

MAILED

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

SEATTLE-OAH

IN THE MATTER OF:

EVERETT SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NOS. 2013-SE-0062
2013-SE-0071

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Everett, Washington, on July 16 and 17, 2013. The Parents of the Student whose education is at issue¹ appeared and represented themselves. The Everett School District (District) appeared through Kristine McDowell, executive director of special services, and was represented by Christopher L. Hirst, attorney at law. David Paratore, Karen DeJong, and Jan Bakken, each a District director of special services, were present at the hearing, but did not participate. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Parents' Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 17, 2013. This Complaint was assigned Cause No. 2013-SE-0053 and was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered May 20, 2013, assigning the matter to ALJ Michelle Mentzer. Following the District's filing of a Motion of Prejudice on May 28, 2013, the matter was reassigned to ALJ Anne Senter on May 29, 2013. This Complaint asserts violations of the Individuals with Disabilities Education Improvement Act (IDEA) related to the Student's individualized education program (IEP) and is not at issue in this hearing.

The District filed a Due Process Hearing Request (the District's First Complaint) with OSPI on June 5, 2013. This Complaint was assigned Cause No. 2013-SE-0062 and was forwarded to OAH. A Scheduling Notice was entered June 5, 2013, assigning the matter to ALJ Anne Senter. This Complaint seeks an order overriding the Parents' failure or refusal to provide consent for the District's proposed cognitive assessment of the Student.

The District filed another Due Process Hearing Request (the District's Second Complaint) with OSPI on June 26, 2013. This Complaint was assigned Cause No. 2013-SE-0071 and was forwarded to OAH. A Scheduling Notice was entered June 27, 2013, assigning this matter to ALJ Senter as well. This Complaint relates to the Parents' request for an independent educational evaluation (IEE).

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

Prehearing conferences were held on June 10 and 27, and July 1, 2013, and prehearing orders were entered on June 10 and 28, and July 3, 2013.

It was determined that Cause Nos. 2013-SE-0062 and 2013-SE-0071 would be consolidated for purposes of hearing and decision. No hearing has yet been scheduled in Cause No. 2013-SE-0053 because both parties wish to obtain assessments and/or evaluations of the Student as a result of the hearing in the other two matters that might assist in the resolution or presentation of their cases in Cause No. 2013-SE-0053.

Due Date for Written Decision

As set forth in the Order Closing Record dated July 19, 2013, the due date for a written decision in both matters is thirty days after the close of record. As the record in both matters closed with the submission of post-hearing briefs on July 24, 2013, the due date for a written decision in both matters is August 23, 2013.

Evidence Relied Upon

Exhibits Admitted:

Parents' Exhibits: P3 – P6, P8 – P10, and P13 – 18;

District's Exhibits: D1-D15, and D17; and

Court's Exhibits: C1 – C2.

Witnesses Heard (in order of appearance):

John Flater, District school psychologist
Patricia Hall, District teacher of deaf and hard-of-hearing students
David Breiger, Ph.D., Seattle Children's Hospital
Kristine McDowell, District executive director of special services
[REDACTED] Student's neighbor
Student's Maternal Grandmother
Student's Mother
Student's Paternal Grandmother

Post-hearing Briefs

The District and the Parents each timely submitted a post-hearing brief.

ISSUES

The issues for the due process hearing are:

1. Whether the Parents' refusal to consent to the cognitive assessment portion of an evaluation of the Student should be overridden;
2. Whether the Parents' request for an independent educational evaluation (IEE) of the Student is premature;
3. Whether any portion of the Parents' request for an IEE is barred by the statute of limitations; and
4. Whether the District's evaluation of the Student is appropriate and, if not, whether the District should pay for an IEE of the Student.

See the Second Prehearing Order in Cause No. 2013-SE-0062 and the Prehearing Order entered July 3, 2013, in Cause No. 2013-SE-0071.

FINDINGS OF FACT

1. The Student was in the second grade during the 2012-2013 school year and receiving special education and related services under the multiple disabilities eligibility category based on a hearing impairment and a health impairment.
2. The Parents, other family members, and a neighbor, perceived that the Student's ability to communicate deteriorated after the start of the 2012-2013 school year. They observed him stuttering and having difficulty speaking in complete sentences outside the school setting.
3. On February 6, 2013, the Father emailed a number of District employees seeking to meet with the Student's individualized education program (IEP) team to discuss his placement. Exhibit D1, page 1. The Father expressed concerns about the Student struggling to fit in, being teased by other students about his hearing aids and the way he talks, crying in the morning because he does not want to go to school, having trouble sleeping because of worries about school, and his stress causing him to stutter and become harder to understand. *Id.* The Father noted that the Parents had been requesting a meeting since October, and expressed an interest in placing the Student at the Northwest School for Hearing-Impaired Children. *Id.*
4. The District invited the Parents to an IEP meeting on February 13, 2013, to address their concerns. Exhibit D2. The District members of the IEP team decided to reevaluate the Student because of significant concerns with the Student's academic progress and the Parents' concerns and request for an alternate program in an environment for children with hearing impairments. Exhibit D9, page 1. The Parents did not consent to a reevaluation that day. Flater testimony.
5. On February 13, 2013, following the meeting, the District provided the Parents with a Prior Written Notice (PWN) proposing to reevaluate the Student. Exhibit D2, pages 3-4. The PWN and an accompanying assessment plan each stated that the proposed evaluation would include assessments in the areas of health, intellectual/cognitive functioning, academic performance, adaptive skills, communication, fine/gross motor skills, and audiology. Exhibit D, pages 5-6.

6. The Parents returned the PWN to the District with a handwritten note signed by the Mother dated February 27, 2013;

We understand the need for and give permission consent [sic] for reevaluation of [the Student] in all areas with the Exception of cognitive evaluation, which we feel and have been advised is inappropriate relative to the question at hand. feel [sic] free to move forward with Reevaluation at this time, Again [sic] without cognitive testing. Please advise us when this begins.

Exhibit D4, page 2 (underlining in original).

7. The District sent Parents another PWN dated February 13, 2013, (but which was likely prepared after that date) which stated that the written permission provided by the Parents on February 27, 2013, was "accepted as written consent" for reevaluation activities. Exhibit D5.

8. The Maternal Grandmother, who is a clinical and school psychologist, had emailed John Flater, District school psychologist, on February 22, 2013, wishing to discuss the scope of the potential reevaluation and stating that she was dismayed at the Student's "extreme level of disfluency/stuttering and high level of anxiety about even the smallest things." Exhibit D3. Mr. Flater did not respond because the District had received the Parents' consent by the time he was next at the Student's school. Flater testimony.

9. Mr. Flater coordinated the evaluation activities and led the evaluation team. Flater testimony. He has been a school psychologist for 18 years. *Id.*

10. The District wanted to conduct a cognitive assessment because the Student had been assessed approximately a year apart in 2010 and 2011 with conflicting results. Flater testimony. Additionally, the Student has difficulty copying and writing, even when things are directly in front of him, concerns that do not involve a hearing impairment. Hall testimony.

11. The District evaluated the Student in all areas of suspected disability except for the cognitive assessment for which the Parents denied consent. Flater testimony.

12. Mr. Flater completed assessments in reading, writing, and math, and coordinated the assessment of adaptive and self-help skills. Flater testimony. He used the Woodcock Johnson II and followed the instructions for administering that test while also making accommodation for the Student's slow pace, using eye contact to get the Student's attention, and repeating directions. *Id.* Mr. Flater believed he obtained valid results as the Student's rapport seemed positive, he appeared to enjoy and understand the testing, and he made a good effort. *Id.* Mr. Flater observed very little stuttering and he did not perceive that the Student was overly anxious. *Id.*

13. With respect to adaptive and self-help skills, Mr. Flater administered the Adaptive Behavior Assessment System (ABAS), obtaining ratings from one of the Parents, from the general education teacher, and from the special education teacher. Exhibit D9, page 5; Flater testimony.

14. Patricia Hall is a District teacher of deaf and hard of hearing students. Hall testimony. She has a BA in elementary education, a minor in special education, and a master's degree in

deaf education. *Id.* She holds state certificates to teach elementary and special education, and an endorsement in teaching deaf and hard of hearing children. *Id.* She has taught for over 30 years, always focusing on deaf and hard of hearing children. *Id.* She has worked with the Student since he became eligible for special education at age three, and been involved in all of his evaluations and IEPs.

15. Ms. Hall serves the Student by providing specially designed instruction in audiology skills, teaching him to use hearing aids and an FM system to respond to sound and speech in the environment. Hall testimony. Ms. Hall and Eileen Anderson, a District audiologist, reviewed the Student's audiological records and hearing history as part of the evaluation, including records from Seattle Children's Hospital. Exhibit P6, page 25.

16. The reevaluation report addresses the Student's present level of performance with respect to hearing/audiology:

[The Student] wears hearing aids in both ears for his mild to moderate bilateral hearing loss. In addition, he consistently uses an fm system at school. He has good access to sound and will let his teachers know when his hearing equipment (hearing aid or fm system) is not working.

[The Student] enjoys listening activities and focuses on his tasks willingly. He has made progress in his listening skills. His skills are inconsistent and some days he asks for several repetitions of auditory information. He performs best when expectations for his responses are reviewed prior to the lesson being taught. He will ask for repetition when he feels comfortable.

17. With respect to communication, Gail Loren, District speech language pathologist, administered the Clinical Evaluation of Language Fundamentals (CELF-4). In addition to setting forth the CELF-4 scores, the evaluation report addresses the Student's present level of performance related to articulation:

[The Student's] articulation at the word and sentence levels is accurate and intelligible. However, in his conversational speech, he omits sibilants and voiceless consonants which impacts his intelligibility. All of his teachers and therapists report that there are numerous times when they cannot understand words or phrases that he says. This situation is likely a result of his hearing loss. [The Student's] articulation errors impact the intelligibility of his speech and therefore his classroom performance.

18. Likewise, the report addresses the Student's present levels of performance with respect to fluency:

[The Student] is demonstrating inconsistent, but significant disfluency. When he is most disfluent, his speech includes multiple repetitions, prolongations and blocks. His speech can be from 15% to 45% disfluent and impacts his performance in therapy, in the classroom, and in social interaction with his peers. [The Student's] disfluency prevents him from using his expressive language skills and therefore impacts his performance. He would benefit from therapy to teach him techniques that promote fluency to use when he needs them.

19. The Student's gross and fine motor skills were assessed using the Bruininks-Oseretsy Test of Motor Proficiency, Second Edition (BOT2), by Nancy Miller, who has been an occupational therapist for approximately twenty-five years.

20. The District's evaluation included a review of relevant District records and previous cognitive assessment results, medical and health information, and information from the Parents with respect to their concerns, including concerns about the Student's anxiety and stuttering that interfered with his intelligibility.

21. The evaluation team determined that the Student continued to qualify for special education and related services under the multiple disabilities category. Exhibit D9, page 8. The team considered the adverse impacts of the disabilities on the Student, noting that he requires specially designed instruction in all academic areas, his adaptive behavior deficits within the school setting significantly limit his ability to function independently and participate successfully in the educational curriculum, delays in gross and fine motor and visual motor delays impact his ability to access curriculum, his hearing loss impacts his ability to acquire auditory information, and his diagnoses of ADHD and seizure disorder continue to impact his alertness and his educational performance. The team further noted:

Pragmatic speech deficits interfere with [the Student's] use of appropriate conversational turn-taking and topic maintenance. Articulation errors impact the intelligibility of his speech and related classroom performance. Language dysfluency prevents [the Student] from using his expressive skills effectively and affects classroom performance.

Exhibit D9, page 8.

22. The report identified the areas of service for which the Student would need specially designed instruction: academic (reading, writing, and math), adaptive, physical, communication, and hearing/aural rehabilitation. Exhibit D9, page 9. The evaluation team recommended goal areas for the Student, recommended continued audiology services to supplement the specially designed instruction, and recommended intervention and accommodations for the Student. Exhibit D9, page 10.

23. The evaluation report contains signatures of the evaluation team members. Exhibit D9, page 11. It also includes individual documentation of assessment and observation results. Exhibit D, pages 12-27.

24. The District provided the Parents with a PWN dated April 23, 2013, proposing to continue the Student's eligibility based on the reevaluation. Exhibit D10.

25. An IEP meeting was held on May 3, 2013, resulting in a new IEP for the Student. Exhibits D11; P8.

26. At a resolution meeting regarding the Parents' Complaint on June 13, 2013, the District proposed that Dr. David Breiger provide a cognitive assessment of the Student. Exhibit D12 The Parents declined and requested that Dr. Wendy Marlowe assess the Student. No agreement was reached at this meeting.

27. On June 18, 2013, the Father emailed Jeff Russell, who he identified as the president of the District's board of directors, and copied numerous District employees. Exhibit D12, page 5. The email set forth the Father's concerns about the Student's situation and stated that the District had filed due process requesting an IEE (misusing this term) and that the Parents had asked for Dr. Wendy Marlowe to "do the IEE." Exhibit D12, page 6. The email stated that the Father had not heard from the District "on our request for an IEE," and he did not know who to contact. *Id.*

28. Kristine McDowell, the District's executive director of special services, responded to the email on June 20, 2013, stating that the District would not agree to Dr. Marlowe, and offering the names of two other potential evaluators for the Parents to consider. Exhibit D12, page 5.

29. In an email on June 20, 2013, the Father questioned why Dr. Marlowe was not acceptable when she was on the District's Independent Education Evaluators Resource List and when WAC 392-172A-05005 allows the parents to choose an independent evaluator. Exhibit D12, page 4. Ms. McDowell responded that the dispute was not about an IEE, but about the District's request to conduct an assessment for which it has the right to choose the evaluator. Exhibit D12, page 3.

30. The Parents responded in an email dated June 21, 2013, stating that they had made multiple requests for an IEE and been denied. Exhibit D12, page 2. The email stated that they had requested IEEs verbally and in emails, and after the District's request for a cognitive assessment, but did not identify any particular dates when the requests were made. *Id.*

31. Ms. McDowell acknowledged in an email dated June 25, 2013, the Parents' request for an IEE in their email of June 21, 2013, and asserted that this was the first time they had made such a request to the District. Exhibit D12, page 1; Exhibit P15. She stated that the District believed the request was premature as the Parents had not allowed the District to conduct its own cognitive assessment. Exhibit D12, pages 1-2; Exhibit P15. She proposed that the Parents provide consent for the District to conduct a cognitive assessment by a provider of its choosing to complete the April 2013 reevaluation and, if the Parents informed the District that it continued to disagree with the final results of the reevaluation after the cognitive assessment, it would agree with the Parents' request for an IEE at District expense by a qualified evaluator of their choosing. Exhibit D12, page 2; Exhibit P15. She stated that, if this proposal was not agreeable to the Parents, the District would submit another due process hearing request because it believed its most recent reevaluation was appropriate to the extent the Parents allowed it to be conducted, and because it believed the Parents' request for an IEE was premature. *Id.*

32. The Father responded in an email dated June 25, 2013, expressing his frustration that the District might file another due process hearing request and without stating his agreement to the District's proposed solution. Exhibit D12, pages 1-2.

33. Although the Father stated in the email of June 21, 2013, that the Parents had made multiple earlier requests for an IEE, the Mother only testified that they had made such a request at the resolution meeting on June 13, 2013. However, she was not certain whether they had used the term "IEE" or only expressed their desire that the District use an evaluator of their choosing to conduct the Student's evaluation. The Parents have not presented sufficient

evidence to support a finding that they requested an IEE prior to the statement that they had done so in the June 18, 2013, email to Mr. Russell.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. OAH has jurisdiction over the parties and subject matter of this action for OSPI as authorized by 20 U.S.C. §1401 *et seq.* (Individuals with Disabilities Education Improvement Act (IDEA)), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) §300 *et seq.*, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the District is the party seeking relief in these matters, it has the burden of proof.

Consent Override

3. A school district must obtain informed parental consent prior to conducting a reevaluation of a student eligible for special education services, absent certain circumstances that do not exist here. WAC 392-172A-03000(3)(a). If a parent does not provide consent to the reevaluation, the school district may, but is not required to, "pursue the reevaluation" by using the due process procedures to override consent. WAC 392-172A-03000(3)(b). When a District conducts an evaluation, it has the right to choose its evaluators so long as they are trained and knowledgeable. WAC 392-172-03020.

4. The process of reevaluating a student culminates, upon completion of assessments and other evaluation measures, with a determination by a group of qualified professionals and the student's parents as to whether the student is eligible for special education and the provision of an evaluation report to the parents. WAC 392-172A-03040(1); *Lake Washington School District*, Cause No. 2012-SE-0075 (SEA WA 2012).

5. In this case, the District conducted the assessments and other evaluation measures to which the Parents consented. The evaluation team then met and completed an evaluation report in April 2013, which included a determination that the Student remained eligible for special education and related services. That evaluation report was later used as the basis for the May 2013 IEP. Because the evaluation team met and finalized the evaluation report and provided it to the Parents, the reevaluation was complete. The District had the right to pursue a cognitive assessment of the Student using the consent override procedure, but instead opted to complete the reevaluation as modified by the Parents' consent to all but the cognitive assessment.

6. A reevaluation may occur not more than once a year unless the parents and the school district agree otherwise. WAC 392-172A-03015(2)(a). Neither party presented legal authority as to whether an ALJ may override a parent's refusal to consent to a reevaluation within one year of a prior reevaluation.

7. The District argues that two cases indicate that issuance of an evaluation report does not preclude it from using due process procedures to override consent. In the first case, *Panama-Buena Vista Union School District*, 111 LRP 6774 (SEA CA 2011), the parent of a three-year old who was not yet attending school in the district agreed to a preliminary speech screening to determine whether further assessments were warranted, but did not agree to the district's request to conduct a more comprehensive evaluation by a school nurse, speech pathologist, and school psychologist. The district was allowed to evaluate the student despite the parent's lack of consent for several reasons: The parent was required to permit appropriate assessments if she wanted the student to receive special education services; the preliminary screening was not an evaluation under the IDEA; and the parent's concerns that the evaluation might lead to a diagnosis that would label the student did not eradicate the district's obligation to assess the student. *Id.* In the second case, *Tustin Unified School District*, 110 LRP 24125 (SEA CA 2010), the parent agreed to a visual assessment but not the other portions of a reevaluation sought by the district. The district authorized a provider to conduct the visual assessment and filed a request for due process hearing seeking to override the parents' consent as to the rest of the evaluation. *Id.* After the filing of the request for hearing, the parents consented to a health assessment, but not the remainder of the evaluation sought, and the health assessment was conducted. *Id.* As a result of the hearing, the district was allowed to assess the student pursuant to its assessment plan without parental consent. *Id.* Neither of the cases stated that the district had completed an evaluation report. Nor did they address the issues of when an evaluation is complete or whether a parent's refusal to consent can be overridden when the resulting reevaluation would be within one year of the most recent reevaluation.

8. Even if authority exists for an ALJ to override a parent's refusal to consent to a reevaluation within one year of a prior reevaluation, the exercise of any such authority is not appropriate in this case where the District completed its reevaluation without a seeking a consent override of the very assessment it now wishes to conduct and there are no significant changed circumstances warranting a further reevaluation.

9. The District has not met its burden of proving that the Parents' refusal to consent to a cognitive assessment as part of the April 2013 reevaluation should be overridden

Independent Educational Evaluation (IEE)

10. If Parents of a student eligible for special education disagree with the school district's evaluation, they have the right to obtain an IEE, an evaluation conducted by a qualified examiner who is not employed by the school district. WAC 392-172A-05005.

11. If a parent requests an IEE at public expense, the school district must either initiate a hearing within fifteen days to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense without unnecessary delay. WAC 392-172A-05005(2)(c).

Timing of the Parents' Request for an IEE

12. A parent does not have a right to an IEE at public expense before the school district completes its own evaluation. See, e.g., *Lake Washington Sch. Dist.*, Cause No. 2012-SE-0075 (SEA WA 2012); *Lake Washington Sch. Dist.*, 107 LRP 63157 (SEA WA 2007); *D.Z. Bethlehem*,

110 LRP 43828 (Pa. Commw. Ct., 2010); *Letter to Zirkel*, 109 LRP 1463 (OSEP, 2008); *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 17 Fed. Reg. 46689 (Aug. 14 2006).

13. The District argues that the Parents request for an IEE is premature because it should first be allowed to complete its reevaluation by conducting the cognitive assessment that it proposed as part of the reevaluation. However, as determined above, the District completed its reevaluation, without the cognitive assessment, by holding an evaluation team meeting and issuing a final evaluation report, which it then relied upon in completing the Student's annual IEP. Because the District has completed its reevaluation of the Student, the Parents' request for an IEE is not premature.

14. The District also argues that that any request by the Parents for an IEE premised on the District's failure to conduct a cognitive assessment as part of the April 2013 reevaluation is premature until the District is first provided an opportunity to conduct such an assessment. As the Parents have not alleged the District's reevaluation was insufficient on this ground and the Parents are seeking more than a cognitive assessment, this argument is not considered.

Statute of Limitations

15. Claims under the IDEA are subject to a two-year statute of limitations. WAC 392-172A-05080. The Parents stated at a prehearing conference that they intended to argue they were entitled to an IEE based on evaluations conducted by the District in April 2013 and May 2011 being inappropriate. However, they confirmed at the hearing that they were only challenging the April 2013 evaluation, and they presented no evidence or argument about the May 2011 evaluation. Accordingly, as April 2013 is within the two-year statute of limitations, no portion of the Parents' request for an IEE is barred by the statute of limitations.

Timing of the District's Request for Hearing

16. Although the Parents assert that they made earlier requests for an IEE, the earliest date they were able to prove was the mention of a request in the email to Mr. Russell dated June 18, 2013. As the District's Second Complaint was filed on June 26, 2013, it was well within the fifteen-day period for requesting a hearing. See WAC 392-172A-05005(2)(c).

Appropriateness of the District's April 2013 Evaluation

17. The District is required to follow the requirements for evaluations set forth in WAC 392-172A-03020, which provides:

Evaluation procedures.

- (1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010, that describes any evaluation procedures the district proposes to conduct.
- (2) In conducting the evaluation, the group of qualified professionals selected by the school district must:
 - (a) Use a variety of assessment tools and strategies to gather relevant functional,

developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

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

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

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

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

(3) Each school district must ensure that:

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

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

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

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

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

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

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

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

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

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

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

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

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

18. The District is also required to follow the requirements for evaluations set forth in WAC 392-172A-03025, which provides:

Review of existing data for evaluations and reevaluations.

As part of an initial evaluation, if appropriate, and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, must:

(1) Review existing evaluation data on the student, including:

(a) Evaluations and information provided by the parents of the student;

(b) Current classroom-based, local, or state assessments, and classroom-based observations; and

(c) Observations by teachers and related services providers.

(2)(a) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(i) Whether the student is eligible for special education services, and what special education and related services the student needs; or

(ii) In case of a reevaluation, whether the student continues to meet eligibility, and whether the educational needs of the student including any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum; and

(b) The present levels of academic achievement and related developmental needs of the student.

(3) The group described in this section may conduct its review without a meeting.

(4) The school district must administer such assessments and other evaluation measures as may be needed to produce the data identified in subsection (1) of this section.

(5)(a) If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be a student eligible for special education services, and to determine the student's educational needs, the school district must notify the student's parents of:

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the student continues to be a student eligible for special education, and to determine the student's educational needs.

(b) The school district is not required to conduct the assessment described in this subsection (5) unless requested to do so by the student's parents

19. Likewise, the District is required to follow the requirements for evaluation reports set forth in WAC 392-172A-03035, which provides:

Evaluation report.

(1) The evaluation report shall be sufficient in scope to develop an IEP, and at a minimum, must include:

(a) A statement of whether the student has a disability that meets the eligibility criteria in this chapter;

(b) A discussion of the assessments and review of data that supports the conclusion regarding eligibility including additional information required under WAC 392-172A-03080 for students with specific learning disabilities;

(c) How the student's disability affects the student's involvement and progress in the general education curriculum or for preschool children, in appropriate activities;

(d) The recommended special education and related services needed by the student;

(e) Other information, as determined through the evaluation process and parental input, needed to develop an IEP;

(f) The date and signature of each professional member of the group certifying that the evaluation report represents his or her conclusion. If the evaluation report does not reflect his or her conclusion, the professional member of the group must include a separate statement representing his or her conclusions.

(2) Individuals contributing to the report must document the results of their individual assessments or observations.

20. The Parents argue that the District's reevaluation is inappropriate because it does not address the concerns of the Parents and others regarding the Student's "communication regression" since the beginning of the 2012-2013 school year. The report contains ample

explanation of the Student's current levels of performance with respect to communication.² The explanation is adequate to determine whether the Student is eligible for special education and related services, how the disability affects his involvement and progress in the general education curriculum, and to determine his need for special education and related services. See WAC 392-172A-03035. There is no specific requirement that an evaluation report compare the Student's prior levels of performance or make a determination as to whether or not there has been a regression. The Parents do not argue that any other particular assessment should have been conducted to address their concerns about the Student's communication. The reevaluation adequately addressed these concerns, and the failure to determine or specifically note that there was a "communication regression" does not make the reevaluation inappropriate.

21. The Maternal Grandmother, a school psychologist, opined that the reevaluation was deficient because it did not include evaluations of potential placements for the Student. Evaluating potential placement options is not a requirement of the evaluation process. See WAC 392-172A-03005 through 392-172A-03080. Moreover, placement decisions are not to be made prior to the development of an IEP. See *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992). Consistent with this authority, the Deaf Students Education Services Policy Guidance from the U.S. Department of Education presented by the Parents as Exhibit P11 states that "[t]he decision as to what placement will provide FAPE for an individual deaf child – which includes a determination as to the LRE in which appropriate services can be made available to the child – must be made *only after a full and complete IEP has been developed that addresses the full range of the child's needs.*" (emphasis added) Accordingly, the failure to evaluate potential placements for the Student did not render the reevaluation inappropriate.

22. The Maternal Grandmother also opined that the reevaluation should have included research about how hearing impairments relate to academic delays. While such research might be useful, there is no requirement to conduct research as part of a reevaluation or to include the results of such research in an evaluation report. See WAC 392-172A-03005 through 392-172A-03080. Accordingly, the failure to do so does not make the reevaluation inappropriate.

23. The District's reevaluation of the Student complied with the evaluation procedures set forth in WAC 392-172A-03020 and WAC 392-172A-03025 except to the extent that no cognitive assessment was conducted despite the District's determination that it was necessary. Likewise, the District's reevaluation report complied with the requirements of WAC 392-172A-03035.

24. The District has met its burden of proving that its reevaluation was appropriate to the extent it was allowed to reevaluate the Student. Accordingly, the Parents are not entitled to an IEE as any deficiency in the reevaluation was caused by their own denial of consent for a cognitive assessment and they may not benefit from the results of their own action.

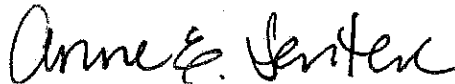
² The Parents argue that the services provided in the May 2013 IEP, which was based on the April 2013 reevaluation, demonstrate that the reevaluation did not adequately consider the Student's communication regression. The May 2013 IEP is the subject of another due process hearing request and the services provided under that IEP are not at issue here.

25. Nothing in this order prevents the Parents and the District from agreeing to conduct a reevaluation of the Student. See WAC 392-172A-03015(2)(a). Nor does anything in this order prevent the Parents from obtaining an IEE at their own expense. See WAC 392-172A-05005(3).

ORDER

1. The Everett School District's request for an order overriding the Parents' refusal to consent to a cognitive assessment as part of the District's reevaluation of the Student is DENIED,
2. The Parents are not entitled to an independent educational evaluation at public expense.

Signed at Seattle, Washington on August 23, 2013.



Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Final Decision

**Further Appeal Rights: Information About Your Right To Bring A Petition For
Reconsideration And Your Right To Bring A Civil Action**

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

AS

Parents



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