement. They put it on the IEP. So, to me, that states agreement.

*Id.* at T174.

39. The Parents did not expect the District to pay for the Student's placement at ICOLPH. *Id.* at T107. Specifically, the Mother did not believe at any time that the District had agreed to pay for the Student to attend ICOLPH. *Id.* at T174.

40. In an email to Ms. Gough on September 14, 2016, the Mother confirmed that the Parents were declining transportation to and from and a district-provided interpreter during the Student's direct therapy services at the District. D35.

41. On January 10, 2017, Ms. Arnold sent an email to the Parents and Ms. Hendry, the Student's teacher at ICOLPH. The purpose of the email was to set a date to develop a plan for the Student's approaching triennial reevaluation.<sup>18</sup> Ms. Arnold wanted to initiate the reevaluation in order to have it completed in time to develop the Student's next IEP, which was due in May 2017. D40. Ms. Arnold had initially proposed initiating the reevaluation in November, but the Parents had declined because they wanted to wait to discuss the reevaluation until after pending progress reports were completed. Arnold 6/6: T31.

42. The Mother met with Ms. Arnold on January 18, 2017. Part of the discussion involved the Student's pending reevaluation. D41. During the meeting, the Mother became "very angry," was "yelling," and "banged on the table a couple of times" when Ms. Arnold brought up the subject of including cognitive testing as part of the Student's reevaluation. The Parents had opposed cognitive testing in the past. Arnold 6/6: T33.

43. Uncomfortable with the Mother's behavior, Ms. Arnold left the meeting and immediately went to speak with Principal Cindy Foster. *Id.* at T34. Ms. Arnold did not want to be in a one-on-one situation with the Parents moving forward. *Id.* at T95. Principal Foster instructed Ms. Arnold not to meet alone with the Parents any longer. *Id.* at T93.

44. On February 9, 2017, Principal Foster and Ms. Arnold had another civility meeting with the Parents to address the Mother's behavior during her meeting with Ms. Arnold on January 18<sup>th</sup>. *Id.* at T35; D43.

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<sup>18</sup> The Student's last evaluation was completed in August 2014. D1.

45. On February 21, 2017, the Parents received IEP Progress Reports for the Student. D44; D45p3. During her review of the progress reports, the Mother first came to learn that one of the six benchmarks for the Student's fine motor goal was missing.<sup>19</sup> D45p3; Mother 6/4: T185.

46. On February 22, 2017, the Mother sent an email to Ms. Arnold, Principal Foster, and Cynthia Stoppelmoor, the District OT who was providing the Student's services for his fine motor goal. D45p3. The Mother told the District that one of the Student's fine motor benchmarks was missing, and asked to have it corrected.

47. Ms. Stoppelmoor<sup>20</sup> replied to the Mother via email the next day, attempting to clarify which benchmark was missing. D45p2. The Mother confirmed Ms. Stoppelmoor's understanding. *Id.* at pp1-2. As could best be determined, the missing benchmark was inadvertently deleted from the Student's IEP during the IEP amendment on September 9, 2016. Arnold 6/6: T36.

48. Ms. Stoppelmoor opined that compensatory education was not required despite the missing benchmark, but she did not explain the basis for her opinion. Stoppelmoor 6/6: T169.

49. On February 27, 2017, the Student's IEP was amended to include the missing benchmark. D47.

50. During March 2017, Washington State and Snohomish County experienced an outbreak of measles. D50p3. The Parents had earlier elected not to have the Student vaccinated against measles, mumps, or rubella (MMR). D30.

51. On March 1, 2017, Celia O'Connor-Weaver, the principal at Hawthorne Elementary School where the Student was receiving his direct 1:1 OT and PT services, sent an email to a group, including the Mother. Principal O'Connor-Weaver's email stated that the Student would either need to be immunized or kept out of school until March 15, 2017. D48p1.

52. The Student's exclusion from Hawthorne Elementary School did not affect his receipt of SLP services at Lowell Elementary School. Mother 6/5: T119.

53. The Student missed a total of 50 minutes (two 25-minute sessions) of direct OT services and a total of 60 minutes (two 30-minute sessions) of direct PT services during the two weeks he was excluded from Hawthorne Elementary School due to the MMR outbreak. See D34p18 (IEP calls for 25 minutes/wk of OT services and 30 minutes/wk of PT services).

54. In an email to the Mother on March 1, 2017, District PT Audrey Sharma proposed adding 5-10 minutes to every week after the Student returned to Hawthorne to make up for the two PT sessions the Student would miss. D50p1.

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<sup>19</sup> Compare D28p8 (lists six benchmarks) with D44p1 (lists five benchmarks).

<sup>20</sup> Cynthia Stoppelmoor is a District occupational therapist (OT). Ms. Stoppelmoor earned her bachelor's degree in occupational therapy from the University of St. Catherine's, and a master's degree in education from City University in Seattle. She has 39 years' experience as an OT, and has worked in the District since 1992. She first worked with the Student in the fall of 2016, providing him with OT walk-in services at Hawthorne Elementary School.

55. The Mother responded by email on March 3, 2017, thanking Ms. Sharma and agreeing to Ms. Sharma's plan to add minutes to future 1:1 sessions. *Id.* The Mother does not know if additional minutes were added to subsequent PT sessions. Mother 6/4: T169.

56. The Mother also spoke in-person with Ms. Stoppelmoor, the Student's OT service provider. Ms. Stoppelmoor also proposed adding minutes to the Student's subsequent OT sessions to make up for the two missed sessions. The Mother said that was fine. *Id.* at T169-T170.

#### The Student's 2017 Triennial Reevaluation

57. A team meeting was held on March 6, 2017, to initiate the Student's triennial reevaluation. The Student's last triennial evaluation was set to expire on August 12, 2017. D52pp1-2. The team agreed to assess the Student in the areas of health, emotional/social/behavioral, communication, fine/gross motor, and hearing/audiology. D52p2. The team decided to include assessment in the emotional/social/behavioral area based upon concerns raised by the Student's teacher at ICOLPH, Ms. Hendry. Arnold 6/6: T38. The reevaluation would use the Social Skills Improvement System (SSIS) parent and teacher rating scales, and classroom observation of the Student to assess his emotional/social/behavioral functioning. D52p2.

58. The team wanted to initiate the reevaluation early in part to help inform the development of the Student's annual EIP, as well as to assist in planning for the Student's transition to kindergarten in fall 2017. D52p2.

59. After the meeting on March 6, 2017, the Parents and the District team members engaged in further communication and exchange of information regarding the reevaluation assessment plan. This resulted in changes to the assessment plan and multiple PWNs. *See generally*, D52p3, D53 - D57. Of note, while the Parents initially had concerns about using the SSIS to assess the Student's emotional/social/behavioral functioning, the Parents finally agreed. Arnold 6/6: T40-T41; D54p1.

60. At no time did the Parents ever ask the reevaluation team to evaluate any special need the Student might have related to transportation. The Mother had no reason to believe the Student could not safely take the same school bus to and from school all the other students rode. In fact, the Mother assumed the Student would take the same bus as all the other students. Mother 6/5: T129.

61. The Parents were concerned that any effects of the Student's impaired hearing be taken into consideration during his social/emotional/behavioral assessment. D52p3; Arnold 6/6: T39. The team initially considered having Rebecca Butz-Houghton, an outside school psychologist who was fluent in ASL, conduct the assessment. However, after Ms. Arnold and the Mother consulted with her, Ms. Butz-Houghton determined that her combination of skills was not necessary to conduct the Student's social/emotional/behavioral assessment. The Parents confirmed their agreement in an email to Ms. Arnold. D54p1. In addition, the evaluation team determined that Erin Crafton, an SLP from another school district who worked with that district's deaf and hard of hearing program, and Guthrie Nutter, an ASL specialist with the Washington State Center for Childhood Deafness and Hearing Loss (CDHL), would conduct assessments of the Student's expressive and receptive communication skills, and use of ASL. *See* Nutter assessment report at P4pp1-10; Crafton assessment report at P4pp11-13; Arnold 6/6: T39-T42,

T107-T109. Ms. Arnold later worked to incorporate Mr. Nutter's<sup>21</sup> and Ms. Crafton's<sup>22</sup> assessments into the final reevaluation report. D75.

62. On April 12, 2017, the District received the Parents' consent for the Student's triennial reevaluation. D77p66; Arnold 6/6: T53.

63. The Student had surgery on May 5, 2017, which included removal of his tonsils, related procedures, and insertion of ear tubes. D59, D65, D77p4. The Student was out of school for at least the next two weeks recovering from his surgery. Mother 6/5: T131.

64. The Student's IEP team held a meeting on May 17, 2017, and developed a new IEP for the Student. D67p1. Although the Student's triennial reevaluation was not finished, the Student's prior IEP was going to expire, and the new IEP was intended as a "stop gap" until the reevaluation could be finished and a new annual IEP developed based on the results of the reevaluation. Muller 6/6: T148. The Parents attended the meeting as part of the IEP team. Mother 6/5: T131; D67p19. The Student's reevaluation case manager was District SLP Laurie Muller. Muller 6/6: T148; D67p23.

65. There was no discussion at the meeting about making any changes to the services from the Student's last IEP. *Id.* at T149.

66. It is the Parents' position that because the IEP developed on May 17<sup>th</sup> was not a "two tiered" IEP,<sup>23</sup> the Student did not have an IEP in place at the commencement of the 2017-18 school year. The Mother asserted that, "[w]e didn't have a placement for him...He was not offered a spot at either Lowell or any other school. He was not allowed to come to school to participate in a classroom, a kindergarten classroom." Mother 6/5: T172-T173. But at the same time the Mother acknowledged that "[s]o, while I know that that IEP was in effect, it did not have the two tiered matrix; so, there was no classroom identified for him. So, again, he was not welcome at any school at the time that school started in September." *Id.* at 6/5: T173.

67. In an email to the Parents on May 22, 2017, Ms. Arnold proposed extending the evaluation timeline to June 22, 2017, the last day of school, due in part to the Student's period of recovery from surgery. D68pp1-2; Arnold 6/6: T53.

68. The Mother and Ms. Arnold signed an Agreement to Extend Evaluation Timeline on May 31, 2017. The Agreement extended the evaluation timeline to June 22, 2017. D77p59.

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<sup>21</sup> Mr. Nutter concluded that the "most ideal academic language setting (for the Student) would be an ASL/English bilingual immersion program." D77p47.

<sup>22</sup> Ms. Crafton concluded that the Student had a mild delay in expressive language and a moderate delay in receptive language when spoken English is paired with ASL, and that the Student would benefit from the support of a paraeducator who knows sign language. P4p13.

<sup>23</sup> A two-tiered IEP would, apparently, be an annual IEP which, spanning two school years, identifies a different placement for the second school year.



69. As part of his triennial reevaluation, the Student's emotional/social/behavioral functioning was assessed. Ms. Arnold gathered input from the Mother and the Student's preschool teacher at ICOLPH, Ms. Hendry, using the SSIS Parent Rating and Teacher Rating Scales. Ms. Arnold gathered additional information on the Student's functioning through sharing of anecdotal information, classroom observation, and completion of a Social Communication Skills – Pragmatics Checklist. D77/P7p24.<sup>24</sup>

70. Ms. Arnold reviewed the results of Ms. Hendry's SSIS Teacher Rating Scale. There are three "validity indexes" on the SSIS Teacher Rating Scale: the F Index, the Response Pattern, and the Response Consistency. One of Ms. Hendry's three validity indexes indicted that her ratings of the Student's social functioning should be viewed with "caution". That index was her Response Pattern index. P20p3.

71. Ms. Arnold is very familiar with the use and interpretation of the SSIS. She has consistently used the SSIS as a tool in social/emotional assessments over the past six years. Arnold 6/6: T110. When a validity index score indicates caution, Ms. Arnold uses her "professional training, skills, knowledge, and the procedures set forth in the SSIS manual" to evaluate the validity of the individual's responses. *Id.* at T116, T118.

72. Ms. Arnold reviewed Ms. Hendry's SSIS Teacher Rating Scale to see if there was a discernable pattern to her responses. Ms. Arnold determined there was no discernable pattern in Ms. Hendry's responses. Ms. Arnold next considered Ms. Hendry's responses in light of the "qualitative information" about the Student that Ms. Hendry shared with her during the assessment planning process and the information Ms. Hendry shared during her observation of the Student in Ms. Hendry's classroom at ICOLPH on May 2, 2017. D64p2. Ms. Arnold also considered her direct observation of the Student in Ms. Hendry's classroom. Relying upon her education, training and experience with the SSIS, Ms. Arnold concluded that Ms. Hendry's SSIS Teacher Rating Scale responses were valid and "interpretable." Arnold 6/6: T69-T71, T114-T115.

73. Ms. Arnold did not identify or mention Ms. Hendry's SSIS Response Pattern index indicating "caution" in any of the drafts or in the Student's final triennial reevaluation report. She did not

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<sup>24</sup> There are four versions or drafts of the Student's triennial reevaluation report in the record: P5, P6, P7, and D77. There is also mention of potentially at least one additional draft of the reevaluation report that is not in the record. See Arnold 6/6: T59, T113, T123 (The "third draft" of the reevaluation report given to the Parents and team members is not in the record); *But see* Mother 6/7: T64 (No draft evaluation report was distributed at the meeting). Despite a comprehensive and painstaking review of all the testimony of record and the exhibits, it is still not entirely clear at what time which versions/drafts of the report were provided to whom. But as can best be determined, the final reevaluation reports are the Exhibits D77 and P7; the only difference between the two exhibits being that D77 reflects signatures of all the reevaluation team members except the Parents, and P7 is void of any signature by any team member. Compare D77 and P7, pages 23. Accordingly, with the exception of the Findings of Fact regarding the qualitative descriptors associated with the SSIS Teacher Rating Scale, all references to the reevaluation report will be to Exhibit D77/P7, since no issue has been raised by the Parents regarding the team signatures or lack thereof. It is also worthwhile to note that the only difference between Exhibit D77/P7 and Exhibit P6 are the qualitative descriptors (D77/P7p19 "significant" and P6p19 "moderate") used to characterize the degree of delay in the Student's social skills derived from the SSIS Teacher Rating Scale.

identify or mention this because it is not something that she would typically include unless there was reason to believe Ms. Hendry's responses were not interpretable. *Id.* at T69-T71.

74. The only other witness to give testimony regarding Ms. Hendry's responses on the SSIS Teacher Rating Scale was Dr. Amy Melick.<sup>25</sup> Dr. Melick has never used and is not familiar with the SSIS. Melick 6/4: T38. She has not reviewed the SSIS test manual. *Id.* at T72-T73. However, Dr. Melick confirmed that Ms. Hendry's SSIS Response Pattern index indicating "caution" does not mean Ms. Hendry's responses were invalid. *Id.* at T86, T99.

75. The Parents first came to learn that Ms. Hendry's SSIS Response Pattern index indicated "caution" when they received Dr. Melick's evaluation report on or about May 4, 2018. Mother 6/4: T226. Had they been aware of Ms. Hendry's SSIS Response Pattern index earlier, they would have had questions about it. *Id.* However, the Parents did not identify what questions they would have had, or how the answers to their questions would have affected the Student's reevaluation or subsequent IEPs.

76. On June 14, 2017, the Student's reevaluation team met to consider the results of his triennial reevaluation. The Parents attended as team members. D77/P7. The reevaluation meeting lasted approximately three hours. D81p1. After the meeting ended, the Parents remained behind with Ms. Arnold to discuss some other changes that the Parents wanted included in the final report. Mother 6/6: T132.

77. Over the course of drafting what would be the final reevaluation report, Ms. Arnold continued to consider the feedback she received from the Parents before, during, and after the reevaluation meeting on June 14, 2017. D80p4. The District also agreed to this at the reevaluation meeting. Brown. 6/7: T23.

78. Ms. Arnold considered the interpretable results of Ms. Hendry's SSIS Teacher Rating Scale. Ms. Hendry's ratings of the Student's social functioning resulted in a score that fell 1.6 standard deviations below the mean for the SSIS. While the SSIS manual provides a qualitative range (e.g. mild, moderate) for numerical *standard* scores, the manual does not provide a qualitative range for numerical *standard deviation* scores. Arnold 6/6: T110.

79. Ms. Arnold assigned a qualitative descriptor to Ms. Hendry's numerical standard deviation score in order to better identify or communicate the degree of the Student's impaired social functioning in the draft reevaluation report. Ms. Arnold first described that impairment as "mild." P5p18. In a subsequent draft of the reevaluation report, Ms. Arnold changed her qualitative

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<sup>25</sup> Dr. Melick is a counselling psychologist, who would later conduct an independent evaluation of the Student's social skills in 2018. See P20. Dr. Melick earned her doctorate in counselling psychology at Pennsylvania State University, after earning her master's degree in counselling for the hearing impaired at Gallaudet University. She is licensed to practice as a psychologist in Washington State. Dr. Melick is employed part-time at Seattle Children's Hospital on the cochlear implant team, where part of her work involves conducting social-skills group sessions for children who have hearing impairments. Dr. Melick also has her own private assessment and therapy practice. Melick 6/4: T26-T27. Dr. Melick does not consider herself to be a "school educator." *Id.* at T68. And while she used Conceptually Accurate Signed English (CASE) to supplement her oral communication with the Student, Dr. Melick possesses no certification as any type of a sign interpreter, and does not consider herself to be an interpreter. *Id.* at T96.

descriptor to "moderate." P6p19. Then in the final reevaluation report, Ms. Arnold changed her qualitative descriptor to "significant." D77/P7pp19.

80. Based solely Ms. Hendry's SSIS Teacher Rating Scale score of -1.6 standard deviations, the Student's social functioning was mildly to moderately delayed. Arnold 6/6: T62. However, when Ms. Arnold also considered "the whole picture of the observation information, the rating scales, input from Erin Crafton, input from other members of the team and reviewing their areas of the evaluation," Ms. Arnold changed her initial qualitative descriptor from mild to moderate. *Id.*

81. After the reevaluation meeting on June 14, 2017, Ms. Arnold recognized that the Parents were "unhappy" with the delay in the Student's social functioning being described as moderate. Arnold 6/6: T64, T119-T121. Ms. Arnold "changed the designation to significant in alignment with feeling that that would be a more concrete alignment in terms of significant being defined in the (Washington Administrative Code) WAC as a delay of minus 1.5 standard deviations or greater...There was no change to the present levels (of performance). There was no change to the data. There was no change to the rating scales. It was just changing the wording with the intention of hopefully that way of describing the delay as being more amenable to the Parents." *Id.* at T64, T119-T121.

82. There were no changes in the recommendations for the Student's specially designed instruction (SDI), nor any change in the eligibility determination due to changing the qualitative descriptors for Ms. Hendry's SSIS Teacher Rating Scale score. *Id.* at T65.

83. Ms. Brown attached a copy of the Student's "final evaluation report" to an email she sent the Parents on June 23, 2017. In her email, Ms. Brown stated:

At this time, the district has finalized the evaluation document. Any remaining concerns or disagreements with the evaluation you may have can be submitted in writing and, if you choose to do so, will be attached to the final copy of the evaluation report...In response (to) your email exchanges with Robin Arnold, the Behavior/Social Scales Individual Assessment Report in the evaluation draft was amended to designate a "significant" delay ( $\geq -1.50$  SD) in social skills rather than a "moderate" delay. A Prior Written Notice dated 6/23/17 is also attached informing you of that action.

D83.

#### The Student's 2017-18 IEP

84. After completion of the Student's triennial reevaluation, the Student's IEP team began preparations to develop an IEP for the Student for the 2017-18 school year to replace the May 2017 "stop gap" IEP.

85. The District wanted to hold the IEP team meeting before the end of the school year so all the team members could attend. D80p3. The District also wanted to hold the IEP meeting before the end of the school year because it knew the Student would be transitioning from preschool to kindergarten, and would require transition planning. Clifford 6/6: T205.

86. An IEP team meeting was set for June 19, 2017, but postponed when the Parents would not excuse a mandatory team member, and because the Parents wanted further team discussion about the triennial reevaluation. D79; Mother 6/5: T158, T177.

87. The IEP team meeting was rescheduled for June 21, 2017, but not held because it conflicted with a follow-up appointment for the Student's earlier surgery. D81; Mother 6/5: T182.

88. In her June 23, 2017 email to which the final triennial reevaluation report was attached, Ms. Brown also stated:

We understand in finalizing the evaluation the IEP timeline (30 calendar days) will begin. Unfortunately, with the school break and due to certificated staff availability, the district members of the team cannot meet within that timeframe. We propose to meet after school on the initial staff work days in late August.

...

I am attaching a DRAFT of an IEP that is based on the now-finalized evaluation – please note that until the IEP team makes a final determination regarding program and placement, the minutes on the matrix will not be accurately reflective of a program.

In regards to your request for a location of a signing environment in which [the Student] would have access to a shared para (to share with other students needing sign language support), because we are still making enrollment and placement decisions, we are unable to let you know exactly which school and program will offer this program.

D83. Ms. Brown proposed meeting on August 30, August 31, or September 5, 2017 to develop the Student's IEP. *Id.*

89. Not receiving any reply from the Parents, on July 6, 2017, Ms. Brown sent another email inquiring about their availability for any of the dates she had earlier proposed. D84p1.

90. The Father responded in an email later the same day stating that, "We are discussing our options with counsel and will get back to you after we return from our vacation." *Id.*

91. On August 17, 2017, the Father sent an email to Ms. Brown and Principal Foster, with copies to the Mother and the Parents' attorneys, Lara Hruska and Angela Shapow. D85p1.

92. In his email, the Father said the Parents wanted the IEP team meeting set for either August 28<sup>th</sup> or 31<sup>st</sup>. The Father informed Ms. Brown that their attorney would be attending the meeting, and then identified nine individuals the Parents wanted in attendance at the IEP meeting. *Id.*

93. In his email, the Father also stated that the Parents:

[R]equest all of [the Student's] general and special education records, including but not limited to all test protocols and documentation related to his most recent special education evaluation, under...(FERPA). We further request, under the Washington Public Records Act (42.56 RCW), any correspondence to or from District Staff from 2014 to the present regarding [the Student]...Per FERPA, receipt of these documents must occur prior to any IEP team meeting concerning [the Student].

*Id.*

94. On August 23, 2017, a business services specialist with the District responded to the Parents' records request in an email. The email confirmed the District's receipt of the records

request on August 17, 2017. It went on to inform the Parents that the District would be ready for the Parents to pick up the Student's general education and special education records within one week. However, it also stated that Parents that the District does not provide copies of copyrighted assessments to parents, but would provide copies of protocols to a person designated by the Parents who is "authorized to administer/interpret the protocols." It also informed the Parents that it would take the District 3 weeks to search for and provide all of the Parents' requested emails. D86p1.

95. The Father could not recall if the Parents ever identified any individuals to the District to whom the Student's test protocols could be sent. Father 6/5: T201. While the Father asserted that the Parents were told the Student's test protocols were sent to Dr. Melick, the Father could not recall who told the Parents. *Id.* at T201-T202. Given the Father could not recall if the Parents ever identified any individual to whom the District could send the protocols, and his inability to recall who told the Parents that the District had sent the protocols to Dr. Melick, it is found as fact that the District did not tell the Parents that the protocols were sent to Dr. Melick.

96. In an email on August 24, 2017, Principal Foster informed the Parents that the Student's general education and special education records were ready to be picked up at the front office. D87.

97. The Student's IEP team met over three days totaling eleven hours to develop the Student's IEP. D88p1, P16p1.

98. The first IEP team meeting was held on August 31, 2017, and lasted just over three hours from 3:30 p.m. to 6:40 p.m. There were 19 team members, including the Parents, as well as attorneys for both the Parents and the District present. *Id.*

99. The District's 2017-18 school year began on September 6, 2017.<sup>26</sup> The Parents registered the Student to attend Lowell Elementary School, and the Student and the Mother attended the Lowell kindergarten orientation. Mother 6/5: T188. However, the Parents unilaterally elected to place the Student at Our Savior Lutheran Preschool in a half-day preschool program, rather than have him attend kindergarten at Lowell Elementary School. The Mother continued to home school the Student as well. *Id.* at T166.

100. The Student continued to access his walk-in SLP, OT, and PT services with an educational interpreter at the District during the 2017-18 school year. Brown 6/7: T37. However, it is unclear *when* during the school year the Student began accessing his walk-in services. *Id.* at T51. This is despite the fact that, prior to filing their Complaint on October 16, 2017, the Parents never asked the District to continue providing the Student's walk-in SLP, OT, or PT services for the 2017-18 school year. Mother 6/5: T161.

101. The IEP team met again on September 7, 2017, with the same participants as the first meeting. The meeting lasted from 3:30 p.m. to 8:00 p.m. D88p2. The meeting "got a little feisty," and Ms. Clifford sent out the District's civility policy before the third meeting. Clifford 6/6: T209.

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<sup>26</sup> See FN 3.

102. The IEP team met for a third time on September 21, 2017. The meeting lasted from 3:45 p.m. to 7:15 p.m. It is unclear exactly who attended this third and final meeting. D88p4.

103. Over the course of the three meetings, the IEP team developed the Student's new IEP. D89pp5-34.

104. The IEP team determined that the Student required both a 1:1 paraeducator and a 1:1 sign language interpreter to support environmental accommodations and modifications in his educational environment. *Id.* at p33. The parties do not dispute the IEP team's determination that the Student requires a 1:1 sign interpreter in order to obtain a free appropriate public education.

105. The Student's new IEP provided him with a number of accommodations and modifications in the classroom. D89p29. These included altering the format of materials, sign language, rephrasing test questions and/or directions, extra time to complete assignments, extra time on tests and quizzes, allowing breaks, providing individualized and small group instruction, modifying, repeating and modelling of instructions, preferential seating, utilizing oral responses to assignments and tests, hands-on assignments, additional time to respond, closed captioning, and sensory strategies and materials to support self-regulation.

106. Ms. Clifford opined that an educational interpreter, alone, could not provide all of the Student's accommodations and modifications while also signing. Clifford 6/6: T217, T231. Similarly, Ms. Clifford opined that a kindergarten classroom teacher, alone, could not provide all of the Student's accommodations and modifications while the teacher is leading instruction for 20 to 23 kindergarten students. *Id.* at T216.

107. Ms. Stoppelmoor opined that a 1:1 paraeducator would be helpful to her while she was delivering her OT specially designed instruction to the Student. The paraeducator could "carry over" what the paraeducator observed during Ms. Stoppelmoor's specially designed instruction into the Student's general education kindergarten classroom. Stoppelmoor 6/6: T180-T181. In addition, Ms. Stoppelmoor agreed with Ms. Clifford that a kindergarten classroom teacher would not be able to support the Student with 20-plus other kindergarten students in the room at the same time. *Id.* at T186.

108. The roles and responsibilities of an educational interpreter and a 1:1 paraeducator are different. An educational interpreter is present to ensure a student can access their learning environment through language. A paraeducator is present to provide educational scaffolding and support within the context of a general education setting. Brown 6/7: T30-T33.

109. During her testimony, Dr. Melick was asked if an educational interpreter could assist with the Student's accommodations and modifications. Dr. Melick confirmed she has almost no experience working with educational interpreters. Melick 6/4: T45. In addition, Dr. Melick's response to the question was vague and rambling, and not compelling. *Id.* at T47-50.

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110. Dr. Ilene Schwartz<sup>27</sup> appeared as a witness for the Parents. Dr. Schwartz opined that a paraeducator could help a teacher implement a student's special education program, including a student's IEP goals, with materials preparation and with more intensive instruction to assist with the generalization of skill acquisition across settings. Schwartz 6/5: T39-T43.

111. Dr. Schwartz has never met or observed the Student. She reviewed the Student's September 2017 IEP (P15), another of the Student's IEPs, the District's 2017 triennial reevaluation of the Student, and Dr. Melick's May 2018 evaluation of the Student. Dr. Schwartz did no direct assessment of the Student, and did not prepare any type of report regarding the Student. *Id.* at T28, T45.

112. The Student's new September 2017 IEP called for him to be in a general education setting for 87.94% of the school day. D89p33. The remainder of his time at school, 12.06%, would be spent receiving some of his specially designed instruction in a special education setting. This included specially designed instruction in behavior/social skills, communication, fine/gross motor, and hearing. *Id.* at p31.

113. Ms. Stoppelmoor developed the fine and gross motor goals in the Student's September 2017 IEP. Stoppelmoor 6/6: T172-T173. Ms. Stoppelmoor opined that some of the service minutes for the fine/gross motor skills specially designed instruction needed to be in a special education setting because the Student "needed specific practice with a number of different skills...so that he could work on those skills and then be able to carry it over...into the classroom alongside his peers." *Id.* at T175-T178. Ms. Stoppelmoor had concerns about there being too many people and/or too many distractions for the Student in a general education classroom. *Id.*

114. The Student's 2017 IEP called for some of the communication specially designed instruction to be delivered in a special education setting because some of the communication goals were to learn and execute sign language. The ideal way to learn sign language is in a "voice off environment that is quiet." Brown 6/7: T29. This is especially important for individuals who have some ability to hear, because if you have any ability to hear "your body will default to hearing." *Id.*

115. One of the Student's IEP goals involves fingerspelling. D89p20 (Hearing Goal #1). When learning how to fingerspell, the best environment is a small, quiet environment, as in a pull-out

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<sup>27</sup> Dr. Schwartz is a psychologist. She earned her doctorate from the University of Kansas. Her research interests are in the areas of applied behavior analysis and early childhood special education, and involve identifying and validating instructional strategies for children with autism and other significant disabilities. P24. She has been a faculty member or professor at the University of Washington in the special education department since 1991, and is currently the director of the Haring Center at the university that houses the experimental education unit (EEU). Schwartz 6/5: T9-T10. The EEU is a preschool through kindergarten program where children with disabilities as well as typically developing children ages birth through kindergarten are educated together in fully inclusive classrooms. *Id.* at T10. An EEU kindergarten class will typically have 18 students, with and without disabilities, three paid staff, and some number of adult intern-students in the classroom. *Id.* at T35. This allows for more individualization and expert support than a typical public school kindergarten class. *Id.* at T34.

setting.<sup>28</sup> It is appropriate to provide the Student's specially designed instruction for fingerspelling both in and out of a general education classroom. Brown 6/7: T29.

116. Dr. Schwartz has extensive experience with inclusion education, i.e. providing specially designed instruction in a setting where there are both disabled students and typically developing students. Schwartz 6/5: T10. Research has established that when students are pulled out of a general education classroom to be provided specially designed instruction, they may experience problems with generalizing the skills they learn in a pull-out environment to other environments. *Id.* at T12. However, Dr. Schwartz acknowledges that inclusive education does not require a general education environment all of the time. *Id.* at T36.

117. Dr. Schwartz reviewed the Student's September 2017 IEP goals and gave her expert opinion testimony regarding whether those goals could be implemented in a public school general education kindergarten classroom. *Id.* at T17-T26, T46. It is Dr. Schwartz's opinion that those goals could be implemented in such a setting. *Id.* However, Dr. Schwartz also acknowledged that: one of the Student's goals could be implemented in a pull-out small-group setting provided general education peers were available to evaluate the Student's progress (Social/Behavior Goal #1 at D89p17; Schwartz 6/5: T19); that one of the Student's goals could be implemented in a pull-out setting if a student was sensitive to the fact s/he was learning to fingerspell (Hearing Goal #1 at D89p20; Schwartz 6/5: T22); that one of the Student's goals would require there be someone in an inclusive general education classroom that understood ASL (Hearing Goal #2 at D89p20; Schwartz 6/5: T22); that she would have to observe a student's inclusive kindergarten classroom before she could offer an opinion regarding a goal (Communication Goal #1 at D89p26; Schwartz 6/5: T24); that implementing one of the Student's goals would depend upon what other students in his classroom would be doing (Communication Goal #2 at D89p26; Schwartz 6/5: T24); and that the data collection required to measure progress for two of the Student's goals would be difficult in an inclusive classroom (Communication Goals 3 and 4 at D89p26; Schwartz 6/5: T26).

118. Dr. Schwartz did not offer any opinion regarding implementation of the Student's articulation goal (D89p21) in an inclusive or push-in versus a pull-out model.

119. After careful consideration of the opinion testimony from District staff who are familiar with and know the Student, and have in some cases provided services to the Student over a substantial period of time, and the testimony of Dr. Schwartz, who has never met or observed the Student and whose opinion is based upon a limited review of a few of the Student's educational records, it is concluded that the testimony of the District staff is deserving of greater weight with respect to the implementation of the Student's September 2017 IEP goals in a pull-out versus a push-in service model.

120. It is also concluded that the opinion testimony of District staff is entitled to greater weight than the Mother's opinion testimony regarding implementation of the Student's IEP goals in a pull-out versus push-in model. It has already been found that the Mother's testimony in other areas

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<sup>28</sup> A pull-out setting is one in which a student eligible for special education is pulled-out of a general education classroom to receive specially designed instruction in another environment, typically a special education setting. Pull-out services can be contrasted with "push-in" services, where specially designed instruction is provided in a general education, or inclusive, setting. Schwartz 6/5: T11-T12.



must be viewed with reasonable skepticism. Furthermore, parents typically have a closer and more personal interest, including financial interest, in the outcome of a special education due process hearing than a typical school district staff person. Accordingly, a parent's testimony, especially with respect to opinion versus fact testimony, should be subject to greater scrutiny. Together, these factors support the finding that the opinion testimony of the District staff who appeared as witnesses must be given more weight than the Mother's testimony regarding implementation of the Student's September 2017 IEP goals in a pull-out versus a push-in service model.

121. Dr. Schwartz also gave testimony regarding the transition of students from a private preschool setting to a public kindergarten school setting. Schwartz 6/5: T29-T31. However, her testimony was in response to a *general* question regarding what types of services *children* need during such a transition. See question by Parents' counsel at 6/5: T29. As such, Dr. Schwartz's testimony is not probative of what, if any, transition services *the Student* might require. The failure to consider any *individualized* needs of the Student results in Dr. Schwartz's opinion testimony on this point not being probative of what the Student might require in terms of any transition services moving from ICOLPH to a District kindergarten classroom.

122. After the final IEP team meeting on September 21, 2017, the District sought to hire an educational interpreter and a 1:1 paraeducator for the Student. D89p3 (Clifford September 29, 2017 email).

123. On October 16, 2017, the Parents filed their Complaint, requesting a due process hearing.

124. In an email on October 18, 2017, Ms. Clifford informed the Parents that the District was prepared to serve the Student under his September 2017 IEP as of October 24, 2017. D89p2.

#### Dr. Melick's Independent Evaluation of the Student

125. In January 2018, the Parents retained Dr. Melick to conduct an evaluation of the Student's social skills. P20p1.

126. Dr. Melick interviewed the Parents and the Student, observed the Student's preschool class at Our Savior Lutheran Preschool, observed a general education kindergarten class at Lowell Elementary School, and observed the Student receiving his SLP, OT, and PT specially designed instruction at Lowell Elementary School. Dr. Melick reviewed multiple education records for the Students, but did not conduct any standardized assessments of the Student, instead relying upon the results of the SSIS conducted as part of the District's 2017 triennial reevaluation of the Student. Dr. Melick had the Student's preschool teacher at Our Savior Lutheran Preschool, Nancy Bodkin, complete the PKBS-2 and Vineland-3. *Id.* at pp1-2.

127. Dr. Melick produced her evaluation report on or about May 4, 2018. *Id.* at p1. Based upon her evaluation, Dr. Melick concluded that the Student "would be able to participate in a general education classroom at this time if he had the support of an educational interpreter who has knowledge of working with younger children." *Id.* at p8. Dr. Melick went on to conclude that:

The District's current recommendation to have two adults in the classroom to specifically work with [the Student] on a full-time basis could hamper [the Student's] communication skills.

It is not clear to me that [the Student] needs specially designed instruction in social and behavior skills. Based on my evaluation it appears that the majority of [the Student's] social skill delays are directly related to his communication delays and not because he is lacking actual social skills.

Id. at p9. However, Dr. Melick acknowledges that it is very difficult to separate communication skills from social skills because you need one skill for the other skill. Melick 6/4: T43.

128. Dr. Melick also stated in her report that "I do want to add that I have concerns about [the Student] being placed at the Lowell Elementary school (sic) at this time. It appears to me that the conflict over the IEP process has created an adversarial atmosphere between [the Student's] parents and some staff members at Lowell." P20p9.

129. The source of whatever information that led Dr. Melick to conclude she had concerns were the Student to be placed at Lowell Elementary School is not clear from the record.

## CONCLUSIONS OF LAW

### The IDEA and Jurisdiction

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).

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

4. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

*Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

*M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1201 (9<sup>th</sup> Cir.), *cert. denied*, 583 U.S. \_\_\_, 138 S. Ct. 556 (2017).

5. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

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).

6. 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); 34 CFR §300.513.

Whether the Everett School District procedurally violated the IDEA by failing to fund the Student's placement in a regular early child program for the 2016-2017 school year, or by failing to implement the Student's IEP in his LRE during the 2016-2017 school year, and whether as a result of either failure the Parents are entitled to reimbursement for tuition and expenses paid to Immaculate Conception.

7. As a preliminary matter, it is concluded that the Parents have failed to prove that the Student's IEP, as amended on June 8, 2016, did not offer the Student FAPE, both procedurally and substantively, for the 2016-17 school year. The record was simply not developed by the Parents to support any such conclusion. Moreover, the Parents' closing brief makes no argument that the IEP was not appropriate. Rather, the Parents rely on the argument that the District agreed

to or adopted the Parents' unilateral placement of the Student at ICOLPH as the basis for their reimbursement claim.

8. The Parents argue that when the Student's IEP team amended his IEP on September 9, 2016, and included language that the Student would attend a private program at ICOLPH (Finding of Fact (FOF) 36), the District agreed to, adopted, acquiesced to or ratified the Parents' clearly unilateral placement of the Student at ICOLPH, and as such the District became financially responsible for the cost of the Student attending ICOLPH. In support of this argument, the Parents cite the decision in *Blount County Bd. of Educ. v. Bowens*, 762 F.3d 1242, 2014 U.S. App. LEXIS 15051, 63 IDELR 243 (11<sup>th</sup> Cir. 2014).<sup>29</sup> However, the Parents' reliance on *Blount* is not compelling under the facts in this case.

9. In *Blount*, the district never conducted any evaluations of the student. Instead, the district's representative told the parent that the district accepted an evaluation of the student by an outside clinic. When the parent identified a non-district placement for the student, the district representative responded that the non-district placement was excellent. When the parent and the district representative met again later, the parent informed the representative that she intended to enroll the student in the non-district placement, and the district representative did not make any offer to place the student in the district. Then in another subsequent meeting, the parents and the same district representative agreed that the non-district placement was the most appropriate placement for the student based on the evaluation by the outside clinic. Later, after developing an IEP for the student, the district representative provided the parents with a form for the non-district placement to acknowledge that it would be responsible for implementation of the student's IEP. On appeal, the district did not contest the factual finding made by the hearing officer and the district court that it had agreed to place the student at the non-district placement. Accordingly, the circuit court held that the district was responsible for the cost of the non-district placement.

10. The facts in this case could hardly be more different from in *Blount*. In this case, the District evaluated the Student in August 2014 (FOF 1), and developed IEPs for the Student based upon its own evaluation. FOF 4, 5, 24. Prior to August 29, 2016, the Parents never provided any notice of their intent to place the Student outside the District. FOF 28. In addition, once the Parents made the District aware of their intent to unilaterally place the Student at ICOLPH, it was the Parents who requested an IEP team meeting be convened. FOF 27. Once Ms. Arnold became aware of the Parents' intent to unilaterally place the Student at ICOLPH, she confirmed her understanding that the Parents wanted the District to provide only direct therapy services for the Student. FOF 29. The Mother confirmed it was the Parent's unilateral decision to place the Student at ICOLPH. FOF 30. The Student's IEP team met on September 9, 2016, and amended the Student's IEP to provide exactly what the Parents requested; only direct therapy services. FOF 32, 35. The District noted the Student's IEP that the Student would be attending ICOLPH. FOF 36. The Parents did not expect the District to pay for ICOLPH, and at no time believed the District had agreed to pay for ICOLPH. FOF 39.

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<sup>29</sup> The undersigned ALJ has also reviewed the district court's decision (*Blount County Bd. of Educ. v. Bowens*, 929 F. Supp. 2d 1199, 2013 U.S. Dist. LEXIS 27444 (N.D. Ala., 2013)), as well as the hearing officer's decision (*Blount County Board of Education*, 111 LRP 73137 (AL SEA 2011)).

11. Under the facts in this case, it is manifest that there was never any meeting of the minds between the Parents and the District about the District placing the Student at ICOLPH, or that the District had assumed any financial responsibility for ICOLPH. Moreover, the Parents' assertion now that the District should be financially responsible for reimbursing the Parents for the cost of the Student attending ICOLPH during the 2016-17 school year is, at best, disingenuous.

12. Is it concluded that under the facts in this case, the holding in *Blount* is neither controlling nor persuasive.<sup>30</sup> It is concluded that the District did not adopt the Parents' unilateral placement of the Student at ICOLPH as its placement, and did not in any manner ratify the Parents' unilateral placement. It is concluded that the Parents unilaterally placed the Student at ICOLPH, and as they have not proven the Student's IEP for the 2016-17 school year denied the Student FAPE, there is no legal basis to order the District to reimburse the Parents for their unilateral placement. The Parents' request for tuition and expenses paid to ICOLPH for the 2016-17 school year is denied.

Whether the Everett School District procedurally violated the IDEA during the 2017 evaluation by failing to evaluate a suspected need for special transportation or failing to evaluate the Student's transition needs.

13. At no time did the Parents ever ask the District to evaluate any special need the Student might have related to transportation during the Student's 2017 triennial reevaluation. Indeed, the Mother had no reason to believe the Student could not take a general education school bus. In fact, the Mother assumed the Student would ride the same bus as all the other students. FOF 60. Given these facts, it is concluded that the District was not on any reasonable notice that the Student might have some suspected need for special transportation, or that the Student's triennial reevaluation should have included any type of assessment concerning special transportation. Moreover, the Parents' assertion regarding the District's failure to appropriately evaluate the Student is disingenuous and further calls into question the credibility of their claims against the District. The Parents' arguments in their closing brief on this issue are also not compelling. The Parents argue the District was on notice because the Student required special transportation in his most recent IEP, citing P3p18. That IEP provided transportation to the Student. However, as best can be determined, that was because the Student was attending ICOLPH at the time, and the District was transporting *only the Student* to and from his direct therapy services. It is true that the District raised the issue of the Student safely riding the school bus if he returned to the District for the 2017-18 school year, but that concern was raised at the IEP meetings *after* the reevaluation was complete.

14. With respect to any failure to evaluate a need for transition services, the record is underdeveloped. However, even were the evidence to support a reason to suspect the Student required some type of service to transition back to public school over and above the needs of any student entering kindergarten, a plan for those transition services may be created and appropriately developed *after* an IEP has been completed. *J. G. v. Hawaii*, 2018 U.S. Dist. LEXIS 132945, 118 LRP 32739 (Dist. Ct. HI 2018).

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<sup>30</sup> It is also noteworthy that the 11<sup>th</sup> Circuit's ruling in *Blount* has not been cited for the proposition the Parents argue herein by any other court the undersigned ALJ can identify. It appears that the very unique fact pattern in *Blount* is likely to limit its applicability to other situations.

15. It is concluded the Parents have failed to prove the District committed any procedural violation with respect to the Student's 2017 triennial reevaluation.

Whether the Everett School District failed to appropriately evaluate the Student in 2017 by failing to test the validity of the teacher's score responses on the SSIS, failing to consider inconsistencies in the teacher's response pattern on the SSIS in evaluating the Student's social needs, or failing to consider the Student's hearing impairment as a factor in assessing the validity of the social assessments.

16. The testimony of Ms. Arnold and the corresponding findings of fact make abundantly clear how she very carefully considered Ms. Hendry's score on the SSIS validity index that indicated Ms. Hendry's scores should be viewed with caution. FOF 70-72. The Parents have offered no evidence to refute Ms. Arnold's careful and well-articulated analysis of the validity score. The same careful and well-articulated analysis holds true with respect to any inconsistencies in Ms. Hendry's response pattern.<sup>31</sup>

17. The record is equally clear the reevaluation team planned for, assessed, and considered any effects of the Student's fluctuating hearing loss on his social functioning. FOF 61. And again, the record is not at all clear how or in what manner the Parents believe those effects were not considered by the team.

18. It is concluded the Parents have failed to prove that the Student's 2017 triennial reevaluation was not appropriate.

Whether the Everett School District denied parental participation by failing to disclose that the Teacher Scale Validity Index on the SSIS required those scores to be viewed with "caution."

19. Apart from their otherwise bare assertion that they would have had questions if they had known Ms. Hendry's SSIS validity index score indicated caution, the Parents have not persuasively explained how not knowing this significantly impeded their right to participate in the decision-making process. WAC 392-172A-05105(2)(b). In their closing brief, the Parents cite to WAC 392-172A-03020(3)(a)(iii) for the proposition that districts must document the use of professional judgment in an evaluation report, and argue that Ms. Hendry's validity index score indicating caution was not reported in the reevaluation report. The Parents badly misconstrue this regulation. The regulation requires the use of professional judgment in the case where "properly validated tests are unavailable." *Id.* (emphasis added). That is not the case here. Neither party has asserted that the SSIS is not a properly validated test. The Parents appear to conflate the issue of a properly validated test with the issue of the scores derived from a properly validated test. As explained above, Ms. Arnold has coherently and convincingly explained how she used her professional judgment to determine Ms. Hendry's scores were interpretable. The regulation cited by the Parents does not support a conclusion that the District was required to note in the reevaluation report that one of three validity indexes for Ms. Hendry's scores indicated

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<sup>31</sup> The Parents have not clearly articulated any fundamental difference between consideration of the validity index score and consideration of any inconsistencies in the response pattern; they appear to be two sides of the same coin.

the results should be viewed with caution. The Parents have not proven any significant impediment of their right to participate in the decision-making process.

Whether the Everett School District denied parental participation by failing to provide the Student's Parents with his complete educational records, including testing protocols, at the Parents' request prior to the 2017-2018 IEP development process.

20. The Parents requested all of the Student's educational records, including test protocols, on August 17, 2017. FOF 91. The only records the Parents now claim they did not receive were the test protocols. The District promptly responded on August 23, 2017, stating that it would only provide the copyrighted test protocols to a person designated by the Parents who was authorized to administer and interpret protocols. FOF 94. The Father could not recall if the Parents ever identified such an individual to the District. FOF 95.

21. The Parents' closing brief also cites to *Letter to Price*, 57 IDELR 50 (OSEP 2010), and *Letter to Shuster*, 108 LRP 2302 (OSEP 2007), for the proposition that test protocols are student records. That conclusion is overly broad. Only if test protocols contain personally identifying information do they become educational records. There is no evidence of record to find that the Student's test protocols requested by the Parents include such personally identifying information, and accordingly are educational records to which the Parents are entitled. The Parents have proven no violation of the IDEA with respect to the District's refusal to provide the Student's test protocols directly to the Parents.

Whether the Everett School District denied parental participation by refusing to define the term "signing environment" at the Parents' request.

22. As noted in the District's closing brief, the term signing environment is defined in the Student's IEP. See D89p32. In addition, the District is correct that there was no testimony establishing any request from the Parents for any explanation. Indeed, the Parents' closing brief makes no mention of this alleged procedural violation. It is concluded that the Parents have established no violation of the IDEA with respect to this contention.

Whether the Everett School District denied parental participation by inappropriately and inaccurately reporting the Student's social and behavioral needs.

23. This issue goes to Ms. Arnold's qualitative descriptors (mild, moderate, significant) associated with Ms. Hendry's SSIS standard deviation scores on the multiple drafts of the Student's triennial reevaluation. It is true that Ms. Arnold made at least the final change, from moderate to significant, without involvement of the other team members, including the Parents. FOF 81. However, after careful consideration, it is concluded that this was not a material change to the reevaluation report, and therefore did not significantly impede the Parents' participation in the reevaluation process. There were no changes to the present levels of performance. There was no change to the data. There were no changes to the rating scales. There were no changes to the recommendations for services or eligibility. In their closing brief, the Parents disagree with the characterization of the Student having a significant delay in social functioning, as that exaggerates the Student's social skills deficits as indicated in Dr. Melick's 2018 evaluation. However, given the passage of time between the Student's triennial reevaluation in 2017 and Dr. Melick's evaluation in 2018, such a comparison must be highly suspect. Furthermore, upon receipt of the final triennial reevaluation report, the Parents were aware of the change to

significant, and it does not appear they felt any need to address the change until over a year later when they raised the issue in their Complaint. That does not reflect a significant concern on the part of the Parents.

Whether the Everett School District denied parental participation by providing a prior written notice that is inconsistent with the Student's 2017-2018 IEP and drafting an internally inconsistent IEP for the 2017-2018 School Year.

24. These two issues are closely related and are discussed together. As an initial matter, any inconsistencies between *drafts* of the Student's IEPs leading to the final IEP is immaterial. Only the final IEP in September 2017 is material for its content. With respect to differences between the Student's final IEP and prior written notices, the Parents' closing brief, in very conclusory fashion, asserts that the differences result in an inability to determine what exactly is being proposed. See Parents' Closing Argument at p24. What the Parents' brief does not do is explain how any differences resulted in the *Parents* being unable to determine what the IEP was proposing for the Student. The Parents are highly educated individuals. The Mother has significant experience in the development of IEPs through her education, training, and experience. The IEP was the subject of three IEP meetings spanning eleven hours of team discussion. Given all this and the lack of a more specific, individualized explanation of how any differences significantly impeded the Parents' participating in the decision-making process, it is concluded that any differences between the final September 2017 IEP and prior written notices did not significantly impede the Parents' opportunity to participate. Furthermore, the Parent's closing brief does not appear to identify any internal inconsistencies in the final September 2017 IEP, but rather focuses on the drafts leading up to the final IEP. Again, such differences between drafts and final IEPs is not material. It is only the final IEP that embodies the offer of services for the Student.

Whether the Everett School District denied parental participation by unilaterally removing the Student's fine motor goal on Sept 9, 2016.

25. This issue mischaracterizes the evidence of record. The best evidence leads to a finding that the Student's fine motor goal was inadvertently lost or somehow omitted during an amendment of the Student's IEP on September 9, 2016. FOF 46-47. There is no evidence to find any unilateral *intent* on the part of the District to remove the fine motor goal or somehow conceal the deletion from the Parents. The Parents were no more denied their right to participate in the removal of the fine motor goal than all the other members of the Student's IEP team. This was a simple mistake, nothing more, nothing less. It is concluded that under the facts in this case, the Parents were not significantly denied their right to participate in the decision-making process because, quite literally, there was no decision-making process from which to be excluded. This was a simple mistake.

Whether the Everett School District denied parental participation by denying the Parents' requests to discuss unilateral changes to the information on the Student's social functioning in the 2017 evaluation.

26. This issue is not addressed in the Parents closing brief. Consequently, it cannot be determined how the Parents believe their right to participate in the decision-making process was significantly impeded. A bare assertion without more explanation does not support a conclusion the District committed a procedural violation and even if so, how any such procedural violation



warrants any remedy.

Whether the Everett School District Procedurally violated the IDEA by failing to have an IEP in effect at the beginning of the 2017-2018 School Year.

27. The Student's IEP team, including the Parents, held a meeting on May 17, 2017, and developed a new annual IEP for the Student. FOF 64. While that IEP was intended as a stopgap until the Student's triennial reevaluation was completed, nevertheless the new IEP was in effect at the start of the Student's 2017-18 school year. The Parents argue that this IEP had "soured" because it was not a two-tiered IEP, i.e. an IEP that identified a new educational placement for the Student for kindergarten in the fall of 2017. See Parents' Closing Argument, pp. 26-27. The undersigned respectfully disagrees with the Parents' legal analysis. There is no legal require that an IEP which spans two school years be a so-called two-tiered IEP. In fact, the vast majority of annual IEPs will span two school years. Moreover, there is no legal requirement, absent very particular facts, that an IEP must identify the physical location where the IEP will be implemented. The legal analysis regarding this issue in the Parents' closing brief is generally unsupported by citation to legal authority, and assumes facts not in evidence. It is concluded that the Student's May 17, 2017 IEP was in effect at the start of the 2017-18 school year.

Whether the Everett School District substantively violated the IDEA by failing to provide a stay-put placement for the Student between October 16, 2017 and January 2018.

28. As concluded above, the Parents unilaterally placed the Student at ICOLPH with the start of the 2016-17 school year. The District is in no way responsible for placing the Student at ICOLPH. Similarly, the District is not responsible for reimbursement for the Parents' unilateral placement at ICOLPH. Then, despite the fact that the District had an IEP in place for the Student at the start of the 2017-18 school year that provided him with direct therapy services but did not place the Student at ICOLPH, the Parents unilaterally placed the Student at Our Savior Lutheran Preschool. This was after having registered the Student to attend kindergarten at Lowell Elementary School, and having participated in the Lowell kindergarten orientation. FOF 99.

29. The Parents argue that the District failed to offer the Student a kindergarten placement at the start of the 2017-18 school year. Parents' Closing Argument, p.12. This is legally incorrect. The District had an IEP in effect for the Student at the start of the 2017-18 school year, but the Parents again made a unilateral decision to place the Student in a private program at Our Savior Lutheran Preschool. Additionally, but for the delay in completing a new IEP for the Student, a delay based upon multiple factors including the Student's unavailability to timely participate in his reevaluation due to his recovery from surgery, the Parents' unavailability over the summer vacation, and a very reasonably unexpected need to meet three time totaling eleven hours to develop the Student's IEP, the new IEP would likely have been place for the start of the 2017-18 school year.

30. Reasonable delays incurred in implementing an IEP while a school district conducts assessments and negotiates with parents are not material. See *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 1189 (W.D. Wash. 2002) (finding that implementation delay that occurred at "behest of the parents ... was reasonable and was not ... error"); cf. *Tracy N. v. Haw. Dep't of Educ.*, 715 F. Supp. 2d 1093, 1112 (D. Haw. 2010) (finding that delay in determining student's educational placement was reasonable because there were "ongoing discussions regarding

placement in response to [the student's mother's] concerns, a reassessment of [the student's] cognitive and academic skills, and a reevaluation of [her] behavior").

31. A student's stay-put placement is typically the student's last implemented IEP in effect at the time a request for a due process hearing is requested. This is a student's current educational placement. "Current educational placement" is not defined by the IDEA or its implementing regulations. The Ninth Circuit recently summarized its case law defining the term in *N.E. v. Seattle School District*, 842 F.3d 1093 (9th Cir. 2016):

We have defined "educational placement" as the general educational program of the student." *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). More specifically, we have, in a series of cases, "interpreted 'current educational placement' to mean 'the placement set forth in the child's last implemented IEP.'" *K.D. ex rel. C.L. v. Dep't of Educ.*, 665 F.3d 1110, 1117-18 (9th Cir. 2011); *N.D.*, 600 F.3d at 1114; *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 911 (9th Cir. 2009); *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002)(per curiam). Although the statute refers to "educational placement," not to "IEP," the purpose of an IEP is to embody the services and educational placement or placements that are planned for the child. See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1111-12 (9th Cir. 2016) (describing the creation and elements of an IEP).

32. The Parents argue that the Student's stay-put placement is a regular early childhood program. Parents' Closing Argument, p.12. This revisits the Parents' argument that the District had approved, agreed to, adopted, acquiesced to or ratified the Parents' unilateral placement at ICOLPH. That argument has been rejected above. There was no IEP in effect at the time the Parents filed their request for a due process hearing that placed the Student in an early childhood program. The Student was attending ICOLPH based upon the Parents' unilateral decision, not because there was any IEP in effect that placed the Student at ICOLPH. The Parents' unilateral placement of the Student continued when they enrolled him at Our Savior Lutheran Preschool. There was no IEP in effect at the time the Parents' filed their request for hearing that placed the Student at Our Savior Lutheran Preschool. Therefore, Our Savior Lutheran Preschool is not the Student's stay-put placement, and the District is not responsible for the cost of, or reimbursement for, that unilateral placement.

Whether the Everett School District substantively violated the IDEA by failing to implement the Student's IEP during the MMR outbreak.

33. Only a material failure to implement a student's IEP will result in a substantive denial of FAPE. See *Van Duyn v. Baker Sch. Dist.*, 502 F.3d, 811, 815, 826 (9th Cir. 2007). The District partially failed to implement the Student's IEP during a two-week period in March 2017 due to an MMR outbreak. Over the course of those two weeks, the Student did not receive his OT and PT specially designed instruction, resulting in a total loss of 110 minutes of instruction. FOF 53. The Student's PT and OT providers proposed adding time to the Student's remaining PT and OT sessions to make up for the missed sessions, and the Mother agreed. FOF 55-56. While the Parents argue the agreement to add minutes to future sessions was not formalized at an IEP team meeting or through a formal offer of FAPE from the District, it is concluded such action is not necessary. This was a situation where a student missed a small amount of specially designed instruction, and it was apparently made up through an informal arrangement with the service providers. Awarding any compensatory education now would likely result in over recovery to the Student. It is concluded that while the District failed to fully implement the Student's IEP, the

failure to implement was not material, and likely the Student ultimately recovered his missed service minutes.

Whether the Everett School District substantively violated the IDEA by failing to plan for transitioning the Student from his private preschool placement to a general education kindergarten setting in his IEP when the District was unable to implement his IEP at the natural start of the school year.

34. The Parents first cite *R.E.B. v. State of Hawaii Dep't of Educ.*, 870 F.3d 1025 (9<sup>th</sup> Cir. 2017) in support of their argument that the Student's IEP must include a transition plan. That reliance is misplaced, as the *R.E.B.* decision has been withdrawn. See *R.E.B. v. State of Hawaii Dep't of Educ.*, 118 LRP 12999 (9<sup>th</sup> Cir. 2018). And as noted above, there is authority supporting the conclusion that a transition plan may be developed after an IEP has been developed. See *J. G.*, supra. Furthermore, the evidence presented by the Parents at hearing, principally through Dr. Schwartz's testimony, went not to any individualized need of the Student, but much more generally to what any student transitioning to kindergarten might need.

35. It is concluded that the Parents have not proven any substantive violation of the IDEA with respect to a failure to plan for the Student's anticipated transition to kindergarten in the District for the 2017-18 school year.

Whether the Everett School District substantively violated the IDEA by unnecessarily requiring a full-time 1:1 para-professional in the 2017-2018 school year IEP.

36. This issue comes down to weighing the testimony of the District staff who know and have provided services to the Student over a substantial period of time, and primarily the testimony of Drs. Melick and Schwartz, who have much more limited personal knowledge of the Student. Dr. Schwartz, in part, confirmed that a 1:1 paraeducator could in fact benefit the Student, while at the same time acknowledging that 1:1 paraeducators can, in some circumstances, encourage over dependence. While Dr. Melick has considerable experience in the area of social functioning, the undersigned is troubled by her comment in the evaluation report regarding her concern for the Student returning to the District due to an "adversarial atmosphere" between the Student's parents and some of the Lowell Elementary School staff. How Dr. Melick came to this conclusion is not clear. It is clear that Dr. Melick has spoken at length with the Parents. It is not clear whether Dr. Melick ever spoke to any of the staff at Lowell Elementary. If in fact Dr. Melick reached her opinion based solely upon what she learned from the Parents, it does not reflect favorably on Dr. Melick's objectivity. Furthermore, Dr. Melick is not an educator, and so has limited experience upon which to form opinions on educational methodology issues, like the appropriateness of a 1:1 paraeducator for the Student.

37. After careful consideration of all the evidence of record, it is concluded that with respect to the issue of whether or not it is appropriate for the Student to be assigned a 1:1 paraeducator in addition to an educational interpreter, which neither party disputes, the opinions of the District staff who have known and worked with the Student warrant greater weight than the opinions of Drs. Melick and Schwartz. Accordingly, it is concluded by a preponderance of the evidence that the assignment of a 1:1 paraeducator to the Student is appropriate under the IDEA.

Whether the Everett School District substantively violated the IDEA by inappropriately requiring occupational therapy, speech-language therapy, social, hearing and communication services

minutes in a special education environment when inclusive services are appropriate.

38. As with the issue of assigning the Student a 1:1 paraeducator, this issue requires the weighing of conflicting opinion evidence. However, with this issue the best evidence presented by the Parents is the opinion testimony of Dr. Schwartz. Dr. Melick does not present the same education, training or experience on the issue of pull-out versus push-in services as does Dr. Schwartz. However, Dr. Schwartz has never met, observed, provided services for, or evaluated the Student. She reviewed only limited records for the Student. All of this must compel a conclusion that while Dr. Schwartz's credentials and years of experience with inclusive education are beyond question, the personal knowledge of the Student and his individualized educational experience possessed by the many District witnesses deserves greater weight. All those witnesses support the provision of at least some of the Student's specially designed instruction in a special education environment. Accordingly, it is concluded by a preponderance of the evidence that the Student's September 2017 IEP placing him in general education for 87.94% of the school day and placing him in a special education setting for 12.06% of the school day is appropriate.

Whether the Everett School District substantively violated the IDEA by failing to offer or provide an ASL interpreter in the Student's private placement during the 2016-2017 SY.

39. Initially, it must be repeated that the Parents have not proven the Student's IEP for the 2016-17 school year was inappropriate when they unilaterally removed the Student from the District and placed him at ICOLPH. It has also been found as fact that the Parents never requested that the District provide an interpreter for the Student at ICOLPH. FOF 31. And as pointed out in the District's closing brief, the record is unclear whether the Student required a sign interpreter at ICOLPH. District's Post-Hearing Brief, p. 40. Furthermore, the Parents closing brief cites no legal authority to support the claim that the District was legally obligated under the IDEA to provide a sign interpreter for the Student at ICOLPH under the facts in this case.

40. It is concluded by a preponderance of the evidence that the Parents have failed to prove the District violated the IDEA when it did not provide a sign interpreter for the Student at ICOLPH during the 2016-17 school year.

Whether the District is responsible for funding the Student's private placement for the 2017-2018 School Year.

41. Having found in favor of the District on all issues pertaining to the Student's September 2017 IEP, it is concluded the Parents have not proven the IEP was inappropriate at the time it was created. Accordingly, the District cannot be held responsible for funding the Student's private placement at Our Savior Lutheran Preschool for the 2017-18 school year.

42. All arguments made by the parties have been considered. Arguments not specifically addressed herein have been considered, but are found not to be persuasive or not to substantially affect a party's rights.

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## ORDER

The Parents have not proven by a preponderance of the evidence that the Everett School District either violated the Individuals with Disabilities Education Act (IDEA), or that any violation of IDEA by the Everett School District warrants a remedy. Accordingly, the Parents' requested remedies are denied.

Signed at Seattle, Washington on August 31, 2018.



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(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 this 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



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cc: Administrative Resource Services, OSPI

Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator