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October 9, 2017

Parents
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**In re: Port Townsend School District
OSPI Cause No. 2017-SE-0070
OAH Docket No. 06-2017-OSPI-00341**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle C. Mentzer".

Michelle C. Mentzer
Administrative Law Judge

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

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

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IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0070

PORT TOWNSEND SCHOOL DISTRICT

OAH DOCKET NO. 06-2017-OSPI-00341

**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 Port Townsend, Washington, on September 14, 2017. The Father of the Student whose education is at issue¹ appeared on behalf of the Parents. The Port Townsend School District (District) was represented by Lynette Baisch, attorney at law, who was accompanied by law clerk Valerie Walker. The following is hereby entered:

STATEMENT OF THE CASE

The District filed a due process hearing request on June 30, 2017. Prehearing conferences were held on July 12 and September 5, 2017. A prehearing order was issued on July 13, 2017.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a District motion for continuance. See First Prehearing Order of July 13, 2017. The hearing record closed with the filing of a post-hearing brief by the Parents on September 29, 2017.² Thirty days thereafter is October 29, 2017. The due date for the written decision is therefore October 29, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence: Joint Exhibits J-1 through J-6; Parent Exhibits P-1 through P-4; and District Exhibits D-1 through D-5.

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

Emily Gustafson, PhD, District school psychologist;
Philippa Lance, District occupational therapist;
Patricia Range, District special education teacher; and
The Father of the Student.

¹ In the interest of preserving family privacy, the names of all family members of the Student are omitted from this decision. Instead, they are identified as, e.g., "Parents," "Mother," "Father," "Student," or "Sibling."

² The District chose to deliver its closing argument orally, at the end of the due process hearing.

ISSUE

Whether the District's May 2017 evaluation of the Student was appropriate, and if not, whether the Parents are entitled to an independent educational evaluation (IEE) at public expense. See First Prehearing Order of July 13, 2017.

FINDINGS OF FACT

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

Background

1. The Student is seven years old and is in a second grade general education class in the 2017-2018 school year. He lives with his Father and Step-Mother (referred to herein as the Parents), and an older step-sibling. D-1. Since mid-2016, the Student has been receiving play therapy to promote his social/emotional growth. J-1:1.³
2. In March 2017, when the Student was in first grade, the Parents had him evaluated at Seattle Children's Hospital (Children's) as part of the "Fathers Too" study on attention deficit hyperactivity disorder (ADHD). The evaluation relied on standardized psychological rating scales filled out by the Father and two of the Student's teachers. The Children's evaluation diagnosed the Student with ADHD, Combined Type, Oppositional Defiant Disorder (ODD), and Unspecified Anxiety Disorder. J-4.
3. Also in March 2017, after the Children's evaluation was conducted but before its report was issued, the Parents requested that the District conduct a special education evaluation of the Student due to behavioral and social/emotional concerns. The Parents' request was made on March 6, 2017. A meeting was held on April 13, 2017 to determine whether an evaluation would be conducted. In attendance at the meeting were the Parents, school psychologist Dr. Emily Gustafson, special education teacher Patricia Range, the school principal, the director of special services, and one of the Student's general education teachers.⁴ J-1; Testimony of Gustafson. At the meeting, the District decided to conduct a special education evaluation covering the following areas: medical-physical; behavior; general education; cognitive; fine motor; classroom observation; social/emotional; and academic. J-1.

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³ Citations to the exhibits use the following format. "J-1:1" refer to Joint Exhibit J-1, at page 1.

⁴ The Student is in a choice program that has two general education teachers and approximately 50 students. Testimony of Gustafson.

District's Evaluation

4. The Father signed consent for the evaluation on April 14, 2017, the day after the meeting described above. The consent form asked the Parents to list any other areas that needed to be considered in the evaluation. The Parents did not list any other areas. J-2. The evaluation was completed on May 18, 2017. J-3. All assessments were conducted in English, the Student's native language.

Qualifications of Evaluators

5. Emily Gustafson received a PhD in School Psychology from the University of Maryland in 2011. She was subsequently employed as a school psychologist by the Olympic Educational Service District for almost two years, and by the District for the last four years. She is certified as a school psychologist nationally and in Washington State. Dr. Gustafson has given presentations at conferences of the American Psychological Association, the National Association of School Psychologists, and the Maryland School Psychologist Association. D-2.

6. Patricia Range received a master's degree in special education from James Madison University in 1984, and a master's degree in special education administration from Grand Valley State University in 1996. Ms. Range has served as a director of special education in several school districts, and has worked as a special education teacher in several others. She holds a Washington State continuing administrator certificate, residency administrator certificate, and a teaching certificate with endorsements in elementary and special education. D-3.

7. Philippa Lance received a bachelor's degree in occupational therapy in 1996 from the University of Puget Sound. She has been employed as an occupational therapist at Swedish Medical Center, the University of Washington Medical Center, and the Olympic Medical Physical Therapy and Rehabilitation Clinic. She has been employed by the District since 2008. Ms. Lance is certified as an occupational therapist nationally and in Washington State. D-4.

Medical-Physical

8. The medical-physical assessment was based on information provided by the Father on a District questionnaire. That information included the following: The Student may have had in utero exposure to substances. It is suspected that he witnessed domestic violence while living with his biological mother, and she is suspected of having neglected him. Recently, the Student has been engaging in defiant behavior, has lacked motivation to work toward goals, has had trouble making friends, and seems to experience dislike from peers and low self-esteem. D-1; J-3:5. At the hearing, the Father explained that he shared custody with the biological mother until she abandoned the Student at age five. Since that time, the Student has lived with the Father and Step-Mother. The biological mother's abandonment of him has been a significant and difficult event for the Student. Testimony of Father.

General Education

9. The Student's teachers state that he is kind, sensitive and eager to please. He has a strong desire to have friends and to succeed academically. He works well with adults and has strong communication skills. He is curious, with a thirst for knowledge. He loves to play, is

imaginative, has a sense of humor, and wants to connect with others. He is intelligent and often analyzes things scientifically. J-3:6.

10. The teachers also provided the following information: The Student is at grade level academically. He does demonstrate some mild behavioral and social challenges. The teachers are concerned about his ability to focus, tune out extraneous information, sequence multi-step tasks, and manage more than two materials at once. He also has some difficulties making friends. He does not read social cues very well and is sometimes impulsive toward peers. However, he matured greatly over the course of the school year, with significant improvements in his emotional regulation skills. When corrected for classroom behavior, the Student is now generally able to be reflective instead of reactive. *Id.*

Behavior/Social/Emotional

11. The Student's behavioral and social/emotional status was assessed by Dr. Gustafson using the Behavior Assessment System for Children, 3rd edition (BASC-3). The BASC-3 is a valid and reliable instrument for assessing children of the Student's age. Dr. Gustafson administered it pursuant to the test producer's instructions. She is not aware of the BASC-3 having any discriminatory impact on children of the Student's racial or cultural background. Testimony of Gustafson.

12. Rating scales for the BASC-3 were completed by the Father and the Student's teachers.⁵ The teachers rated the Student in the "at risk" range⁶ in the areas of Hyperactivity, Anxiety, Depression, Attention Problems, and Withdrawal. They rated him "within normal limits" in the areas of Aggression, Conduct Problems, Somatization, Learning Problems, Atypicality, Adaptability, Social Skills, Leadership, Study Skills, and Functional Communication. J-3:11-12.

13. The Father rated the Student in the "clinically significant" range⁷ in the areas of Conduct Problems, Attention Problems, and Atypicality. He rated the Student in the "at risk" range in the areas of Hyperactivity, Anxiety, Somatization, Adaptability, Leadership, Activities of Daily Living, and Functional Communication. He rated the Student "within normal limits" in the areas of Aggression, Depression, Withdrawal, and Social Skills. J-3:10.

14. The Father rated the Student as having a higher level of behavioral problems than did his teachers. This is not uncommon, and may occur due to a student behaving differently in different environments, or due to the raters having different perceptions about how the student presents. Testimony of Gustafson.

15. Based on a combination of the ratings from the Father and the teachers, the Student's overall behavioral symptoms index was a standard score of 66, which is in the "at risk" range. It

⁵ One of the Student's teachers completed the BASC-3 rating scale in consultation with the other. Testimony of Gustafson.

⁶ The "at risk" range suggests a mild concern that might require monitoring and intervention. J-3:8.

⁷ The "clinically significant" range indicates a moderate to severe concern that requires frequent monitoring and intervention. J-3:8.

is 1.5 standard deviations above the mean.⁸ J-3:8-9. Generally, students who receive special education services in the area of behavior have scores at least 2 standard deviations above the mean and have behaviors that substantially inhibit their ability to access their education. J-3:2. The 2-standard-deviation criterion is not the only standard used; a student's actual behavior at school is also considered in determining eligibility. Testimony of Gustafson.

16. Dr. Gustafson determined that the Student's primary areas of difficulty at school fell into two general categories. One is hyperactivity and attention problems, which is in line with his ADHD diagnosis. The Student needs some additional direction and re-direction to stay on track. The other category concerns anxiety, depression, and withdrawal. The Student has some difficulty making friends and acts impulsively around peers. However, Dr. Gustafson concluded overall that the Student's social/emotional/behavioral difficulties at school do not appear to be having a significant negative impact on his academic access or progress in general education. J-3:9.

Cognitive

17. Dr. Gustafson assessed the Student's cognitive abilities using the Differential Abilities Scale, 2nd edition (DAS-2). The DAS-2 is a valid and reliable instrument for assessing children of the Student's age. Dr. Gustafson administered it according to the test producer's instructions. She is not aware of the DAS-2 having any discriminatory impact on children of the Student's racial or cultural background. The Student was cooperative and attentive to testing. J-3:13-15; Testimony of Gustafson.

18. The Student's overall cognitive ability score (General Conceptual Ability) was 114, which is in the above-average range. The component scores were as follows: Verbal Ability 127; Nonverbal Reasoning 103; and Spatial Ability 107. Diagnostic portions of the assessment that are not part of the GCA score yielded the following scores: Working Memory 129; and Processing Speed 87. From the Student's relative weakness in Processing Speed, Dr. Gustafson concluded he may benefit from instruction at a measured pace, with reduced emphasis on the speed of presentation and response. She also noted that his much stronger Working Memory abilities should help compensate for weaker skills in Processing Speed. *Id.*

Academic

19. Special education teacher Patricia Range administered the Kaufman Test of Educational Achievement, 3rd edition (KTEA-3) to assess the Student's academic skills. The KTEA-3 is a valid and reliable instrument for assessing children of the Student's age. Testimony of Gustafson. Ms. Range is qualified to administer it and administered it according to the test producer's instructions. She is not aware of the KTEA-3 having any discriminatory impact on children of the Student's racial or cultural background. The Student was eager to do the testing, worked continually, and had an optimistic attitude. J-3:16-18; Testimony of Range.

⁸ "Above" the mean in this assessment signifies behavioral or social/emotional status that is worse than the mean. J-3:8-9.

20. The Student's composite scores in Reading, Math, and Written Language were all in the average range. His strongest areas were Math Concepts and Applications (standard score 110, 75th percentile), and Written Expression (standard score 122, 93rd percentile).⁹ J-3:18. No learning disability was found because there was not a severe discrepancy between the Student's cognitive scores and his academic scores. Testimony of Gustafson. Based on the Student's academic scores and his classroom performance, the Student was found not in need of special education in any academic area. *Id.*

Fine Motor

21. Occupational therapist Philippa Lance evaluated the Student using two instruments. His fine motor skills were assessed using the Bruininks-Oseretsky Test of Motor Proficiency, 2nd edition (BOT-2). His visual perception skills were assessed using the Motor-Free Visual Perception Test, 4th edition (MVPT-4). Both tests are valid and reliable instruments for assessing children of the Student's age. Ms. Lance is qualified to administer these tests and administered them according to the test producer's instructions. She is not aware of either test having a discriminatory impact on children of the Student's racial or cultural background. J-3:19; Testimony of Lance.

22. All scores on both tests were in the average range. Based on this, and on observing the Student in the classroom, Ms. Lance concluded he was not in need of occupational therapy services. *Id.*

Classroom Observation

23. Dr. Gustafson observed the Student in his classroom on three different occasions: during "choice time," during a math test, and during a math instruction period. Dr. Gustafson found the Student was quiet, attentive, well-behaved, and interacted appropriately with peers. On the math test, he completed only 80% of the problems, skipping the remainder. Inconsistent work completion is common for first-graders, especially for boys. It is a skill that should develop; if it does not, it can become an area of concern. The teachers also reported that the Student often takes longer than others to complete assignments. J-3:20; Testimony of Gustafson. No behavior during any of her three classroom observations or during any of the assessments she administered led Dr. Gustafson to believe the Student had a disability not already identified. In addition to her own observations, Dr. Gustafson interviewed both of the Student's teachers. Testimony of Gustafson.

Eligibility Determination and Recommendations

24. The evaluation team considered all of the assessments above, as well as the Children's ADHD evaluation, and concluded as follows: The Student has some mild social/emotional/behavioral difficulties, but they do not have an adverse educational impact and

⁹ The Written Language composite score includes subtests in both Written Expression and Spelling. Although the Student's Written Expression subtest was in the above-average range, his Written Language composite score was only in the average range because his Spelling subtest score was in the average range. J-3:18.

he does not require specially designed instruction to address them. These difficulties can be handled with redirection and accommodations in the general education classroom. Pulling him out of general education for specially designed instruction would actually have a negative impact on his education. In academics, the Student is performing in the average or above-average range. The team had no reason to suspect disabilities other than those identified in the Children's evaluation. The findings of the evaluation were not primarily due to a lack of instruction or limited English proficiency. J-3:1-3, 21; Testimony of Gustafson. The team recommended a number of interventions that could be provided in the general education setting via a 504 plan:¹⁰

- Access to a quiet work space with limited distractions when possible/appropriate;
- Seating close to the teacher to facilitate the monitoring of work production and redirection when needed;
- Frequent check-ins for progress and understanding;
- Frequent praise and positive encouragement;
- A predictable routine within the classroom, and review with the Student of any changes that may occur on a day-to-day basis;
- Shortened assignments, with the option of completing more if he finishes the shortened assignment before the time is up;
- Visually shorten or chunk assignments, e.g., fold paper in half and have him work only on the first half before moving on;
- Frequent opportunities to move and have breaks;
- Extra support when the Student is expected to move between manipulative types, e.g. cards, dice, and writing;
- Provide short, concise, specific directions;
- Include the Student in social skills group or "lunch bunch" with school counselor when available/appropriate;
- Provide feedback in class around the Student's social interactions; and
- Give preemptive coaching to Student around social issues such as invading personal space, particularly prior to known times of challenge.

See J-3:3.

Initial Intake at Children's Autism Clinic

25. Three months after the District completed its evaluation, the Parents obtained an initial intake at Children's Autism Clinic in August 2017. The initial intake was conducted by an advanced registered nurse practitioner (ARNP). The ARNP spent 35 minutes with the Student, and another 35 minutes discussing care coordination and counseling with the Parents. P-4.

26. The Children's ARNP found as follows: The Student's expressive language includes conversation and narratives. He has a tendency to "talk at people" and over-explain. He is detail-oriented and often corrects others. On occasion he asks questions to be social. In casual

¹⁰ A "504 plan" refers to Section 504 of the Rehabilitation Act of 1973, 29 United States Code (USC) §701 *et seq.* That is a federal law designed, among other things, to provide accommodations for students who have disabilities in order to ensure they are able to access to their education.

conversation he sustains eye contact, but has more difficulty with eye contact when asked to pay attention. He has a normal range of facial expressions and uses a variety of gestures coordinated with speech. He can read others' expressions and is beginning to understand sarcasm. He finds it difficult to make friends. He does not understand personal space or subtle social cues, which can be off-putting to peers. He tends to gravitate toward younger children. He is empathetic toward others and expresses remorse. He has no history of repetitive motor movements, though he repetitively verbalizes certain words and phrases. He struggles with changes in routine. His play is functional and imaginary. He has rules that he creates and follows in play, and has small non-functional routines that he completes. He does not have overly-restricted interests, nor has he been hyper-focused on a specific toy or object. He is particular about the types of clothing he wears and the books he reads. He has been averse to loud noises. He seeks out physical touch, but then is fidgety. He has behavioral outbursts, compounded by guilt, remorse or tiredness. He pushes boundaries and can become physical with family members. Lately these outbursts have been less frequent. *Id.*

27. The Children's ARNP concluded the Student presents with several characteristics associated with Autism Spectrum Disorder (ASD). She therefore listed autism as a "rule out" disorder and authorized an ASD evaluation. *Id.* That evaluation has not yet occurred. Testimony of Father.

Analysis of Parents' Criticism of District Evaluation

28. On June 15, 2017, the Parents requested an IEE at District expense. P-3. On June 30, 2017, the District filed the due process hearing request in this case to defend its own evaluation.

29. In his declaration and testimony, the Father asserted that the District's evaluation was inadequate in ten different respects. First, he stated the evaluation did not address a "discrepancy" between the Student's high scores in some areas of executive functioning and his ADHD symptoms. For instance, his Working Memory score was very high, but he has some difficulty sequencing multi-step tasks and managing more than two materials at once. P-1; Testimony of Father. However, in Dr. Gustafson's experience, there is no discrepancy between these facts, and the Student's relative weakness in Processing Speed can account for his difficulty switching between materials. Testimony of Gustafson. The Parents presented no testimony from a person with the appropriate education, training and experience to contradict Dr. Gustafson's opinion on these matters.

30. Second, the Father states the District failed to obtain additional information about the Student as follows: Dr. Gustafson did not personally interview the Parents, and she did not obtain information from his primary care physician, his play therapist, or documentation about trauma in his early life. P-1. Regarding Dr. Gustafson not interviewing the Parents, she heard the Parents' thoughts and concerns in person at both the pre- and post-evaluation meetings. She also obtained extensive information from the Father on the BASC-3 parent questionnaire and the medical/developmental questionnaire, which sought information in 26 areas. D-1. Regarding information from the Student's physician, play therapist, and early-life documentation, Dr. Gustafson testified without contradiction that -- other than the Children's "Fathers Too" assessment -- the Parents did not identify any other provider or source that the District should contact for information. Nor did the Parents ask at either the pre- or post-evaluation meeting that any other information or provider be pursued. Testimony of Gustafson.

31. Third, the Father states the evaluation did not include data from the "Fathers Too" ADHD evaluation. P-1. This is not correct. The District's evaluation summarized the findings of the "Fathers Too" evaluation and attached a full copy of that evaluation to its own report. J-3:5.

32. Fourth, the Father states the evaluation did not indicate how the Student's "at risk" behavioral areas affect him in the classroom, or what viable solutions might be. P-1. This is not correct. The evaluation stated the Student has difficulty focusing and tuning out extraneous information, sequencing multi-step tasks, managing more than two materials at once, reading social cues well, acting impulsively toward peers, and invading others' personal space. J-3. The evaluation proposed the 13 interventions listed above to ameliorate these areas of difficulty.

33. Fifth, the Father states the evaluation was inadequate because it did not evaluate the Student for ASD. P-1. This assertion is addressed in the Conclusions of Law, below, because legal questions are involved.

34. Sixth, the Father states the District did not evaluate the Student in the area of sensory processing, despite the Student having issues with personal space and reading social cues. P-1. The Father presented no evidence that personal space and reading social cues are matters that concern sensory processing, as opposed to social/emotional/behavioral concerns. He also did not raise any sensory processing concerns at the pre-evaluation meeting, on the consent form for the evaluation (which solicited other areas the Parents might want evaluated), or at the post-assessment meeting. Testimony of Gustafson; J-2.

35. Seventh, the Father states the Student's 504 plan is inadequate, having been based on an inadequate evaluation. P-1. This tribunal has jurisdiction over claims raised under the IDEA, but not under Section 504. The Father's assertion concerning the 504 plan therefore will not be addressed.¹¹

36. Eighth, during the hearing the Father appeared to assert that the Student's cognitive scores may have been influenced by a motivational prize he was allowed to select in Dr. Gustafson's office. During the cognitive assessment, the Student noticed a prize box that Dr. Gustafson uses, if needed, to motivate students to complete an assessment. The Student's behavior demonstrated no need to use the prize box, but he asked if he could receive a prize if he worked hard. Dr. Gustafson agreed in order to build rapport with him. The use of prizes for completing assessments is a standard practice in her profession. It does not interfere with test results or allow students to out-perform their abilities. Testimony of Gustafson.

37. Ninth, the Father states that none of the three contexts in which Dr. Gustafson observed the Student was a lunch or recess period. He himself observed the Student once at recess, and saw him act immaturely, crying over an extremely minor injury. Testimony of Father. Dr. Gustafson noted that one of her three observations was during "choice time," when the Student played a board game with peers. His interactions while playing were appropriate, he was included by his peers, he followed the rules, and was calm and well self-regulated. Also,

¹¹ In any event, the Student's 504 plan was adopted a few weeks before school ended in June 2017. P-2. There was no evidence at the hearing regarding its effect during the last few weeks of school, or during the first few weeks of school in September 2017. (The hearing was held in mid-September 2017).

during the math instruction period she observed, the Student appropriately discussed possible solutions with a peer when prompted, engaged in appropriate turn-taking when talking with the peer, and volunteered to disagree with the conclusion of the presenter at the front of the class. J-3:20; Testimony of Gustafson. Dr. Gustafson would have made sure to include a playground observation if the Student had been getting disciplinary referrals from recess or if his playground behavior was causing problems. Testimony of Gustafson. Regarding the Father's one recess observation, there is no evidence whether he shared it at either the pre- or the post-evaluation meetings. He also did not testify whether that observation occurred early or later in the school year. The Student's teachers state that he made significant improvements in his emotional regulation over the course of the school year.

38. Tenth, the Father testified that a disproportionate amount of parent-volunteer time is spent on the Student, and this is arguably special education. (The Student is in a choice program that utilizes a lot of parent volunteer time in the classroom.) However, special education is defined as being delivered by a certificated special education teacher, or a paraprofessional with necessary skills and knowledge under the supervision of a certificated special education teacher.¹² Parent classroom volunteers cannot deliver special education. Neither of the Student's teachers expressed any concern about his use of volunteer time. Testimony of Gustafson. To the extent parent-volunteers spend extra time with the Student, it lends support to the District's assertion that interventions and accommodations exist to help the Student succeed in the general education environment.

39. The Parents' closing brief repeats some of the assertions above. In addition, it denies the accuracy of Dr. Gustafson's testimony that the choice program in which the Student participates attracts higher-performing students than does the District's regular, non-choice programs. As seen above, no finding was made reflecting Dr. Gustafson's testimony about this matter. The matter was found not relevant to the case.

40. The Parents' closing brief also asserts new facts about which there was no evidence at the hearing, and therefore they cannot be considered. Those new factual assertions appear in the following portions of the Parents' closing brief, which are hereby stricken: paragraph 3, sentence 3 and sentences 7 through 10; paragraph 5, sentences 2 and 3.

CONCLUSIONS OF LAW

Jurisdiction

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

¹² See WAC 392-172A-02090; *see also* 34 CFR §300.156.

IEEs and Evaluations under the IDEA Regulations¹³

2. If a parent disagrees with a school district's evaluation, the parent has the right to obtain an IEE, which is an evaluation conducted by a qualified examiner not employed by the school district. If a parent requests an IEE at public expense, the district must provide the parent with certain information on obtaining IEEs, and must either initiate a due process hearing within 15 calendar days to defend the appropriateness of its own evaluation, or ensure that a publicly-funded IEE is provided without unnecessary delay. If the district initiates a hearing, and the final decision is that the district's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. WAC 392-172A-05005; *see also* WAC 392-172A-01035(1)(b); 34 CFR §300.502.

3. The soundness of the ultimate eligibility decision made as a result of a school district evaluation is not at issue in a due process hearing filed by a school district to defend its evaluation. As the court explained in *E.P. v. Howard County Pub. Sch. System*, 2017 U.S. Dist. LEXIS 133780, 70 IDELR 176 (D. MD. 2017):

Of import here, this is not a case where the Parents filed a due process complaint under 34 C.F.R. § 300.507, to establish the improper denial of a "free appropriate public education" or to establish that E.P. should have been found eligible for special education services. Rather, this is a case in which [the school district] filed a due process complaint, pursuant to 34 C.F.R. § 300.502(b)(2)(i)-(ii), to defend its educational and psychological assessments of E.P. Accordingly, the suit does not implicate the determination of E.P.'s individualized education program ("IEP") team, which found that E.P. is not eligible for special education services under IDEA; the IEP team's eligibility determination is not relevant to the question of whether [the school district's] evaluation was appropriate. *See* 20 U.S.C. § 1414(d)(1)(B), discussed, *infra*.

See also Irvine Unif'd Sch. Dist., 112 LRP 41895 (SEA CA 2012); *Reading Sch. Dist.*, 112 LRP 9606, n. 9 (SEA PA 2012); *Rowland Unif'd Sch. Dist.*, 110 LRP 15993 (SEA CA 2010); *Anaheim City Sch. Dist.*, 110 LRP 15988 (SEA CA 2010); *Raytown C-2 School District*, 39 IDELR 149 (SEA MO 2003). Rather, what is at issue is whether a district's evaluation was reasonable at the time it was conducted and met all applicable legal requirements. *See J.S. v. Shoreline Sch. Dist.*, 220 F. Supp.2d 1175, 1185-1187 (W.D. WA 2002).

4. The District here filed its due process hearing request 15 days after the Parents made their IEE request, so the District met the deadline imposed by WAC 392-172A-05005. The District also met the other deadlines applicable to special education evaluations. The decision whether to conduct an evaluation was made on April 13, 2017, which was less than 25 school days after March 30, 2017, when the Parents referred the Student for an evaluation. *See* WAC 392-172A-03005(2)(c); *see also* 34 CFR §300.301. The evaluation was completed on May 18, 2017, which was less than 35 school days after April 14, 2017, when the Parents provided

¹³ The Washington regulations on IEEs and evaluations are lengthy. The most pertinent provisions of the regulations at issue in this case are summarized here. The full text of the cited Washington regulations is attached as an Addendum to the decision.

written consent for the evaluation. See WAC 392-172A-03005(3)(a); see also 34 CFR §300.301.

5. Also required for an evaluation is that a “group of qualified professionals selected by the school district” must use a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . .” The group must not use “any single measure or assessment as the sole criterion” for determining eligibility or educational programming. The group must use technically sound instruments that may assess the relative contribution of cognitive, behavioral, physical and developmental factors. WAC 392-172A-03020; see also 34 CFR §300.304.

6. The District has established that it complied with these requirements. The school psychologist, special education teacher, and occupational therapist who conducted the assessments were qualified professionals. They used a variety of assessment tools and strategies to gather a great deal of relevant information about the Student, including information provided by the Parents. They did not use any single measure or assessment as the sole criterion for determining eligibility. They used technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors.

7. School districts must also ensure that assessments are selected and administered to avoid discrimination based on race or culture, and are administered in the student’s native language or mode of communication. Assessments must be administered by “trained and knowledgeable personnel” and “in accordance with any instructions provided by the producer of the assessments.” Students must be assessed “in all areas related to the suspected disability” and the evaluation must be “sufficiently comprehensive to identify all of the student’s special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.” *Id.*

8. The District has established that it complied with these requirements. There is no evidence the assessments used were discriminatory based on race or culture. They were administered in the Student’s native language. The three professionals who administered the evaluations were qualified to do so, and they administered the assessments in accordance with the test producer’s instructions.

9. The Parents assert the District did not assess the Student in all areas of suspected disability because it did not assess him for ASD or a sensory processing disorder. Regarding the latter, there was no evidence to support the suspicion of a sensory processing disorder. The Children’s Autism Center initial intake does not raise a suspicion of this and Dr. Gustafson saw no information that would raise such a suspicion on her part. Regarding ASD, Dr. Gustafson saw no information that raised a suspicion of ASD for her. Testimony of Gustafson. The Children’s Autism Center intake was done three months after the District completed its evaluation. The Children’s intake notes were nevertheless admitted in evidence based on *E.M. v. Pajaro Valley Unif’d Sch. Dist.*, 652 F.3d 999, 1004-1006 (9th Cir. 2011) (outside evaluation conducted three years after school district’s evaluation should have been admitted because it might shed light on the reasonableness of the district’s evaluation; the fact that the exclusive use of hindsight is forbidden does not preclude consideration of subsequent

events).¹⁴

10. The admission of after-acquired evidence, however, does not necessarily mean that a school district acted unreasonably in not finding what is indicated in the later evidence. In fact, in *E.M. v. Pajaro Valley Unif'd Sch. Dist.*, the Ninth Circuit subsequently affirmed a district court conclusion -- after the district court admitted and considered the after-acquired evaluation -- that the school district's earlier evaluation had been reasonable. See *E.M. v. Pajaro Valley Unif'd Sch. Dist.*, 758 F.3d 1162, 1171-1172 (9th Cir.), *cert. denied*, 135 S. Ct. 996 (2015). In the present case, the Parents did not call the Children's ARNP as a witness, so there was no opportunity for the District to cross-examine her about any number of subjects, including: whether she reviewed any information about the Student from teachers (such as the information contained in the District's evaluation), and what level of knowledge about the Student she was able to achieve from a 35-minute visit with him and no observation of him with peers. Nor could the Children's ARNP be questioned about how strong the indications of possible ASD are in the Student: if they are very strong, then the Parents' case would be stronger because the District more likely should have recognized them; if the indications were just above the threshold for conducting an evaluation, the Parents' case would be correspondingly weaker. These questions were not answered in the intake notes. More importantly, the intake notes are a hearsay document. Findings of fact cannot be based exclusively on that hearsay document because doing so would unduly abridge the District's opportunity to confront the witness and rebut evidence. See Administrative Procedure Act, RCW 34.05.461(4). For these reasons, the Parents' argument based on the Children's initial intake notes must fail.¹⁵

11. Another regulation, WAC 392-172A-03025, concerns the review of existing data during evaluations. It provides that evaluations must review existing evaluation data on the student and identify what additional data is needed to determine whether the student meets eligibility criteria. *Id.*; see also 34 CFR §300.305. Here, there was no existing evaluation data because this was an initial evaluation. The District did review existing data on the Student's performance and progress in the general education section of the evaluation, reviewed medical and developmental information in the medical-physical section, and reviewed past behavioral information via the rating scales filled out by the teachers and the Father. For these reasons, the District has established that it complied with this regulatory requirement.

12. WAC 392-172A-03040 concerns eligibility determinations, and provides in pertinent part as follows: Upon completing the evaluation assessments, a group of qualified professionals and the parents must determine whether the student is eligible for special education. A student must not be determined eligible "[i]f the student does not otherwise meet the eligibility criteria including presence of a disability, adverse educational impact and need for specially designed

¹⁴ Nothing in this decision addresses whether the District has evaluation duties regarding the Student going forward. The decision only addresses whether the District's May 2017 evaluation was appropriate.

¹⁵ During the first prehearing conference on July 12, 2017, the Parents were advised that presenting written reports by outside providers, without calling those providers as witnesses, would likely result in the reports being given significantly less weight than if the providers were called as witnesses and available for cross-examination. The Parents were also advised at the prehearing conference that the ALJ liberally allows telephone testimony where it would be more convenient or less expensive for such providers to testify by telephone.

instruction.” In interpreting evaluation data to determine eligibility, the district must draw upon information from a variety of sources, including parent and teacher input. The district must also ensure that information obtained from all of these sources is documented and carefully considered. *Id.*; see also 34 CFR §300.306.

13. Here, the group of qualified professionals and the Parents met to review the results of the evaluation and determine the Student's eligibility. They examined the three criteria for eligibility, and determined that the Student met the first criterion (presence of a disability), but did not meet the remaining two (adverse educational impact and need for specially designed instruction). As noted above, the correctness of the eligibility determination is not at issue in this case, only that the proper criteria were considered. The evaluation team drew from a variety of sources, including parent and teacher input, to make its eligibility decision. The evaluation team carefully documented and considered the assessments and other data in the evaluation report. For these reasons, the District has established that it complied with this regulation.

14. WAC 392-172A-03035 concerns evaluation reports. It requires that they include: a statement of whether the student has a disability that meets eligibility criteria; a discussion of the assessments and review of data that supports the eligibility conclusion; a discussion of how the disability affects the student's progress in the general education curriculum; and the recommended special education and related services the student needs. *Id.*; see also 34 CFR §300.304-.306. For the reasons set forth in the paragraph above, and based on the Findings of Fact above, the District has established that it complied with this regulation.

15. Finally, turning to the Parents' assertions about the inadequacy of the evaluation, each assertion was analyzed in the Findings of Fact (except for the one that was analyzed in the Conclusions of Law) and all were found not supported by the evidence.

16. 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 Port Townsend School District's May 2017 evaluation of the Student was appropriate. The Parent is therefore not entitled to an independent educational evaluation at public expense.

Signed at Seattle, Washington on October 9, 2017.



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.

Parents

[REDACTED]

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

Addendum

392-172A-03020 Evaluation procedures.

(1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010, that describes any evaluation procedures the district proposes to conduct.

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

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

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

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

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

(3) Each school district must ensure that:

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

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

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

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

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

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

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

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

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

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

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

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

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

392-172A-03025 Review of existing data for evaluations and reevaluations.

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

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

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

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

(c) Observations by teachers and related services providers.

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

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

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

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

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

(4) The school district must administer such assessments and other evaluation measures as may be needed to produce the data identified in subsection (2) of this section.

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

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

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

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

392-172A-03030 Evaluations before change in eligibility.

(1) Except as provided in subsection (2) of this section, school districts must evaluate a student eligible for special education in accordance with WAC 392-172A-03020 through 392-

172A-03080 before determining that the student is no longer eligible for special education services.

(2) A reevaluation is not required before the termination of a student's eligibility due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under WAC 392-172A-02000 (2)(c).

(3) For a student whose eligibility terminates under circumstances described in subsection (2) of this section, a public agency must provide the student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

392-172A-03035 Evaluation report.

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

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

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

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

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

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

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

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

392-172A-03040 Determination of eligibility.

(1) Upon completion of the administration of assessments and other evaluation measures:

(a) A group of qualified professionals and the parent of the student determine whether the student is eligible for special education and the educational needs of the student; and

(b) The school district must provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(2)(a) A student must not be determined to be eligible for special education services if the determinant factor is:

(i) Lack of appropriate instruction in reading, based upon the state's grade level standards;

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

(b) If the student does not otherwise meet the eligibility criteria including presence of a disability, adverse educational impact and need for specially designed instruction.

(3) In interpreting evaluation data for the purpose of determining eligibility for special education services, each school district must:

(a) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior; and

(b) Ensure that information obtained from all of these sources is documented and carefully considered.

(4) If a determination is made that a student is eligible for special education, an IEP must be developed for the student in accordance with WAC 392-172A-03090 through 392-172A-03135.

392-172A-05005 Independent educational evaluation.

(1)(a) Parents of a student eligible for special education have the right under this chapter to obtain an independent educational evaluation of the student if the parent disagrees with the school district's evaluation subject to subsections (2) through (7) of this section.

(b) Each school district shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in subsection (7) of this section.

(c) For the purposes of this section:

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the student in question; and

(ii) Public expense means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with this chapter.

(2)(a) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation conducted or obtained by the school district.

(b) A parent is entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

(c) If a parent requests an independent educational evaluation at public expense consistent with (a) of this subsection, the school district must either:

(i) Initiate a due process hearing within fifteen days to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense without unnecessary delay, unless the school district demonstrates in a hearing under this chapter that the evaluation obtained by the parent did not meet agency criteria.

(3) If the school district initiates a hearing and the final decision is that the district's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the school district may ask for the parent's reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district must either provide the independent educational evaluation at public expense or initiate a due process hearing to defend the educational evaluation.

(5) If the parent obtains an independent educational evaluation at public or private expense, the results of the evaluation:

(a) Must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the student; and

(b) May be presented as evidence at a hearing under this chapter regarding that student.

(6) If an administrative law judge requests an independent educational evaluation as part of a due process hearing, the cost of the evaluation must be at public expense.

(7)(a) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(b) Except for the criteria described in (a) of this subsection, a school district may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.
