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 JUN 02 2016

SEATTLE-OAH

June 2, 2016

Parents



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RECEIVED

JUN 10 2016

Superintendent of Public Instruction
 Administrative Resource Services

In re: Elma School District
 OSPI Cause Nos. 2014-SE-0033X/0034X
 OAH Docket Nos. 12-2014-OSPI-00004/00005

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,

Anne Senter

Anne Senter
 Administrative Law Judge

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

MAILED

JUN 02 2016

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

IN THE MATTER OF:

ELMA SCHOOL DISTRICT

OSPI CAUSE NOS. 2014-SE-0033X
2014-SE-0034X

OAH DOCKET NOS. 12-2014-OSPI-00004
12-2014-OSPI-00005

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

For translation of this document, please call OAH, (800) 583-8271. Para sa pagsasalín ng dokumentong ito, maaring tumawag sa OAH, (800) 583-8271.

A hearing in these consolidated cases was held before Administrative Law Judge (ALJ) Anne Senter in Elma, Washington, on February 8 - 11 and 22 - 23, 2016. The Parents of the Students whose education is at issue¹ appeared and represented themselves. The Elma School District (the District) was represented by Philip Thompson and Mary Elizabeth W. Rasmussen, attorneys at law. Stacey Rockey, District special services director, also appeared. Mario Suson interpreted in Tagalog for the Mother.²

STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 20, 2014. Because the Complaint identified two students, it was assigned two cause numbers, one for each student. The Complaint was assigned Cause Nos. 2014-SE-0033X and 2014-SE-0034X and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered May 20, 2014, which assigned the matter to ALJ Anne Senter.

¹To ensure confidentiality, names of parents and students are not used. The student at issue in Cause No 2014-SE-0033X is referred to as Student A, and the Student at issue in Cause No. 2014-SE-0034X is referred to as Student B. They are referred to collectively as "the Students."

² The Mother speaks both English and Tagalog and testified primarily in English. All English testimony other than that of the Mother was interpreted in Tagalog.

The Complaint indicated that it involved special education disciplinary matters. Accordingly, OSPI assigned them cause numbers ending in "X" to designate the requests as involving disciplinary matters subject to expedited hearings and decisions. Washington Administrative Code (WAC) 392-172A-05160; 34 Code of Federal Regulations (CFR) §300.532. After review at a prehearing conference and clarifying with the parties, the ALJ determined that the Complaint did not raise any issues involving special education disciplinary matters and struck the expedited status. The District challenged the sufficiency of the Parents' Complaint, and the challenge was denied.

The Parents were granted leave to amend their due process hearing request on December 19, 2014. The District filed a motion for summary judgment, which was granted in part and denied in part in an order dated February 5, 2015.

Numerous prehearing conferences were held and prehearing orders entered. Many continuances were granted, often at the Parents' request while they were seeking counsel.

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 – D59; D62 – D63; and

Parents' Exhibits: P1; P3 -4; P5 (bottom handwritten portion only); P7 - P12; and P14 - P16.

Witnesses Heard (in order of appearance):

Greg Scroggins, District assistant principal;
Laurie Wilson, District speech language pathologist (retired);
Scott Raub, OSPI special education parent and community liaison;
Melissa Crisp, District special education teacher;
Deborah Shaffer, District school psychologist;
Stacey Rockey, District special services director;
Howard King, District superintendent (former);
The Students' Father;
Mark Keating, District principal; and
Julie Zwarun, District special services secretary.

Briefs

Both parties timely submitted pre- and post-hearing briefs. The post-hearing briefs were received on May 3, 2016. On May 5, 2016, the District submitted a new second page of its post-hearing brief as an errata, and requested that the new page be substituted for the page submitted on May 3, 2016. As the errata only corrects a typographical error by removing one word from the brief and its late filing does not prejudice the Parents, this substitution is accepted.

Due Date for Written Decision

As set forth in the Third Prehearing Order, the due date for a written decision in this matter is 30 days after the record of the hearing closes. As the record closed with the receipt of the parties' post-hearing briefs on May 3, 2016, the due date for the written decision in this case is June 2, 2016.

ISSUES

As set forth in the Fifteenth Prehearing Order, the issues for the due process hearing are:

- a. Whether the ALJ has the authority to address allegations that the District violated the resolution agreement dated February 27, 2013;
- b. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Students a free appropriate public education (FAPE) by:
 - i. Failing to comply with the resolution agreement dated February 27, 2013;
 - ii. Failing to evaluate the Students beginning in the 2012-2013 school year;
 - iii. Exiting the Students from special education in the beginning of the 2012-2013 school year;
 - iv. Not telling the Parents the Students were exited from special education services;
 - v. Failing to provide the Students with speech language pathology (SLP) services after they were exited from special education;
 - vi. Not providing tutoring or other support for Student B beginning with the 2012-2013 school year;
- c. And, whether the Parents are entitled to their requested remedies:
 - i. Compensatory education:
 - A. Tutoring for Student B;
 - B. Speech therapy for both Students;
 - ii. An Independent Educational Evaluation (IEE) of both Students;
 - iii. An order directing the District to communicate with the Parents;
 - iv. And/or other equitable remedies, as appropriate.

FINDINGS OF FACT

Witness Reliability

1. The Father expressed a great deal of confusion about dates and events during the time period at issue. See, e.g., Father, Tr. 724.³ Additionally, he testified that he was unaware of some events that took place because he was working a lot and that the Mother, who did not testify, was more involved with the school. See, e.g., Father, Tr. 689. Indeed, the Mother objected to him being asked about a number of subjects related to the case on the grounds that she knew about them, not him. See, e.g., Mother (objecting), Tr. 622, 639, 689. Moreover, some of his testimony was refuted by exhibits. An example of this was when he testified that he had never seen a particular document, but then realized that he had signed it. Father, Tr. 642. Another example is his testimony that the District had not offered to evaluate the Students at a June 2014 resolution meeting and that he had never seen certain consent forms until September 2014. The audio recording of the June 2014 resolution meeting, which the Father attended, demonstrates that the District offered to evaluate the Students multiple times and showed the Parents the consent forms. Exhibit D38, Father, Tr. 677-78, 680, 728, 745. Thus, although it cannot be concluded whether this was due to lack of memory, lack of understanding, or untruthfulness, the reliability of the Father's testimony is generally suspect, and this is taken into consideration when his testimony is inconsistent with that of other witnesses and/or not supported by other evidence.

Background

Student A

2. The District first found Student A eligible for special education services under the "communication disorder eligibility category" in January 2007, when she was in kindergarten. Exhibit D1. Her IEPs for the next six years each provided for 20 minutes of speech language pathology (SLP) services per week. Exhibits D2 - D4, D8, D10, D12. She made progress toward her goals in each of these years. *Id.*

3. Student A was in the fifth grade during the 2011-2012 school year. Exhibit D49, p.12. That year she received an A or A- each quarter in Reading, an A each quarter in Writing, and an A or B each quarter in Math, Science, and Social Studies. *Id.* And she received an A each quarter in Music and Physical Education (PE). *Id.* She earned at least satisfactory (S) grades or better (S+) in computers and in all the personal skills rated (does what is expected; does her best; and respects other's safety, learning, and well-being). *Id.* The comments for the first quarter stated "[Student A] works hard in all her classes and is earning great grades. She is also a great role model for her fellow students." *Id.* For second quarter, the comments stated

³ References to the transcript of the hearing are to the name of the witness followed by the page number(s) on which the testimony is located.

"Good attitude and hard work pays off with excellent grades. [Student A] is one of the hardest workers in the class and sets a good example for others." *Id.* For third quarter, the comments state "Good job again!" and for fourth quarter "Promoted to 6th grade. Have a great summer." *Id.* Student A's report card does not contain any statements about her speech or identify any concerns about her academics. *Id.*

4. Student A's IEP dated December 12, 2011, states in the present levels section that she is "a very quiet student who always does what is expected." Exhibit D12, p.3. It notes that she passed all areas of statewide testing for the fourth grade and that she participates in choir. *Id.* With respect to her social/emotional skills, it stated that she appears to have a nice group of friends and that she is always thoughtful and kind to her friends and her brother. *Id.* The IEP does not identify any concerns about Student A unrelated to her SLP goals. Exhibit D12.

5. There is no evidence in the record of any concerns raised by District staff or the Parents about Student A during her fifth-grade year.

Student B

6. The District first found Student B eligible for special education services under the "communication disorder eligibility category" in January 2010, when he was in kindergarten. Exhibit D6. His IEPs for the next three years each provided for 20 minutes per week of SLP services and he made progress toward his goals each year. Exhibits D9, D11, D13. In December 2013, the IEP team discussed exiting Student B from special education because he had made very positive gains in his speech skills and become a competent speaker. Exhibit D13, 2. Services were continued to honor the Parents' lingering concerns about his speech. *Id.*

7. Student B was in the second grade during the 2011-2012 school year. Exhibit D50. In Reading he received a grade of needs improvement (N) for each quarter. Exhibit D50, p. 6. For Reading, he was at level 6 at the first quarter, level 8 at the second quarter, level 14 at the third quarter, and level 16 at the fourth quarter. *Id.* The report card states that students are expected to be reading at level 28 at the end of the school year to be considered on grade level. He received an N each quarter in both Independent Spelling and Spelling Tests. He received less than satisfactory (S-) or N grade in Capitalization/Punctuation and Paragraph Writing. He received an S or S- in each of the math concepts addressed through the third quarter. *Id.* at 7. The report card does not provide any math grades for the fourth quarter and does not explain why. *Id.* He received an S or S- for each quarter in Computers, Music, and PE. *Id.* The report card notes that he was receiving reading intervention each of the four quarters. *Id.*

8. Student B's second-grade report card contains the following comments for the second quarter:

[Student B] is a nice, polite boy. [Student B] worked hard this quarter in reading yet remains below grade level. He passed the level 8. He did a good job with sight words but still struggles to decode unknown words when reading. To be at grade level he should be reading level 20 or above. He continues to go to Reading Intervention. Have him read aloud as often as possible at home. In

Math we worked on regrouping with addition and subtraction. With one on one [sic] guidance he can work through the steps of regrouping. He is not as confident when he does independent work. He relies heavily on his neighbors for help with his work. He would benefit from memorizing +/- subtraction facts. His Writing grade reflects incomplete work samples. He is working on writing complete sentences and conclusions. He does a good job with punctuation and capitalization. When [Student B] has free time he loves to draw and seems to be very artistic. I look forward to 3rd quarter and watching [Student B] continue to make progress in all academic areas.

Id. at 8.

9. The report card also contains comments for the fourth quarter:

[Student B] has worked hard this quarter. He is reading at level 16. He is about a full year below grade level in Reading. He made steady progress throughout the year. I encourage him to read all summer long to help maintain the skills he has worked so hard to learn. I have enjoyed watching him become a "reader." He is very proud of himself. In Math, help [Student B] to memorize addition and subtraction facts, work on telling time and coin values. [Student B] is a sweet boy. I enjoyed having him in class. I hope [Student B] has a wonderful summer and I look forward to hearing about the progress he makes in 3rd grade.

Id.

10. There are no comments for the first or third quarters. *Id.* The report card states "Parent conference" for each of those quarters and, for the third quarter, states "low academics." *Id.*

2012-2013 school year

11. Both Students continued to receive SLP services during the 2012-2013 school year. Wilson, Tr. 266, 279, 315. The Parents appear to believe that both Students stopped receiving SLP services and were exited from special education, without first having been evaluated, in September 2012. See Exhibit D20; Father, Tr. 728. However, there is no evidence in the record that the Students were exited from special education at that time and the only evidence that they were not receiving SLP services is the Father's testimony of hearsay statements by the Students. Because no finding can be based on this hearsay testimony, the Parents have not proven that the Students stopped receiving SLP services or were exited from special education in September 2012. See RCW 34.05.461(4) (Findings of fact may not be based exclusively on hearsay unless the ALJ determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence).

12. Student A was in sixth grade during the 2012-2013 school year. Exhibit D50, p.9. There is no evidence that Student A's teachers or Parents requested that she be reevaluated during the first part of her sixth-grade year. Nor is there any evidence that her teachers, other District staff, or Parents raised any concerns about Student A during the first part of the school year.

13. For the first quarter of her sixth-grade year, Student A earned an A in Band, Language Arts, and PE, an A- in Math, a B in Science/Health, and a B- in Social Studies, which resulted in a grade point average (GPA) of 3.567. Exhibit D49, pp. 13-14.

14. Student B was in the third grade during the 2012-2013 school year. He received Title I intervention in reading beginning in October 2012. Exhibit D51, p.1. There is no evidence that Student B's teachers or Parents requested that he be reevaluated during the first part of his third-grade year. Nor is there any evidence that the Parents raised any concerns with the District at that time.

15. For the first quarter of his third-grade year, Student B earned an A in Neatness, C in Spelling, B in Writing, S in Computer Ed, C+ in Music Ed, A in PE, D in Math, and A in Reading. Exhibit D50, pp. 9-12. His teacher's comments for that quarter include the following:

This quarter [Student B] did not always use his work time wisely. As a result, his grades suffered, and he needed to stay in to complete assignments. I believe that [Student B] is capable of doing 3rd grade work, and recently I have seen him put more effort into completing his work on time. I am looking forward to positive changes from [Student B] in 2nd quarter.

* * *

[Math]: [Student B] has had difficulty with place value and rounding this quarter. He has spent additional time relearning the rules, and he is beginning to understand the steps involved. He needs to pay attention to directions when they are given. [Student B] is currently working to pass addn. and sub. Math facts for 0-5.

* * *

[Reading]: According to AR testing,⁴ [Student B] is reading and comprehending material at a 1.1 grade level with a reading range of 1.7 – 2.7. When tested @ the beg. of the year, [Student B] was reading 27 wpm, he is now reading 63 wpm. The goal for 1st quarter was 82 wpm. [Student B] is participating daily, in a reading group to help him improve his fluency when reading and phonics word attack skills. Please have [Student B] read his AR book, nightly to you, to improve reading fluency and comprehension.

⁴ AR refers to Accelerator Reading, a reading program that gives a grade equivalent score. Crisp, Tr. 399-400.

Id. There is no explanation why Student B received an A in reading when testing showed he was reading at an early first-grade level. *Id.* Nor is there any explanation as to when in the first quarter the AR testing placing him at the first-grade level was conducted. *Id.*

The reevaluations.

16. Both Students were due for a triennial reevaluation during the 2012-2013 school year as their last evaluations were completed on January 4, 2010. Exhibits D6, p. 2; D7, p. 2.

17. The District prepared a prior notice of reevaluation for each of the Students, dated October 29, 2012. Exhibits D14, p.6; D15, p. 6. Each of the notices explained that their purpose was to notify the Parents of the District's intent to reevaluate the Students because evaluations are required by law every three years. *Id.* The notices stated that the Parents had the right to submit any information they deemed important to the reevaluation team and a form for gathering information from parents was attached to each notice. Exhibits D14, pp. 6-7; D15, pp. 6-7. A consent to evaluate form was included for each of the Students as well, requesting the Parents' permission to conduct reevaluations. Exhibits D14, p. 8; D15, p. 8. The prior notice documents were prepared by Julie Zwarun, District special education secretary. Exhibits D14, p.6; D15, p.6. Ms. Rockey testified that these documents would typically be mailed to parents and that she believed Ms. Zwarun would have sent them to the Parents. Rockey, Tr. 484, 486. Although Ms. Zwarun testified, she did not testify as to whether she mailed these documents to the Parents. The Father testified that he had not seen the documents and therefore had not received them. Father, Tr. 564. Thus, the District did not demonstrate that these documents were provided to the Parents.

18. The District prepared two form letters with Ms. Zwarun's name on them to the Parents, both dated November 7, 2012. Exhibits D14, p.5; D15, p.5. One letter referred to Student A and the other to Student B. *Id.* The letters each remind the Parents to return the reevaluation packet to the District as soon as possible. *Id.* Ms. Rockey testified that these reminder letters are typically mailed to parents if they do not respond to the paperwork requesting consent for reevaluations. Rockey, Tr. 485. No District witness testified whether the District mailed the letters to the Parents. The Father testified that he had not seen the documents and therefore had not received them. Father, Tr. 564. The District thus did not demonstrate that these letters were mailed to the Parents.

19. Laurie Wilson, District SLP, evaluated each of the Students. Exhibits D14, D15. She did not receive signed consent forms from the Parents or any input from them about the testing before she started the evaluation. Wilson, Tr. 337-39.

20. To assess Student A's speech, Ms. Wilson administered a standardized photo articulation test on November 14, 2012, pursuant to the test's instructions. Exhibit D15, p.1; Wilson, Tr. 266-67, 268. *Id.* She also considered a speech sample. Student A was able to produce all sounds correctly on both the photo articulation test and in a sample of conversational speech. Exhibit D15, pp. 1-2; Wilson, Tr. 267. She did not make any errors at all. Wilson, Tr. 267. Student A's teachers reported to Ms. Wilson that her speech did not affect her performance in class. Wilson, Tr. 267. Ms. Wilson noted in her report that Student A receives excellent grades

and also noted Student A's' MAP scores, which showed her at the 26th percentile in Math, 77th percentile in Reading, 81st percentile in General Science, and 63rd percentile in Science Concepts/Processes. Exhibit D15, p1. Ms. Wilson concluded that there was no need to evaluate Student A in any other area. Wilson, Tr. 267.

21. To assess Student B's speech, Ms. Wilson used a standardized photo articulation test and the oral expression portion of standardized oral and written language scales. Exhibit D14, p. 1; Wilson, Tr. 278. Student B made no sound errors on the photo articulation test and received a standard score of 94 on the language scales, which was appropriate for his age. Exhibit D14, p.1; Wilson, Tr. 278. Ms. Wilson administered the assessments in accordance with their instructions. Wilson, Tr. 279. Ms. Wilson received information from Student B's teacher that his reading fluency was progressing and his schoolwork was improving. Wilson, Tr. 278. Ms. Wilson believed that she evaluated Student B in all areas of suspected disability. Wilson, Tr. 279.

22. Ms. Wilson talked with the Mother twice by phone, on November 30 and December 5, 2012, about attending evaluation team meetings to discuss the reevaluations. Exhibit D16, pp. 3, 6; Wilson, Tr. 280. The Mother responded that she did not wish to meet with Ms. Wilson because she was doing something with OSPI. Exhibit D16, pp. 3, 6; Wilson, Tr. 280-82; Father, Tr. 610-11. Ms. Wilson explained to the Mother that she would need to send written notice home even though the Mother did not want to go to a meeting. Wilson, Tr. 282. Ms. Wilson also drafted an Invitation to Meeting to the Parents for each Student, dated December 10, 2012, setting evaluation team meetings for December 11, 2012. Exhibit D16, pp. 3, 6. There is no evidence whether this document was provided to the Parents prior to the scheduled meeting.

23. The evaluation team for each Student included Ms. Wilson, an administrator, and a general education teacher. Exhibits D14, p.4; D15, p.4. The evaluation report of each of the Students concluded that they no longer qualified for special education. Exhibits D14, p.2; D15, p.2. Each member of the evaluation team signed the evaluation reports. Exhibits D14, p.4; D15, p.4.

24. Ms. Wilson prepared Parent Notice of Action forms for each Student, stating that they no longer qualified for speech services. Exhibits D16, pp. 2, 5. She prepared a cover letter to the Parents enclosing the Parent Notices of Action and Invitations to Meetings. Exhibit D16, pp. 1-3, 5-6. Although those documents are dated December 10 and/or 11, 2012, the undated letter to the Parents states that she had hoped to discuss the documents with them at the meeting in December and mentioned that she hoped they enjoyed their holidays. *Id.* It is thus found that the letter was written sometime after the winter break. It is not clear whether the evaluation reports were sent with this letter as well. With respect to both the evaluation reports and the letter with attachments, Ms. Wilson did not recall whether she sent them home in the Students' backpacks or handed them to the Parents. Wilson, Tr. 283-84, 280, 330.

Parent complaints and resolution

25. On January 21, 2013, the Parents filed a due process hearing request regarding both Students. Exhibits D17, D18. It stated that "Stacey Rockey is violating WA state law by

dismissing my kids from the services without reevaluation and IEP meeting.” *Id.* The proposed solution was that the Students be reevaluated and an IEP meeting held. *Id.* The request was assigned two cause numbers, one for each child: 2013-SE-0007X and 2013-SE-0008X.⁵ *Id.*

26. On January 22, 2013, the Mother filed a Request for Special Education Citizen Complaint with OSPI. Exhibits D19, pp. 4-10; P1. The Mother stated that she believed the District violated the IDEA in the following way:

I believed that the [sic] violated the state law by not re-evaluating our kids and dismiss them [sic] from the services without my knowledge and not sending the parents of action [sic] before the dismissal, not doing the IEP meeting with the people whose concern. [sic]

Exhibit D19, p. 5; P1, p.2. The citizen complaint also alleged bullying, harassment, and discrimination by the District and stated that the District had called the Mother on the phone in September 2012 and told her that her children would be dismissed without being reevaluated. *Id.*

27. A resolution meeting was held on January 28, 2013. Exhibits D22, pp. 2-7; P3. As a result of the resolution meeting, the Parents and the District agreed that the District would pay for independent evaluations of the Students. *Id.* Additionally, they agreed that, if the independent evaluations showed the same results as the District’s evaluations, the District would allow the Students to be speech volunteers for the 2012-2013 school year. *Id.* Speech volunteers are students who attend speech therapy and practice words, even though they are not eligible for special education. Wilson, Tr. 288.

28. Both Students were evaluated at Grays Harbor Community Hospital in February 2013. Exhibits D25, D26. The evaluation of Student A revealed that her articulation of speech was within normal limits, although she would “benefit from oral motor exercises to increase strength for range of motions during speech and thus improve speech skills independently,” and that she may benefit from therapy for reading comprehension to increase her abilities to the appropriate age and grade level for her chronological age. Exhibit D26, p. 3. The evaluation recommended that she address these goals at school if they were within the school’s scope of education or at an outpatient medical clinic. *Id.* No witness testified whether this evaluation supports or contradicts the District’s determination that Student A no longer qualified for special education and related services.

29. The Grays Harbor Community Hospital evaluation of Student B revealed that his speech skills were within normal limits. Exhibit D25, p. 3. However, the testing identified deficits in the

⁵ A second Due Process Hearing Request was filed on January 23, 2013, which was assigned Cause No. 2013-SE-0009. Exhibit D20. It was dismissed as moot because it did not name a student and because it was an attempt by the Parents to explain in greater detail the issues raised in the first request. Exhibits D23, p.4; D24. The Order of Dismissal does not state that the dismissal was “with prejudice.” D24, p.2.

areas of oral motor asymmetry and weakness, eye asymmetry, and vision tracking weakness, intermittent degrees of tight and hoarse vocal quality, and a decreased rate of oral reading. *Id.* It recommended that he would benefit from continued speech language therapy to address these deficits at an outpatient medical clinic if the services fell outside the school's scope of speech therapy. *Id.* No witness testified whether this evaluation supports or contradicts the District's determination that Student B no longer qualified for special education and related services.

30. Another resolution meeting was held on February 27, 2013, which resulted in another resolution agreement:

1. [Student B and Student A] will continue to see Mrs. Wilson for the remainder of the school year.
2. If there are concerns at the beginning of the year they will be reevaluated.
3. Parents agree to withdraw the due process hearing request and citizen's complaint.

Exhibits D27, P4.

31. Cause Numbers 203-SE-0007X and 2013-SE-0008X were dismissed following the Parents' withdrawal of their request for due process hearing. Exhibit D27, p.12. The Order of Dismissal does not state that they were dismissed "with prejudice." *Id.*

32. The Students continued to see Ms. Wilson as speech volunteers for the rest of the 2012-2013 school year. Wilson, Tr. 290-91.

33. For the second quarter, Student A received an A in Band, Language Arts, and PE, an A- in Math, a B+ in Social Studies, and a B in Science/Health, earning a GPA of 3.667. Exhibit D49, pp. 13-14. For the third quarter, she received an A in Band, Language Arts, Math, and PE, an A- in Social Studies, and a B in Science/Health, earning a GPA of 3.783. *Id.* For the fourth quarter, she received an A in Band, Language Arts, PE, and Science/Health, an A- in Math, and a B+ in Social Studies, earning a GPA of 3.833. *Id.*

34. There is no evidence that the Parents requested that the Students be reevaluated in any area or raised other concerns during the remainder of the 2012-2013 school year.

2013-2014 school year

35. The Parents met with District staff in the fall of Student B's fourth-grade year and raised concerns about his academics and homework completion. Exhibit D29. Student B was referred to a student concern team (SCT) and plans were made to support his homework completion. Exhibit D29; Scroggins. The Student attended an after-school YMCA program at the school, which included homework support with a tutor. Scroggins, Tr. 210. The Student was receiving both math and reading interventions. Exhibit D29, p.3. A check-in system was set up under which Student B checked in with a teacher in the morning and with the YMCA tutor in the afternoon to ensure he was organizing and completing his homework. Exhibit D29, p.3. When

the teacher he was checking in with in the morning became unavailable, Mr. Keating, the school principal took over for her. Scroggins, Tr. 209.

36. For the first quarter of the 2013-2014 school year, Student A received an A in Band, Science, and Social Studies, an A- in English/Language Arts and Pre-Algebra, and a B+ in Leadership, earning a 3.78 GPA. Exhibit D49, p.13-14. For the second quarter, she received an A in Band and Social Studies, a B+ in English/Language Arts, Leadership, and Science, and a B in Pre-Algebra, earning a 3.483 GPA. *Id.* For the third quarter, she received an A- in Band and Washington State History, and a B in English/Language Arts, Pre-Algebra, PE, and Science, earning a 3.233 GPA. *Id.*

37. In January 2014, the Parents filed another citizen complaint with OSPI. Exhibit D30, pp. 5-10. It alleged that the District had not followed the resolution agreement and that Ms. Rockey would not talk to them about it. *Id.*

38. On March 21, 2014, following an investigation, OSPI issued a decision with respect to the Parents' citizen complaint. Exhibit D34, p.2-7. OSPI concluded that the District had followed both resolution agreements and noted that there was nothing to indicate that anyone had concerns about the Students' speech that would have triggered the District's obligation to evaluate the Students in the school year following the resolution agreements. *Id.* at 7. The decision stated that nothing prevented the Parents from asking for an evaluation to determine if the Students may now need special education and related services to address any lack of academic progress. *Id.* at 7.

39. On April 3, 2014, the Parents met with Principal Keating and Assistant Principal Scroggins. Exhibit D28, p. 6; D29, p. 6; P7, p.2. The Parents requested at this meeting that the Students be evaluated in speech. *Id.* There is no evidence that Parents requested that the Students be evaluated in speech or raised concerns about the Students' speech at any time during this school year before this meeting. Nor is there any evidence that the Parents raised any concerns about Student A or requested any evaluations of her before this meeting.

40. Ms. Zwarun prepared and mailed Notices of Action for each Student on April 28, 2014. Exhibit D28, pp.3, 8; Zwarun, Tr. 980. Each notice stated that the District proposed to evaluate the Student based on the Parents' request. Exhibit D28, pp. 3, 8. Also included were consent forms requesting the Parents' consent for an SLP to evaluate each of the Students. Exhibit D28, pp. 4, 10.

41. Ms. Zwarun sent the consent forms to the Parents again, this time by certified mail, on May 12, 2014. Exhibit D29, pp. 3, 9; Zwarun, Tr. 981. The District received the certified mail return receipt bearing the Parents' name and address back from the post office. Exhibit D28, p.7; Zwarun, Tr. 981-82. The Parents' last name is written in all capital letters in the "received by (print name)" line, and an illegible signature appears on the signature line. Exhibit D28, p.17. The date of delivery line states "5-14-14." *Id.* The Father testified that he did not sign the card and that the signature on the card was not the Mother's. Father, Tr. 578-79. The Father testified that he never saw the consent forms until September 2014 when he received them from his attorney. Father, Tr. 728.

42. Based on Ms. Zwarun's testimony that she twice mailed the consent forms to the Parents and received a return receipt showing that someone at the Parents' address had signed for them and the Father's confusion about when he first saw the consent forms demonstrated by the audio recording of the resolution meeting below, it is found that the Parents received the consent forms in May 2014.

43. The Parents filed their Complaint in this case on May 20, 2014. Complaint, p.1. In the "Problem and Facts" section of the Complaint form, the Parents stated "Stacey Rockey and the school district is violated [sic] the law by not follow through [sic] the resolution agreement on Feb. 27, 2013 + didn't do evaluation." Complaint, p. 2. As a remedy, the Complaint requests that the Students be evaluated and that Ms. Rockey, Principal Keating, and District Superintendent King be disciplined. *Id.*

44. A resolution meeting in this case was held on June 3, 2014. Exhibits D37, p.1; P8. Ms. Rockey and Mr. Keating both testified that the District offered the Parents the opportunity, at the resolution meeting, to sign the consent forms authorizing the District to evaluate the Students for speech and they refused. Exhibit P9; Rockey, Tr. 837, Keating, Tr. 957. The Father's testimony on this point varied, but he ultimately stated that the Parents were not offered the consent forms and that he never saw the consent forms until the following September. Father, Tr. 587, 677-78, 680, 728, 745.

45. An audio recording of the resolution meeting is included in the record. Exhibit D38. The recording reveals the following: Ms. Rockey explained to the Parents that the District had sent them consent forms to evaluate the Students after learning in April that the Parents wanted them evaluated. *Id.* Ms. Rockey showed them the forms and the Parents denied having received them. Ms. Rockey said, "If you want them evaluated, all you have to do is sign this piece of paper and we can evaluate them. That's all we have to do." The Mother responded, "That's not the point. The point is you guys, you guys didn't follow what is written in the evaluation, the evaluation, or into the resolution agreement." *Id.*

46. Later in the meeting, either Mr. Keating or Mr. King (it is not evident from the audio recording who was speaking) stated, "If you want your child, your children, to be evaluated, just sign the paper and then..." The Mother interrupted, stating "I'm not. I want you guys, I want you guys to do all that. Then I will sign that." Mr. Keating or Mr. King then said, "We followed our, our procedures perfectly, ok? If you want your children to be evaluated, we have no problem with that." The Mother again interrupted, stating "No, let's just talk this this to the judge." Mr. Keating or Mr. King stated, "Can I finish now? Can I finish? All you've got to do is sign the papers and say..." The Mother again interrupted and said, "So you guys can get away with this [unintelligible]? You guys got away with this last year. I'm not going to let you get away with this this year." *Id.*

47. The Mother also refused to sign the Resolution Session Participants and Agreement form stating that there had been no agreement. Ms. Rockey told the Mother she would write in that the Parents refused to sign because they wanted to wait for the judge. The Mother said she should write, "The School District doesn't want to do anything." Ms. Rockey again stated that

"the School District is willing to evaluate," but the Mother interrupted stating, "I'm not going to let you write anything you want." *Id.* See also Exhibit D37, p.1.

48. Based on the testimony of the District witnesses as well as the audio recording, it is found that the District offered to evaluate the Students, including in areas other than speech, at the resolution meeting, but the Parents refused to provide consent.

2014-2015 school year

49. Ms. Rockey stated, in a declaration in support of the District's motion for summary judgment dated September 2, 2014, that the District remained willing to evaluate the Students, including in areas other than speech. Exhibit P9. She attached the consent forms to her declaration. *Id.*

50. The Parents signed the consent forms on September 3, 2014, noting on the forms that they had just received them from their lawyer. Exhibits D40; P14. For Student B, the Parents added areas for testing in addition to speech. Exhibit D40, p.2.

51. The District evaluated both of the Students in October 2014. Exhibits D42, D43. Student A was evaluated in speech using the Goldman-Fristoe2 Test of Articulation and a speech sample. Exhibit D42, p.3. She received a standard score of 101 on the Goldman-Fristoe2, which meant that her speech was appropriate for her age. *Id.*; Wilson, Tr. 298. She did not demonstrate any sound errors in words, sentences, or conversational speech. Exhibit D42, p.3; Wilson, Tr. 298. Based on the evaluation, it was determined that Student A did not qualify for special education. Exhibit D42, p. 4.

52. Student B was evaluated in speech as well as academic areas. Exhibit D43, p.5. With respect to speech, Ms. Wilson administered a number of tests. Student B received a standard score of 105 on the Goldman-Fristoe Test of Articulation, which is within the normal range for his age. Exhibit D43, p.15; Wilson, Tr. 303-04. It was determined that he was not eligible for SLP services. Exhibit D43, p.16. With respect to academic areas, it was determined that he qualified for special education under the specific learning disability eligibility category based on having a specific learning disability in the areas of math calculation and reasoning. *Id.* at p.10.

53. An individualized education program (IEP) was developed for Student B, which provided for 100 minutes per day of specially designed instruction (SDI) in math in a special education group setting. Exhibit D44, p.1.

54. The Parents requested IEEs for both Students. Exhibit D45; Wilson, Tr. 300-01. The District granted the Parents' request. Exhibit D47, pp. 2, 4.

55. Student A was evaluated in speech at Grays Harbor Community Hospital in May 2015. Exhibit D48, pp. 3-4. She was assessed using the Clinical Evaluation of Language Fundamentals, 3rd edition (CELF3) as well as an informal articulation assessment during a conversational language sample. *Id.* at 3. The assessment concluded that Student A demonstrated expressive and receptive language skills judged to be within normal limits for her

age, that she demonstrated no articulation errors during connected speech, and was completely fluent in terms of her speech production. *Id.* Accordingly, it was concluded that Student A "is not currently in need of specialized services for areas covered by speech therapy." *Id.* at 4.

56. Student B was also evaluated in speech at Grays Harbor Community Hospital in May 2015. Exhibit D48, pp. 1-2. He completed the CELF3 as well as the Goldman Fristoe Test of Articulation 2. *Id.* at 1. Student B demonstrated receptive language skills within normal limits, at or above what would be expected of a child his age. *Id.* His expressive language skills were overall within functional limits, but the evaluator identified the sentence assembly subtest of the CELF3 as one area in which he was "somewhat low for his age". On the Goldman Fristoe, Student B produced speech that was completely fluent and without articulation errors or impairment. *Id.* at 2. The evaluation concluded that Student B "does not currently qualify for skilled therapy in areas covered by speech therapy," although he would likely benefit from skilled therapy designed to improve his ability to be flexible in his use of language as demonstrated by the CELF3 sentence assembly subtest. *Id.*

57. Student B was also evaluated at the University of Washington LEARN Clinic as part of the IEE, which resulted in an evaluation report dated October 12, 2015. Exhibit P16. This evaluation determined that Student B's performance was consistent with the presence of a specific learning disorder with impairment in mathematics, reading decoding and fluency, and writing mechanics. *Id.* at 16. It also determined that Student B had symptoms of inattention "consistent with Attention Deficit Hyperactivity Disorder, Inattentive Type." *Id.* The evaluation recommended that Student B have an IEP with goals in mathematics, reading, written expression, and study skills. *Id.*

58. Following the receipt of the LEARN Clinic evaluation report, the District developed an IEP on October 28, 2015, that provided for 50 minutes each of SDI five times per week in reading, written language, and math, to be received in a special education setting. Exhibit D63, p.2.

59. There are approximately 52 school weeks between the District's December 2012 reevaluation of Student B the District's provision of consent forms to the Parents in May 2014. This number is calculated as follows: School years in Washington State are required to contain 180 school days. That number of days divided by five days per week equals 36 weeks of school. This accounts for the one year between mid-December 2012 and mid-December 2013. There are approximately 16 school weeks between mid-December 2013 and mid-May 2014 accounting for typical school breaks.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12

RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parents are seeking relief in this case, they have the burden of proof.

The IDEA

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 *Board of Education of Hendrick Hudson Central School District 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.

Id. at 206-207 (footnotes omitted).

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

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

Id. at 188-189.

5. A district is not required to provide a "potential-maximizing" education" to provide FAPE, but only a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01. A district must provide a student with a "meaningful benefit" in order to satisfy the FAPE requirement. *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014).

Authority to Address Alleged Violations of the Resolution Agreement

6. “[A]dministrative agencies, being ‘creatures of statute,’ possess only such powers and authority as are expressly granted by statute or necessarily implied therein.” *Taylor v. Morris*, 88 Wn.2d 586, 588, 564 P.2d 795 (1977). The IDEA and state regulations vest an ALJ with jurisdiction to hear complaints related to the identification, evaluation, educational placement, or provision of FAPE to a student. WAC 392-172A-05080(2); 34 CFR §300.510(d)(2). Neither provide that an ALJ has the authority to enforce a resolution agreement. *Id.* In contrast, both federal and Washington law specify that a resolution agreement may be enforced in state and federal courts. WAC 392-172A-05090(4)(a)(ii); 20 U.S.C. §1415(f)(1)(B)(iii). Additionally, in Washington, a complaint that a school district is not complying with a resolution agreement can be addressed through a citizen complaint filed with OSPI. WAC 392-172A-05025(2)(a)(i)(B). See also 34 CFR §300.537 (allowing states to provide enforcement mechanisms for resolution agreements). Accordingly, only a court or OSPI, not an ALJ, may enforce resolution agreements. *Seattle School Dist.*, 115 LRP 54788 (SEA WA 2015); *Eatonville School Dist.*, Cause No. 2006-SE-0003, Order on Motion for Summary Judgment (SEA WA 2006).⁶

7. Because the ALJ has no authority to address the Parents’ allegations that the District failed to comply with the Resolution Agreement, these arguments are not considered. Nothing in this order prevents the Parents from pursuing these allegations in court or through OSPI’s citizen complaint procedure.

Res Judicata

8. The District argues that all the Parents’ claims are barred by *res judicata* because they concern alleged acts or omissions that occurred before the Parents’ prior due process hearing requests in Cause Nos. 2013-SE-0007X, -0008X, and -0009, which should have been raised in those complaints. *Res judicata* is a legal doctrine that bars the litigation of claims that were, or could have been, raised in a previous suit between the parties that reached a final judgment on the merits. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898 (1995); *T.G. v. Baldwin Park Unified Sch. Dist.*, 443 Fed. Appx. 273, 275 (9th Cir. 2011). For the doctrine to apply, a prior judgment must have involved the same 1) subject matter, 2) cause of action, 3) persons and parties, and 4) quality of the persons for or against whom the claim is made. *Loveridge*, 125 Wn.2d at 763.

9. The Parents’ prior due process hearing requests did not result in final judgments for purposes of the *res judicata* doctrine. The dismissal order entered in Cause Nos. 2013-SE-0007X and -0008X and in Cause No. 2013-SE-0009 did not state that the dismissals were “with prejudice.” In Washington, unless otherwise stated in an order of dismissal, dismissal is without prejudice. Civil Rule (CR) 41(4). In Washington, a dismissal without prejudice cannot be used to establish *res judicata*. *Zarbell v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 52 Wn.2d. 549, 554,

⁶ A copy of this order is available by contacting OSPI’s public records officer.

327 P.2d 436 (1958); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 223 (1989). Therefore, it must be concluded that the doctrine of *res judicata* does not preclude the Parents from raising claims predating the complaints in their earlier cases so long as those claims otherwise fall within the two-year statute of limitations. See WAC 392-172A-05080.

The District's Motion for Judgment as a Matter of Law

10. At the conclusion of the Parents' case, the District made an oral motion to dismiss issues a, b(1), b(iii), b(iv), and b(v) as well as the remedies associated with every issue except issue b(ii) on the grounds that the Parents had not met their burden of proof with respect to those issues. The ALJ declined to rule on the motion at the hearing. Instead, the ALJ determined that she would hold the remainder of the hearing and address the motion in her written decision by first looking at the issues the District wished to dismiss considering only the evidence presented by the Parents. However, rather than complicating the decision by writing two sets of findings of fact and addressing the issues twice, the ALJ has prepared just one set of findings of fact, which includes evidence presented in both the Parents' and the District's case. And each issue is addressed only once. However, the ALJ has ensured that no violation of the IDEA with respect to any of the issues in the District's motion has been found on a matter for which the Parents bear the burden of proof using evidence presented after the Parent's case in chief.

Failure to Evaluate the Students

11. A reevaluation must be conducted at least every three years unless the parent and the district agree that a reevaluation is unnecessary. WAC 392-172A-03015(2)(b); 34 CFR §300.303(b)(2). A reevaluation must also be conducted if a district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the child's parent or teacher requests a reevaluation. WAC 392-172A-03015(1); 34 CFR §300.303(a)(1)-(2). This standard applies during the time period that the Students were receiving special education.

12. Under its child find duty, a district must conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating and identifying students in need of special education and related services. WAC 392-172A-02040(1). See also 34 CFR § 300.111. Additionally, a parent, district, or other person may initiate a request for an initial evaluation to determine if a student is eligible for special education. WAC 392-172A-03005; See also 34 CFR 300.301(b). A district must make a determination whether or not to evaluate the student within 25 school days after receiving the request. WAC 392-172A-03005. If the district determines that it will evaluate the student, it must evaluate the student and arrive at a decision within 35 school days after parents provide written consent for the evaluation. WAC 392-172A-03005(3). This standard applies once the Students exited from special education.

13. When conducting evaluations, districts must ensure that a child is assessed in "all areas related to the suspected disability." WAC 392-172A-03020(3)(e); 34 CFR 300.304(c)(4). But a district need not evaluate in areas in which it does not suspect a disability. See, e.g., *Razzaghi v. Dist. of Columbia*, 44 IDELR 271 (D.D.C. 2005); *Moses Lake Sch. Dist.*, 109 LRP

26490 (2008). An evaluation must also be "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. WAC 392-172A-03020(g); 34 CFR § 300.304(c)(6).

14. The District conducted reevaluations of both Students in December 2012. Thus, for each Student, there are three questions that must be considered: 1) Whether the District evaluated the Students in all areas of suspected disability as part of the December 2012 reevaluations; 2) Whether the District should have initiated reevaluations of the Students earlier in the 2012-2013 school year *before* the December 2012 reevaluations; and 3) Whether the District should have initiated evaluations of the Students *after* the December 2012 reevaluations.

Student A

15. The December 2012 reevaluation of Student A evaluated her only in speech, the area for which she had been receiving services. Student A received all A and B grades, her teachers did not express any other areas of concern, and her Parents have not identified any areas of suspected disability for which they believe she should have been tested other than speech. Accordingly, the Parents have not met their burden of proving that Student A should have been evaluated in any areas of suspected disability other than speech in the December 2012 reevaluation.

16. With respect to the time period after the December 2012 reevaluation, Student A's triennial reevaluation was not due until January 2013. During the 2012-2013 school year, prior to the December 2012 reevaluation, no parent or teacher requested that Student A be reevaluated. Nor was there any reason that the District should have determined that her educational or related services needs warranted a reevaluation as she was making progress on her speech goals, earning all A and B grades, and there was no evidence of any concerns about her, academically or otherwise. Accordingly, the Parents have not met their burden of proving that she should have been reevaluated sooner than December 2012.

17. There is no evidence of a referral made by the Parents or anyone else to evaluate Student A after the December 2012 reevaluation until the Parents' request in April 2014. Nor was there any reason for the District to suspect a disability, triggering its child find obligation, as the Student was earning all A and B grades and there is no evidence of concerns by her teachers or others about her academics or speech. Once the Parents requested an evaluation in April 2014, the District timely determined that it would evaluate her. Thus, the Parents have not met their burden of proving the District should have evaluated Student A again after the December 2012 reevaluation.

18. The Parents have not met their burden of proving that the District violated the IDEA by failing to evaluate Student A beginning with the 2012-2013 school year.

Student B

19. The December 2012 reevaluation of Student B evaluated him only in speech, the area for which he had been receiving services. Student B was demonstrating significant academic deficits at this time. His first quarter report card, which would have been issued around the same time as or before the reevaluation, demonstrated that he was reading and comprehending material at an early first-grade level although he was in the third grade and had received reading intervention services throughout the second grade. In the second grade, he had been a full year below grade level in reading. Additionally, he received a D in math during the first quarter of his third-grade year. Given these circumstances, the District should have evaluated Student B in math and reading as suspected areas of disability.

20. As to the period during the 2012-2013 school year before the December 2012 reevaluation, the Student's triennial reevaluation was not due until January 2013 and there is no evidence that the Parents or any teachers requested a reevaluation. The question of whether the District should have determined that his educational or related services needs warranted an earlier reevaluation is more complicated. The Student was making progress on his speech goals. He had been a full grade level behind in reading at the end of second grade despite receiving reading intervention services. The record does not demonstrate at what point in the first quarter of the Student's third-grade year the District determined that he was reading at an early first-grade level or that he was producing math work that would result in a D by the end of the quarter. Accordingly, it is difficult to pinpoint the precise time, before the December 2012 reevaluation, that the District should have determined a reevaluation was necessary. Moreover, the Student's triennial reevaluation was approaching and was started in November 2012. Under these facts, the Parents have not met their burden of proving that the District should have reevaluated Student B earlier in the 2012-2013 school year than it did.

21. Because it is determined that the District should have evaluated Student B in math and reading at the December 2012 reevaluation, there is no need to determine whether it should also have evaluated him in those areas after the 2012 reevaluation. There is no evidence that the Parents or teachers made a referral for an evaluation in speech prior to the Parents' request in April 2014. Nor is there any evidence that there was any reason for the District to believe that this remained, or newly became, a suspected area of disability for Student B. Once the Parents requested an evaluation in April 2014, the District timely determined that it would evaluate him. Thus, the Parents have not met their burden of proving the District should have evaluated Student B again after the December 2012 reevaluation.

Exiting the Students from Special Education

22. A student determined eligible for special education services remains eligible until one of the following occurs:

- (a) A group of qualified professionals and the parent of the student, based on a reevaluation, determines the student is no longer eligible for special education;
- (b) The student has met high school graduation requirements established by the school district pursuant to rules of the state board of education, and the student

has graduated from high school with a regular high school diploma. A regular high school diploma does not include a certificate of high school completion, or a general educational development credential. . . . ; or

- (c) The student . . . has reached the age of twenty-one. . . . ; or
- (d) The student stops receiving special education services based on a parent's written revocation

WAC 392-172A-02000. See also 34 CFR §300.102(a)(3)

23. The Students were exited from special education in December 2012 based on the District's reevaluations, one of the stated grounds for exiting students from special education. Thus, the question of whether the Students were properly exited from education requires a determination of whether the underlying reevaluations were appropriate.

24. A district must obtain consent from a student's parents before it reevaluates except under certain circumstances pursuant to WAC 392-172A-03000, which provides in relevant part:

(3)(a) A school district must obtain informed parental consent, prior to conducting any reevaluation of a student eligible for special education services, subject to the exceptions in (d) of this subsection and subsection (4) of this section.

(d) A school district may proceed with a reevaluation and does not need to obtain informed parental consent if the school district can demonstrate that:

- (i) It made reasonable efforts to obtain such consent; and
- (ii) The child's parent has failed to respond.

(4)(d) To meet the reasonable efforts requirements to obtain consent for an evaluation or reevaluation the school district must document its attempts to obtain parental consent using the procedures in WAC 392-172A-03100(6).

WAC 392-172A-03100(6), in turn, provides that:

(6) A meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- (a) Detailed records of telephone calls made or attempted and the results of those calls;
- (b) Copies of correspondence sent to the parents and any responses received; and
- (c) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

See also 34 CFR §300.300(c)(1)-(2), and 34 CFR §300.322(d).

25. Here, the District reevaluated both Students in December 2012 without first obtaining the Parents' consent. The District presented as exhibits two written communications to the Parents, but was not able to demonstrate that it actually delivered those documents to them. Thus, the District has not demonstrated that it made reasonable efforts to obtain consent from the Parents before conducting the reevaluations. This is a procedural violation of the IDEA.

26. Procedural violations of the IDEA amount to a denial of FAPE only if they 1) impeded the child's right to a free appropriate public education, 2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child, or 3) caused a deprivation of educational benefits. WAC 392-172A-05105(2); 20 USC §1415(f)(3)(E)(ii). Here, the failure to obtain the Parents' consent could have significantly impeded the Parents' opportunity to participate in the decision making process. However, the Parents had the opportunity to participate in the reevaluation process by attending the evaluation team meeting, but they refused, and they have not provided any argument as to how the failure to obtain their consent otherwise prejudiced them. Nor did the failure to obtain consent impede the Students' right to FAPE or deprive them of educational benefits. Thus, although the failure to obtain consent was a procedural violation of the IDEA, it did not deny the Students FAPE.

27. The District is also 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.

See also 34 CFR 300.304.

28. 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

See also 34 CFR 300.305.

29. 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.

30. Other than arguing generally that Student B should have been evaluated with respect to academics during the 2012-2013 school year, the Parents do not identify any ways in which they believe the District's reevaluations of the Students were inappropriate.

Student A

31. Other than the procedural violation of failing to obtain consent, the Parents have not proven violations with respect to the District's 2012 reevaluation of Student A. She was assessed in all areas of suspected disabilities using a variety of assessment tools and strategies. Because the reevaluation was appropriate and resulted in a determination that Student A was no longer eligible for special education, the District did not violate the IDEA by exiting Student A from special education.

Student B

32. Other than the procedural violation of failing to obtain consent and the failure to evaluate the Student in all suspected areas of disability discussed above, the Parents have not otherwise proven violations with respect to the District's 2012 reevaluation of Student B. With respect to speech, he was assessed using a variety of assessment tools and strategies. Thus, the evaluation properly determined that Student B was no longer eligible for or in need of speech services, but it was inappropriate in that it did not evaluate him in all areas of suspected disability. Accordingly, it should not have been the basis for exiting him from special education.

Failing to Notify the Parents the Students Were Exited from Special Education

33. The Parents have not met their burden of proving that the District failed to notify them that the Students were exited from special education. Ms. Wilson contacted the Parents to participate in the evaluation team meeting and they refused to attend, she sent them notice that the Students were being exited from special education, and the Parents soon thereafter filed due process hearing requests and a citizen complaint alleging that the District had exited the Students from special education, demonstrating that they had knowledge of the District's decision.

Failing to Provide Speech Therapy After Being Exited from Special Education

34. The Parents have not met their burden of proving that the District violated the IDEA by failing to provide speech therapy to the Students after they were exited from special education. They have not proven that the Students were inappropriately evaluated with respect to speech. Moreover, each Student has been evaluated in speech three times since the District's 2012 reevaluation, including twice by independent evaluators, and no evaluation has concluded that the Students remained eligible for special education speech services.

Tutoring or Other Support for Student B

35. To the extent the Parents argue that the District should have provided something other than special education or related services, the failure to provide "other support" would not violate the IDEA, which deals only with special education. The District was not obligated to provide any special education or related services to Student B after he was exited from special education because there was no IEP in place. The failure to have an IEP in place flows from the District's failure to evaluate Student B in all areas of suspected disability as part of the December 2012 reevaluation, and remedies for that violation are addressed below.

REMEDIES

Compensatory education

36. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C.

Cir. 2005). It is a remedy intended to place a student in the position the student would have occupied if a school district had honored its duty to provide FAPE, and it must be based on a determination of each student's individual needs. It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

37. The District should have evaluated Student B in math and reading as part of the December 2012 reevaluation, but did not. It did not offer to evaluate Student B again until May 2014, at which point the Parents failed to provide consent. There are approximately 52 school weeks between these two events. Under the IEP eventually developed after the Student had been evaluated and found eligible with respect to both math and reading, he receives 50 minutes of SDI daily in each subject. Students are generally able to progress much more rapidly when tutored one-to-one rather than receiving instruction in classrooms with other students. For that reason, an hour-for-hour award, without evidence to support such, is not appropriate. One hour of instruction per week in each subject is adopted as the appropriate quantum of compensatory education. Thus, the District shall provide Student B with 52 hours of one-on-one specially designed instruction in reading and 52 hours of one-on-one specially designed instruction in math as compensatory education.

38. The compensatory services ordered above shall be provided by fully certificated District staff with the education, training, and experience to provide such instruction. The compensatory instruction may be delivered at any time in the calendar year following the entry of this decision, at the duration and frequency determined appropriate by the Parent and the District. Once such a schedule is set, Student B shall, except in an emergency, give notice 24 hours in advance of a scheduled session. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award.

39. The Parents also requested speech therapy as compensatory education. As the Students were not denied speech therapy to which they were entitled, this remedy is denied.

Parents' other requested remedies.

40. The Parents request that the District provide both Students with another IEE. The District has already provided both Students with IEEs since the time the Complaint in this case was filed, and there is no showing of what purpose or value there would be in yet another IEE. The Parents' request is denied.

41. The Parents also request that the District be ordered to communicate with them. School districts have legal obligations with respect to parent participation and notification. The ALJ will not impose additional obligations on the District.

42. The Parents requested reimbursement of costs related to this case. The ALJ has no authority to order such reimbursement, so the request is denied.

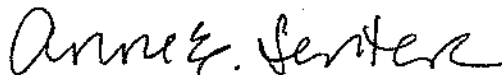
Other Arguments

43. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

1. The District violated the IDEA and denied Student B a FAPE by failing to evaluate him in all areas of suspected disability during the December 2012 reevaluation and by exiting him from special education without first conducting an appropriate evaluation. The District did not otherwise deny Student B a FAPE.
2. The District did not deny Student A a FAPE.
3. The District shall provide Student B with compensatory services in the form of 52 hours of one-on-one specially designed instruction in math and 52 hours of one-on-one specially designed instruction in reading to be delivered as set forth above.

Signed at Seattle, Washington on June 2, 2016.



Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

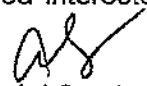
Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. The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

CERTIFICATE OF SERVICE

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

Parents




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