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STATE OF WASHINGTON
 OFFICE OF ADMINISTRATIVE HEARINGS
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April 15, 2015

Parents

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In re: **Seattle School District**
OSPI Cause No. 2014-SE-0071
OAH Docket No. 12-2014-OSPI-00014

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,

for Anne Senter
 Administrative Law Judge

cc: Administrative Resource Services, OSPI
 Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

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

SEATTLE-OAH

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

OSPI CAUSE NO. 2014-SE-0071

OAH DOCKET NO. 12-2014-OSPI-00014

**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 Seattle, Washington, on February 13, 18, and 19, 2015. The Parents of the Student whose education is at issue¹ appeared and represented themselves. The Seattle School District (the District) was represented by Tracy Miller and Elizabeth Rasmussen, attorneys at law. Sherry Studley, District special education supervisor, also appeared.

STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 5, 2014. The Complaint was assigned Cause No. 2014-SE-0071 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered September 8, 2014, which assigned the matter to ALJ Michelle Mentzer. After the District filed a Motion of Prejudice, an Order of Reassignment of Administrative Law Judge and Order Changing Hearing was entered September 15, 2014. The District filed its Response to the Complaint on September 15, 2014. The Parents amended their Complaint, on October 30, 2014, to add additional claims and an additional requested remedy.

Prehearing conferences were held on September 25, October 6, 9, and 30, and November 19, 2014, and January 27, 2015. Prehearing orders were entered September 26, October 7, 9, and 30, and December 8, 2014, and January 27, 2015.

An order granting the Parents' stay-put motion was entered October 15, 2014, ordering that Hamjin Robinson, a private school, is the Student's stay-put placement and that the District pay his tuition there pending the decision in this case.

The parties each timely submitted post-hearing briefs on March 16, 2015.

Due Date for Written Decision

As set forth in the Third Prehearing Order, the due date for a written decision in this matter was continued at the District's request to thirty days after the record of the hearing closes. As

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

the record closed with the submission of post-hearing briefs on March 16, 2015, the due date for a written decision is **April 15, 2015**.

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 - D21;

Parents' Exhibits: P1 - P10, P12 - P17, P19 - P22, and P24; and

Court's Exhibits: C1 – C3.

Witnesses Heard (in order of appearance):

The Student's Father;
Stacy Turner, assistant head of school and director of admissions, Hamlin Robinson School;
Catey Roe, teacher, Hamlin Robinson School;
Sherry Studley, District special education supervisor;
The Student's Mother;
Robin Olney, District private school supervisor; and
Elizabeth "Scout" Broadhead, District school psychologist.

ISSUES

As set forth in the Fourth 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 October 11, 2013;
- b. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Failing to comply with the resolution agreement dated October 11, 2013 by not reevaluating the Student, holding an Individualized Education Program (IEP) meeting in January 2014, or taking the Parents on tours of appropriate programs;
 - ii. Failing to develop an IEP for the Student while he was at Hamlin Robinson after April 3, 2013;
 - iii. Failing to reevaluate the Student during the 2013-2014 school year;
 - iv. Failing to provide an appropriate IEP for the 2014-2015 school year by:
 - A. Not providing for methods known to be successful for students with dyslexia and dysgraphia;

- B. Not providing for training or development for District staff in methods known to be successful for students with dyslexia and dysgraphia;
 - C. Not including goals or objectives relating to sight words or spelling;
 - D. Not including goals or objectives related to math;
 - E. Not providing for structured sequential multisensory instruction;
 - F. Not providing an appropriate amount of specially designed instruction (SDI);
 - G. Not providing SDI in social/emotional behavior;
 - H. Not providing SDI in math, science, and social studies;
 - I. Not providing for extended school year (ESY) services;
 - J. Not providing for tutoring in reading;
- v. Failing to reevaluate the Student as requested by the Parents at an IEP meeting in July 2014;
- c. And, whether the Parents are entitled to their requested remedies:
- i. Placement of the Student at Hamlin Robinson for the 2014-2015 and 2015-2016 school years with transportation at District expense;
 - ii. Compensatory education in the form of private tutoring to be paid for by the Parents and reimbursed by the District for the 2014-2015 and 2015-2016 school years;
 - iii. Reimbursement to the Parents for:
 - A. Tutoring expenses for the 2013-2014 school year;²
 - B. Summer school expenses for the summer of 2014;
 - C. Transportation expenses for the 2013-2014 school year;
 - D. The independent evaluation;
 - iv. And/or other equitable remedies, as appropriate

² The Fourth Prehearing Order contained a typographical error stating that tutoring expenses were requested for the "2013-2013" school year. The Parents clarified at the hearing that the request was intended to be for the 2013-2014 school year.

FINDINGS OF FACT

Background

1. The Student is 12 years old and in the sixth grade. Exhibit P22, p.1. He attended school in the District from kindergarten through the third grade. Exhibit P1, p.3. The Student's Parents unilaterally placed him at the Hamlin Robinson School (Hamlin Robinson), a private school in Seattle, for the fourth grade during the 2012-2013 school year. *Id.* at 30 - 31.

2. The Parents filed a due process hearing request in July 2012, which was assigned Cause No. 2012-SE-0069. Exhibit P1, p. 1. Following a hearing, ALJ Michelle Mentzer concluded in a decision dated April 3, 2013, that the District violated the IDEA and denied the Student a FAPE by failing to evaluate and identify the Student for special education and then by failing to provide appropriate services in reading and written language once it found him eligible for special education. *Id.* at 34. She determined that Hamlin Robinson was an appropriate placement for the Student and ordered the District "to place the Student there at public expense, including tuition and transportation expenses." *Id.* at 38.

3. With respect to the Parents' argument that the District failed to provide an IEP prior to the start of the 2012-2013 school year, ALJ Mentzer held:

The Parents seem to believe they have the right to a special IEP designed for private placements. That is not the case. They have the right to enroll the Student part-time in public school to receive any course, activity or ancillary service not provided at Hamlin Robinson. See WAC 392-172A-04010(1). They have not requested such dual enrollment and it has not been denied to them.

Id. at 39.

4. In August 2013, the District offered an IEP for the Student that would have placed him at a District school. Exhibits P8; D10. The Parents disagreed with this IEP and filed another due process hearing request, which was assigned Cause No. 2013-SE-0086. Exhibit P8, p. 1. The Parents and the District entered into a Resolution Agreement dated October 4, 2013. *Id.* Under the Resolution Agreement, the Parents agreed to withdraw their request for due process hearing with prejudice. *Id.* The District agreed to "reimburse the Parent[s] for Student's tuition paid for Hamlin Robison [sic] for the 2013-2014 school year," to call an IEP meeting in January 2014 at Hamlin Robinson to get a progress check on the Student's reading level, to take the Parents to District middle schools in the spring of 2014, and to conduct a comprehensive reevaluation of the Student if the Parents provide consent for such a reevaluation at the January 2014 IEP meeting. *Id.* at 1, 2.

5. The Resolution Agreement, which was signed by both Parents, contained a mutual waiver and release under which the Parents agreed to "release and discharge each and all liabilities, claims, demands, debts, or causes of action, including without limitation claims or causes of action for attorneys' fees, expert fees, costs and expenses that arose out of or relate to the "District's treatment of Student or the District's provision of or attempts to provide IDEA or Section 504 services to or for student occurring prior to October 7, 2013." *Id.* at 2.

6. Following the resolution meeting, the Parents understood that Robin Olney would be their point of contact with the District. Father, Tr. 60. Ms. Olney believes that she sent the Parents an email with the information they would need to request a reevaluation after the meeting, but the Parents did not receive it. Olney, Tr. 472, Father, Tr. 534, Mother, Tr. 536.

7. Ms. Studley understood that it was her responsibility to follow up with the Parents about the District's responsibilities under the Resolution Agreement, but the need for an IEP meeting in January 2014 was somehow removed from her calendar. Studley, Tr. 307. She did not call the Parents until March or April of 2014 and left a message. Studley, Tr. 307; Father, Tr. 60-61. The Parents did not return Ms. Studley's call. Studley, Tr. 435.

8. On May 13, 2014, the Parents sent an email to Ms. Olney asking about the plan for the Student. Exhibit P12, p.1. Ms. Olney responded that Ms. Studley, rather than Ms. Olney, would be working with the Parents on the IEP. *Id.*

9. There was no further communication between the Parents and the District until Ms. Studley sent the Parents an email on June 16, 2014, asking them to complete a consent form so she could obtain test scores from Hamlin Robinson, and stating that she would call an IEP meeting in the summer to offer a District placement for the Student. Exhibit P12. She stated that she had identified a couple of really good reading programs at District middle schools. *Id.* Additionally, she stated that she would like to offer a "summer reevaluation to see if [the Student] qualifies for services in math." *Id.* Because the Father thought that a comprehensive reevaluation was appropriate, rather than one only in math, he responded in an email on June 24, 2014, with a request that the areas of need for the reevaluation be discussed at the IEP meeting. *Id.*; Father, Tr. 67.

Prior Evaluations of the Student

10. The Parents obtained a language and learning evaluation of the Student from Group Health Cooperative (Group Health) in February 2011. Exhibit P2. The evaluation was conducted by a speech-language pathologist, who found that the Student's reading, writing, and spelling skills were delayed by a full grade level. *Id.* at 9. The evaluator found that the Student's reading difficulties stemmed from poor retrieval skills and recommended that focused reading and writing support given in a timely manner would help prevent future academic concerns. *Id.* at 7, 9. The report noted that the Student was performing at or above standard for science, social studies, and math, and contained no recommendations with respect to these subjects. *Id.* at 1, 9. The report did not address any social, emotional, or behavioral needs of the Student.

11. The District conducted an initial evaluation of the Student in February 2011, which was led by Debra Vilhauer, a District school psychologist. Exhibit P3. Ms. Vilhauer's cognitive testing found the Student's General Ability Index (GAI) to be 122, placing his broad cognitive abilities at the 93rd percentile. *Id.* at 6. Ms. Vilhauer found that the Student demonstrated a specific learning disability in reading and written expression and was not making adequate progress in those areas based on observations of his work in the general education classroom. *Id.* at 8. She also found that there was a severe discrepancy between his expected and obtained levels in math computation, but that he was making adequate progress in that area. *Id.* Accordingly, the evaluation report recommended special education services in reading and written language. Based on completion of the Connors 3 checklist by the Student's teacher,

items endorsed on the hyperactivity/impulsivity scale as occurring "often" or "very often" included that he leaves his seat when he should stay seated, fidgets or squirms in his seat, is restless or overactive, interrupts others, is noisy and loud when using free time, talks too much, and is constantly moving. *Id.* at 19. The evaluation report did not recommend services in areas other than reading and written language. *Id.*

12. Elizabeth Andrews Smith, Ph.D., conducted an independent educational evaluation (IEE) of the Student in May 2012. Exhibit P4. She found that his GAI was 116, placing him at the 86th percentile. *Id.* at 5. Dr. Smith diagnosed the Student with dyslexia or reading disorder, and a disorder of written language. *Id.* at 13.

13. Dr. Smith recommended that the Student receive intensive intervention efforts and that he would need four to five days per week of individualized remediation using systemic, structured, sequential, and multisensory instruction. *Id.* at 14. She identified several programs that would meet this criteria, including Slingerland. *Id.* She offered goals for the Student in basic reading skills, reading fluency, spelling, and written language. *Id.* at 14-17. The spelling goal she offered was to increase the Student's spelling skills by two grade levels. *Id.* at 16. She offered two objectives – one was to improve his orthographic coding skills by identifying phonetically irregular sight words and the other was to improve his ability to apply phonics rules to spelling. *Id.* Although Dr. Smith assessed the Student in math, she did not make any recommendations in that area. *Id.* Nor did she make any educational recommendations regarding science, social studies, or social, emotional or behavioral issues other than to consider consulting with a counselor or psychologist regarding the Student's anxiety. Exhibit P4. She recommended that the Student continue "private individualized tutoring." *Id.* at 14.

14. The District conducted a reevaluation of the Student in September 2012, which was led by Scout Broadhead, District school psychologist. Exhibit D8. The reevaluation included a review of Dr. Smith's IEE and the District's initial evaluation. *Id.* at 22. The District reevaluation concluded that the Student continued to qualify for special education in reading and written language. *Id.* at 8. It also concluded that he would receive specially designed instruction in study/organization skills to address concerns about his inattention in class and moving, leaving his seat, and fidgeting. *Id.* at 6. The reevaluation did not recommend specially designed instruction in math, science, social studies, or social/emotional. Exhibit D8.

Hamlin Robinson

15. Hamlin Robinson is an independent private school for children with dyslexia and related language challenges or disabilities. It serves children in first through eighth grades who have average or higher intelligence but who struggle with the acquisition of language skills. Hamlin Robinson does not admit students whose primary needs are emotional and/or behavioral. The school has non-public agency status with OSPI and has contracted with a few local school districts to serve individual students. Exhibit P1, p. 31; Turner, Tr. 98.

16. The foundation of Hamlin Robinson's program is the Slingerland methodology. Exhibit P1, p. 32; Turner, Tr. 99. Slingerland is a multisensory structured approach to teaching language. Visual, kinesthetic, and auditory components are presented simultaneously during instruction of reading and writing. Turner, Tr. 99. Slingerland instruction is not used in math and other academic classes, although all teachers are trained in it and it supports the approach the school uses across all content areas. Turner, Tr. 116.

17. Stacy Turner, Hamlin Robinson's assistant head of school, observes that the Student has grown in the following areas while at Hamlin Robinson: his ability to navigate school, his social interactions, his academic skills, his confidence and his engagement in understanding his ownership and responsibility in instruction and how he was approaching and participating in class. Turner, Tr. 103.

18. Hamlin Robinson tested the Student using the Kaufman Test of Educational Achievement (KTEA) in the fall of 2012 when he entered and in the spring of 2013 and 2014. Exhibit P16.

19. The Student's reading composite score was 84 in the fall of 2012, 77 in the spring of 2013, and 81 in the spring of 2014. Exhibit P16; Turner, Tr. 107. The Student's scores do not demonstrate progress in reading over this time period. Turner, Tr. 133.

20. The Student made strong gains in this time period with respect to written language, although spelling is still a challenge for him. Exhibit P32; Turner, Tr. 110. His math composite score from spring 2014 is average and places him at the 77th percentile. Exhibit P16, p.30. He performed at grade level in math at Hamlin Robinson as well. Turner, Tr. 131; Roe, Tr. 260-61.

21. Catey Roe, who taught the Student in several subjects at Hamlin Robinson, describes him as a "very strong content student," meaning that math, science, and social studies are areas of strength for him. Roe, Tr. 226, 288. He did well in social studies and science, with issues arising only when asked to read text independently. Roe, Tr. 226. Math is an area of strength for the Student, and Ms. Roe has noticed "a huge amount of growth" in terms of his confidence in math. Roe, Tr. 230.

22. Ms. Roe also noted great progress in his social and emotional behavior over his fifth-grade year, especially improvement in his confidence and his ability to persevere in times of challenge. Roe, Tr. 227. She noted that, although she has seen tremendous progress in this area, he does sometimes pull back a little and present as emotionally fragile when he has a setback at school. Roe, Tr. 241-42. He does a better job of seeking help and asking for the things he needs to feel better. Roe, Tr. 242.

July 2014 IEP

23. An IEP meeting was held on July 24, 2014. Exhibit P13, p. 1. The meeting included Ms. Studley, District special education supervisor; the Parents; Stacy Turner, the assistant head of school at Hamlin Robinson; Catey Roe, the Student's Hamlin Robinson reading teacher; and Jerda Smeltzer, his Hamlin Robinson math teacher/reading tutor. Exhibit P14, p.2.

24. At the IEP meeting, the Parents again requested that the Student be reevaluated. The District agreed to test in the areas of social/behavioral skills, math, reading, written expression, study skills/organization, and cognitive ability. *Id.* at 12-13. The District's prior written notice stated that the reevaluation would be scheduled "first thing fall semester, 2014" because summer is a difficult time to test students. *Id.* at 13.

25. The IEP offered on July 24, 2014, included annual goals in reading, study skills/organization, and written language. Exhibit P13, pages 5-6. It provided for daily services in reading and written language in the form of two special education classes each day, as well

as ten minutes of study and organizational skills and 30 minutes of reading per day provided by an instructional aide in the general education setting. *Id.* at 10, 12; Studley, Tr. 318-19. The IEP stated that the Student would not receive extended school year (ESY) services. Exhibit P13, p. 11. The District intended that the Student would be served at his neighborhood school. *Id.* at 12. That school has two reading programs that are systemic structured multisensory reading interventions. Studley, Tr. 381-82.

26. The IEP included the following program accommodations/modifications and support for school personnel:

- Testing presentation: Human readers for writing, mathematics, and science.
- Testing presentation: Student may underline or mark assessment directions with a pencil.
- Testing response: For writing, Student may use a print or electronic dictionary or thesaurus, spell check, and word prediction software with topic-specific dictionaries disabled.
- Testing response: MSP/HSPE Basic: Pass at Level 2.
- Testing response: Scribe.
- Testing setting: Individual or small group testing.
- Testing timing and scheduling: Double time for testing situations.
- Testing timing and scheduling: Multiple or frequent breaks.
- Access/Use of the following: Frequent checks for progress on long assignments.
- Access/use of the following: Multi-sensory instruction and visual example.
- Access/Use of the following: Preferential seating near the front of the classroom.
- Access/Use of the following: Note taking assistance through means such as: copies of overhead notes, peer partnering, teacher prepared notes and/or textbook pages when available.
- Access/Use of the following: Printed materials in audio format.
- Access/Use of the following: Shared instructional aide as part of inclusion program.
- Behaviorally related: Ability to stand or pace in rear or side of classroom during instruction.
- Behaviorally related: Breaks available when frustration level escalates.
- Behaviorally related: Seat in a non-distracting area of class.
- Behaviorally related: Use of positives to encourage behavior and performance.
- Content area: Use of graphic organizers.
- Grading modifications: Extended time to complete assignments/tests/projects/without penalty when requested before due date.
- Organization: Provide directions for tests and assignments orally and in writing and provide clarification of expectations.
- Organization: Help with organizational strategies such as class assignments, homework, use of day planner.

Id. at 8.

27. Following the IEP meeting, the Parents communicated their concerns to Ms. Studley, who made some changes to the IEP based on those concerns and addressed others in an email. Exhibit P14.

28. One of the concerns raised by the Parents was that the IEP did not provide for ESY services. *Id.* at 16. The Parents noted that the Student had benefitted from summer programs the prior three summers. *Id.* Ms. Studley responded that the team would make the decision about ESY in the spring when it would have data to indicate whether he loses ground after school breaks or was just beginning to learn a new skill. *Id.* If the team found him eligible for ESY, the team would write an ESY IEP then. *Id.* The District offers ESY services during the four weeks of July. Studley, Tr. 439.

29. Ms. Studley explained that the decoding goals would address the Student's deficits in spelling and sight words. Exhibit P14, p.19; Studley, Tr. 408-09.

The 2014-2015 school year

30. The Parents decided that, until evaluation data suggested otherwise, the Student would continue to attend Hamlin Robinson. Father, Tr. 78.

31. The Parents then filed their Due Process Hearing Request in this case on September 5, 2014. Exhibit C1; Father, Tr. 79.

Dr. Smith's December 2014 reevaluation

32. The District never completed the reevaluation that it had agreed to conduct at the July 2014 IEP meeting. (Mother, Tr. 348) The Parents amended their Due Process Hearing Request on October 30, 2014, to add the failure to evaluate as a claim in this case. Exhibit C3.

33. The Parents obtained a reevaluation by Dr. Smith at their own expense. Exhibit P22; Father, Tr. 159. The cost for Dr. Smith's reevaluation was \$750.00. Exhibit P17, p. 9; Mother, Tr. 325. The purpose of the reevaluation was to provide updated information about the Student's progress and current academic skill levels and recommendations for further intervention and accommodation. Exhibit P22 at 3.

34. With respect to mathematics, Dr. Smith found that the Student scored in the average range and at grade level on a test of untimed math calculation and that his accuracy was generally good, although he occasionally applied the steps in a procedure incorrectly. *Id.* at 6. She noted that his ability to recall math facts quickly was significantly less developed, but he did not make any errors. *Id.* His math calculation skills on the Woodcock Johnson III placed him at the 21st percentile for math calculation skills, the 45th percentile for math calculation, and the 10th percentile for math facts fluency. *Id.* at 6.

35. As part of her evaluation, Dr. Smith had the Student's teachers at Hamlin Robinson complete an informal teacher rating scale. Exhibit P22, p. 2. Two teachers rated him as average for social skills/peer relationships and two rated him as above average. *Id.* at 3. He was rated as average in math calculation and above average in math reasoning. *Id.* Two teachers rated him as average in spelling and two rated him as below average. *Id.*

36. In summarizing the Student's progress since her evaluation in 2012, Dr. Smith noted that his grade equivalent scores indicated advancement in all areas with the exception of a measure of reading accuracy. *Id.* at 7. She noted that his challenges related to dysgraphia had substantially improved, but that his difficulties due to dyslexia continue to be a significant

hindrance to his academic achievement as observed on measures of basic reading skill, reading fluency, reading comprehension, and spelling. *Id.* at 8. She noted that he would continue to need individualized, intensive intervention to further develop his reading skills. *Id.*

37. Dr. Smith's recommendations for educational planning included continued individualized instruction with a primary focus on reading accuracy and fluency using structured, sequential, multisensory, research-based programs and materials. Exhibit P22, p. 8. She did not specifically recommend goals or services with respect to spelling or sight words. *Id.* Dr. Smith did not recommend individualized instruction in any other academic area or with respect to social and/or emotional needs. *Id.* She noted that the Student "will need" to receive some instruction in literacy skills in the summer so he does not regress, but she provided no data about the Student's history of regression or recoupment. *Id.* at 8. She provided a long list of recommended accommodations and modifications, almost every one of which was already included in the District's July 2014 IEP. Compare Exhibits P13, pp. 7-8 and P22, pp. 9-10.

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, 126 S.Ct. 528 (2005). As the Parents are the party 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 *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

Rowley, 458 U.S. at 206-207.

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

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

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

Resolution Agreement

5. "[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. *Eatonville School Dist.*, Cause No. 2006-SE-0003, Order on Motion for Summary Judgment (SEA WA 2006).³

6. 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.

Failure to Reevaluate the Student

7. 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

³ A copy of this order is available by contacting OSPI's public records officer.

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).

During the 2013-2014 school year

8. As set forth above, the parties' Resolution Agreement cannot be the basis for the District's failure to reevaluate the Student during the 2013-2014 school year because the ALJ has no authority to enforce it.

9. The Parents' claims arising before October 7, 2013, are similarly not considered because they are contractually barred by the Resolution Agreement that resolved Cause No. 2013-SE-0086.⁴ The Resolution Agreement is a legally binding contract under which the Parents agreed to "release and discharge [the District] from any and all liabilities, claims, demands, debts, or causes of action, including without limitation claims or causes of action . . . that arose out of or relate to the District's treatment of the Student or the district's provision of or attempts to provide IDEA or Section 504 services to or for student occurring prior to October 7, 2013." See *Seattle School District*, 114 LRP 32867 (SEA WA 2014); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005) (the elements of contract formation are an offer, acceptance of that offer, and the exchange of something of value in consideration for entering into the contract).

10. As the Student's last District evaluation was in 2012, he was not due for a triennial reevaluation during the 2013-2014 school year. Nor have the Parents presented evidence that, after October 7, 2013, they or one of the Student's teachers requested a reevaluation or that the District should have determined that the Student's educational or related services needs warranted a reevaluation during the 2013-2014 school year. Accordingly, the Parents have not met their burden of proving that the District violated the IDEA by failing to reevaluate the Student during that school year.

At the Parents' request in July 2014

11. The Parents requested that the Student be reevaluated at the July 2014 IEP meeting, and the District agreed to conduct the requested reevaluation at the beginning of the school year. The District's only argument as to why it did not comply with the Parents' request was that the Parents "allowed the District no time to perform" the reevaluation because they filed this case just two days after school started. The District has provided no legal authority as to why the Parents' filing of a Due Process Hearing Request would excuse the District from reevaluating the Student.

12. The District violated the IDEA by failing to reevaluate the Student based on the Parents' request in July 2014. The District's failure to evaluate the Student is a procedural violation of the IDEA. Procedural violations of the IDEA amount to a denial of FAPE only if the procedural inadequacies impeded the child's right to a free appropriate education, significantly impeded the

⁴ The District's alternate theory that these claims are barred by the doctrine of *res judicata* is not considered as it is not necessary for the resolution of the case.

parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate education to the student, or caused a deprivation of educational benefits. WAC 392-172A-05105; 34 CFR §300.513(2). Here, the District's failure to reevaluate the Student significantly impeded the Parents' opportunity to participate in the decision-making process because they did not have current information about the Student they needed to evaluate the District's proposed IEP. Thus, the violation resulted in a denial of FAPE and caused the Parents to obtain an evaluation of the Student at their own expense.

Failure to Develop an IEP for the Student after April 3, 2013, while he was at Hamlin Robinson

13. The Parents argue that Judge Mentzer's order entered April 3, 2013, that the District "place the Student" at Hamlin Robinson required the District to ensure that he receive special education and related services in conformance with an IEP developed by the District as is required when a school district places a student in a private school.⁵ See WAC 392-172A-04085; 34 CFR §300.146.

14. As set forth above, however, any claims arising before October 7, 2013, are contractually barred by the Resolution Agreement. This includes any claim that the District failed to develop an IEP for the Student while he was at Hamlin Robinson between April 3, 2013, and October 7, 2013.

15. After October 7, 2013, the Student remained at Hamlin Robinson pursuant to the Resolution Agreement, not Judge Mentzer's order. Unlike Judge Mentzer's order, the Resolution Agreement did not purport to "place" the Student at Hamlin Robinson. To the contrary, it stated that the District would "reimburse" the Parents for tuition paid there. This is akin to a unilateral placement of the Student in a private school by the Parents, which Judge Mentzer held does not entitle the Student to a District IEP. See WAC 392-172A-04010(1) (right of parents of privately-placed students to enroll students part-time in public school to receive any course, activity, or ancillary service not provided at the private school). Accordingly, the Parents have not met their burden of proving that the District violated the IDEA by failing to develop an IEP for the Student while he was at Hamlin Robinson after April 3, 2013.

IEP for the 2014-2015 School Year

16. As noted above, an IEP is substantively appropriate if it is developed in compliance with the IDEA's procedures and is reasonably calculated to enable the child to receive an educational benefit. *Rowley*, 458 U.S. 176. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

⁵ No determination is made as to whether a District must provide an IEP for a student under these circumstances as it is not necessary to the resolution of this case.

Methodology

17. Three of the Parents' claims relate to methodology the District would use with the Student: 1) not providing for methods known to be successful for students with dyslexia and dysgraphia; 2) not providing for training or development for District staff in methods known to be successful for students with dyslexia and dysgraphia; and 3) not providing for structured sequential multisensory instruction.

18. School districts are generally entitled to deference in deciding what programming is appropriate for a student. *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1031 n.5 (9th Cir. 2010). For that reason, IEPs need not address the instructional method to be used unless a specific methodology is necessary for a student to receive an appropriate education. See *id.* at 1039.

19. Here, Dr. Smith specifically recommended, and Judge Mentzer concurred, that the Student requires structured sequential multisensory instruction in reading. There is no similar recommendation that Slingerland, the methodology used at Hamlin Robinson, is the only structured sequential multisensory instruction appropriate for the Student. Because the IEP includes a statement that the Student will receive multisensory instruction and the District has demonstrated that the placement offered has at least two reading programs that use structured sequential multisensory instruction, the Parents have not met their burden of proving that the District has violated the IDEA by not more specifically identifying a particular methodology for reading instruction or for staff training in a particular methodology in the IEP.

20. With respect to the Parents' claims that the District has not provided for methods or staff training appropriate for the Students' dysgraphia, the Parents have identified no particular method they believe should have been included in the IEP. Nor have any of the professionals who evaluated the Student in the relevant time period recommended any particular methodology. Accordingly, the Parents have not proven a violation with respect to methodology and staff training related to dysgraphia.

Specially designed instruction (SDI)

21. An IEP must include a statement of the special education to be provided to enable the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students including nondisabled students in the activities described in this section. WAC 392-172A-03090(1)(d); 34 CFR §300.320.

22. Specially designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction to address the student's unique needs that result from the student's disability and to ensure access of the student to the general education curriculum. WAC 392-172A-01175; 34 CFR §300.39(b)(3).

23. The Parents argue that the District should have provided SDI in math, science, social studies, and social/emotional behavior, and that the District has not provided an appropriate total amount of SDI.

24. With respect to math, the Student is working at grade level and no evaluation, including Dr. Smith's 2014 reevaluation, has recommended that the Student receive SDI in math.

25. With respect to science and social studies, the Student works at grade level, his Hamlin Robinson teacher states that he is a strong content student, and no evaluation, including Dr. Smith's 2014 reevaluation, recommends that he receive SDI in these areas.

26. With respect to social/emotional behavior, the Parents rely on the Student's emotional state – including his test anxiety, self-confidence, relationships, and his need to get up and move around the classroom – when he last attended a District school and their concerns about returning him to a District setting. Father, Tr. 195-97. However, no evaluation, including Dr. Smith's 2014 reevaluation, recommends that he receive SDI in this area. And the IEP provides a number of accommodations that address the Parents' concerns about the Student's test anxiety and his need to move within the classroom. Although the Parents expressed concerns about the Student's relationships when he attended school in the District, Hamlin Robinson staff did not identify this as a problem for him, and both the Parents and Hamlin Robinson staff noted that his confidence has greatly improved.

27. The Parents' concerns about the lack of overall minutes of SDI is related to the Parents' belief that the Student receives SDI throughout his school day at Hamlin Robinson because of its instructional style. (Father, Tr. 197-98) There is no evidence, however, that the Student needs more SDI than would be provided in two special education classes for reading and writing with supports for the Student within the general education setting in order to receive a FAPE.

28. Accordingly, the Parents have not demonstrated that the July 2014 IEP was not reasonably calculated to provide an educational benefit based on the SDI provided and, therefore, have not proven a violation of the IDEA.

Goals and objectives

29. The Parents argue that the District should have included goals or objectives related to sight words, spelling, and math.

30. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of the student's other educational needs that result from the student's disability. WAC 392-172A-03090(1)(b)(i); 34.CFR §300.320(a)(2).

31. The IDEA does not specify the number of goals that must be included in an IEP, but there should typically be at least one goal for each area of need. *See, e.g., Bellflower Unified Sch. Dist.*, 54 IDELR 66 (SEA CA 2010) (IEP deficient because it did not contain goals to address student's deficits in attending to group instruction); *Flagstaff Arts and Leadership Academy*, 113 LRP 27180 (SEA AZ 2013) (IEP deficient because it failed to provide goals to properly address basic reading, reading fluency, life skills, and other areas of need). An IEP need not contain every goal requested by a parent or recommended by the parent's experts. *See G.D. v. Torrance Unified Sch. Dist.*, 112 LRP 12078 (C.D. Cal. 2012) (IEP goals not inappropriate where the district included goals addressing the student's significant needs while excluding those it deemed unnecessary or not age appropriate).

32. As discussed above, the Parents have failed to show that the Student requires SDI in math. For the same reasons, they have not demonstrated that he requires math goals.

33. With respect to spelling and sight words, the Student's standardized test scores are low in these areas and Hamlin Robinson staff identified them as areas of weakness. And Dr. Smith proposed a spelling goal in her 2012 evaluation. However, Dr. Smith did not recommend goals or services in these areas in her 2014 reevaluation. And Ms. Studley opined that the Student's spelling and recognition of sight words would improve through instruction in decoding, which is provided in the District's proposed IEP. Accordingly, the Parents have not demonstrated that the IEP is not reasonably calculated to enable the child to receive an educational benefit due to its lack of goals in these areas.

Extended school year (ESY) services

34. Districts must ensure that ESY services are available when necessary to provide FAPE to a student eligible for special education. WAC 392-172A-02020(2). But they must only be provided if the IEP team determines on an individual basis that they are necessary. WAC 392-172A-02020(2).

35. The purpose of ESY services is the maintenance of the student's skills or behaviors, not the teaching of new ones. WAC 392-172A-02020(5). ESY services are the "exception and not the rule." *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008). They are "only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *Id.*

36. The criteria for determining the need for ESY services should include regression and recoupment time based on documented evidence or on the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need. WAC 392-172A-02020(6). For this purpose, "regression" means a significant loss of skills or behaviors if educational services are interrupted, and "recoupment" means the recovery of skills or behaviors to a level demonstrated before the interruption of services. WAC 392-172A-02020(6) – (7).

37. The Parents have offered no evidence of the Student's regression and/or recoupment history. Rather, they argue that he has benefitted from summer instruction in the past. Dr. Smith's recommendation in her 2014 reevaluation that he receive literacy instruction in the summer "so he does not regress" similarly does not provide any documentation about his past regression and/or recoupment. For this reason, the Parents have not demonstrated that the District violated the IDEA by not including ESY in the July 2014 IEP rather than waiting until the spring to determine, based on regression and recoupment or other data, whether it would be necessary.

38. The Parents argue that the IEP drafted on July 25, 2014, should have included ESY services for the summer of 2014 as well as the summer of 2015. Because the District offers ESY services in July, the Parents have not demonstrated that the IEP drafted at the end of that month should have provided those services. Moreover, as discussed above, they have not

provided any regression or recoupment data to support the argument. Accordingly, they have not proven a violation of the IDEA in this respect.

Tutoring in reading

39. The Parents have not proven that tutoring in reading, in addition to the District's proposed SDI in reading provided both in a daily special education reading class and by an instructional aide in the general education setting, is necessary to provide the Student a FAPE. Dr. Smith, in her 2012 evaluation, recommended only *private* tutoring for the Student, and there was no recommendation for tutoring at all in the 2014 reevaluation. Accordingly, the Parents have not proven a violation of the IDEA in this respect.

REMEDIES

Prospective Placement at Hamlin Robinson

40. Reimbursement to parents for their unilateral placement of a student in a private school, and prospective private placement in such school, are only appropriate when the school district's placement violated the IDEA and the parent's private school placement is appropriate under the IDEA. *See Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Because the Parents have not proven that the District's proposed placement violated the IDEA, their request for prospective placement at Hamlin Robinson at the District's expense is denied.

Compensatory Education

41. 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. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). As the Parents have not met their burden of proving that the District denied the Student any educational benefits, their request for compensatory education in the form of tutoring is denied.

Reimbursement to the Parents

Evaluation

42. Because the District failed to reevaluate the Student, necessitating that the Parents obtain their own evaluation, reimbursement for Dr. Smith's evaluation is appropriate. The District shall reimburse the Parents in the amount of \$750.00 for the cost of Dr. Smith's evaluation within 45 days of the date of this order.

Other Requests

43. Because the Parents have not proven other violations of the IDEA, their requests for reimbursement for tutoring expenses for the 2013-2014 school year and summer school expenses for the summer of 2014 are denied.

44. The Parents' request for reimbursement for transportation expenses for the 2013-2014 school year, which they argue were required by Judge Mentzer's decision, is also denied as the

failure to pay for transportation expenses was not included in the issue statement and because the ALJ has no authority to enforce Judge Mentzer's decision. Nothing in this order prevents the Parents from pursuing this allegation through OSPI's citizen complaint procedure.

ORDER

1. The District has violated the IDEA and denied the Student a FAPE by failing to reevaluate him after the Parents' request in July 2014.
2. The District did not otherwise violate the IDEA or deny the Student a FAPE.
3. The District shall reimburse the Parents \$750.00 for Dr. Smith's reevaluation within 45 days of the date of this order.
4. The Parents' remaining requested remedies are denied.

Signed at Seattle, Washington on April 15, 2015.



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. *lan*

Parents


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cc: Administrative Resource Services, OSPI
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