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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

No. 35353-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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IN THE MATTER OF  
Sumner School District,

Appellant,

v.

A.D., a Minor Special Education Student, by and through  
his Mother and Legal Guardian, L.D.,

Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 FEB 15 PM 1:33

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The Parents continue to obfuscate a straightforward appeal through extensive discussions of irrelevant issues and inapplicable regulations. Neither the Parents' response nor the ALJ's Order contains any evidence to support a finding or conclusion that the District denied the Parents the ability to participate in any aspect of A.D.'s educational program development. Furthermore, the Parents did not cross-appeal the ALJ's lack of decision regarding the substantive issue of whether ESY was needed and provide no argument that they presented sufficient evidence to carry their burden of proving that A.D. was entitled to ESY.

## II. ARGUMENT

### A. Standard of Review -- The ALJ's Order is Not Entitled to Deference

This Court is not required to give the ALJ's Order any deference, despite the Parents' assertion that it was "well-reasoned."<sup>1</sup> The two critical issues in the case before the ALJ were (1) whether A.D. was eligible for ESY, and (2) whether the District's alleged procedural violations denied the Parents their right to participate in educational decisions about A.D. The ALJ ducked the first issue completely, and based her ruling solely on the second issue, concluding – without any

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<sup>1</sup> Brief of the Appellees at 3.

basis in the evidence or findings of fact -- that a purported procedural violation by the District amounted to a denial of a free, appropriate public education for A.D. because it prevented the Parents from fully participating in the process of developing A.D.'s educational program.<sup>2</sup> The ALJ's decision that the District committed a procedural violation was unsupported by evidence presented at the hearing. Instead, the ALJ mischaracterized testimony, relied upon state regulations inapplicable to ESY determinations, and made unsupported accusations about the District's actions.

The ALJ (and the Parents) did not articulate *how* any of the District's actions limited the Parents' ability to participate in decisions about A.D.'s educational program. A.D.'s mother attended and actively participated in every one of the meetings she could have attended concerning A.D.'s IEP and his ESY needs. Specifically, as presented by the evidence before the ALJ, A.D.'s mother participated as follows:

- she signed the District's March 2005 Evaluation Report;
- she attended a meeting on March 14, 2005 to review and discuss the Evaluation Report;

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<sup>2</sup> CP 27-44.

- she expressed her disagreement with the ESY statement in the Evaluation Report<sup>3</sup> and the statement was changed to reflect her disagreement and the District's willingness to consider the issue further in an IEP meeting;<sup>4</sup>
- she attended the IEP meeting on April 6, 2005, where the subject of ESY was discussed and New Horizon was tasked to provide information to the District about A.D.'s need for ESY; and
- she attended the IEP meeting on June 28, 2005, at which A.D.'s need (or lack of need) for ESY was determined.

The District clearly gave A.D.'s mother notice that the District believed A.D. did not qualify for ESY services, subsequently received information from A.D.'s mother in these meetings, and based upon her statements, agreed to change their initial ESY decision to inquire further. Based on this evidence, it is clear that the District never made a decision to "change" A.D.'s ESY eligibility for which "prior notice" may have been required. Without any such "change," there was no "prior notice" required of the District. In light of all of this active

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<sup>3</sup> The section which specifically addressed ESY services in the Evaluation Report stated "There is no current data indicating a need for ESY services at this time." CP 267, Petitioner's Ex. 15 at 13.

<sup>4</sup> The statement regarding ESY services in the Evaluation Report was changed to "This will be looked at further during an IEP meeting." CP 844:3 - 846:7; CP 503, District Ex. 15 at 14; CP 533, District Ex. 20; and CP 865:16 - 866:6.

participation by A.D.'s mother, it is unclear what further "procedure" the ALJ required of the District, and what "notice" the Parents needed that they did not receive. The ALJ utterly failed to address *how* the District deprived the Parents of any procedural rights. Without any statement or indication of what process the Parents were denied, the ALJ's Order is simply not "well-reasoned."<sup>5</sup>

Notably, the ALJ's Order does not hold that the Parents proved that ESY was needed. Nothing in the ALJ's Order held that A.D. needed ESY or that the Parents met their burden of proving that he did. The ALJ focused on alleged procedural violations, but did not at all rule on the substantive issue of whether A.D. needed ESY. The Parents did not cross-appeal on the ALJ's failure to rule on this issue, and any argument in the Parents' brief that the Parents proved that A.D. required ESY services is out of place in this appeal.

Lastly, deference may be owed to an ALJ when an appeal involves an ALJ's determinations about educational policy or implicates

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<sup>5</sup> Even if a procedural violation occurred, the Parents offered no evidence – and the ALJ pointed to none – to show that any procedural violation deprived the Parents of their ability to participate in educational decisions about A.D. Under the IDEA, relief can only be granted to parents on the basis of procedural violations when the violation is so severe that it either deprives a student of educational opportunity or prevents parents from fully participating in the process. The ALJ expressly based her ruling on her finding that the Parents were unable to fully participate. However, nothing in the evidence provides any support for this aspect of the ALJ's Order.

an ALJ's relatively greater level of experience and specialized knowledge. However, this case does not involve a determination of educational policy, nor does it involve issues that would implicate any experience that the ALJ may have that this Court does not possess. As noted in the District's opening brief, the ALJ's decision was not a decision regarding educational policy and, therefore, is entitled to no deference on that ground.

Further, the ALJ does not have greater experience than this Court in educational matters. The Parents confuse the ALJ with "school authorities," when they state that courts should not substitute their own notions of educational policy for those of the school authorities which they review.<sup>6</sup> The order at issue in this case was issued by an ALJ from the Office of Administrative Hearings ("OAH"), operating on behalf of the Office of Superintendent of Public Instruction ("OSPI"). Because OSPI is an administrative agency of the State of Washington, this Court's review of the ALJ's decision is governed by the Administrative Procedures Act ("APA").<sup>7</sup>

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<sup>6</sup> Brief of the Appellees at 22.

<sup>7</sup> *Frazier v. Superintendent of Pub. Instruction*, 106 Wn.2d 754, 756, 725 P.2d 619 (1986).

An agency's interpretation of a statute or regulation is reviewed under the "error of law" standard.<sup>8</sup> The "error of law" standard permits an appellate court to substitute its own interpretation of a statute or regulation for that of the agency.<sup>9</sup> A court need only give deference to an agency's interpretation of a statute or regulation if the statute or regulation falls within the realm of the agency's expertise.<sup>10</sup> The OAH is an independent agency and it is not OSPI. ALJ Shave and the OAH are not OSPI, and the ALJ's interpretation of the regulations of OSPI is not the interpretation of that agency and therefore is not entitled to any deference. Since ALJ Shave has no particular expertise in the realm of OSPI, this Court is free to substitute its own interpretations of the applicable special education laws in place of those of the ALJ.

B. The Parents Did Not Meet Their Burden of Proof at the Administrative Hearing

As provided in the District's opening brief, the Parents have challenged the IEP put in place by the District, which included the District's decision that A.D. did not need ESY. Pursuant to the U.S.

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<sup>8</sup> *Cobra Roofing v. Labor & Indus.*, 122 Wn. App. 402, 409 (2004); *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 695 (1990).

<sup>9</sup> *Cobra Roofing*, 122 Wn. App. at 409; *St. Francis*, 115 Wn.2d at 695.

<sup>10</sup> *See Cobra Roofing*, 122 Wn. App. at 409.

Supreme Court's decision in *Schaffer v. Weast*,<sup>11</sup> the burden of proof in administrative hearings is upon the party challenging the IEP. As the party challenging the IEP in this case, the Parents bore the burden at the hearing, but failed to meet it.

**No "Extensive ESY Service History" Existed.** The District's opening brief discusses in great detail the Parents' failure to meet their burden of proving that A.D. required ESY services. Despite the Parents' contention, it was far from "abundantly clear"<sup>12</sup> that A.D. needed ESY services. There was no "extensive ESY service history"<sup>13</sup> for the District to review or "accept" for A.D. The Parents presented no concrete evidence at the hearing that showed that A.D. ever had a *need* for ESY in the past. A.D. seemed to have received summer services in California, but no evidence showed that he in fact *needed* those services to address problems with regression and failure to recoup. The testimony from Ramona Unified School District employee Eileen Highley showed that *no* Ramona personnel had ever determined on an individualized basis that A.D. actually required ESY in order to obtain

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<sup>11</sup> *Schaffer v. Weast*, 126 S.Ct. 528, 163 L. Ed. 2d 387 (2005).

<sup>12</sup> Brief of the Appellees at 14.

<sup>13</sup> Brief of the Appellees at 40.

an appropriate education.<sup>14</sup> Instead, A.D. was simply given such services as a matter of course because a certain portion of his school day was spent in special education classes.<sup>15</sup> In fact, no evidence was presented by the Parents about whether A.D. had any regression/recoupment difficulties, when A.D. actually attended any ESY program, the content of any such ESY program, or how any such ESY program helped A.D. obtain an appropriate education. A.D. did not even attend an ESY program in the summer of 2004, immediately before his enrollment in the District.<sup>16</sup> Thus, there was no relevant information provided by the Ramona Unified School District, and certainly no “extensive ESY service history,” that could have assisted the District in its decision about whether to provide A.D. with ESY.

**No Social or Behavioral Issues Existed in A.D.’s IEP.** The Parents criticize the District for failing to inquire into A.D.’s need for ESY based on his “identified social, emotional, and behavioral deficits.”<sup>17</sup> However, the purpose of ESY is to further the goals in a

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<sup>14</sup> CP 725:23 – 726:6.

<sup>15</sup> *Id.*

<sup>16</sup> CP 798:16-22.

<sup>17</sup> Brief of the Appellees at 42.

student's IEP,<sup>18</sup> and prevent significant regression and slow recoupment in relation to those goals. There were no social, emotional, or behavioral deficits in A.D.'s IEP and no related goals, other than one possibly related goal of his need to improve "school adjustment" skills.<sup>19</sup> At the hearing, the Parents provided no testimony from qualified witnesses regarding A.D.'s alleged social issues. The Parents cite to testimony from various teachers and school administrators, but provided no testimony from a professional versed in analyzing a student's social, emotional, or behavioral deficits.<sup>20</sup> The Parents could have asked A.D.'s counselor at New Horizon, Christopher Evans,<sup>21</sup> to provide testimony at the hearing regarding any social issues A.D. may have had; but they did not. Without testimony by Mr. Evans or another counselor of A.D., there was no evidence presented at the hearing to support the Parents' current assertion that A.D. needed ESY due to some alleged social and behavioral issues.

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<sup>18</sup> 34 C.F.R. § 300.309; WAC 392-172-163.

<sup>19</sup> CP 225, Petitioner's Ex. 8 at 5; CP 414, District Ex. 1 at 9.

<sup>20</sup> The Parents cite to testimony from Eileen Highley (Ramona's Director of Pupil Services), Duane Smalley (general education teacher at New Horizon), Elena Tsaregordtseva (general education teacher at New Horizon), and Marla Veliz (CEO of New Horizon). Brief of the Appellees at 42, fn. 158. However, not one of these individuals is a witness qualified to diagnose or even assess A.D.'s social, emotional, or behavioral deficits.

<sup>21</sup> Mr. Evans was included on the Parents' witness list for the hearing, but they chose not to call him as a witness. CP 136 (Petitioners' List of Witnesses).

**A.D. Did Not Suffer Serious Regression.** The Parents erroneously claim that the District failed to properly undertake any meaningful action with respect to the evaluation and assessment of A.D.'s regression potential after an extended break.<sup>22</sup> This is patently false. As was clearly shown by A.D.'s grade reports and witness testimony, he suffered no significant regression over his spring and summer breaks.<sup>23</sup> Most telling was A.D.'s progress report from New Horizon reflecting A.D.'s grades after a long summer break away from school.<sup>24</sup> That September 22, 2005 progress report was provided at the hearing by the District as evidence that A.D. showed no significant regression from his performance at the end of the prior school year. The Parents provided no rebuttal evidence or any evidence whatsoever to show that A.D. did regress during his breaks, let alone any evidence that he failed to recoup at a reasonable pace.

**The District Actively Sought Information from New Horizon and Ramona.** The Parents also claim that the District failed to seek any meaningful input from A.D.'s teachers in the Ramona School District in

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<sup>22</sup> Brief of the Appellees at 15.

<sup>23</sup> CP 486, District Ex. 14 at 1; CP 658:17 – 660:3; 525, District Ex. 16; CP 660:4 – 661:9; CP 900:12 – 902:2.

<sup>24</sup> CP 658:17 – 660:3; 525, District Ex. 16.

California or from his teachers at New Horizon.<sup>25</sup> This assertion is utterly false and contradicted by the record. As described in great detail in the District's statement of facts in its opening brief, the District engaged in repeated and persistent attempts to obtain input from A.D.'s former school district in California and from the teachers at New Horizon.<sup>26</sup> No information to support A.D.'s need for ESY was provided. The reason the record lacks information to support A.D.'s need for ESY services is not because the District failed to seek it out, but because no such information exists. If such evidence did exist, the Parents obviously would have offered it into evidence during the hearing to meet their burden of proof, but they did not. Therefore, the District determined that A.D. did not qualify for ESY services because there was no information to support ESY, despite the District's attempts to obtain such information.

**The District Addressed ESY in Its Initial Evaluation Report.**

In its brief, the Parents also mischaracterize the proof provided at the hearing. The Parents claim that the District only addressed ESY *after* the Parents and the New Horizon staff "began to inquire" about ESY for

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<sup>25</sup> Brief of the Appellees at 20.

<sup>26</sup> Brief of Appellant at 7-16.

A.D.<sup>27</sup> This is a clear misrepresentation. The District provided a March 2005 Evaluation Report for A.D., which stated that no ESY services were needed at the time.<sup>28</sup> It was at that time that the Parents expressed disagreement about A.D.'s ESY, so the District agreed to look into ESY further at an IEP meeting.<sup>29</sup> At the April 2005 IEP meeting, the District explained to New Horizon staff that it needed data from New Horizon to support the Parents' "belief" that A.D. needed ESY.<sup>30</sup> Because A.D. was only attending New Horizon and not the District, it was implicit that any information regarding A.D.'s need for ESY would have to come from New Horizon. However, no such supporting information was ever provided. The characterization that the District only addressed A.D.'s ESY *after* prompting by the Parents and New Horizon staff is completely false.

The Parents and the teachers and administrators at New Horizon may have genuinely believed that A.D. should have been provided with ESY. However, despite repeated requests during the IEP development process, no data was provided to the District to support those "beliefs."

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<sup>27</sup> Brief of the Appellees at 30.

<sup>28</sup> CP 267, Petitioner's Ex. 15.

<sup>29</sup> CP 844:3 – 846:7.

<sup>30</sup> CP 783:2 – 785:4; CP 871:17 – 873:5; CP 894:18-24; CP 610:6-20; CP 644:14 – 645:4; CP 663:22 – 665:2.

The Parents had the opportunity to prove that A.D. needed ESY at the hearing, but again failed to provide any supportive data to the ALJ, utterly failing to meet their burden of proof.

C. No ESY “Evaluation” or “Assessment” is Required Under State and Federal Special Education Laws

Throughout their brief, the Parents make reference to an ESY “evaluation” and “assessment,” which the District was allegedly required to – and allegedly failed to -- undertake to determine A.D.’s need for ESY. The Parents claim that (a) the District did not initiate an ESY “evaluation,” (b) the District did not conduct any actual tests, evaluations, or assessment of A.D.’s need for ESY, (c) the District’s psychologist had never conducted an “ESY evaluation or assessment” and was “not familiar with any of the actual assessment, test, or evaluation procedures required for an appropriate ESY determination,” and (d) these are all “components” of an ESY “evaluation.”

Despite repeated references to ESY “evaluation” and “assessment” procedures, trying to convince this Court that such procedures are mandated by special education statutes or regulations, the Parents cite not a single statute or regulation or case, nor any testimony in the record below, which describes an ESY “evaluation” or “assessment” or that any such procedure is required. The Parents fail to

provide authority, because there is NO requirement under state or federal law for any type of ESY “evaluation” or “assessment.” Instead, consistent with identical state and federal regulations governing ESY services<sup>31</sup> and as provided in the District’s opening brief, when determining whether a student needs ESY, schools should determine whether the student’s skills regress after a break from schooling, and whether it takes an unreasonably long time upon return to school to recoup those lost skills.<sup>32</sup>

The Parents cite to the evaluation procedures required to develop a student’s IEP and contend that ESY evaluations (despite their non-existence) “are held to the same standard that . . . applies to all of the other necessary ‘evaluations’ . . .” under special education laws.<sup>33</sup> The Parents believe that when determining whether a student needs ESY, a school must adopt the same procedures it uses to evaluate a student when drafting his/her IEP.<sup>34</sup> This contention misreads special education law requirements and is unsupported by any authority whatsoever. As

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<sup>31</sup> 34 C.F.R. § 300.309; WAC 392-172-163.

<sup>32</sup> *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1301 (9th Cir. 1992) (citing *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1027-28 (10th Cir. 1990)) (emphasis added).

<sup>33</sup> Brief of the Appellees at 43.

<sup>34</sup> Brief of the Appellees at 12.

described in the District’s opening brief and herein, there is no such thing as an ESY “evaluation” or “assessment.” Further, there is no authority, despite the District’s exhaustive search, in state or federal statutes or regulations or in case law, for the Parents’ assertion that schools must “evaluate” a student’s need for ESY in the same manner in which it evaluates a student when qualifying him or her for special education eligibility. The Parents do not provide authority to support their argument because none exists. The Parents simply provide boilerplate language regarding special education law as it applies to evaluations and drafting of IEPs and then leap to the unfounded conclusion that the procedures therein apply to ESY determinations. The myriad of statutes and regulations cited by the Parents do not support their conclusion and instead, govern initial evaluations (to determine whether a child has a disability) and refer to requirements for drafting IEPs, not for making ESY determinations.<sup>35</sup>

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<sup>35</sup> For example, 34 C.F.R. §§ 300.500 and 300.533, cited by the Parents as support for their argument, provide procedural requirements for schools when conducting the “initial evaluation” of a student to determine (a) whether the child has a disability, and (b) the content of the IEP, as required by 34 C.F.R. §§ 300.531 and 300.532. The regulations do not state that the procedures apply to anything other than the initial evaluation and certainly do not imply that they govern ESY determinations. The same is true for the almost identical state regulations the Parents cited in support. *See* WAC 392-172-106 and -108.

In an attempt to support their assertion that the District was required to conduct some ESY “evaluation” or “assessment,” the Parents cite to various research studies in the field of special education that have identified “ESY assessment procedures,” which the Parents believe the District could have used.<sup>36</sup> However, those learned treatises or research studies were neither offered nor admitted as exhibits (or even mentioned in or provided with the Parents’ briefing before the ALJ) in the record below. The complete text of these studies has not even been provided to the Court in an appendix to the Parents’ brief. The Parents offered testimony from no witness who could have explained what these research studies mean and whether they were conducted in a scientifically valid manner. Had the Parents wanted to carry their burden of proof at the administrative hearing, they had ample opportunity to call a witness to testify about the methodology IEP teams should use to determine whether a student needs ESY, about whether such methods were used in A.D.’s case, and about which information and data provided by A.D.’s private school teachers supported the conclusion that he required ESY services. The Parents – who had the burden of proof below – did not call any such witness. Most

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<sup>36</sup> Brief of the Appellees at 41, fn. 156; 43, fn. 161 and 162.

importantly, the mere citation to research studies does nothing to support the Parents' argument that state or federal law require some ESY evaluation or assessment. The Parents' argument that these research studies should have been used by the District for A.D.'s ESY determination must be rejected. The Parents' vague references to research studies which they did not offer into evidence below should be disregarded.

The Parents also continuously cite to a *Hoelt/Johnson* ESY "test," referring to "specific criteria" apparently "adopted" by the Ninth Circuit.<sup>37</sup> However, upon closer reading of the *Hoelt* and *Johnson* cases, it is clear that there is no "test" or adopted "criteria" for determining ESY. The Parents' citation to any such "test" is pure fabrication. In the Ninth Circuit *Hoelt* case, the only question was whether the plaintiff class members, students who claimed to be denied access to appropriate ESY services, had exhausted their administrative remedies.<sup>38</sup> The *Hoelt* court did not address the merits of whether ESY was properly denied to the plaintiff class members and other than stating that ESY is provided to "prevent serious regression over the summer

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<sup>37</sup> Brief of the Appellees at 34.

<sup>38</sup> *Hoelt, supra*, 967 F.2d at 1306.

months,”<sup>39</sup> the *Hoefl* court did not discuss whatsoever any required eligibility criteria for making an ESY determination. The only holding by the *Hoefl* court regarding ESY was that administrative exhaustion is required when challenging a school’s ESY eligibility criteria.<sup>40</sup> No state or federal court has ever cited *Hoefl* as authority for an ESY “test.” Further, the *Hoefl* court’s only reference to the Tenth Circuit’s *Johnson* decision was a “[s]ee generally” citation to the *Hoefl* court’s statement that the purpose of ESY is to “prevent serious regression.”<sup>41</sup> The Parents’ assertion that the Ninth Circuit has “adopted” the “specific criteria” in the Tenth Circuit *Johnson* case, based solely upon the one “[s]ee generally” citation, is a blatant misrepresentation.

Even if this court were to “adopt” the *Johnson* case, the Tenth Circuit court does not provide any “test” with “factors” and/or

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<sup>39</sup> *Id.* at 1301.

<sup>40</sup> *Id.* at 1306.

<sup>41</sup> The entire passage from *Hoefl* which references *Johnson* is as follows:

The children of the named plaintiffs are disabled students who receive special education and related services from Tucson Unified, but who do not receive the extended school year services to which their parents believe they are entitled. Extended school year programming is educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months. *See generally Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022, 1027-28 (10<sup>th</sup> Cir. 1990) (per curiam) (discussing extended year programming purposes and eligibility criteria), *cert. denied*, 114 L. Ed. 2d 79, 111 S. Ct. 1685 (1991). Because this case is before us following dismissal on the pleadings, for purposes of our review we take as true the following factual allegations.

processes to determine ESY eligibility. The extensive citation to *Johnson* in the Parents' brief does not define any "test" or "process" or evaluation device a school must use to determine a student's need for ESY. At most, the *Johnson* court cites to the Fifth Circuit's *Alamo Heights* decision as a "broad premise" in support of the regression/recoupment analysis, not as a required "test" or "evaluation" process.<sup>42</sup> There simply is no "*Hoefl/Johnson* ESY test" or factors to apply or any "comprehensive evaluation process" provided, and all references in the Parents' brief to this non-existent "test" or "evaluation" should be rejected.

Further, there is absolutely no reasoning in the *Johnson* opinion that supports the Parents' position or the ALJ's final order. The *Johnson* court noted that the regression-recoupment standard is not the only standard that an IEP team may use to decide whether a student is eligible for ESY; other considerations such as a student's past need for ESY may also be relevant in appropriate cases.<sup>43</sup> Whether the District was bound by the reasoning in *Johnson* or not, as discussed above, the Parents presented no evidence at the administrative hearing to support

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*Id.* at 1301 (footnote omitted) (emphasis provided).

<sup>42</sup> *Johnson, supra*, 921 F. 2d at 1028 (citing *Alamo Heights Indep. Sch. Dist. V. State Board of Education*, 790 F.2d 1153, 1158 (5<sup>th</sup> Cir. 1986)).

A.D.'s past or future need for ESY or any evidence of the type discussed in *Johnson*, so their reliance on *Johnson* is entirely misplaced.

Therefore, the Parents' complaints about the District's decision-making process are simply not based on any requirements that actually exist in state or federal law. The Parents complain about the District psychologist, Cher Collins, who conducted a reevaluation of A.D. early in the school year to determine his continued eligibility for special education services and to properly classify his areas of disability.<sup>44</sup> She then participated in IEP meetings in the early spring and June of 2005 as one of many members of the IEP team.<sup>45</sup> The Parents have cited no authority that states that a school psychologist is responsible for an "ESY evaluation or assessment." Instead, the ESY regulation clearly places the responsibility for determining whether ESY is appropriate in the hands of the IEP team as a whole.<sup>46</sup> The reason Ms. Collins had never performed an "ESY evaluation or assessment" per the Parents' complaint is because no such ESY "evaluation" or "assessment" exists.

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<sup>43</sup> *Id.* at 1027-28.

<sup>44</sup> CP 859:8 - 873:6.

<sup>45</sup> CP 869:3 - 875:2.

<sup>46</sup> WAC 392-172-163(2).

There is simply no case law or state or federal statute or regulation which required the District to conduct any specific type of ESY “evaluation” or “assessment” of A.D. and all such misleading contentions in the Parents’ brief should be given no weight.

D. The Court Should Disregard the Parents’ Arguments About Issues Not Relevant to this Appeal

The Parents repeatedly complain that there was a “lengthy delay” by the District in initiating a special education evaluation for A.D., and that this delay violates the IDEA.<sup>47</sup> This alleged “delay” was not an issue to be decided upon at the hearing, so this Court should completely disregard the Parents’ arguments on this point.<sup>48</sup>

Furthermore, it is unclear exactly what “lengthy delay” the Parents are referring to. It seems the Parents are referring to a delay between the time A.D. was enrolled in the District in the fall of 2004 and its evaluation and drafting of his IEP which was finalized in the spring of 2005. However, the Parents’ argument on this alleged “delay” is disingenuous and irrelevant in this appeal. The time period to which the Parents refer relate to the settlement agreement entered into by the Parents and the District. The Parents and the District disagreed about

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<sup>47</sup> Brief of the Appellees at 26-27.

<sup>48</sup> CP 27-44 (ALJ’s order noting that the hearing would involve only those issues identified in her Prehearing Order).

A.D.'s placement and program for the 2005-2005 school year and, therefore, reached a settlement agreement in December 2004.<sup>49</sup> The agreement provided that A.D. would attend New Horizon for the remainder of the 2004-2005 school year, while the District would conduct a comprehensive evaluation of A.D. during that time.<sup>50</sup> Therefore, the District was to evaluate A.D. during the 2004-2005 school year, while he attended New Horizon, in order to be prepared to draft the IEP that would be in effect during A.D.'s 2005-2006 school year. Thus, it is unclear what "delay" the Parents now complain of.

The Parents also fault the District for failing to raise any concerns to A.D.'s parents about the adequacy of his "previous evaluations, IEPs, or ESY services by the Ramona Unified School District."<sup>51</sup> This assertion is completely irrelevant and outside of the issues before the ALJ at the hearing. Again, this issue refers to the fall of 2004 and was completely resolved by the settlement agreement entered into in December 2004. This issue was not before the ALJ and is not relevant to the issues before this Court.

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<sup>49</sup> CP 244, Petitioner's Ex. 11; CP 831:18 - 832:3.

<sup>50</sup> CP 244, Petitioner's Ex. 11.

<sup>51</sup> Brief of the Appellees at 29.

The Parents also confuse the settlement agreement with some sort of “decision” by the District to “adopt” A.D.’s previous IEP from Ramona.<sup>52</sup> The December 2004 settlement agreement is not an “affirmation” by the District of any previous IEP, nor is it indication of any “decision” by the District to “adopt” any previous IEP. It is unclear how the Parents support or justify this depiction, but it should be flatly rejected.

All of the Parents’ complaints regarding the District’s actions during the fall 2004 timeframe should be disregarded.<sup>53</sup> The no-fault settlement agreement entered into between the parties resolved all legal issues pending between them at that time, so it is inappropriate and highly prejudicial for the Parents to attempt to re-argue those now-resolved complaints before this Court on appeal. It is understandable that the Parents would seek to put these irrelevant issues before the Court, because they had no evidence to support their argument that A.D. should have received ESY services in the summer of 2005.

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<sup>52</sup> Brief of the Appellees at 31.

<sup>53</sup> Brief of the Appellees at 26-30.

III. CONCLUSION

For the reasons set forth above and in the District's opening brief, the District submits that the ALJ's Order and the Final Order of the superior court should be reversed.

DATED this 13<sup>th</sup> day of February, 2007.

KARR TUTTLE CAMPBELL

By:



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No. 35353-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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IN THE MATTER OF  
Sumner School District,

Appellant,

v.

A.D., a Minor Special Education Student, by and through his Mother and Legal  
Guardian, L.D.,

Respondent.

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CERTIFICATE OF SERVICE

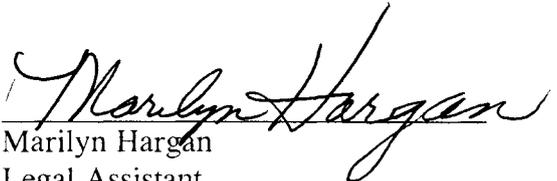
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I, Marilyn J. Hargan, hereby declare that on February 15, 2007, I caused a copy of Reply of Appellant to be served on opposing counsel by sending a true copy of same as indicated below.

Randal B. Brown Randal Brown Law Office 25913 - 163 <sup>rd</sup> Avenue SE Covington, WA 98042 Fax 253/253-630-0879	<input type="checkbox"/> Certified U.S. Mail <input checked="" type="checkbox"/> Regular U.S. Mail <input type="checkbox"/> Messenger (hand delivery) <input checked="" type="checkbox"/> Via Fax
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DATED this 15<sup>th</sup> day of February, 2007.

  
Marilyn Hargan  
Legal Assistant  
Karr Tuttle Campbell