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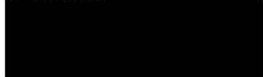


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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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November 8, 2016

Parent


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In re: Seattle School District
OSPI Cause No. 2016-SE-0039
OAH Docket No. 04-2016-OSPI-00051

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,


Michelle C. Mentzer
Administrative Law Judge

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

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Superintendent of Public Instruction
Administrative Resource Services

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

IN THE MATTER OF:

OSPI CAUSE NO. 2016-SE-0039

SEATTLE SCHOOL DISTRICT

OAH DOCKET NO. 04-2016-OSPI-00051

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Seattle, Washington, on August 24, 26, 29 and 30, 2016. The Parent of the Student whose education is at issue¹ appeared and was represented by Sarah Stasch and Barbara Ransom, attorneys at law.² The Seattle School District (District) was represented by David Hokit and Sam Chalfant, attorneys at law, and Andrea Schiers, the District's assistant general counsel. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a due process hearing request (Complaint) on April 11, 2016. Prehearing conferences were held on May 17, and August 15, 2016. Prehearing orders were issued on April 28, May 24, July 8, and August 17, 2016, and an order was issued after the hearing on October 11, 2016.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a District request for continuance of that date. See First Prehearing Order of May 24, 2016. The hearing record closed with the filing of post-hearing briefs on October 25, 2016. Thirty days thereafter is November 24, 2016. The due date for the written decision is therefore November 24, 2016.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-15;
Parent Exhibits: P-1 through P-13; and
District Exhibits: D-1 through D-20.³

¹ In the interests of preserving the family's privacy, this decision does not name the Parent or Student. Instead, they are identified as "Parent" or "Mother," and "Student."

² Barbara Ransom was admitted *pro hac vice* in this proceeding by an order entered April 28, 2016.

³ District Exhibit D-20 was offered in evidence on the last day of the hearing. The Parent objected to its admission. The Parent's objection was taken under advisement because it required legal research that could not be accomplished by the end of the hearing later that day. The section of the Conclusions of

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

The Parent of the Student;
Virginia "Ginny" Andrews, District general education teacher;
Elizabeth Smith, PhD, private psychologist;
Billie Butterfield, former District school psychologist;
Emily O'Sullivan, District occupational therapist;
Natalie White, District speech language pathologist;
Patricia Campbell, District special education supervisor;⁴
Charlotte Martinez, District special education teacher;
Kelley Archer, District elementary school principal;⁵
Stacy Turner, assistant head of school, Hamlin Robinson School;
Jessica Ruger, enrollment management director and school counselor, Hamlin Robinson School; and
Shannon Woodard, former family support advocate, Open Door program.

ISSUES

The Issues Statement below reflects the claims made and remedies requested in the due process hearing request. The inclusion of alleged violations of the Individuals with Disabilities Education Act (IDEA) in an Issues Statement does not guarantee that they constitute violations of the IDEA. The inclusion of requested remedies in an Issues Statement does not guarantee that this tribunal has the authority to award them. The issues for hearing are:

- a. Whether the District violated the IDEA and denied the Student a free appropriate public education (FAPE) by:
 1. Completing an inappropriate special education evaluation in April 2014 that failed to assess the Student in all areas of suspected disability;
 2. Failing to conduct a functional behavioral assessment (FBA) as requested by the Parent in or about May 2014;
 3. Developing an IEP in September 2014 that was inappropriate in that it:

Law entitled "Evidentiary Ruling" explains why the Parent's objection was overruled and Exhibit D-20 was admitted.

⁴ Subsequent to the events at issue here, Patricia Campbell's title became director of special education school-based services. At all times relevant to this decision, Ms. Campbell served as a special education supervisor.

⁵ Subsequent to the events at issue here, Kelley Archer became the assistant principal at a different school from the school the Student attended. However, at all times relevant to this decision, Ms. Archer's position was elementary school principal at the school the Student attended.

- (a) lacked an appropriate positive behavioral support plan for the Student;
 - (b) failed to identify specially designed instruction to be provided by an occupational therapist (OT), failed to provide for sufficient OT services, and failed to provide such services to address the Student's dysgraphia;
 - (c) lacked specially designed instruction to be provided by a speech-language pathologist (SLP);
 - (d) failed to provide for multi-sensory language programs to address the Student's dyslexia;
4. Offering an inappropriate placement in the September 2014 IEP, which placement lacked appropriate supports and services;
5. Failing to continue monitoring the Student's progress during the 2014-2015 school year, when the Student began attending Hamlin Robinson School;
- b. Whether Hamlin Robinson School was an appropriate placement for the Student during the 2014-2015 school year;
- c. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate:
 1. A declaration that the District violated the IDEA and denied the Student a FAPE in the ways set forth above;
 2. Compensatory education for all days the District excluded the Student from school in violation of the IDEA, and for all periods during which the District denied the Student a FAPE, in the following forms:
 - (a) a summer reading program for three consecutive summers, to be conducted by a certified reading specialist with expertise in dyslexia who is selected by the Parent;
 - (b) a summer language arts and written communication program for three consecutive summers, to be conducted by a certified specialist with experience in dyslexia and dysgraphia who is selected by the Parent;
 - (c) SLP services for three hours per week during three consecutive school years, to be provided directly by an SLP in the school environment in one-on-one and small group settings;
 - (d) OT services for three hours per week during three consecutive school years, to be provided in the school environment in a one-on-one setting; and
 3. Reimbursement of the Parent's expenses for the Student's attendance at Hamlin Robinson School during the 2014-2015 school year.

See Order Memorializing Amendment of Issues Statement, October 11, 2016.

FINDINGS OF FACT

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

Background

1. The Student is currently in the 6th grade at Hamlin Robinson School, a private school in Seattle. He has attended Hamlin Robinson since the 4th grade. Prior to that time, he attended District elementary schools.⁶

2. During 2nd grade (2012-2013 school year) at a District elementary school, the Student struggled academically and was referred to the school's Student Intervention Team (SIT). D-1.⁷ School staff recommended that the Student be evaluated for special education. This occurred both in 2nd grade and in the first half of 3rd grade. Testimony of Butterfield and Andrews; D-1:5; D-2:1. The Parent refused to consent to an evaluation, saying it was off the table and she did not want her son to enter the school-to-prison pipeline, as she put it. Testimony of Andrews, Archer, and Butterfield; D-2:1. The Parent asked the District to pursue other interventions, which the District did. Several interventions were tried through the SIT process, but the Parent felt they were ineffective. Testimony of Parent; D-1; J-2.

3. Despite having repeatedly refused a special education evaluation, the Parent alleged in her Complaint, and again in her response to a summary judgment motion, that the District never offered her a special education evaluation. The Complaint stated:

Because District refused to provide [the Student] with anything but ineffective, band aid services as a result of the SIT meetings, [the Parent] contacted OSPI [Office of Superintendent of Public Instruction] and obtained a form to put her request for a special education evaluation in writing . . .

Complaint, ¶11. In her summary judgment declaration, the Parent stated that during the SIT process, "the District staff never suggested or explained that an evaluation should be conducted". Declaration of [Parent], ¶5. The Parent again alleged that she had to contact OSPI to find out how to obtain a special education evaluation and services. *Id.* at ¶¶6-7.

4. At the hearing, the Parent continued to deny ever having been offered a special education evaluation before she herself requested one in late-January 2014. Testimony of Parent. This assertion is contradicted not only by school staff's testimony, but by

⁶ The elementary schools the Student attended are not named, to provide greater confidentiality to the family.

⁷ Citations to the exhibits are in the following format. "D-1" refers to District Exhibit D-1. Where specific pages within an exhibit are cited, e.g., pages 2 and 3 of Exhibit D-1, they would be cited as "D-1:2-3."

contemporaneous notes of the school psychologist at a November 2013 SIT meeting, which stated the District would offer both a special education evaluation and an FBA. Testimony of Butterfield; D-1:5. It is also contradicted by a prior written notice issued at the time the Parent finally requested a special education evaluation. That prior written notice stated: “[The Student] was referred in the past and a decision to assess was made in the fall of 2012. No consent was received at that time for an assessment.” D-2:1.

5. Based on all of the evidence to the contrary, the Parent's allegation that the District never offered a special education evaluation until she herself requested one in late-January 2014 is found to be untrue. The events in question occurred prior to the statute of limitations period. However, they bear on an assessment of the Parent's credibility, which is at issue on several matters that arose within the statute of limitations period, as discussed below.

6. When the Parent requested a special education evaluation in late-January 2014, the District agreed. J-2; D-2; D-3. The District provided the Parent an evaluation consent form on February 10, 2014, and received the signed form back from the Parent on March 12, 2014. J-3:2. The evaluation was completed and the evaluation review meeting was held on April 10, 2014. In the interim, in late-March 2014, a Section 504 plan was adopted to provide support for the Student pending completion of the evaluation and IEP. J-1.

7. On the same day in late-January 2014 that the Parent requested a special education evaluation, the Student was suspended from school due to behavioral incidents. The conditions for his return to school included adoption of a safety plan, a mental health evaluation, and the Parent cooperating in the special education evaluation process. Testimony of Archer, Parent and Andrews. The Parent refused to obtain a mental health evaluation for the Student, and the school relented on that condition. The Student was out of school for two months. During that time, the Parent successfully appealed his exclusion and the conditions placed on his return. Testimony of Archer. He returned to school in late-March 2014. Testimony of Parent.

District's April 2014 Evaluation

8. The District's evaluation that was completed April 10, 2014, found the Student eligible for special education and related services. A school psychologist assessed him in the following areas: cognitive ability, reading, written expression, and social/behavior skills. A speech-language pathologist (SLP) assessed his communication skills, and an occupational therapist (OT) assessed his fine motor skills. J-3. Math was not assessed, as that is an area of relative strength for the Student. The evaluation found the Student eligible under the IDEA based on specific learning disabilities (SLDs) in reading and written language. It found he needed special education in these areas, as well as in social/behavioral skills, communication, and fine motor skills. *Id.*

9. The Student's reading skills were evaluated using the Kaufman Test of Educational Achievement (KTEA-II), which included assessments of word and letter recognition, decoding ability, sight word recognition, reading comprehension, and spelling. J-3:5-6. The District school psychologist's conclusions were as follows:

[The Student] was able to identify sounds associated with letters. He could read some sight words such as “was” and “that”, although he sometimes showed reversals, such as reading “no” for “on”. As words became longer, [the Student]

was not able to read them and did not demonstrate decoding strategies. His standard score on the Letter & Word Recognition subtest fell at 75 (5th %ile). In the Reading Comprehension subtest, [the Student] was able to match short, simple words with pictures. He was not able to read simple sentences. Again he demonstrated reversals in his attempts at reading, particularly in the letters /b/ and /d/. [The Student's] reading comprehension standard score fell at 70 (2nd %ile). . . . Goals should include basic reading skills such as sight word vocabulary as well as decoding skills, as [the Student's] difficulty with basic reading skills and lack of decoding strategies contributes to his inability to read and understand written sentences and passages.

J-3:5. The school psychologist found a severe discrepancy between the Student's full scale IQ score of 85⁸ and his reading scores on the KTEA-II. This made him eligible for special education as a student with a specific learning disability in reading. *Id.*

10. The school psychologist also used the KTEA-II to assess the Student's written language skills. She summarized her findings as follows:

While initially the third grade assessment measure was used, [the Student's] inability to complete items on this measure prompted changing to the second grade measure. On this easier measure [the Student] was able to write individual letters and copy words. He could write a simple sentence with proper spacing between words. He has an understanding of punctuation and is able to complete sentences with proper subject/verb agreement. His standard score on the second grade measure fell at 72 (3rd %ile), but it should be noted that this measure is below his level, and is normed on children younger than he.

[The Student's] greatest challenge in the writing task appeared to be associating letters with sounds that he hears and spelling words correctly. He is able to follow a story and could dictate and attempt to write sentences that fit with the story theme when the story was at his instructional level. Although he is able to punctuate sentences when prompted, he did not do this independently. Recognizing that the measure administered was below [the Student's] grade level, and that his score fell below the considered criterion score of 73⁹, [the Student] is eligible for services in the area of written language skills.

⁸ This full scale IQ score was an estimate by the school psychologist, not a firm score, due to fairly large discrepancies between the Student's scores on different parts of the IQ test. J-3:2. A nearly identical estimate of 84 for the Student's full scale IQ was arrived at by a private psychologist, Dr. Elizabeth Smith, shortly thereafter. Dr. Smith had similar caveats because she observed similar discrepancies between the Student's scores on various parts of the test. P-4:3-5. Dr. Smith's evaluation of the Student, which was conducted as an independent educational evaluation (IEE), is discussed in more depth below.

⁹ The criterion score of 73 is a number derived from the Student's full scale IQ score. Based on that IQ score, any standard score on an academic achievement test falling below 73 indicates a severe discrepancy between his cognitive ability and his academic performance in that area. See Washington Administrative Code (WAC) 392-172A-03065 through -03080; see also 34 Code of Federal Regulations (CFR) §§300.307 - 300.311.

J-3:6.

11. Regarding the social/behavioral evaluation, the Parent selected two school staff members she felt were not biased against the Student to provide input for this evaluation.¹⁰ These two staff members filled out rating forms from the Behavior Assessment System for Children (BASC)¹¹. The BASC has rating forms that can be filled out by parents, as well. The Parent contends she filled one out, turned it in to the school psychologist, but the school psychologist failed to include her scores in the evaluation report. Testimony of Parent. The school psychologist contends she did not receive a rating form from the Parent. She stated she would have included the Parent's input in the evaluation report if she had received it. The school psychologist recalls the Parent telling her the Student had no behavioral issues at home, and that the Parent either declined to take a rating form for that reason, or took it but did not return it. Testimony of Butterfield. A contemporaneous email from the school psychologist shows she encouraged the Parent to fill out a BASC rating scale. She wrote to the Parent: "There is also a parent report form and *I would welcome your input if you would want to complete one.* Sometimes it is helpful to compare behavior at home and at school." D-4:2 (emphasis added).

12. The school psychologist was highly experienced, having worked 23 years in that profession. Testimony of Butterfield. There is no reason she would have excluded the Parent's input if it had been received, since she encouraged it to be submitted. Also, if the Parent's rating scores had actually been submitted, but had been omitted from the draft report discussed at the evaluation meeting of April 10, 2014, the Parent could have pointed that out and it could have been corrected. She did not do so. Nor did she raise the alleged exclusion of her input in the Complaint. The first time she raised it was in her testimony at the hearing. The Parent's allegation in this regard is not found credible.

13. The Parent declined to sign the April 10, 2014 evaluation report. She wanted to take it home and review it further. Testimony of Butterfield; J-3:8. By April 28th, the District had not received any further comments from the Parent on the evaluation, so the school principal emailed the Parent asking for her feedback so the IEP process could move forward. D-6. Also on April 28th, the Parent requested an independent educational evaluation (IEE) and the District agreed to fund it. *Id.* On May 1st, the school psychologist emailed the Parent asking again for the Parent's feedback on the evaluation report, stating the District wanted to get the IEP process moving forward. D-10:3. The Parent never provided further feedback on the evaluation.

¹⁰ The Parent's Closing Brief, at pages 6–7, finds fault with the choice of one of these two school staff members to participate in the BASC assessment. However, the Parent specifically chose this staff member for the BASC after rejecting as biased other staff members selected by the school psychologist. Testimony of Butterfield.

¹¹ The school psychologist only wrote "BASC" in the evaluation report, but she used the then-current version of the BASC. She is now retired, but believes the current version at that time was the 2nd edition (BASC-II). Testimony of Butterfield.

IEP Development Process – Spring 2014

Functional Behavioral Assessment

14. The parties agreed that the Student had behavioral problems at school and would benefit from an FBA, which would then be used to develop a Behavior Intervention Plan (BIP). The Parent also alleges the Student was bullied and harassed, but she did not establish that any such incident occurred.

15. On May 5, 2014, the Parent requested an FBA and an assistive technology assessment. The District agreed. District staff informed her that both of these assessments are usually done after the initial IEP is drafted, so that staff can get to know the child and be better able to complete the assessments. D-10:2; Testimony of Butterfield. The District planned to have a special education teacher conduct the FBA. The Parent did not want the teacher to conduct it, so the District offered a special education supervisor. The Parent then asked that the FBA be conducted by a board certified behavior analyst (BCBA). D-12. The District offered a District staff person who is a BCBA. The District sent the Parent a consent form for this BCBA to perform the FBA, and a follow-up email to remind her to send it back. J-5.

16. At IEP meetings in mid-May and September 2014, the Parent stated she wanted someone independent of the District to conduct the FBA. D-20; J-9. At the September 25, 2014 IEP meeting, the District agreed to use an outside professional chosen by the Parent to conduct the FBA. J-8:20; J-9. The Parent never named any outside professional to conduct the FBA. The Parent never provided signed consent for an FBA to be conducted. An FBA was therefore never conducted, and a BIP was never written.

May 12, 2014 IEP meeting and District's attempt to reconvene the IEP team thereafter

17. On May 6 and 7, 2014, the District emailed the Parent inviting her to the Student's first IEP meeting on May 12th. The Parent did not respond until the morning of May 12th, when she wrote: "I will be there." Forty minutes before the meeting was scheduled to begin on May 12th, the school principal replied to the Parent's email: "Great! We look forward to seeing you and getting [the Student] the services he needs to succeed." J-5:1. The Parent did not send any further reply indicating she would not attend.

18. At the hearing, the Parent denied having received any notice of the May 12, 2014 IEP meeting. She also denied attending it, denied that any IEP meeting occurred prior to September 2014, and denied receiving any IEP draft prior to September 2014. Testimony of Parent. The Parent pointed to the absence of signatures on the draft IEP dated May 12th as corroborating her assertion that no meeting occurred, and noted a teacher's testimony that the usual practice is to obtain signatures at IEP meetings. See Testimony of Martinez.

19. The May 12, 2014 draft IEP is not the only draft IEP in the record that lacks signatures. Two subsequent draft IEPs contain no signatures: the drafts discussed at the September 3 and September 8, 2014 meetings. J-6; J-7. Only the final IEP is signed, indicating the District did not obtain signatures until a final IEP was adopted. J-8.

20. District team members who attended the May 12, 2014 IEP meeting testified that the Parent did, in fact, attend. They also testified to particular subjects the Parent discussed at that

meeting. Testimony of Andrews and Archer. The Student's 3rd grade teacher attended the May 12th meeting, but did not attend the subsequent IEP meetings that occurred in September 2014 (the 4th grade teacher attended instead). The 3rd grade teacher has clear and specific recollections of what the Parent discussed at the May 12th IEP meeting. Testimony of Andrews. Since this teacher attended no IEP meeting for the Student except this one, it is very likely her memory about the Parent's input arose from the May 12th meeting, as she testified.

21. The Parent's testimony that she did not attend any IEP meeting or receive any draft IEP prior to September 2014, is also contradicted by the Issues Statement adopted for the hearing. The Issues Statement was derived from the Parent's Complaint and from her elaboration on the Complaint at the first prehearing conference. After the Issues Statement was adopted in a prehearing order, the Parent had ten days to object to it. No objection was received. Two of the issues directly contradict her subsequent testimony that she did not attend any IEP meeting or receive any draft IEP prior to September 2014. Those issues were whether the District denied the Student a FAPE by "[f]ailing to provide the Parent with prior written notice concerning why the District did not accept the Parent's proposed changes to the Spring 2014 IEP" and "[f]ailing to provide the Parent with prior written notice that the District would not implement the Spring 2014 IEP." See First Prehearing Order of May 24, 2016, ¶¶20.a.8 and 20.a.9.¹²

22. Prior to the due process hearing, the District did not know the Parent would allege she had not attended the May 12th IEP meeting. To rebut this unexpected testimony, the District offered in evidence an email written by the school principal the morning after the May 12th IEP meeting. In the email, the principal reported to District administrators what had occurred at the meeting, which is summarized here as follows: The Parent raised objections to the communication and fine motor goals, and the team did not have time to discuss reading or written language goals, although the meeting ran until 5:00 p.m. The Parent wanted the goals to state that the Student would improve from the 1st grade level to the 4th grade level in the course of one year. District team members did not feel this was realistic. The Parent said she was going to write the IEP goals herself. The District team agreed to reconvene to discuss the IEP goals she would propose. The Parent also stated that behavioral goals could not be written because an FBA had not been done. The Parent refused to sign consent for the provision of initial services even after the District team members made clear they could not start special education services until receiving her written consent. D-20.

23. The Parent was shown this email during cross-examination to see if it would refresh her recollection of having attended the May 12th meeting. She stated it did not. Testimony of Parent. The principal's email summarizing the meeting was then offered as an exhibit during the principal's testimony. The Parent objected to its admission and the objection was taken under advisement, to be ruled on in the final decision. For the reasons stated in the Conclusions of Law, below, the exhibit was admitted.

¹² The two issues in question were subsequently dropped from the case for another reason: The ALJ stated during the due process hearing that, now that she realized the Spring 2014 IEP was only a *draft*, and was not adopted by the District, she did not plan to address in her decision the issues previously identified concerning the Spring 2014 IEP. See Tr. 469-472. Counsel for both parties agreed in post-hearing correspondence, and a number of issues related to the Spring 2014 IEP were deleted from the Issues Statement, including the two issues discussed in the text, above. See Order Memorializing Amendment of Issues Statement, issued October 11, 2016.

24. It is found that the Parent did attend the May 12, 2014 IEP meeting. The District witnesses' testimony on this matter, corroborated by the email written the morning after the meeting, is found more credible than the Parent's testimony denying she attended. Also, contemporaneous email evidence establishes that the Parent was notified of the meeting, contrary to her testimony that she received no notice of it.¹³

25. On May 15, 2014, the school principal emailed the Parent asking to receive the Parent's feedback on the IEP goals, which the Parent had stated at the May 12th meeting that she would provide. The email also said they needed to reschedule the IEP meeting so they could get services in place for the Student. D-12:1. Not having heard back from the Parent on either of these matters, the principal did a follow-up email on June 15, 2014, stating:

We really have to get [the Student's] IEP finished. I know you were going to look at the 4th grade standards and provide us with some feedback but it's getting awfully late in the year and I still haven't heard anything from you. . . . I'm very concerned about [the Student] starting next year as a fourth grader without any supports. Please let me know where you are with your end, so we can move forward and get [the Student] the help he needs.

J-5:10. The Parent did not respond to the District on any of these matters. In August, the District scheduled the next IEP meeting for the first day of the new school year, September 3, 2014. D-13; J-6:1-2.

Dr. Smith's IEE

26. On March 14, 2014, while the District's evaluation was underway, the Parent asked for an independent educational evaluation (IEE). D-4:1. The District explained that it had to complete its own evaluation first. Testimony of Parent. Shortly after the District completed its evaluation, the Parent again requested an IEE. D-6. The District agreed to pay for it. The Parent selected Elizabeth Andrews Smith, PhD,¹⁴ to conduct the IEE.

¹³ After the Parent denied having attended the May 12, 2014 IEP meeting, the District asked the Parent if she had ever been convicted of a crime involving dishonesty or false statement, citing the admissibility of such convictions under Washington Evidence Rule 609. The Parent at first objected to the question, but later withdrew her objection and the parties stipulated as follows: In 2011, the Parent was convicted of first degree theft and first degree identity theft. While these convictions add weight to the credibility determinations made herein, the same determinations would have been made regardless of the criminal convictions, based on the weight of the evidence on each matter as to which the Parent's version of events is not credited.

¹⁴ Elizabeth Andrews Smith, PhD, received a doctorate in learning disabilities from Northwestern University in 1997. She served for 10 years as an adjunct professor of special education at Seattle Pacific University. She also worked in a variety of teaching and administrative positions in schools for 10 years. Dr. Smith has served as a board member or president of several organizations focused on learning disabilities. She has published several articles and has made numerous professional presentations in this field. P-1. Dr. Smith has maintained a private practice in Bellevue, Washington, since 1998. She is also a licensed mental health counselor. Testimony of Smith.

27. Dr. Smith assessed the Student over two sessions in May and June 2014. She completed her evaluation report on August 6, 2014. P-4.¹⁵ Dr. Smith administered the assessments listed in the footnote below.¹⁶ Dr. Smith found the Student had dyslexia, dysgraphia, and a language disorder. The report explained that dyslexia means a specific learning disability of neurological origin characterized by "difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities." P-4:11. Ten to 25% of the population shows some signs of dyslexia. It is the most common cause of reading, writing, and spelling difficulties. Testimony of Smith. Dr. Smith's report explained that dysgraphia means "handwriting difficulties that are related to both graphomotor function weaknesses (letter formation, graphomotor speed) and orthographic coding (retrieval of print information from memory)." P-4:11-12.

28. Dr. Smith's report stated the Student had weaknesses in auditory processing, visual processing, nonverbal conceptualization, visual-motor integration, and graphomotor skills. These weaknesses result in significant challenges for the Student in letter-sound associations, word recognition, and word analysis for decoding and spelling. These fundamental difficulties undermine his reading fluency, reading comprehension, and written composition. In writing and math calculations, his orthographic coding and graphomotor deficits impede the accuracy with which he can convey ideas. P-4:10-11.

29. Like the District, Dr. Smith calculated the Student's full scale IQ to be approximately 84. Also like the District, she cautioned that this was only an approximation because of the large discrepancies between his scores on parts of the IQ test. She explained that the large discrepancies between those scores provide valuable information; they allow educators to design reading instruction to tap into his areas of strength and support his areas of weakness. Similarly, the Student's differential performance on various subtests of standardized reading assessments yields this kind of valuable information. Testimony of Smith.

30. Based on what would be expected from his IQ score, the Student's reading and written language abilities showed severe underachievement. Therefore, like the District, Dr. Smith diagnosed specific learning disabilities in reading and written language. Also like the District,

¹⁵ The Parent testified that Dr. Smith told her the time lag from June to August 2014 in completing her report occurred because she had a hard time communicating with the District and getting paid for her services. However, Dr. Smith testified that she wrote the report between June 12 and August 6, 2014, and sent it to the District and the Parent as soon as she finished it. Dr. Smith attributed the time lag to no other reason than her writing time. Dr. Smith had better knowledge than the Parent of the reason for her own lag time in completing the report. Dr. Smith's testimony from direct knowledge is credited over the Parent's hearsay testimony.

¹⁶ Dr. Smith administered the following assessments: Beery-Buktenica Developmental Test of Visual-Motor Integration, Visual Perception (VMI); Comprehensive Test of Phonological Processing-2nd edition (CTOPP-2); Gray Oral Reading Test-5th edition (GORT-5); Peabody Picture Vocabulary Test-4th edition (PPVT-4); Test of Orthographic Competence (TOC); Test of Word Reading Efficiency-2nd edition (TOWRE-2); Wechsler Intelligence Scale for Children-4th edition (WISC-IV); and Woodcock-Johnson Tests of Achievement-3rd edition (WJ-III). P-4:1.

she found an oral language disability, with deficits in both receptive and expressive language skills, as well as behavioral challenges at school that stemmed from his disabilities. P-4:11-12.

31. At the hearing, Dr. Smith explained that underachievement relative to IQ in reading (i.e., a specific learning disability) can be due to dyslexia, receptive or expressive language problems, or attention deficit hyperactivity disorder (ADHD). Testimony of Smith. There is no evidence the Student has ADHD, but he does have the other two problems. Dr. Smith attributes the Student's specific learning disabilities to dyslexia and dysgraphia. P-4:12.

32. Dr. Smith was one of the contributors to, and editors of, the *Washington State Dyslexia Resource Guide*, which was jointly published by OSPI and other organizations. Testimony of Smith. The guide explains as follows:

A student with dyslexia may qualify for special education services as a student with a Specific Learning Disability in the area of reading, but a formal diagnosis of dyslexia will not be provided at the school level.

Washington State Dyslexia Resource Guide (November 2011), at p. 24.¹⁷ Dr. Smith agreed at the hearing that schools generally do not provide formal diagnoses of dyslexia, as the school did not here. Testimony of Smith.

33. Dr. Smith recommended specific IEP goals and accommodations for the Student, and recommended intensive and frequent instruction using a reading curriculum that is multisensory, structured, and that has proven successful with dyslexic students. She named several such curricula, one of which was the Wilson program. P-4:13. Her recommendations for goals and accommodations are discussed below, in the context of whether they were adopted into the Student's IEP.

34. Two years later, in May 2016, Dr. Smith reevaluated the Student. P-11. The purpose of the reevaluation was to assess his progress since attending Hamlin Robinson School. For the reasons discussed below, no findings are made about the Student's progress at Hamlin Robinson. For the same reason, no findings are made about Dr. Smith's 2016 reevaluation.

September 2014 IEP

35. After receiving Dr. Smith's report in August 2014, the District scheduled another IEP meeting for the first day of school, September 3, 2014. D-13; D-14. Dr. Smith participated in the meeting, which lasted for 3.5 hours. J-6:26. A follow-up meeting was held on September 8th that lasted 2.5 hours, with Dr. Smith participating by telephone for the first hour. Testimony of Campbell; J-7:21. An IEP was still not agreed upon. At the end of the September 8th meeting, the Parent informed the IEP team that the Student was already attending a private school. Testimony of Campbell. The Parent completed the private school application on

¹⁷ Both parties questioned witnesses about the *Washington State Dyslexia Resource Guide* at the hearing, but neither party offered it in evidence. After the hearing, the parties agreed that the undersigned could take official notice of the publication, pursuant to RCW 34.05.452(5). The guide is available online at: <http://www.k12.wa.us/Reading/pubdocs/DyslexiaResourceGuide.pdf>.

September 2nd. Testimony of Turner. Based on the Parent's testimony about dates, the Student began attending the private school (Hamiin Robinson) on either September 4 or 5, 2014.

36. The IEP team met for a final time on September 25, 2014. The Parent's input was sought on each goal in the IEP, but the Parent declined to provide input, saying she did not have time for the team to go through the whole IEP. When asked for input on portions of the IEP, she repeatedly said "keep going". J-8:20; J-9:2; Testimony of Campbell. The team adopted an IEP that day, with the Parent dissenting. J-8:1. The District offered placement at Montlake Elementary School,¹⁸ where a Wilson-trained special education teacher was located. That teacher had a low student count and would provide the Student's reading instruction one-on-one using the Wilson program. The fundamental skills she would have worked on with the Student are the same skills Dr. Smith advocated should be targeted. Testimony of Martinez; P-4:10-15; J-9:3; J-10:3. The prior written notice adopting the IEP stated that the Student's reading instruction would be provided "in an [sic] one on one setting by a certified teacher trained in a curriculum recommended by the IEE provider." J-8:20. Montlake Elementary is not the Student's neighborhood school, but it is in the same central region of the District as his neighborhood school. District members of the team also thought that changing schools would allow for a fresh start with a new IEP team, since the Parent was angry at the team from the Student's then-current school. Testimony of Campbell.¹⁹

37. The IEP provided for specially designed instruction in reading for 50 minutes per day, and the same amount of written language instruction per day. It also provided the following: 30 minutes per day of social/behavioral instruction; 30 minutes, six times per month of SLP services; and 30 minutes, four times per month of OT services. J-8:17.

38. Most of Dr. Smith's recommendations were adopted in the final IEP. As originally proposed, the Student's goal on reading decoding did not have objectives or benchmarks. J-14:10. At Dr. Smith's suggestion, objectives were added to provide benchmarks over the course of the year for measuring his progress. Testimony of Smith; J-8:9.

39. The District's original reading comprehension goal was to be measured using levels from the Teacher's College system. J-14:10. At Dr. Smith's recommendations, grade level standards were used instead. Testimony of Smith; J-8:9-10. Objectives to provide benchmarks for measuring progress over the course of the year were also added. J-8:9-10.²⁰

¹⁸ It does not impact the family's confidentiality to include the name of Montlake Elementary School, because the Student never ultimately attended there.

¹⁹ The Parent alleges District administrators determined that the IEP team at the Student's current neighborhood school was incapable of developing an appropriate IEP for him, and this why they solicited the involvement of the Montlake special education teacher. Parent's Closing Brief at p. 12. However, the record is clear that the District solicited the involvement of the Montlake special education teacher and proposed a Montlake placement for the two reasons stated in the text, above. There is no evidence to support the Parent's allegation of a different reason.

²⁰ Dr. Smith noted that the mastery criteria in the IEP's two reading goals appeared low: 30% and 50%, respectively. She explained that mastery criteria should be 90 to 95%. Testimony of Smith. The Montlake special education teacher, who wrote the goals, explained that 30% and 50% refer to the

40. Regarding how high to set the target levels in the goals, both Dr. Smith and the Montlake special education teacher felt the increase from 1st to 4th grade level, advocated for by the Parent, was unrealistic. Testimony of Smith and Campbell; J-9. The team therefore changed the target from 4th grade to 3rd grade level. Dr. Smith believes that achieving this target of two years' growth in one year is a goal that can be worked toward with intensive and appropriate instruction. Testimony of Smith.

41. The only reading recommendation from Dr. Smith that was not adopted in the IEP was to have a reading fluency goal. Fluency is measured by accuracy plus speed: the number of correct words per minute that a student can read. Testimony of Smith. The IEP's decoding goal focused on accuracy, not speed. The Montlake special education teacher explained that speed develops by working on decoding words accurately. She also stated that the Wilson program includes speed assessments. She would be using these Wilson speed assessments to determine when to move the Student to the next higher level in reading. Thus, reading fluency would be part of the Student's IEP goal work. Testimony of Martinez.

42. Concerning written language goals, the final IEP reflected Dr. Smith's recommended goals in the areas of spelling, composing structurally correct sentences, and writing conventions (punctuation and capitalization). The District took Dr. Smith's three objectives (which were part of one goal) and set them out as three separate goals. Testimony of Smith; J-8:10-11; P-4:14. The only difference is that the IEP aimed for improvement from 20% accuracy to 60% accuracy, whereas Dr. Smith recommended a target of 95% accuracy. The Montlake special education teacher felt 60% was a more realistic goal. The IEP team adopted the 60% recommendation. *Id.*; Testimony of Martinez.²¹ Finally, Dr. Smith recommended using the "Handwriting Without Tears" program as part of the Student's written language work. The District OT added to the IEP a recommendation that the Student use Handwriting Without Tears, or a similar evidence-based program, as part of his OT therapy and class work. Testimony of O'Sullivan; J-8:7.

43. Dr. Smith concurred with the goal areas recommended by the District OT. Testimony of Smith. The IEP's fine motor OT goal provided that, when given sentences written on a board, the Student would copy three to five sentences, increasing his accuracy to 80% in sizing, spacing, line orientation, and letter formation. J-8:11. The District OT explained that copying from a board puts into play additional and different skills than writing one's own text. Testimony of O'Sullivan.

44. Dr. Smith also concurred with the goal areas recommended by the District SLP. Testimony of Smith. The IEP's communication goals focused on the Student's weakness in using narrative language. They called on the Student to provide verbal narratives in response to increasingly complex prompts, beginning with a single picture or word, and progressing to

Student performing at the 30th percentile and 50th percentile relative to same-age peers. She would not move him to the next higher reading level until he demonstrated 85 to 95% mastery at the lower level, similar to Dr. Smith's mastery criteria. Testimony of Martinez.

²¹ The Parent mistakenly asserts that the final IEP of September 25, 2014 still reflected the unrealistically high 95% accuracy target in its written language goals. Parent's Closing Brief at p. 13. Actually, the final IEP contains the 60% accuracy target in all of its written language goals. J-8:10-11.

prompts of a sentence and a paragraph, increasing his ability to do this from 30% to 90%. The Student's task was to elaborate and add details from his imagination to the prompts he was given. Another communication goal required the Student to name six or more items in five categories, improving expressive language skills until he was able to do this in five out of five trials (starting from a baseline of zero out of five). Testimony of White; J-8:12-13.

45. Finally, in the social/behavioral area, the IEP's Present Levels of Performance identified areas of concern in hyperactivity, aggression, conduct problems, depression, short attention span and easy distraction. J-8:8. The IEP had two annual goals for the Student in this area. First, when given a non-preferred activity, the Student would be taught to use a strategy to manage his frustration level and allow him to get back on task. He was currently able to do this 20% of the time, and the goal was to improve to 80% of the time. Second, the Student would be taught to improve his self-advocacy skills by asking the teacher for assistance to clarify the tasks in his assignments. He was currently able to do this 10% of the time, and the goal was to improve to doing it 70% of the time. J-8:11. The Student would receive specially designed instruction for 30 minutes each day to help him make progress on these goals. J-8:17. Dr. Smith did not comment on the IEP's social/behavioral goals or services.

46. Concerning classroom accommodations, all 12 of Dr. Smith's recommendations were included in the IEP. Testimony of Smith; P-4:15-16; J-8:14-15. They included accommodations that would provide behavioral support as well as academic assistance, such as the use of clear expectations, frequent checks for understanding, extra time to process information; breaks when his frustration level escalated, adult proximity, positive reinforcement for appropriate behaviors, repetition and clarification, and preferential seating near the teacher. J-8:14-15.

47. The IEP placed the Student in a special education environment 44% of the time, and a general education environment 56% of the time. J-8:17-18. His reading, written language, social/behavioral instruction, and related services would be in the special education environment. His math instruction and other classes, lunch, and recess would be in the general education environment. The IEP was to be implemented at Montlake Elementary School, where there was a Wilson-trained special education teacher to provide his reading instruction.

48. The Parent disagreed with the final IEP and declined to consent to the provision of special education services. J-8:19. She also stated that the team from Montlake Elementary (who were present at the final IEP meeting) were stiff, and the Student needed staff who were flexible. Testimony of Campbell; J-9. The Parent said at the meeting that Montlake was a KKK school and asked how many students of color it had. (The Student is African-American.) Testimony of Campbell. The Parent wanted written progress reports every month, while the IEP provided for them every trimester. She also testified that the annual goals in the IEP were unrealistically high. Testimony of Parent. At the IEP meetings, however, she advocated for even higher, not lower, target goals. Testimony of Campbell, Martinez, and Archer.

Hamlin Robinson School

49. The Student began attending Hamlin Robinson School in September 2014, for his 4th grade year. He has attended Hamlin Robinson since then, and is now in the fall of his 6th grade year. Hamlin Robinson is a private school in Seattle that focusses on the needs of students with learning disabilities.

50. No findings are made concerning Hamlin Robinson or its appropriateness for the Student. This is because, as discussed below, the Parent has not established that the District violated the IDEA. Therefore, reimbursement for private school tuition and prospective placement at the private school cannot be awarded.

CONCLUSIONS OF LAW

The IDEA

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

3. 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.

4. For a school district to provide FAPE, it is not required to provide a "potential-

maximizing” education, but rather a “basic floor of opportunity.” *Rowley*, 458 U.S. at 200 - 201. An IEP must be “reasonably calculated to enable the child to receive educational benefits.” *Id.*, 458 U.S. at 207. “[A] school must provide a student with a ‘meaningful benefit’ in order to satisfy the substantive [FAPE] requirement[.]” *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014) (internal citation and quotation marks omitted).

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

6. A parent is entitled to reimbursement for a private school placement only if the parent establishes two things: first, that the district’s placement violated IDEA, and second, that the private school placement was appropriate. See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361 (1993).

Evidentiary Ruling

7. The District offered Exhibit D-20 in evidence during the hearing. Exhibit D-20 was not included among the District’s proposed exhibits that were exchanged five business days before the hearing. Exhibit D-20 is an email from the school principal detailing the Parent’s statements at the May 12, 2014 IEP meeting. It was offered to rebut the Parent’s unanticipated testimony that she was not present at that meeting. The Parent objected to the admission of Exhibit D-20 based on the five business-day rule, which provides:

Any party to a due process hearing has the right to . . . [p]rohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing . . .

WAC 392-172A-05100(1)(c); see 34 CFR §300.512.²²

8. The District argued that Exhibit D-20 was offered for impeachment purposes and was therefore admissible under WAC 10-08-140(2), which provides in pertinent part:

(2) Where practicable, the presiding officer may order:

(a) That all documentary evidence which is to be offered during the hearing or portions of the hearing be submitted to the presiding officer and to the other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;

(b) That documentary evidence not submitted in advance as required in (a) of this subsection be not received in evidence in the absence of a clear showing

²² The five business-day rule in the IDEA itself covers only the disclosure of *evaluations* prior to hearing. See 20 USC 1415(f)(2). The U.S. Department of Education regulations implementing the IDEA expanded the five business-day rule to cover all proposed exhibits, and Washington State regulations did the same. See 34 CFR §300.512; WAC 392-172A-05100(1)(c).

that the offering party had good cause for his or her failure to produce the evidence sooner, *unless it is submitted for impeachment purposes*;

(italics added). The matter was taken under advisement, to be ruled on in this decision, because the objection was lodged on the last day of hearing, when there was insufficient time to research the matter prior to the conclusion of the hearing.

9. Rebuttal or impeachment evidence²³ is admitted to allow a party to rebut a new, unanticipated matter presented by the opposing party. See *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968).

Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case.

Id., 74 Wn.2d at 394-395. See *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984) ("The testimony of Ms. M.'s sister appears to have been true rebuttal testimony offered in reply to a new matter raised by the defense not anticipated by the State.")

10. Impeachment evidence under Washington law is also governed by Evidence Rule (ER) 607, which provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Witnesses may be impeached by their own prior inconsistent statements or by extrinsic evidence. See *Tamburello v. Dept. of Labor and Industries*, 14 Wn. App. 827, 828-829, 545 P.2d 570 (1976) (motion picture of plaintiff engaging in physical activities that he testified he was incapable of performing was properly admitted as extrinsic impeachment evidence). When extrinsic evidence is used for impeachment, "[i]n a sense these exhibits are merely items of rebuttal in impeachment form." *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788, 498 P.2d 870 (1972). The court in *Jacqueline's* went on to hold: "[E]vidence properly admitted to impeach by mere contradiction constitutes an exception to the general rule and is competent to prove the substantive facts encompassed in such evidence." *Id.* at 789. In other words, such evidence may be considered for the truth of the matter asserted therein, not solely for the limited purpose of attacking credibility.

11. The undersigned has found only two IDEA cases dealing with the intersection of the five business-day rule and the general rules concerning the admission of previously undisclosed rebuttal or impeachment exhibits. One of those cases confronted the question directly: *Blue Springs R-IV Sch. Dist.*, 63 IDELR 272 (SEA MO 2014). In *Blue Springs*, a school district witness testified that during development of the IEP, the parents' expert requested only a few

²³ The terms "rebuttal" evidence and "impeachment" evidence are used interchangeably in this discussion, because the choice of term depends on the phase of the trial during which the evidence is offered: If offered by the plaintiff, it is usually offered after hearing the defendant's witnesses, i.e., in the rebuttal phase of the trial. If offered by the defendant, who does not have a rebuttal phase, it is usually offered during the defendant's case in response to something heard during the plaintiff's case-in-chief. Such evidence offered by the defendant is often called "impeachment" evidence rather than "rebuttal" evidence because it is not offered during the "rebuttal" phase of the trial.

items be included in it. The parents then offered in evidence notes the expert had prepared concerning the IEP, to prove she had requested that more items be included. The commissioner hearing the case at first excluded the notes based on the five business-day rule. However, on reconsideration, the commissioner admitted the notes as a rebuttal exhibit, stating:

Upon reconsideration, we reverse our ruling. After researching the issue, we have found no case law that would prohibit the introduction of rebuttal evidence in IDEA cases, notwithstanding the rule set forth in 34 CFR 300.512(a)(3) [the five business-day rule].

Id.

12. The second case on the question addressed it indirectly. In *Somerset County Public School System*, 21 IDELR 942 (SEA MD 1994), the state review board found the hearing officer erred by not allowing the parents to see documents that were shown to district witnesses to refresh their recollection during testimony. The documents had not been disclosed five business days before the hearing and were not exhibits in the case. The state review board held that, not only were the parents entitled to see the documents, but they would also have been entitled to “introduce relevant parts of [them] for impeachment purposes.” *Id.* (internal citations omitted). Thus, documents that were not disclosed five business days before the hearing would nevertheless have been admissible as impeachment exhibits if the parents, upon seeing them, wished them to be admitted.²⁴

13. The regulation relied upon by the District, WAC 10-08-140(2), is an administrative version of the common court rule that impeachment exhibits need not be – and as a practical matter cannot be – disclosed as exhibits prior to trial. See, e.g., Federal Rule of Civil Procedure (FRCP) 26(a)(3)(A); King County Local Court Civil Rule 4(j) (both of which create an exception to the requirement of pre-trial disclosure of exhibits for impeachment exhibits). It might be argued that the five business-day rule is more specific (applying only to IDEA hearings) than WAC 10-08-140(2) (applying to *all* administrative hearings), and so only the IDEA regulation should apply. However, it must be presumed that the U.S. Department of Education, in adopting the five business-day rule, was aware of the Federal Rules of Civil Procedure. If the Department had intended its rule to abrogate a Federal Rule of Civil Procedure, it is expected the Department would have so stated in the rule.

14. The decisions in *Blue Ridge* and *Somerset County* are sound. They conform with general civil and administrative procedure rules. Also, if impeachment evidence is barred unless disclosed prior to the hearing, parties would have an incentive to put every shred of paperwork into the record in the event that, during the hearing, a witness unexpectedly testifies to something that might be addressed in a document previously thought cumulative or of marginal relevance. Excluding all undisclosed impeachment exhibits can also provide an incentive to save surprise testimony for the hearing, instead of sharing the matter during

²⁴ It is likely that the intersection of the IDEA’s five business-day rule and the general rules on impeachment exhibits has arisen in significantly more cases than the two cited above. However, the matter would usually be ruled on during the due process hearing itself, and would therefore not be discussed in the written decision. This would explain the paucity of searchable legal authority on this question.

resolution sessions and settlement negotiations. Saving such matters until testimony at the hearing ensures that the opposing party will be unable to introduce documentary evidence to the contrary: the opposing party would not have anticipated the need for it prior to the hearing.

15. For the reasons set forth above, it is concluded that the District properly offered Exhibit D-20 as an impeachment exhibit. The District did not know, nor did it have reason to know, that at the due process hearing the Parent would deny having been present at the May 12, 2014 IEP meeting. The District had no reason to list among its proposed exhibits an email tending to prove the Parent was present at that meeting. The email was written at a time when the writer's recollection was fresh, giving it more probative value than testimony by the writer two years after the fact, and after several intervening IEP meetings attended by the Parent that could arguably have been confused in the witness's mind with the IEP meeting in question. For these reasons, Exhibit D-20 is admitted as extrinsic evidence to impeach the Parent's unanticipated testimony that she was not present at the May 12, 2014 IEP meeting.

Appropriateness of April 2014 Evaluation²⁵

16. The IDEA has a number of eligibility categories, one of which is "specific learning disabilities." Students must be found eligible under one of these categories in order to be considered a child with a disability. 20 USC §1401(3)(A)(i); WAC 392-172A-01035(1)(a); 34 CFR §300.8.

17. The District correctly assessed the Student for specific learning disabilities in reading and writing, since he was suspected of having disabilities in these areas. Nothing in the IDEA or its implementing regulations requires that students with such disabilities be assessed to see whether they also meet the diagnostic criteria for dyslexia or dysgraphia. OSPI's *Washington State Dyslexia Resource Guide*, *supra*, states, without any criticism, that school districts in Washington do *not* provide dyslexia diagnoses. The particular strengths and weaknesses that each student demonstrates on various subtests of their reading and cognitive assessments allow educators to target instruction to tap into their areas of strength and support their areas of weakness, as Dr. Smith explained.

18. The U.S. Department of Education, Office of Special Education Programs (OSEP), recently reiterated its guidance on this matter:

As we explained in our October 23, 2015 letter, while IDEA does not prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia in eligibility determinations, there is no requirement under IDEA that a disability label or "diagnosis" be given to each student receiving special education and related services, so long as the child is regarded as having a disability and receives

²⁵ Much of the Parent's Closing Brief is devoted to matters that arose prior to completion of the April 10, 2014 evaluation. The Parent's Closing Brief presents these matters not merely as background, but seeks adjudication of them. However, all claims that arose prior to April 10, 2014 were dismissed on summary judgment because they are outside the statute of limitations. See Order Granting in Part and Denying in Part District's Motion for Partial Summary Judgment of July 8, 2016. In addition, the Parent's brief asserts facts that were specifically ruled inadmissible on relevance grounds on the first day of hearing. See Tr. 9-10; Parent's Brief at page 2, lines 14-20.

needed special education and related services. 34 CFR § 300.111(d). To ensure that this occurs, the public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 CFR § 300.304(c)(4). There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected disability, as it determines appropriate.

Letter to Unnerstall, 68 IDELR 22 (OSEP 2016) (italics added). OSEP went on to state:

However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and the child's educational needs, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments.

Id.

19. The Parent has not established that a particular assessment for dyslexia was needed to determine whether the Student had a disability or to determine his educational needs. Dyslexia is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities, according to Dr. Smith and the *Washington State Dyslexia Resource Guide, supra*, at p. 8. As the District argues (District's Closing Brief at 9), its own evaluation assessed the Student in these areas, including word and letter recognition, decoding ability, reading comprehension, and spelling. The school psychologist found he demonstrated word reversals, lacked decoding strategies, exhibited poor letter and word recognition, and had poor reading comprehension and spelling skills. Accordingly, the IEP team adopted annual goals focused on decoding efficiency, answering reading comprehension questions, phonetic spelling, and composing structurally correct sentences.

20. For these reasons, the Parent has not established that a dyslexia assessment was needed to ascertain whether the Student had a disability or to determine his educational needs. *Letter to Unnerstall, supra*. Neither has the Parent demonstrated that the OT's fine motor assessment, combined with the school psychologist's written language assessment, failed to provide this same information regarding the Student's writing abilities, such that a separate dysgraphia assessment was required.²⁶

²⁶ Even if the Parent had established the District's evaluation was inappropriate for not including a dyslexia and/or dysgraphia evaluation, the claim is largely moot. Immediately following the District's evaluation, the District agreed to the Parent's request for an IEE. The IEE assessed the Student for dyslexia and dysgraphia at public expense – precisely the assessments the Parent claims were missing from the District's evaluation. The District then made extensive use of the IEE report, as well as input from the IEE provider at two IEP meetings, to develop the September 2014 IEP. The only further remedy that could be awarded if the Parent had prevailed on this claim is compensatory education for the interval of four months between the time the District's evaluation was completed (April 10, 2014) and the time the IEE report was completed (August 6, 2014). The IEP would arguably have been adopted four months sooner without the IEE process. However, the Parent's own conduct delayed adoption of an IEP for four months after the IEE was completed, a fact that would be considered in deciding what equitable relief

21. Next, the Parent incorrectly asserts that the District violated the IDEA by failing to provide her with certain data-based documentation discussed in WAC 392-172A-03055(4)(b) *prior to* conducting its evaluation, because no parental consent was required to obtain this data documentation. Parent's Closing Brief at pp. 16-17.²⁷ Beside the fact that this claim falls outside the statute of limitations, and was therefore dismissed on summary judgment, the claim is wrong. The regulations in WAC 392-172A-03045 through -03080 are *part of* the evaluation process, and parental consent *is* required. The title of that set of regulations is "Additional Procedures for Identifying Students with Specific Learning Disabilities". The opening sentence of the first of these regulations is: "In addition to the evaluation procedures for determining whether students are eligible for special education, school districts must follow additional procedures for identifying whether a student has a specific learning disability." WAC 392-172A-03045. These additional procedures are part of the evaluation process, for which consent is required. The regulation in question tells the evaluation team what past data it must scrutinize before concluding, in the evaluation, that a student is eligible under the SLD category.

22. The Parent also argues the District's evaluation failed to assess the Student appropriately in the social/emotional area. Parent's Closing Brief at pp. 19-20. This claim is unsupported. The Parent offered no evidence to challenge the school psychologist's credible testimony concerning the appropriateness of her evaluation, which utilized the standardized BASC assessment. The Parent asserts, without any support in the record, that the school psychologist used the BASC in a manner that compromised its validity and reliability. Parent's Closing Brief at p. 19. The Parent is referring to the fact that only *teacher* rating forms were used, not a *parent* rating form. The uncontested testimony about this was from the school psychologist, who stated that the absence of a parent rating does *not* invalidate the BASC. Also, it is the Parent, not the District, who was responsible for the absence of a parent rating form. The school psychologist offered the Parent one, but the Parent either declined to take it, or took it but did not return it.

23. For all of these reasons, the Parent has not established that the District's April 2014 evaluation violated the IDEA or denied the Student a FAPE.

Absence of FBA

24. As stated in the Findings of Fact, the District offered several times to conduct an FBA. The District agreed to all of the Parent's changing conditions as to who the provider should be. When the Parent ultimately requested that the District pay for an outside professional to conduct the FBA, the District agreed. The ball was in the Parent's court to name the outside professional she wished to use. The Parent never did so, and never provided the District written consent to conduct an FBA. Parental consent must be received before a district may conduct an FBA. See *Letter to Addressee*, 112 LRP 23125 (U.S. Dept. of Educ., Office of Special

should be awarded. During those four months (mid-May to early-September 2014), the Parent failed to respond to the District's repeated attempts to reconvene the IEP team, thus delaying adoption of an IEP, and the start of special education for the Student, for four months.

²⁷ The Parent's brief is actually entitled "Complainants' [sic] Closing Findings of Supported Facts and Legal Argument." For ease of reference, it is referred to herein as Parent's Closing Brief.

Education Programs (OSEP) 2012); *Freeman Sch. Dist.*, 115 LRP 57722 (SEA WA 2015); *Muskegon Public Schools*, 115 LRP 24863 (SEA MI 2015).

25. For these reasons, the Parent has not established that the District violated the IDEA by failing to conduct an FBA.

September 2014 IEP

26. The Parent asserts the Student did not receive any of the educational services identified in his evaluation or IEP,²⁸ and she requests compensatory education from the date of the evaluation, April 10, 2014, through the end of the school year in June 2014. Parent's Closing Brief at pp. 10, 23; Issue Statement ¶1(c)(2). This assertion is surprising, because it is impermissible for a district to provide special education or related services until a parent signs consent for the initial provision of such services. 20 USC §1414(a)(1)(D)(ii); WAC 392-172A-03000(2)(a); 34 CFR §300.300. After the Student was found eligible on April 10, 2014, the Parent declined to provide consent for the initial provision of services at four IEP meetings from May 12, 2014 through September 25, 2014. The Parent had the right to decline consent, but the District was legally barred from providing special education or related services without that consent. The Parent's request for compensatory education for the failure to deliver services must therefore be rejected.

27. The Parent also argues the District failed to have an IEP in effect at the beginning of the 2014-2015 school year. Parent's Closing Brief at pp. 11, 19. See 20 USC §1414(d)(2)(A); 392-172A-03105(1); 34 CFR §300.323. This claim was not raised in the Parent's complaint or included in the Issues Statement for the hearing (see Issues section, above). It was raised for the first time in the Parent's opening statement at the hearing. "The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise." WAC 392-172A-05100(3); see 34 CFR §300.511. The Issues Statement was amended by agreement of the parties in other respects after the hearing began, but not in this respect. See Order Memorializing Amendment of Issues Statement of October 11, 2016. The District has not agreed to add this claim to the hearing. See District's Closing Brief at pp. 7-8.

28. Even if the Parent had timely raised the claim, it would fail on the merits. The Parent did not consent to the District's proposed IEP at the May 12, 2014 IEP meeting, and did not respond to the District's subsequent attempts in May and June 2014 to schedule another IEP meeting before the school year ended so that an IEP would be in place at the beginning of the school year. The Parent attended the next IEP meeting on September 3, 2014 (the first day of school), and again did not consent to the IEP. Her lack of response to attempts to reschedule the IEP meeting in May and June, and her decision not to consent to the IEPs offered prior to and on the first day of school, prevented the District from having an IEP in effect at the beginning of the school year. If this were not an *initial* IEP, the District could have put it into effect over the Parent's disagreement simply by issuing a prior written notice making it

²⁸ It is unclear which of these two documents -- the evaluation or IEP -- she is referring to, because she calls it an IEP but uses the date of the evaluation (albeit with a typographical error in the year). Parent's Closing Brief at p. 10.

effective.²⁹ However, because this was an initial IEP, it could not be put into effect absent the Parent's written consent, as discussed above. For these reasons, even if the Parent had timely raised the issue, the District would not be held liable for failing to have an IEP in place at the beginning of the school year. To hold otherwise would create an IDEA violation any time an initial IEP is offered by a district, but repeatedly refused by a parent, regardless of all efforts the district may have made to have an IEP in effect by the beginning of a school year.

29. The Parent repeatedly testified that she requested that the IEP require goal progress reports every month, instead of every trimester. However, this claim was not raised in the Parent's Complaint or included in the Issues Statement for the hearing (see Issues section, above). Moreover, the Parent offered no legal authority to support a claim that more frequent reporting was required, nor any factual evidence why it was necessary to provide the Student a FAPE.

30. There are five areas in which the Parent alleged the September 2014 IEP was inappropriate. Those five areas are discussed separately below.

Positive behavioral support plan

31. The Parent alleges the IEP did not contain a positive behavior support plan. The term used for a behavior support plan in the IDEA regulations is "behavior intervention plan" (BIP). An IEP must include a BIP if the IEP team determines it is necessary in order for the student to receive a FAPE. WAC 392-172A-03090(1)(h); 34 CFR §300.320. Positive behavioral interventions and supports must be considered by IEP teams where a child's behavior impedes the child's learning or that of others. 20 USC §1414(d)(3)(B)(i); WAC 392-172A-03110(2)(a)(i); 34 CFR §300.324.

32. The District here repeatedly offered to conduct an FBA and use it to develop a BIP. The Parent did not cooperate, and so an FBA was never conducted. If the Parent had made clear from the start that she would not cooperate in the conduct of an FBA -- instead of presenting a changing series of requirements for the FBA provider and finally failing to name any private provider when the District agreed to pay for whomever she chose -- then the District would have been on notice to move forward and create a BIP without the benefit of an FBA. Instead, the Parent strung the District along, making it appear she would ultimately consent to an FBA. While it is best to have an FBA to guide the creation of a BIP, it is not required if a district adequately identifies behavioral problems and effectively addresses them. See *Endrew F. v. Douglas County Sch. Dist. RE 1*, 798 F.3d 1329, 1337-1338 (10th Cir. 2014); *K.L. v. New York City Dept. of Educ.*, 2012 U.S. Dist. LEXIS 124460, 112 LRP 44086 (S.D.N.Y. 2012). However, the lack of an FBA can lead to the development of an inappropriate BIP. See *C.F. v. New York City Dept. of Educ.*, 746 F.3d 68, 80 (2nd Cir. 2014).

²⁹ A parent in this situation would not be without a remedy. The parent could file a due process hearing request and invoke his or her stay-put rights to prevent implementation of the new IEP. See 20 USC §1415(j). The parent could also revoke consent for special education. See WAC 392-172A-03000(2)(e); 34 CFR §300.300. The district in both of these situations would nevertheless have fulfilled its duty to have an IEP in effect at the beginning of the school year.

33. The facts in this case demonstrate that it was the Parent's conduct that prevented the District from completing an FBA and BIP. Although a BIP was not developed, the IEP did identify significant behavioral problems the Student had and was reasonably calculated to effectively address them. See *Andrew F.*, *supra*; *K.L.*, *supra*. He was to receive 30 minutes per day of behavioral services, supplemented by multiple accommodations that would provide behavioral support. The Parent wrongly asserts that the IEP's social skills goals placed the onus on the Student to change his behavior. Parent's Closing Brief at p. 12. Rather, the IEP provided he would receive 30 minutes per day of specially designed instruction to teach him how to achieve these goals, i.e., teach him strategies to manage his frustration and to self-advocate by asking for teacher assistance.

34. The Parent wrongly asserts that the September 25, 2014 IEP contained no behavioral goals or services. Parent's Closing Brief at pp. 6-7. The title for such goals in IEPs often varies, e.g., "Social," "Emotional," "Social/Emotional" or "Social/Behavior". See, e.g., *L.O. v. East Allen County Sch. Corp.*, 58 F. Supp. 3d 882 (N.D. Ind. 2014); *West-Linn Wilsonville Sch. Dist. v. Student*, 2014 U.S. Dist. LEXIS 103844, 63 IDELR 251 (D. Ore. 2014); *Seattle Sch. Dist.*, 115 LRP 54786 (SEA WA 2015). The title here was "Social" in the goals section of the IEP and "SOCIAL/BEHAVIOR" in the services section of the IEP. J-8:11, 17. What matters is the content of the goals, not the title. The goals here were clearly focused on behavior in the classroom.

35. For all of these reasons, the Parent has not established that the September 2014 IEP was inappropriate as failing to contain a positive behavioral support plan.

Occupational therapy

36. The September 2014 IEP provided for OT services for 30 minutes, four times per month. The IEP contained an annual goal that addressed the Student's fine motor skills in the area of writing. The Parent's witness, Dr. Smith, agreed that the OT's goal areas were appropriate. The Parent offered no testimony from an OT, or any other evidence, to prove the IEP's OT provisions were inappropriate.

Speech-Language Therapy

37. The September 2014 IEP provided for SLP services for 30 minutes, six times per month. Five of the annual goals in the IEP targeted communications skills. A District SLP testified to the appropriateness of these goals. Dr. Smith agreed the goal areas were appropriate. The Parent offered no testimony from an SLP, or any other evidence, to prove they were inappropriate.

Multi-sensory programs to address dyslexia

38. Contrary to the Parent's assertion, the District did offer the Student a multi-sensory reading program to address dyslexia, the Wilson program. Wilson was one of the reading programs recommended by the Parent's IEE provider, Dr. Smith.

39. To the extent the Parent is alleging it was a violation of the IDEA not to list a multi-sensory reading program in the Student's IEP, that contention fails. Omitting reference to a methodology in an IEP does not violate the IDEA unless it has been proven that the student can

only receive an educational benefit using that methodology. See *T.C. v. New York City Dept. of Educ.*, 2016 U.S. Dist. LEXIS 42545, 67 IDELR 183 (S.D.N.Y. 2016); *Lake Washington Sch. Dist.*, 113 LRP 29950 (SEA WA 2013); see also *K.L. v. New York City Dept. of Educ.*, 530 F. App'x 81, 61 IDELR 184 (2nd Cir. 2013, unpublished); *U.S. Dept. of Educ., Analysis of Comments and Changes to IDEA Regulations*, 71 Fed. Reg. 46665 (2006) ("There is nothing in the Act that requires an IEP to include specific instructional methodologies.") Given that the Parent never consented to the provision of special education, so that *no* specially designed instruction was ever provided to the Student, she has not proven that no other methodology could provide him an educational benefit.

40. Also, while the IEP did not mention a methodology, the prior written notice (PWN) adopting the IEP did. It stated that one-on-one instruction in reading would be provided by a certified teacher "trained in a curriculum recommended by the IEE provider." Wilson is one of the curricula recommended by the IEE provider. Promises made in a PWN can legally bind a district just as promises made in the IEP. In *Seattle Sch. Dist.*, 115 LRP 30211 (SEA WA 2015), this tribunal stated that parents must be able to rely on what is written in both PWNs and IEPs, citing a Ninth Circuit case that held the formal PWN requirement:

has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir.), *cert. denied*, 513 U.S. 965, 115 S. Ct. 428 (1994).

41. For all of these reasons, the Parent has not established that the September 2014 IEP was inappropriate as failing to offer a multi-sensory reading program.

Placement

42. The Parent claims the District offered an inappropriate placement in the September 2014 IEP that lacked appropriate supports and services. This claim might be a reiteration of the four aspects of the IEP discussed above (which concern supports and services) or it might be a challenge to the IEP's educational placement as that term is typically understood: "Educational placement" generally refers to the type of placement chosen on the continuum of alternative placements, for example general education class vs. home instruction. See *N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). "Historically, we have referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom . . ." *Analysis of Comments and Changes*, 71 Fed. Reg. 46540, 46588 (U.S. Dept. of Educ. 2006).

43. The Parent's Closing Brief does not address the Student's educational placement as that term is described above. Likewise, there was no testimony at the hearing that the Student belonged at a different point on the least-restrictive environment continuum. The IEP placed him in the special education environment 44% of the time, and the general education environment 56% of the time. There was no evidence this educational placement was

inappropriate. Regarding physical location, nothing in the Parent's Closing Brief argues that Montlake Elementary was an improper location for implementing the Student's placement or services, and there was no evidence establishing that.

Conclusion concerning September 2014 IEP

44. For the reasons set forth above, the Parent has not established that the District's September 2014 IEP violated the IDEA or denied the Student a FAPE.³⁰

Monitoring Student's Progress at Hamlin Robinson

45. The Parent presented no argument in her Closing Brief, and cited no legal authority, to support her claim that the District had a duty to monitor the Student's progress once he entered Hamlin Robinson. The federal district court for the Western District of Washington recently rejected the claim that a school district must continue to monitor the progress of a unilaterally-placed private school student after the district has developed an IEP and the parents have rejected it:

A school district has "an affirmative duty to review and to revise, at least annually, an eligible child's IEP." *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012). *Accord* 20 U.S.C. §1414(d)(4)(A)(i) (the IEP team "revises the child's IEP periodically, but not less frequently than annually"). It must also revise IEPs as appropriate to address, *inter alia*, information provided to or by the parents. §1414(d)(4)(A)(iii).

However, the Parents do not identify an affirmative, independent duty on the part of a school district to continually review and revise an IEP throughout the year after an annual IEP and proposed placement has been rejected and a child placed in private school. As SPS [Seattle Public Schools] argues, a school district could not, for example, reasonably be required to revise an IEP to address any lack of expected progress toward annual goals, §1414(d)(4)(A)(ii)(I), where the IEP was rejected, leaving no goals to measure or track. The duty to revise is more reasonably understood as requiring, in addition to an annual IEP, that a school district remain ready to review and revise upon notice a private school student wishes to return to public school. See 64 Fed. Reg. 12,601 (1999) (school district "must be prepared to develop an IEP and to provide FAPE to a private school child if the child's parents re-enroll the child in public school.")

D.M. v. Seattle School District, 2016 U.S. Dist. LEXIS 122519, 2016 WL 4721802, 116 LRP 39071 (W.D. WA 2016) (emphasis added; footnote omitted).

46. For these reasons, the Parent has not established that the District violated the IDEA by failing to monitor the Student's progress at Hamlin Robinson School.


³⁰ If the Parent had established any such violation, her failure to actively participate and offer input at the September 25, 2014 IEP meeting would be taken into consideration as a matter of equity in determining relief. See *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496 (9th Cir. 1994).

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

ORDER

The Parent has not established that the District violated the IDEA. The Parent is therefore not entitled to any of her requested remedies.


Signed at Seattle, Washington on November 8, 2016.


Michelle C. Mentzer
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. 

Parent



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