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Apr 03, 2020

OAH – SEATTLE

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

IN THE MATTER OF

OSPI CAUSE NO. 2019-SE-0184

OAH DOCKET NO. 11-2019-OSPI-00946

NORTHSHORE SCHOOL DISTRICT

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

A telephonic hearing in the above-entitled matter was held before Administrative Law Judge (“ALJ”) Courtney E. Beebe on February 3 and 4, 2020. The Parents of the Student whose education is at issue¹ appeared and were represented by Jennifer Cochran, Attorney at Law. The Northshore School District (“District”) was represented by Carlos Chavez, attorney at law. Adra Davy, Director of Special Services, also attended. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request with the Office of Superintendent of Public Instruction (“OSPI”) on November 25, 2019. A prehearing conference was held on December 24, 2019. At the first prehearing conference, the due date for the written decision was continued to thirty (30) days after the close of record, pursuant to a motion by the District. A First Prehearing Order was issued on January 15, 2020. The hearing record closed on March 13, 2020. The due date for the written decision is April 12, 2020.

MOTIONS IN LIMINE

The District filed a motion in limine to exclude the Parents’ witnesses Jeffery Snyder and Darlene Matheson. The Administrative Law Judge granted the motion on the record. The Parents filed a motion in limine to permit Nicole Champoux, Elementary Program Director and Angela Spayde, Student Support Director, to testify as expert witnesses. The District objected. The Administrative Law Judge denied the motion as to both witnesses on the record.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents Exhibits: P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-16, P-17, P-21, P-22, P-23, P-24, P-25, P-26, P-33, P-34, P-35, P-37, P-38, P-39, P-40, P-41, P-42, P-43, P-44, P-45, P-47, P-48 through P-63, P-64, pp.12, 13, 98-107, and P-65 through P-78 were admitted. The remaining Parents’ exhibits were not admitted.

District Exhibits: D-1 through D-28 were admitted.

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."

The following witnesses testified under oath. They are listed in order of their appearance: Mother of the Student; Will Harvey, Occupational Therapist; Father of the Student; Dr. Christa Peterson, Psychiatrist; Nicole Champoux, Elementary Program Director; Kim Osgood, General Education Teacher; Jacquie Berkeihiser, LMHC; Desiree Dutt, District School Psychologist; Adra Davy, Director of Special Services; and Becky Anderson, former Assistant Superintendent.

ISSUES AND REQUESTED REMEDIES

Whether the District violated the Individuals with Disabilities Education Act (“IDEA”) and denied the Student a free appropriate public education (“FAPE”) beginning November 25, 2017 through November 25, 2019, by:

- i. failing to conduct an evaluation of the Student in the areas of concern of math, reading, and writing as requested by the Parents on November 24, 2017;
- ii. failing to provide the Parents with testing data as requested between November 30, 2017 and December 31, 2017 such that the Parents could meaningfully participate in an Individualized Education Program (“IEP”) meeting with the District; and
- iii. failing to provide the Student with an IEP that was appropriate in light of the Student’s circumstances.

And, whether the Parents are entitled to their requested remedies:

- i. Reimbursement for tuition the Parents paid to the Montessori Children’s House beginning in November 25, 2017 through current and prospective attendance;
- ii. Reimbursement for transportation costs the Parents paid for transporting the Student to Montessori Children’s House beginning November 25, 2017;
- iii. Or other equitable remedies, as appropriate.

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 the specific facts at issue.

November 2017 Evaluation of the Student

1. At the time of the hearing in this matter, the Student was an 11-year-old sixth grader. (D-1, p.3; Tr., pp.99-100 (Mother).) The Student attended third grade at Sunrise Elementary School in the District from September 2016 to November 2016. (*Id.*) The Parents withdrew the Student from

full-time attendance in the District in November 2016, and the Student remained on a partial home-school program through May 2017.² (Tr., pp.59, 139, (Mother), 457(Berkeihiser).)

2. The Parents reenrolled the Student full-time in the District for fourth grade in September 2017. (Tr., p.357 (Osgood).) On October 17, 2017, the Parents requested an initial evaluation of the Student, and the District agreed that an evaluation in a number of areas, including medical-physical, general education, academic, social/emotional and observation, written expression and math would be appropriate. (D-1, pp.1-5; Tr., pp.325-26 (Dutt).) The District issued a "Notification of Special Education Referral," and set a meeting with the Parents for October 24, 2017. (*Id.*) The District sent the Parents a "Prior Written Notice" on October 24, 2017, "proposing to initiate an evaluation" to "determine if [the Student] is eligible and in need of special education." (*Id.*; Tr., p.301 (Dutt).) The same day, the Mother of the Student signed a "Consent for Initial Evaluation," identifying that the areas of concern were "spelling" and "written expression." (D-1, p.6; P-42; Tr., pp.110-111 (Mother), 300 (Dutt).) Reading was not identified as an area of concern by the District or the Parents.

3. The District evaluated the Student between October 24, 2017, and November 28, 2017 ("November 2017 Evaluation"). (D-2, p.5; Tr., pp.297-301 (Dutt).) The District also gathered "additional data around academic achievement, look[ed] at rate of learning, review[ed] social/emotional records and a (sic) academic probe for characteristics of dyslexia, along with a complete file review (review of existing data)." (*Id.*)

4. The evaluation team consisted of Desiree Dutt³, school psychologist, Kim Osgood⁴, general education teacher, the Mother of the Student, and Becky Anderson⁵, assistant superintendent and district representative ("Evaluation Team"). (D-2, p.8; Tr., pp.300-311(Dutt), 358-359 (Osgood), 468-470 (Anderson).) Ms. Dutt prepared the November 2017 Evaluation report. (Tr.,p.302 (Dutt)).

5. As part of the November 2017 Evaluation, Ms. Osgood contributed her observations of the Student and performed the following social / emotional assessments: Social Skills Improvement System ("SSIS") and Adaptive Behavior Assessment System (ABAS-3). (D-2, pp.10-13; Tr., pp.358-361 (Osgood).) The Student fell within the average range on both assessments. (*Id.*) Based upon her classroom observation, as well as standardized District-wide testing results, Ms. Osgood reported that the Student had deficiencies in written expression, spelling, and math

² The District conducted an initial evaluation of the Student in the Spring of 2017 and concluded that the Student was not eligible for special education services in the area of speech or motor services. (D-17, p.6; Tr., pp.117-118 (Mother).)

³ Desiree Dutt is the District's school psychologist and has master's degrees in clinical and counseling psychology, school psychology, and administration. (Tr., pp.290-299 (Dutt).) Ms. Dutt has worked as a school psychologist for six years and is certified by the National Credentials of School Psychologists. (Tr., p.298 (Dutt).)

⁴ Kim Osgood is a fourth grade teacher at the District and has a master's degree in curriculum and instruction, with a focus on classroom management, and has twenty-nine years of teaching experience. (Tr., p.357 (Osgood).)

⁵ Becky Anderson has a degree in special education, as well as a master's degree and administrative credentials. Ms. Anderson has worked as a teacher and administrator for forty-four (44) years. (Tr., p.468 (Anderson).)

comprehension, was anxious and distracted, and had difficulty organizing his work and time. (*Id.*) The Student's math scores were low due to "computation errors" or "copying problems." (*Id.*)

6. However, the Student tested "at standard in reading for both decoding and comprehension." (*Id.*) Ms. Osgood administered the District-wide standard STAR test to the Student on September 20, 2017 and the Student received a grade equivalency score of 4.5 (half way through fourth grade). (*Id.*) Ms. Osgood observed that the Student's reading comprehension in the classroom was inconsistent, but fell between "standard" and "working toward." (*Id.*) Ms. Osgood determined that the Student was "below standard" on high frequency words only. (*Id.*)

7. Ms. Dutt reviewed and reported the Student's medical-physical data that resulted from a January 27, 2017, private neuropsychological evaluation by Dr. Beau Reilly.⁶ (D-2, p.9; P-24; Tr., pp.307-311 (Dutt).) Dr. Reilly's report included the following diagnoses: ADHD, Anxiety Disorder, Developmental Motor Coordination Disorder, Specific Learning Disorder with Impairment in Reading, Specific Learning Disorder with Impairment in Writing (Dysgraphia), and Specific Learning Disorder with Impairment in Mathematics. (*Ids.*) Student also passed a District administered vision and hearing test with average results on December 1, 2017. (*Ids.*)

8. To assess the Student in the area of behavior, Ms. Dutt specifically reviewed and reported the results of a Behavior Rating Inventory of Executive Function ("BRIEF") questionnaire completed by the Parents as part of Dr. Reilly's January 27, 2017 neuropsychological evaluation. (D-2, p.14; P-24; Tr., pp.307-311 (Dutt).) The BRIEF indicated that "all areas measured . . . were within normal limits." (*Ids.*) Ms. Dutt, based upon Dr. Reilly's evaluation, recommended that the Student receive some supports at school to reduce distractions and anxiety. (D-2, pp.14-15; P-24, pp.5-6; Tr., pp.307-311 (Dutt).)

9. Ms. Dutt also reviewed the Differential Ability Scales Second Edition ("DAS-II") assessment performed by Dr. Reilly to assess the Student's cognitive development. (D-2, pp.16-17; P-24, p.4; Tr. pp.307-311 (Dutt).) The DAS-II assessment revealed that the Student's overall cognitive ability was above average, but that he demonstrated a weakness in processing speed due to lack of attention. (D-2, p.16; P-24; Tr. pp.307-311 (Dutt).)

10. Ms. Dutt reviewed and reported data from Dr. David P. Pomeroy⁷ of the ADD Center of Bellevue, dated June 20, 2017, that concluded the Student suffered from Generalized Anxiety Disorder, and that the Student did not meet the "criteria for the diagnosis of ADHD of any type at this time." (*Id.*; P-17.) The Parents similarly agreed with Dr. Pomeroy that Dr. Reilly's ADHD diagnosis was incorrect, but that the Student's anxiety "impairs his major life functions of thinking, concentrating, and learning. His learning style and difference impair his learning when traditional teaching approaches are used and rigid formats for answers are expected." (D-2, p.9; P-17; Tr., pp.307-311 (Dutt).)

11. Regarding the Student's academic achievement, Ms. Dutt reviewed curriculum-based measures that showed the Student was below normal in math comprehension, at grade level in reading, and below standard in spelling. (D-2, p.18; Tr., pp.307-311 (Dutt).) Ms. Dutt also performed a WIAT III assessment and the Student received scores of 94 and 85 in the areas of

⁶ Dr. Reilly did not testify at the due process hearing in this matter.

⁷ Dr. Pomeroy did not testify at the due process hearing in this matter.

math and math fluency, and a 91 in the area of spelling. (D-2, pp.2, 18-20; Tr. pp.307-311 (Dutt).) These scores fell within the average score range of 85-115. (*Id.*)

12. The Student received a score of 92 on the WIATT-III basic reading and a 98 in the area of total reading, well within the average range of 85-115. (D-2, pp.2, 18; Tr., pp.307-311 (Dutt).) Ms. Dutt also reviewed test scores from the District's previously administered April 5, 2017 Kaufmann Test of Education Achievement Third Edition (KTEA-3) assessment. (D-2, p.18; Tr., pp.308 (Dutt).) The Student received a score of 97 in reading fluency, well within the average range of 85-115. (D-2, pp.2, 19; Tr., pp.307-311 (Dutt).)

13. Dr. Reilly had administered the Woodcock Johnson Test of Achievement Fourth Edition ("WJ-IV ACH") as part of the January 27, 2017, neuropsychological assessment and Ms. Dutt reviewed and included the assessment results in the November 2017 Evaluation report. (D-2, pp.2, 19; P-24, pp.7-8; Tr. pp.307-311 (Dutt).) The average range for scores on the WJ-IV is between 90 and 110. (*Id.*) The Student's composite math score of 87 and composite written expression score of 86 fell in the low average range. (*Id.*) The Student's composite reading score of 95 fell in the average range. (*Id.*) In regards to reading, Dr. Reilly concluded that the Student had "well-integrated reading abilities relative to his peers with the exception of general fluency," as demonstrated by a below average score of 89, compared to broad reading and letter word scores of 95. (P-24, p.7.) Ms. Dutt considered and reported the WJ-IV results in the November 2017 Evaluation. (Tr., pp.307-311 (Dutt).)

14. On October 30, 2017, Ms. Dutt observed the Student in Ms. Osgood's general education classroom, and concluded that the Student "was able to access the curriculum and perform tasks required . . . however [the Student] did require an adult to be within close proximity to perform the desired tasks." (D-2, pp.22-23; Tr., pp.307-311 (Dutt).)

15. Based on the assessments performed and the data reviewed, the Evaluation Team concluded that:

[the Student] meets eligibility as a student with a Specific Learning Disability in the areas of Math Calculation and Written Expression. His rate of progress is below that of his typically developing peers. Assessment results indicate skill gaps in math calculation and written expression that adversely impact his ability to progress in the general education curriculum.

(D-2, p.6; Tr., pp.307-311.) The District provided the Parents with a copy of the November 2017 Evaluation report on November 28, 2017, and issued a "Notice of Meeting" to the Evaluation Team (including the Parents) setting an Evaluation Team meeting on December 5, 2017, at 8:00 a.m. (D-2, p.3; Tr. pp.302-305 (Dutt).)

Evaluation Meeting Attempts and Testing Data/Protocol Requests from November 14, 2017 through April 4, 2018.

16. The Evaluation Team did not meet on December 5, 2017, because of the Parents' schedule. The District issued a "Prior Written Notice" dated December 5, 2017, giving notice to the Parents that the District was "proposing to initiate a (sic) reschedule an evaluation feedback meeting." (D-3, p.1; P-47; P-48; Tr., pp.310-307 (Dutt).) The notice states that the "[t]eam attempted to meet

to review [Student's] evaluation report that was sent to parents on the (sic) November 28th for review. Parent (sic) were unable to attend the scheduled time on December 5, 2017 . . . Team has requested another meeting time for Thursday, December 7th at 9:30am (sic)." (*Id.*) The District issued a "Notice of Meeting" giving notice of an Evaluation Team meeting on December 7, 2017. (D-3, p.2.)

17. The District issued a second "Prior Written Notice" on the same day, December 5, 2017, "proposing to initiate an IEP," stating that the "team has made multiple attempts to set an alternative meeting time with the parents to review the evaluation summary report they received on November 28th. . . Team is willing to meet when parents are available to review the evaluation report. Team attempted to schedule meetings on December 5th, 7th, 8th, 11th, and potentially 12th and 13th." (D-2, pp.26-27; P-49; Tr., pp.66, 113 (Mother), 301-305 (Dutt).)

18. On December 7, 2017, the District issued a "Prior Written Notice" "proposing to initiate a rescheduled parent meeting."⁸ (D-3, pp.4-5; P-50.) The document states:

Team has made multiple attempts via phone and email to arrange meeting to discuss [Student's] evaluation report. In addition, parent has requested to view previous assessments and protocols to help in understanding [Student's] strengths and [w]eaknesses. Parent will attend a meeting on December 7th at 10:45 a.m., to review evaluation report (that was provided on November 28th) and look at previous assessments.

(D-3, pp.4-5; D-4, pp.1-5; Tr., pp.302-303 (Dutt), 404-405 (Davy).)

19. On December 7, 2017, the Mother of the Student met with Ms. Dutt at the District to review the testing protocols and data used in the November 2017 Evaluation. (D-3, p.6; Tr., pp.66, 120 (Mother), 303-306 (Dutt).) The Mother of the Student reviewed the testing protocols and test data, but Ms. Dutt informed the Mother of the Student that she could not copy the testing protocols or the Student's responses (data) because such a disclosure influences the integrity of the assessments and violates the terms of District / test publisher contracts and publisher copyrights. (Tr., pp.120-121 (Mother), 332 (Dutt), 407-408 (Davy).) The Mother of the Student declined to review the November 2017 Evaluation report without her husband present. (D-3, p.6; P-51; Tr., pp.305-306 (Dutt).)

20. Ms. Dutt sent the Parents a letter on December 13, 2017, informing the Parents that the District's personnel would like to convene an Evaluation Team meeting to review the results of the November 2017 Evaluation. (D-2, p.1; Tr., p.301 (Dutt).) The letter stated that the District "wanted to acknowledge that based upon the convergence of data that [the Student] is eligible for special education services in the areas of written expression and math calculation under the eligibility category of specific learning disabilities." (D-2, p.1.) In addition, Ms. Dutt stated:

As a team, we wanted to reach out and recognize that it has been difficult to schedule a convenient time to review the initial special education evaluation report

⁸ Ms. Dutt erroneously marked a box on the form stating that the Parents were "refusing to meet" with the District (D-3, p.4), but corrected the error by hand marking the form and noting that the Parents were not refusing but had difficulty finding a mutually agreeable time (D-3, p5). (Tr., pp. 303-304 (Dutt).)

for [the Student]. We understand that this time of year brings many challenges in terms of time commitments . . . The evaluation team would like the opportunity to review the [November 2017 Evaluation] report with you, when your schedule allows. At this time, the IEP team will begin drafting a proposed initial IEP for your review as part of this process, however, no action will take place in regards to special education services until you are able to participate fully in reviewing the evaluation report with members of the evaluation team.

(Id.) Attached to the letter was a summary of the Student's assessment scores. (D-2, p.2.)

21. On December 14, 2017, the District proposed a facilitated meeting with the Parents, the District personnel, and Sound Options, a mediation service, and the Parents agreed to attend during a phone call on January 5, 2018. (D-8, p.1; Tr., pp.124 (Mother), 409 (Davy).) The District issued meeting notices on January 8, 2018, and January 11, 2018, confirming a meeting to "develop an Initial IEP" and "facilitated review of evaluation and IEP" on January 16, 2018. (D-8, p.3; D-9, p.3; P-52; P-53.) The Parent cancelled the meeting via email on January 12, 2018. (D-6, pp.1-6; D-9, p.1.)

22. The Parents agreed to an informal meeting to answer questions about the evaluation process, and the following individuals met with the Parents informally on January 10, 2018: Ms. Dutt, Ms. Anderson, and Adra Davy⁹, assistant director for elementary special education. (D-8, p.1; Tr., pp. 124-126 (Mother), 408 (Davy), 469 (Anderson).) The District issued a "Prior Written Notice" on January 19, 2018, describing the meeting as follows: "the parent[s] and the district agreed to limit the facilitated meeting to initial evaluation feedback, and schedule the initial IEP meeting at a later time." (D-8, p.1; P-54; Tr., p.408 (Davy).)

23. The Parents continued to communicate with the District via emails with Ms. Davy and Ms. Anderson, between January 11, 2018, and January 17, 2018. (D-4; D-5; D-6; and D-7; Tr., pp.404-410 (Davy), 468 (Anderson).) The Parent continued to request copies of the testing protocols and data used in the November 2017 Evaluation, and the District allowed the Parent to contact Ms. Dutt at any time to obtain testing data and review the testing protocols at the District. (Ids.) The District issued a second "Prior Written Notice" on January 19, 2018, stating:

parent participation in the evaluation is needed prior to moving to an IEP and parent requested two meetings be held one for evaluation and one for IEP. The district agreed with this. Due to publisher and other copyright laws, test protocols may not be copied. The district offered to make all protocols available for parent review, by making an appointment with the school psychologist on numerous occasions.

. . . The parent cancelled the facilitated meeting by email on January 12, 2018, and contacted Sound Options to cancel. The parent requested to have copies of all test protocols prior to attending the evaluation feedback meeting. The district is

⁹ Adra Davy is the current director of special services, but during the period at issue she was the assistant director of special services. (Tr., pp.403-404 (Davy).) Ms. Davy has a master's degree in education leadership, a dual certification in elementary and special education, and an administrator certification. (Tr., p.402.)

unable to make copies of test protocols, but has made test protocols available for review by the parent. Parent has met with the school psychologist on one occasion to review the protocols, and can schedule more time to review the protocols further.

The district would like to meet with the parent to provide initial evaluation feedback. Parent has stated she does not feel ready to meet until she has a full understanding of the test protocols. Parent will need to contact the assistant director for special education and/or the school psychologist when she is ready to schedule the evaluation feedback meeting.

(D-9, pp.1-2; P-55; Tr., pp.406-409 (Davy).)

24. On February 2, 2018, the District issued a “Prior Written Notice” refusing a January 31, 2018, written request from the Mother’s medical provider to give the Mother copies of the testing protocols and data so that she could review the protocols without distraction. (D-10, pp.1-3; P-56; Tr., pp.193-194 (Mother), 409 (Davy).) The District reiterated that the Parents can meet with Ms. Dutt anytime to review the testing protocols without distraction. (*Ids.*)

25. The Parents filed a Request for Public Records form with the District on January 22, 2018, seeking a significant number of records (D-11, p.2), and signed a Release of Records (for the Student’s records) form on February 28, 2018 (D-11, p.1). The District and the Parents communicated via email about the request from February 7, 2018, to March 5, 2018. (D-12; D-13.) The District responded to the Parents’ record request on March 5, 2018. (D-13, p.1; D-14, p.2)

26. On February 23, 2018, the Parent filed a “Special Education Citizen Complaint,” with OSPI, alleging that the District had “failed to follow procedures for responding to the Parents request for [the Student’s] educational records, as the District did not either not (sic) not respond to her requests or did not provide her copies of all requested records.” (D-17, p.2; P-9; Tr., pp.130-132 (Mother).) One of the Parents specific requests was to receive copies of the testing protocols and data from the November 2017 Evaluation. (D-17, p.24; P-9.) After investigation, on April 24, 2018, OSPI issued a written decision, concluding as follows:

In her complaint the Parent alleged that due to the District’s failure to provide records, she was not able to make informed decisions, give informed consent, or meaningfully participate in meetings, and that she was not able to “access remedies.” The documentation and the information provided in this complaint do not support the Parent’s contention . . .

On November 2, 2017, the Parent requested to review [the Student’s] CLEF assessment and then expanded her request on November 14, to include all testing. In response the District provided the Parent access on December 7, 2017, within forty-five calendar days of the request. Additionally the District offered on multiple occasions to schedule additional times for the Parent to access and review the testing when the Parent raised concerns that she didn’t have enough time on December 7, 2017, to review and process the documentation. While the Parent was upset that the District did not provide copies of the testing protocols as she requested, the IDEA and state regulations do not require the District to provide copies of records, but instead require that the District provide access to records.

The District has substantiated that it followed procedures for responding to the Parent's request to review [the Student's] testing data.

(D-17, p.24; P-9; Tr., pp.130-132 (Mother).)

May 15, 2018 IEP and IEP Meeting

27. On April 4, 2018, the District issued a "Prior Written Notice" "proposing to initiate an Initial Evaluation Feedback" meeting. (D-15, p.1; P-43; P-57; Tr., pp.410-411 (Davy).) In the "Prior Written Notice," Ms. Davy noted:

the parents requested to waive the [evaluation] feedback meeting, and move directly to an IEP meeting. This was rejected [by the District] . . . The District has offered several meeting dates and times to the parent, which the parent has rejected. The District also offered to hold the meeting with a facilitator from Sound Options, which the parent initially agreed to and subsequently canceled. The District has offered mediation as a remedy to help the team move forward.

(*Ids.*)

28. The District issued a "Prior Written Notice," "proposing to initiate an IEP." (D-16, p.1; P-44; P-58; Tr., pp.409-411 (Davy).) This document reflects that the Evaluation Team, including the Parents, "met on April 17, 2018 and reviewed the November 2017 Evaluation." (D-16, p.1; Tr., pp.132 (Mother), 411 (Davy).) At the April 17, 2018, meeting the Parents declined to sign the Evaluation Report and requested to "write a dissenting opinion based upon that they believe the data is not current and that dyslexia was not addressed in the report. Parents still have areas of concern in reading and executive function." (*Ids.*)

29. The Parents filed a Special Education Citizen Complaint with OSPI on April 26, 2018, alleging that the District violated the IDEA by failing to follow procedures for evaluating the Student. (D-22; P-8; Tr., pp.179, 227 (Mother).) OSPI initiated an investigation on April 28, 2018, and issued a written decision on June 18, 2018. (D-22; P-28.) OSPI concluded that the District should have also reviewed an audiology report that resulted from a private audiology exam of the Student conducted by Andrea Robinson, Evergreen Speech, on December 19, 2017. (D-22, p.18; P-21; P-22; P-28.) The District received the report on January 2, 2018, and it reflected that the "Dichotic Digits test was below normal in the right ear" and "revealed an auditory processing disorder in the form of auditory integration deficit." (*Id.*) OSPI required the District to review the audiology exam results, but otherwise concluded that the November 2017 Evaluation was appropriate. (*Id.*)

30. The Parents removed the Student from the District and enrolled the Student in the Montessori Children's House Upper Elementary Class sometime in April 2018. (P-66 and P-78; Tr. pp.279-280 (Champoux).)

31. The Parents requested an Independent Education Evaluation ("IEE") via email on April 28, 2018, and the District issued a "Prior Written Notice" on May 14, 2018, "proposing to initiate an IEE-Independent Educational Evaluation," approving the request. (D-18, p.1; P-45; P-59.)

32. On April 30, 2018, the District issued a “Individualized Education Program (IEP) Invitation” setting a facilitated meeting on May 15, 2018, with Sound Options as well as the Parents, Chantal Porter, Special Education Teacher, Ms. Osgood, Steve Hopkins, District Representative, Ms. Davy, and the Student (“IEP Team”). (D-20, p.2; Tr., pp.137-138 (Mother), 411-420 (Davy).) The purpose of the meeting was to “develop an Initial IEP,” and the District provided the Parents with a draft IEP (“May 15, 2018 IEP”).¹⁰ (*Id.*)

33. The IEP Team, except for the Student and the Father of the Student, and a Sound Options facilitator met on May 15, 2018, to review the draft IEP. (D-20, pp.1, 4; Tr., pp.137 (Mother), 363-365 (Osgood), 411-417 (Davy), 478-479 (Anderson).) The IEP provided the Student with a full schedule of education services, 1710 minutes of instruction per week, including SDI as follows: 50 minutes per week of special education in the area of math in the general education classroom, 90 minutes per week of special education in math in a special education setting, and 160 minutes per week of special education in written language in a special education setting. (D-20, p.13-16; Tr., pp.365, 368, 318-383 (Osgood), 413-416, 420 (Davy), 479 (Anderson).) The IEP also provided two “measurable annual goals” for the student in the area of written composition:

By 05/06/19, when given a grade level writing prompt and graphic organizer [Student] will write a 6 sentence paragraph containing a topic sentence, two detail sentences, two explaining sentences, and a closing sentence improving written composition from writing a 2 sentence paragraph to writing a 6 sentence paragraph as measured by student work samples.

...

By 05/16/2019, when given weekly spelling words and a writing assignment involving one-three paragraphs in which he writes words with the same phonemes from his spelling list [Student] will correctly spell one syllable short and long vowel words improving spelling from spelling one syllable short and long vowel words correctly 0% of the time in writing samples to spelling one syllable short and long vowel words correctly 80% of the time in writing samples as measured by written performance.

(D-20, pp.11-12; Tr., pp.365, 368, 381-383 (Osgood), 413-416, 420 (Davy), 479 (Anderson).) The IEP also established two goals in the area of math:

By 05/16/2019, when given a grade level, numerical problem of any of the four operations [Student] will correctly solve the problem improving calculation from solving 60% of grade level, numerical problems correctly to solving 90% of grade level numerical problems correctly as measured by curriculum based performance on assignments, quizzes and tests.

...

By 05/16/2019, when given multiplication facts up through 9x9 [Student] will correctly solve problems improving fact fluency from correctly answering 17 facts in one minute to correctly answering 30 facts in one minute as measured by quizzes begin timed by an adult, without student awareness of being timed.

¹⁰ The draft IEP is not part of the record, but the Parents do not allege that the District failed to provide the Parents with a draft IEP.

(*Ids.*)

34. The Parents expressed a concern about the Student's anxiety level and, to accommodate the concern, the District included in the IEP a "Check-in/Check-out" system with a trusted adult. (D-20, p.13; Tr., p.415 (Davy).)

35. Ms. Osgood, Ms. Davy, and Ms. Anderson agreed that the goals and SDI offered in the IEP were reasonable and appropriate for the Student and the Student's circumstances. (Tr., pp. Tr., pp.365, 368, 381-383 (Osgood), 413-416, 420 (Davy), 479 (Anderson).) The IEP Team, including the Mother of the Student, signed the IEP. (D-20, p.4.)

36. The District issued a "Prior Written Notice" on May 17, 2018, "proposing to initiate an IEP" and reflecting the events of the May 15, 2018 IEP meeting. (D-20, p.21; Tr., pp.416-418(Davy).)

37. The District issued another "Prior Written Notice" on May 23, 2018, "proposing an IEP" based on a "consent for initial services . . . emailed by the Parent on 5/18/2018 and received by the school on 5/21/18." (D-21, p.1; Tr., pp.417-419 (Davy).) More specifically, the Parent emailed the District stating that she "was providing consent, but did not agree with the IEP" but also wanted to "wait to amend the IEP until after the pending IEE is completed. She also asked when services could begin." (D-21, p.1; Tr., pp.417-419 (Davy).)

38. Jacquie Berkeihiser, LMHC, worked with the Student regarding anxiety issues from February 2017 (when attending homeschooling) to April 2019. (P-14; P-15; Tr., pp.446-447; 457 (Berkeihiser).) Ms. Berkeihiser recommended in writing on May 24, 2018 that the Student attend a different school, public or private, because it "would be in his best interest to start fresh at a new school." (*Ids.*) It is unknown if the District received Ms. Berkeihiser's May 24, 2018 letter.

August 7, 2018 IEE and October 9, 2018 Assessment Revision Meeting

39. Dr. Phillip Dunbar-Mayer, assessed and examined the Student on June 16, 2018 and July 13, 2018, and issued a combined "Independent Educational Evaluation & Report of Neuropsychological Evaluation," on August 7, 2018 ("August 7, 2018 IEE").¹¹ (P-25.) Dr. Dunbar-Mayer stated in the document that "[the Student] has trouble with reading, written expression, and mathematics." (P-25, p.3.). Dr. Dunbar-Mayer only relied on Dr. Reilly's diagnosis of a specific learning disability in the area of reading in the report. (P-25, pp.12, 21.)

40. On August 19, 2018, the District issued a Notice of Meeting to the Evaluation Team providing notice of a meeting on October 9, 2018.¹² (D-23, p.1; P-60; P-62; Tr., p.310 (Dutt).) The District sought to convene an assessment revision meeting with the Evaluation Team to review the December 19, 2017, audiology report from Evergreen Speech that was the subject of OSPI's written decision dated June 18, 2018. (D-23, p.3; Tr., pp.310-312 (Dutt).) The District and the Parent communicated via email between August 19, 2018 and October 9, 2018, regarding the subject of the meeting and the individuals who would be present. (P-64, pp.98-109.)

¹¹ Dr. Dunbar-Mayer did not testify at the due process hearing in this matter.

¹² The District also prepared, but may not have issued, a Notice of Meeting giving notice of a meeting on August 27, 2018. (P-61.)

41. The Evaluation Team was expanded to include Cindi Wright, the District's Speech and Language Therapist, and Gretchen Colonius, the District's Occupational Therapist. (D-23, pp.1-2.) Both Ms. Wright and Ms. Colonius assessed the Student in the areas of communication and motor skills, and reported that the Student fell within the average ranges on all assessments and that special education services were not recommended.¹³ (D-23, pp.4-5.) Ms. Dutt also reviewed the December 19, 2017 Evergreen Speech audiology report and recommended adopting the written recommendations¹⁴, but did not recommend SDI for the Student in the areas of communication and motor skills. (D-23, pp.6-7; P-21; P-28; Tr., pp.310.) The Parents agreed that the Student would continue to receive speech and language supports outside of school and SDI was not needed. (*Ids.*) Ms. Dutt created an "assessment revision" ("Assessment Revision") and included the information from Ms. Wright, Ms. Colonius, the Parents, and the December 19, 2017 Evergreen Speech audiology report. (D-23, pp.4-5; Tr., pp.310-311.)

42. The Evaluation Team, including the Parents, met on October 9, 2018, to discuss the Assessment Revision. (D-23; Tr., pp.73 (Mother), 310 (Dutt).) The members of the expanded Evaluation Team accepted the recommendations from the December 19, 2017, Evergreen audiology report, determined that the Student was not eligible for special education services in the areas of communication and motor skills, and signed the Assessment Revision. (D-23, p.8.) The Parents requested that the Student's eligibility category be changed to "multiple disabilities or a combination of Health Impairment and Specific Learning Disability" and that an "integrated learning system program" be implemented. (D-23, pp.10-11; Tr., pp.73 (Morthor), 312 (Dutt).) The District personnel on the Evaluation Team responded that the Parents' requests would be considered after the Evaluation Team could review, consider, meet and discuss Dr. Dunbar-Mayer's August 7, 2018 IEE. (*Ids.*) The Parent did not sign the Assessment Revision. (*Id.*) The District issued an "Assessment Revision Prior Written Notice" on October 9, 2018 "proposing to continue eligibility category reevaluation," and proposing to adopt the recommendations from the December 19, 2017, Evergreen Speech audiology report. (D-23, p.10; P-63; Tr., pp.310-312. (Dutt).)

43. The Parents filed Special Education Citizen Complaints alleging the District violated the IDEA on October 8, 2018, (D-24), February 27, 2019 (D-26), and March 3, 2019 (D-27). OSPI either declined to investigate or concluded that no corrective actions were necessary. (*Ids.*)

44. On October 9, 2018, the District issued a "Prior Written Notice" proposing a facilitated IEP Team meeting or mediation to consider Dr. Dunbar-Mayer's August 7, 2018 IEE. (D-23, p.11.) However, on February 1, 2019, the District issued "Prior Written Notice" stating:

The purpose of this prior written notice is to inform you that we are "refusing to initiate mediation," because the District has proposed mediation through Sound Options but the "parties involved have not been able to reach agreement on the components to be covered in mediation in order to move forward."

¹³ Neither Cindi Wright nor Gretchen Colonius testified at the due process hearing in this matter.

¹⁴ The report recommended the following general education accommodations: verbal rehearsals, preferential classroom seating, written support materials, extended time for assignments and tests when needed, use of outlines, organizers and study guides to assist with following in-class instructions, breakdown of long assignments (chunking) and frequent check-ins. (D-23, p.6.)

CONCLUSIONS OF LAW

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 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. School Districts are required to "provide every student who is eligible for special education between the ages of three and twenty-one years, a free appropriate public education program (FAPE)." WAC 392-172A-02000; 34 C.F.R. Part 300.

3. 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 IDEA, 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).

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

Procedural Issues

The District Provided the Parent with Testing Data and Protocols between November 14, 2017 and April 4, 2018.

5. Parents have a right to be involved in the development of a student's IEP. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir.2001). The IDEA requires districts to provide for meaningful parental participation in the IEP meeting. WAC 392-172A-03100; 20 U.S. 1400(c)(5)(B); 34 C.F.R. 300.322; *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342 (9th Cir., 2007). Specifically, parents shall be given notice of the meeting, an opportunity to attend the meeting at a mutually agreeable time and place, information about the purpose of the meeting and who will attend. WAC 392-172A-03100.

6. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to

attend IEP meetings, but must also have the opportunity for “meaningful participation in the formulation of IEPs.” *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

7. A school district must share educational testing data with parents. The failure to do so constitutes a procedural violation of the IDEA. Failure to provide information prevents parents from meaningfully participating in the creation of the IEP, thereby denying the Student a FAPE under the IDEA. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9th Cir. 2014).

8. Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained or used by the district. WAC 392-172A-05190. “The school district shall comply with a request promptly and before any meeting regarding an individualized education program or resolution session relating to the identification, evaluation, educational placement of the student or provision of FAPE to the student.” *Id.* A school district must respond within forty-five (45) calendar days. *Id.* The right to inspect records includes a right to an explanation and interpretation of the records, the right to copies of the records “if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative of the parent review the records.” *Id.*

9. As a general rule, however, parents do not have a right under FERPA to review and inspect documents that are not education records. 20 U.S.C. Section 1232(g)(a)(4); 34 CFR Section 99.3. Since the IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, copyright law and contract terms with publishers regarding test protocols generally should not be implicated under disclosure regulations. *Letter to Shuster*, 108 LRP 2302, Office of Special Education Programs (2007).

10. The Parents assert that they could not meaningfully participate an IEP meeting with the District because the District did not give the Mother physical copies, or allow the Mother to hand copy, the testing protocols and data used in the November 2017 Evaluation. The District asserts that it provided the Mother with access to the information by giving her opportunities to review the testing protocols and data.

11. The record supports the District’s position. It is undisputed that the Mother viewed the testing protocols and data on December 7, 2017, with Ms. Dutt, and that thereafter the District accommodated the Mother’s request to have additional time without distraction to view, read and process the testing protocols. Additionally, Ms. Dutt made herself available to interpret and explain the testing protocols and data to the Parents at any time convenient for the Parents. The record demonstrates that the Parents declined the District’s offers after December 7, 2017.

12. It is also persuasive that OSPI’s June 18, 2018 written decision similarly concludes based on the same information that the District complied with applicable law and allowed the Parents access to the testing data and protocols.

13. While the Parents may want physical copies of the testing protocols and data, the Parents have not shown they are entitled to physical copies under applicable laws. Also the Parents have not shown how having physical copies of the testing protocols and data prevented them from meaningfully participating in the May 15, 2018 IEP meeting. The Parents had same information

in the November 2017 Evaluation report that the other Evaluation Team and the IEP Team members had available.

14. Given the evidence presented, it cannot be said that the District failed to disclose to the Parents the requested testing data and protocols, or that the Parents could not meaningfully participate in the May 15, 2018 IEP meeting. As a result, it is concluded that the District did not violate the IDEA or WAC 392-172A-03100, or WAC 392-172A-05190, and did not deny the Student FAPE.

Substantive Issues

The District Evaluated the Student in All Areas of Concern in the November 2017 Evaluation

15. When conducting an initial special education evaluation of a student, a district is required to “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student....” WAC 392-172A-03020(2)(a). The district must “[n]ot use any single measure of assessment as the sole criterion” to determine if a student is eligible for special education. WAC 392-172A-03020(2)(b). The district must also ensure “[t]he student is assessed in all areas related to the suspected disability....” WAC 392-172A-03020(2)(e). An evaluation must be completed by a qualified individual and “sufficiently comprehensive to identify all of the student’s special education and related services needs.” WAC 392-172A-03020(3)(g). “The IDEA does not prescribe substantive goals for an evaluation, but provides only that it be ‘reasonably calculated to enable the child to receive educational benefits’.” *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp.2d 1175, 115 (W.D. Wash. 2002) (citing *Rowley*, 458 U.S. at 205-07).

16. Further, under WAC 392-172A-03025:

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.*

17. The IDEA does not give Parents the right to dictate the areas in which a school district must assess a student as part of a special education evaluation. See *Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016); *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834, 2019 WL 2023567 (citing *Avila v. Spokane Sch. Dist.* 81, 686 F. App'x 384, 385 (9th Cir. 2017)). A district need not evaluate in areas in which it does not suspect a disability. See, e.g., *Razzaghi v. Dist. of Columbia*, 44 IDELR 271 (D.D.C 2005); *Moses Lake Sch. Dist.*, 109 LRP 26490 (2008).

18. Concerning eligibility determinations, WAC 392-172A-03040 provides that upon completing the evaluation assessments, a group of qualified professionals and the parent 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 instruction.” *Id.* In

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

19. An evaluation team may conclude that a student has a “specific learning disability,” if:

(1) The student does not achieve adequately for the student's age or meet the state's grade level standards when provided with learning experiences and instruction appropriate for the student's age in one or more of the following areas:

- (a) Oral expression.*
- (b) Listening comprehension.*
- (c) Written expression.*
- (d) Basic reading skill.*
- (e) Reading fluency skills.*
- (f) Reading comprehension.*
- (g) Mathematics calculation.*
- (h) Mathematics problem solving*

WAC 392-172A-03055. A Student may have a specific learning disability if the Student meets the criteria for a “severe discrepancy” as per WAC 392-172A-03060, 03065, or 03075.

20. Finally, WAC 392-172A-03035 concerns evaluation reports. It requires that the report 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.

21. The specific issue raised by the Parents is that the “District failed to conduct an evaluation of the Student in the areas of concern of **math, reading and writing** as requested by the Parents on November 24, 2017.” (*Emphasis Added.*) (Prehearing Order, December 30, 2019, p.3; Parent’s Closing Brief, p.5.)

22. The evidence in the record reflects that the November 2017 Evaluation included multiple assessments and a well-documented review of data. The Evaluation Team, considering information from a variety of sources concluded that the Student possessed a specific learning disability in the areas of math and written expression because the Student met the criteria of WAC 392-172A-03055, warranting that the District provide specially designed instruction. The Parents, then, have not shown that the District failed to evaluate the Student in the areas of math and written expression. Notably, the Parents appear to agree that the Student has a specific learning disability in the area of math and written expression, and that the District should provide specially designed instruction.

23. Regarding the area of reading, the Parent did not identify reading fluency as an area of concern in the consent form dated October 24, 2017, and District personnel did not identify reading fluency as an area of concern prior to conducting the November 2017 Evaluation. However, there is sufficient evidence in the record to show that the Evaluation Team actually did evaluate the Student in the area of reading.

24. Ms. Dutt reviewed, reported, and considered the WJ-IV reading assessment results from Dr. Reilly's January 27, 2017, neuropsychological evaluation and the April 15, 2017, District administered KTEA-3 assessment. Additionally, Ms. Dutt assessed the Student in the area of reading using the WIATT-III assessment. Ms. Osgood performed standard district reading assessments. The District, then, used multiple assessments, and that the District drew from a variety of sources to assess the Student in the area of reading. Additionally, Ms. Dutt documented the information in the November 2017 Evaluation report.

25. In contrast, the Parent has failed to present evidence as to what other assessments should have been performed, or that the assessments performed were either inappropriate or improperly administered. Given the state of the evidence in the record, it must be concluded that the District followed the requirements of the applicable law and conducted an appropriate evaluation of the Student in the area of reading as required by WAC 392-172A-03020, 03025, and 03055.

26. The Parents also asserted that the Evaluation Team should have concluded that the Student has a specific learning disability in reading fluency based solely on Dr. Reilly's conclusion in his January 27, 2017, neuropsychological evaluation and Dr. Dunbar-Mayer repeating that diagnosis in the July 2018 IEE.

27. However, the issue of whether the District incorrectly determined that the Student did not have a specific learning disability in the area of reading (a separate issue from whether the Student was evaluated in the area of concern) was not raised as an issue in this matter prior to the hearing. Notably RCW 34.05.461(4) provides: "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." The court is not required to wade through the record to find evidence to support claims. *E.M. v Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, (9th Cir 2011), citing *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); see *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs hunting for truffles buried in briefs"). Given that the issue of whether the Student had a specific learning disability in reading was not presented in either the Parents' due process hearing request or noticed as an issue in the December 30, 2019, prehearing order, it may be concluded the Parents failed to appropriately raise the issue for consideration by this tribunal.

28. Regardless, the Parents only presented hearsay testimony that the Student had a specific learning disability in the area of reading. Importantly RCW 34.05.461(4) also states:

... Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the party's opportunity to confront witnesses and respond to the evidence.

29. Hearsay is a statement either oral or written, made by some person other than the person testifying at the hearing, offered in evidence to prove the truth of the statement made by the person who is not at the hearing. (E.R. 801.) Hearsay is evidence which is not supported by live testimony and is not subject to cross-examination. Additionally, RCW 34.05.452 provides that:

Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their own affairs.

30. Here Dr. Reilly did not testify under oath, subject to cross-examination, about how the Student was assessed in the area of reading, or diagnosed with a specific learning disability. Further, Dr. Dunbar-Mayer's evaluation merely repeats Dr. Reilly's conclusions. Therefore both Dr. Reilly's January 27, 2017, neuropsychological evaluation and Dr. Dunbar-Mayer's July 2017 IEE amount to hearsay evidence, that, while admissible, is not presented under oath, subject to cross examination. Given this circumstance, the hearsay evidence cannot support a finding of fact that the Student has a specific learning disability in reading fluency because to simply accept the diagnosis from the documentary evidence would unduly abridge the District's opportunity to confront Dr. Dunbar-Mayer and Dr. Reilly.

31. Furthermore, the reading assessments performed by both Dr. Reilly and Dr. Dunbar-Mayer resulted in average reading fluency scores, except for one score on the WJ-IV Sentence Reading Fluency assessment. It is unknown what other information led Dr. Reilly to conclude the Student had a specific learning disability in reading fluency besides this score. On the other hand, the District presented documentary evidence of assessments performed, corroborated by Ms. Dutt and Ms. Osgood's testimony under oath subject to cross-examination, that the Student's reading fluency was in the average range.

32. Moreover, the only violation OSPI identified was the District's failure to consider the audiology report; OSPI specifically concluded that the November 2017 Evaluation was otherwise appropriate and that the District complied with applicable law.

33. Even though not properly raised as an issue for determination, it is concluded that the evidentiary record does not support the Parent's assertion that the Evaluation Team should have determined that the Student had a specific learning disability in the area of reading fluency.

34. It is notable that the District failed to review and consider the December 1, 2017 Evergreen Speech audiology report in its evaluation. However, the Parent did not raise the issue of whether the District should have evaluated the Student in the areas of communication or motor skills. As set forth above, issues not properly raised and noticed are not subject to determination may not be considered. Even so, the record shows the District 1) subsequently reviewed and considered the December 19, 2017 Evergreen Speech audiology report as directed by OSPI in the June 1, 2018 written decision, and 2) evaluated the Student in the areas of communication and motor skills. Furthermore, both the Parents and the District agreed that the Student did not qualify for special education services in these areas. Therefore, even though the issue is not properly raised, it is also concluded that the District did not fail to assess the Student in all areas of concern in the November 2017 Evaluation.

35. Based on the evidence presented, the record supports this tribunal's conclusion that the District conducted an appropriate evaluation of the Student in all areas of concern and did not violate WAC 392-172A-03020, 03025, 03040, and 03055. As a result, it is concluded that the District did not violate the IDEA and did not deny the Student FAPE.

The May 15, 2018 IEP was Reasonably Calculated and Appropriately Ambitious in Light of the Student's Circumstances.

36. 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. The Supreme Court recently clarified the substantive portion of the *Rowley* test:

37. In developing a Student's IEP, WAC 392-172A-03110(1) requires the IEP team to consider:

- (a) The strengths of the student;
- (b) The concerns of the parents for enhancing the education of their student;
- (c) The results of the initial or most recent evaluation of the student; and
- (d) The academic, developmental, and functional needs of the student.

38. An IEP must include a statement of the program modifications and supports that will be provided to enable the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(c)-(d); 34 CFR 300.320(a)(4)(ii).

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

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

41. Related services are transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, including SLP and OT services and parent counseling and training. WAC 392-172A-01155(1).

42. An IEP must also contain a statement of annual goals, including academic and functional goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of a student's other educational needs that result from the student's disability. WAC 392-172A-03090(1)(b)(i); 34 § CFR 300.320(a)(2). For students who take alternate assessments aligned to alternate achievement standards, the IEP must include a description of benchmarks or short-term objectives. *Id.* There must be a relationship between the present levels of performance and the goals and objectives. *Seattle Sch. Dist.*, 34 IDELR 196, 34 LRP 226 (SEA WA 2001). Goals must be stated with enough specificity that they are understandable and must be measurable in order to determine whether a student is making progress toward the goals.

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

44. The Parents failed, throughout the proceedings, to identify specifically how the May 15, 2018 IEP is not reasonably calculated and appropriately ambitious in light of the Student's circumstances. As noted above, RCW 34.05.461(4) requires findings of fact and conclusions of law be entered regarding issues noticed and supported by the evidence; it is not the responsibility of the ALJ to search the record for evidence to support an unspecified claim or violation.

45. While the Parents have not made a specific challenge to any of the provisions of the May 15, 2018, IEP, arguably the Parents have implied that the May 15, 2018 IEP does not provide for SDI in the area of reading, and is not based on Dr. Dunbar-Mayer's June 18, 2018 IEE.

46. As found and concluded above, the District appropriately determined that the Student did not have a specific learning disability in the area of reading such that the Student was eligible for special education services. Because the Student is not eligible for special education services in the area of reading, then the IEP did not include SDI or measurable annual goals. While the Parents disagree with this determination, they presented no evidence that the May 15, 2018 IEP was inappropriate in light of the Student's circumstances. Additionally, the May 15, 2018 IEP does provide SDI and annual goals in the areas of math and written expression, but again, the Parents have not specifically stated any reason that the SDI offered or the annual goals provided are inappropriate in light of the Student's circumstances or that the May 15, 2018 IEP does not confer an educational benefit.

47. Regarding Dr. Dunbar-Mayer's June 18, 2018, IEE, it is important to note that it was conducted after the May 15, 2018 IEP was reviewed, considered and accepted. The appropriateness of a student's IEP is to be judged by reviewing its goals and services **at the time it was offered** and determining whether the IEP was reasonably calculated at that time to confer educational benefit. *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047 (9th Cir. 2012) (*emphasis added*); *Adams v. State of Oregon*, 195 F.3d 1141, 1149-50 (9th Cir. 1999) ("Instead of asking whether the [IEP] was adequate in light of [the student's] progress . . . the more pertinent question [is] whether the [IEP] was appropriately designed and implemented so as to convey a meaningful benefit [to the student].") Essentially, the Parents are asking for a determination that the May 15, 2018 IEP was inappropriate based on information that the IEP Team did not have on May 15, 2018.

48. Because the May 15, 2018 IEP's appropriateness must be judged as of the date it was offered, this tribunal declines to hold the District responsible for failing to review, consider, and adopt recommendations from Dr. Dunbar-Mayer's June 18, 2018 IEE, or conclude that the May 15, 2018 IEP is inappropriate as a result of Dr. Dunbar-Mayer's June 18, 2018 IEE. Furthermore, it is important to recognize that the Parents signed the May 15, 2018 IEP and gave consent to

implement the May 15, 2018 IEP's provisions. Notably, the Parents did not re-enroll the Student at the District, and the District never had an opportunity to provide the Student with services.

49. The Parents have not identified any deficiencies with the May 15, 2018 IEP and therefore it is concluded that the May 15, 2018 IEP is appropriate in light of the Student's circumstances and confers an educational benefit to the Student. The District, then, did not violate the IDEA and did not deny the Student FAPE.

Remedies

50. Because the Parents did not prevail on any of the issues raised in the due process hearing request, the Parents are not entitled to any of the remedies requested.

ORDER

The District did not violate the IDEA and did not deny the Student FAPE beginning November 25, 2017 through November 25, 2019, because:

1. The District provided the Parent with testing data between November 30, 2017 and April 4, 2018, and the Parent had an opportunity to meaningfully participate in the May 15, 2018 IEP meeting.
2. The District evaluated the Student in all areas of concern in the November 2017 Evaluation.
3. The May 15, 2018, IEP was reasonably calculated and appropriately ambitious in light of the Student's circumstances.

Signed and Issued on the Date of Mailing.



COURTNEY E. BEEBE
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.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that today I served this document on each of the parties listed below. I emailed via secure email or mailed a copy to the parties at their addresses of record using Consolidated Mail Services or U.S. Mail.

Parent
c/o Jenny Cochrane
Law Office of Jenny M. Cochrane
777 108th Ave NE Ste 2240
Bellevue, WA 98004

Michael Tolley
Assistant Superintendent of Special Services
Northshore School District
3330 Monte Villa Parkway
Bothell, WA 98021

Jenny Cochrane
Law Office of Jenny M. Cochrane
777 108th Ave NE Ste 2240
Bellevue, WA 98004

Carlos Chavez, Attorney at Law
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101

Dated April 3, 2020 at Seattle, Washington.

lan

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
Seattle, WA 98101

cc: Administrative Resource Services, OSPI

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.
