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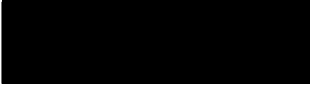
OFFICE OF ADMINISTRATIVE HEARINGS

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August 5, 2016

Parents



James F. Stevens, Executive Director of Special
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In re: **Marysville School District**
OSPI Cause No. 2015-SE-0058
OAH Docket No. 06-2015-OSPI-00110

Dear Parties:

Enclosed please find the *Corrected* Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. Despite being listed as a remedy for the District's violation of the IDEA and denial of a FAPE, reimbursement for private education at Dolan Academy was mistakenly omitted from the order section in the August 1, 2016 Findings of Fact, Conclusions of Law, and Order. Other than correcting this omission, no other changes or amends were made to the original Findings of Fact, Conclusions of Law, and Order.

Sincerely,

A handwritten signature in black ink that reads "Nicole A. Gaines Phelps".

Nicole A. Gaines Phelps
Administrative Law Judge

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

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

MAILED
AUG 05 2016
SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2015-SE-0058

MARYSVILLE SCHOOL DISTRICT

OAH DOCKET NO. 06-2015-OSPI-00110

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Nicole A. Gaines Phelps in Marysville, Washington, on February 1 – 5, 2016. The Parents of the Student whose education is at issue¹ and the Student appeared. They were represented by Kara Freel-Sparks, attorney at law. The Marysville School District (District) was represented by Carlos Chavez, attorney at law. Also present for the District was James Stevens, executive director of special education services. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (Complaint) on June 15, 2015. Prehearing conferences were held on July 13, 22, September 18, and November 19, 2015. Discovery conferences were conducted on and January 14, and 19, 2016. Prehearing orders were issued on July 14, 24, September 17, October 8, and November 19, 2015, and January 12, 2016.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a request for continuance made by the District. See Prehearing Order of July 24, 2015; see also Prehearing Conference Order of September 17, 2015. The hearing record closed with the filing of post-hearing briefs on April 25, 2016. The due date for the written decision therefore is May 25, 2016.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P1, P3-P5, P7-P8, P10-P13, P15-P44, P51, P53-P58, P60, P62-P70, P74, P76-P77, P79, and P80-P81.

District Exhibits: D1-D21, D24-D33, D35-D56.

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

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

The Mother of the Student;
Richard Cota, District school psychologist;
James Stevens, District executive director of special education services;
Dr. Leihua Edstrom, psychologist and independent educational evaluator;
Dr. Allison Brooks, psychologist and co-director of the Brooks Powers Group;
Jeanne Olson, District home hospital tutor;
Shannon Grandbois, District general education teacher;
Caryn Matz, District middle school special education teacher;
Janet Dolan, director Dolan Academy and Learning Center;
Mary Ann Walters, District speech-language pathologist;
Kim Caskey, District general education teacher; and
Karin Weissert, District special education teacher.

ISSUES

- A. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
- i. Failing to provide specially designed instruction (SDI) in areas other than math in the Student's October 2014 individualized education program (IEP);
 - ii. Failing to offer appropriate services to address the Student's anxiety in the October 2014 IEP;
 - iii. Failing to convene an IEP team meeting when the Student's placement was changed to Home Hospital Instruction on October 10, 2014;
 - iv. Failing to implement the Student's IEP while she was on Home Hospital Instruction;
 - v. Failing to consider and adopt most of the recommendations of the December 11, 2014 independent educational evaluation (IEE) in developing the Student's Amended IEP; and
 - vi. Since March 2015, failing to provide SDI in areas other than math and social cognition.
- B. Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate:
- i. Placement in a private school, to be determined at the due process hearing, paid for by the District;
 - ii. Consultation with an educational specialist to determine the Student's needs to remedy the denial of FAPE;
 - iii. Compensatory education for the period of denial of FAPE; and
 - iv. Any other equitable relief deemed appropriate by the ALJ.

See Prehearing Order dated November 19, 2015.

FINDINGS OF FACT

1. 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.

Background

2. The Student has resided in the District for twelve years. Mother Testimony.² In November 2010, at the request of the Parents, the District evaluated the Student for eligibility for special education and related services. Ex. P13. As part of the evaluation process, the District compiled information from the Student's classroom teacher and the Parents. *Id.* The Student also completed a number of assessments including: Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), Wechsler Individual Achievement Test 2nd Edition (WIAT-II), Peabody Picture Vocabulary Test-III, and the Developmental Test of Visual-Motor Integration. *Id.*

3. In summary, the evaluation revealed the Student struggled with verbal comprehension and processing speed but her reading and writing skills were within the average range. *Id.*, p. 3-10. However, her math skills were significantly lower. *Id.*, p. 10. She scored in the fourth percentile in both numerical operation and problem solving. *Id.* Cognitively, her full scale intelligence quotient (FSIQ) was 73, which is "significantly below...[the] average" range of intelligence. Cota, Tr. 330. Although the Parents noted concerns about the Student's display of anxiety and depression, her teachers did not share those concerns. Ex. P13. p. 5. Overall, despite challenges with reading comprehension and math, the evaluation report concluded the Student did not need special education or related services. *Id.*, p. 1.

4. On November 23, 2010, relying on the evaluation results, the District found the Student ineligible for special education and related services. *Id.*, p. 15.

5. In the spring of 2012, the Parents referred the Student for a psychological assessment with Tyson D. Bailey, PsyD, to determine if she suffered from any learning difficulties. See *generally*, Ex. P12. After evaluating the Student, Dr. Bailey agreed with the District's November 2010 evaluation. *Id.* While the Student's overall intelligence remained below the borderline range³ and she suffered from an anxiety disorder, not otherwise specified (NOS), her academic challenges were not significant enough to demonstrate the presence of a specific learning disorder (SLD). *Id.* He notes the Student's Everett Clinic physician evaluated the Student for Attention Deficit/Hyperactivity Disorder (ADHD) but "there was insufficient evidence to warrant a diagnosis." *Id.*, p. 1. He opined her challenges were best characterized as an anxiety disorder NOS as the problems seem mainly related to "academic performance." *Id.*, p. 4. While Dr. Bailey did not find the student qualified for special education or related services, he made a number of recommendations for accommodations, including tutoring in math and enrolling the Student in a "school that could provide individualized educational services to meet her specific needs." *Id.*, p. 5. He surmised a small school setting "may help reduce [her] feelings of anxiety about having difficulty performing at the same level as the remainder of the class." *Id.* In light of

² Testimony from the hearing record is identified by the witness's last name followed by the page number where the testimony is located in the transcript (e.g. Mother, Tr. ___) or for general references to the record (e.g. Mother Testimony). References to exhibits are identified by the party's exhibit and page number (e.g. Ex. P1 p. ___).

³ The Student's FSIQ increased to 77 from her 2010 score of 73.

Dr. Bailey's report, the parents decided that the student would remain enrolled at a small private school called Grace Academy.

6. During the Student's fifth-grade year, the Parents withdrew her from Grace Academy and began homeschooling her. *See generally*, Mother's Testimony. The Student remained in a homeschooling program until the beginning of November 2013. Mother, Tr. 134. At the Student's request, the Parent's enrolled her in the seventh grade at Marysville Middle School in November 2013. *Id.*

Fall 2013

7. The Student asked to attend a public school where she could have regular interaction with her peers and friends. Mother, Tr. 134, 140. Prior to this time, the Student never attended a public school. Mother, Tr. 141. Her educational experience consisted of the small private school setting at Grace Academy, with class sizes of 25 kids, or homeschooling. *Id.* The Parents and the District were concerned how the change from a small setting to the large public setting would impact the Student. The District decided to arrange a meeting with the Parents prior the Student's enrollment in Marysville Middle School (MMS) to discuss the Student's educational needs.⁴ Ex. D2. The meeting occurred on October 28, 2013. *Id.*

8. The Mother, Chinca Jung, special education teacher, Beth Roth, school nurse, Eneille Nelson, assistant principal, Aaron Wallis, school psychologist, and Julie Gass, a private counselor invited by the family, were all in attendance for the transition meeting on October 28, 2013. *Id.* After discussing the Student's strengths and weaknesses, the group decided to evaluate the Student for special education and related services. Additionally, in order to reduce the Student's anxiety in transitioning from the homeschooling environment to MMS, her daily school schedule would consist of first period "power period" in Ms. Jung's classroom, three periods⁵ with the same teacher, and general education classroom settings for math, science, and physical education. *Id.*

January 2014 Evaluation

9. The District convened the evaluation team meeting on January 15, 2014. Ex. P11. The Mother participated in the meeting. *Id.* At the time, the Student had been enrolled in MMS less than two full months. *Id.* Comparison of the Student's WISC-IV scores from March 2012 to December 2013⁶ showed an overall decline in all areas, including her FSIQ, which decreased to 75. Ex. P11 p. 8. The evaluation revealed below-average range scores in reading-comprehension, sentence composition, and essay composition. Ex. P11 p. 11. However, the most significant area was math problem solving and numerical operations, where the Student scored in the low range. *Id.* Indeed, at the time of the evaluation, the Student was failing her

⁴ Over 800 students are enrolled at MMS. Ex. D1. MMS has the typical middle-school environment. Throughout the day, students are expected to transition between multiple teachers and classes. *Id.*

⁵ The group agreed that Mr. Cull, a general education teacher, would instruct the Student in three subjects: literacy, social studies, and literacy lift in his general education classes.

⁶ Dr. Bailey conducted these assessments and reported the Student's scores in his 2013 report.

general education math class. Ex. P11 p. 5. In the evaluation report, the Student's math teacher noted, "I have not had her long, but I do not see evidence of much understanding in her work...but not from lack of effort." *Id.*

10. Despite the evaluation results, the evaluation team did not find the Student eligible for special education and related services. *See generally*, Ex. P11. Instead, the team decided to observe the Student's performance with a few accommodations, including placing her in the 7th grade special education classroom for math and changing her grading scale for math to a "pass/fail based on effort" for the duration of the school year. *Id.* p. 5; *see also* Ex. P10. Additionally, the evaluation team agreed to continue gathering additional information over the course of the next few months and to consider the new information at the end of the school year. *See generally*, Ex. P11 p. 14.

Other Medical Evaluations

11. In April 2014, the Everett Clinic diagnosed the Student with a chromosome disorder associated with intellectual disability and endocrine disorder (delayed growth). Ex. P27. During the same time frame, Ellyn E. Cavanagh, Ph.D., MN, ARNP, saw the Student and the Mother for a consultation concerning the additional diagnosis of ADHD. Ex. P28. In the diagnosis section of her report, Ms. Cavanagh notes the Student's diagnoses as: (1) intellectual disability; (2) genetic disorder-translocation chromosome 6-7; (3) daytime sleepiness; and (4) pragmatic language deficit. *Id.* p. 3. The Student's current medications included: Prozac (for depression); iron (for leg restlessness); hydroxyzine (as needed for anxiety); and clonidine (at night for sleep). *Id.*, p. 2.

12. On April 9, 2014, Dr. Bailey, re-evaluated the Student. *See*, Ex. P8. As part of his April 27, 2014 written report, Dr. Bailey explains the Student's:

endocrine disease...significantly affects her physical development. In addition, [her] genetic translocation on two genes [is] associated with delays in cognitive and physical development.

Ex. P8 p. 4. Based upon his re-evaluation and the Student's test scores, Dr. Bailey opined that she qualified for special education services in all of her classes under the category of emotional/behavioral disability, as well as under an intellectual disability, but did not include autism disorder. *Id.* Dr. Bailey did not interview any of the Student's teachers or any other District staff as a part of his re-evaluation. *See generally*, Ex. P8.

13. In May 2014, Kathi L. Jackson, Ph.D.⁷ also evaluated the Student. Ex. P7. Dr. Jackson's report relies on the materials from the District's prior evaluations; Dr. Bailey's two evaluation reports; Ms. Cavanagh's reports; the Student's medical records from the Everett Clinic; the Student's prior psychiatric records and interviews with the Mother and Student. *Id.*, p. 1. In summary, Dr. Jackson opined the Student's behaviors and symptoms meet the criteria for autism spectrum disorder (ASD), in addition to the other previous diagnosis as outlined in

⁷ Dr. Kathi L. Jackson is a clinical psychologist with a private practice in Everett, WA. *See generally*, Ex. P7.

Dr. Bailey's evaluations. *Id.*, p. 7. Like Dr. Bailey, she too recommended the Student receive special education and related services in all subject areas. *Id.* However, her report appears to be based solely upon a record review and her interview of the Student and the Mother. No new assessments or class observations are mentioned. *See generally*, Ex. P7

14. On August 13, 2014, Dawn L. Earl, ARNP,⁸ examined the Student following Dr. Jackson's ASD diagnosis. Ms. Earl's report notes the Student's current diagnoses as borderline intellectual disability, behavioral issues, oppositional-defiant disorder, anxiety, ADHD, exotropia, vision processing issues, gastroesophageal reflux disease, growth hormone deficiency and balanced translocation involving chromosomes 6 and 7 (also known as Russell-Silver Syndrome). Ex. P24 p. 4; *see also*, P5. Ms. Earl specifically notes individuals with "Russell-Silver Syndrome can have learning differences." *Id.*, p. 5.

15. In May 2014, Cathy Jackson, MD, at the University of Washington's Division of Developmental Medicine, Department of Pediatrics, formally evaluated the Student for behaviors consistent with ASD. Ex. P20 p. 1. Her findings were included in the written report issued by Dr. Emily F. Myers.⁹ *Id.*, p. 3. Both Dr. Cathy Jackson and Dr. Myers concurred with Dr. Kathi Jackson's diagnosis of ASD. *Id.*, p. 1.

16. The Mother sent the Student's medical reports to Aaron Wallis¹⁰ via email on August 30, 2014, in preparation for the upcoming IEP meeting. Ex. P17. At the time, the Mother was unaware that Mr. Wallis no longer worked for the District and that no one was reviewing his email account. Mother, Tr. 139; *see also*, Stevens, Tr. 354-355.

Student's Academics Spring Quarter 2014

17. The Student's standardized test scores during the 2014 Spring Quarter improved from her 2013 Winter Quarter tests scores. *See generally*, Exs. P57-P64. Her final grade report consisted of two A's (language arts and literacy lift); one B (social studies); one D (math); and two F's (science and physical education). *See generally*, P53. The Mother expressed frustration that the Student's grades in her language art, literacy lift and social studies classes were not a true reflection of her academic abilities because of the inclusion of participation points in calculating her final grade. Mother, Tr. 91-92; *see also generally*, Ex. P53 and Ex. P24 p. 1.

⁸ Ms. Earl is employed by Seattle Children's Hospital. She specializes in genetics. *See generally*, Ex P24 p. 5.

⁹ Dr. Myers is the Attending Physician at Seattle Children's Hospital, Neurodevelopment Department. *See generally*, Ex. P20 p. 3.

¹⁰ Aaron Wallis worked as the District's school psychologist during the 2013-2014 school year. During that timeframe, Mr. Wallis served as the Mother's point of contact regarding the Student's IEP and IEP team intervention for the school year.

September 2014 Evaluation and IEP Meetings

18. The District convened an evaluation team meeting with the Parents on September 11, 2014. Ex. D2. At the meeting, the evaluation team considered School Psychologist Richard Cota's evaluation report.¹¹ *Id.* The evaluation report considered information gathered from prior evaluations, assessments, including behavioral assessments, and standardized academic testing. *Id.*, p. 24. Additional and more recent information was provided by Children's Hospital Neurodevelopment Clinic; Dr. Bailey's April 27, 2014 re-evaluation report; Ms. Cavanagh's progress notes; Dr. Kathi Jackson's evaluation report; the Student's recent test results; academic grades; and data collected from classroom observations by her teachers. See generally, Ex. D2 p. 2.

19. The evaluation report specifically identifies the Student's medical diagnoses as: intellectual disability; genetic disorder-translocation of Chromosomes 6-7; daytime sleepiness; pragmatic language deficit, and ADHD. *Id.*, p. 21. As a result of the evaluation, the team found the Student eligible for special education and related services under the other health impairment category (OHI). Ex. D2 p. 3. Given the complexity of the Student's "different medical diagnoses...the health impairment category seemed to be [more] appropriate" than ASD, but the team did discuss the ASD diagnosis. Cota, Tr. 287; Stevens, Tr. 356-357; Matz, Tr. 796. The team determined the Student needed specially designed instruction in mathematics, but her educational needs for writing and reading were currently being met through her general education classes with appropriate accommodations. Ex. D2 p. 3.

20. In the Fall of 2014, following confirmation of the ASD diagnosis, the Student began private therapy with Lindsay K. Beard, LMHC, CMHS. Ex. P4. Ms. Beard opined the Student's school-related anxiety was manifesting through her refusal to attend school and to complete her school work. *Id.* On September 29, 2014, Ms. Beard issued a written report expressing her opinion. *Id.*

21. The District invited the Parents and other members of the IEP team to attend an October 1, 2014 IEP meeting. Ex. P44. Prior to the IEP meeting, the District sent the Parents a draft copy of the proposed IEP. Ex. P44. It is unclear if Ms. Beard's written report was considered in preparing the draft copy of the IEP.

22. At the meeting, the IEP team adopted the evaluation team's recommendations finding the Student eligible for specially designed instruction in math. Ex. D4 p. 6. The IEP expresses concerns regarding the ongoing decline in the Student's math abilities. Indeed, her 8th grade math teacher noted:

[a]cademically in my class so far I feel like this is way over her head...looking at her prior MAP scores she is multiple (4-5 years) behind. She will definitely need modified instruction to keep it from being overwhelming.

¹¹ Prior to leaving employment with the District, Mr. Wallis completed the majority of the background work for the evaluation report. Following Mr. Wallis's departure, Mr. Cota became the District school psychologist. Mr. Cota presented the evaluation report and led the evaluation team discussion. Cota, Tr. 281, 338-339.

Ex. D3 p. 5. During the IEP meeting, the Parents expressed their ongoing concerns with the Student's behavior problems at home, including the Student's refusal to attend school. Mother Testimony; *see also*, Cota, Tr. 343. However, although the Student's teachers noted her frequent absenteeism, none of the teachers indicated any behavior problems at school. *See generally* Ex. D3; *see also*, Cota, Tr. 332-333.

23. The Student's final IEP provided that beginning October 6, 2014, the special education staff would provide her 55 minutes of specially designed instruction in math four times per week and another 30 minutes of specially designed instruction in math one time per week, for a total of 250 minutes of SDI per week. *Id.*, p. 12. The IEP does not state whether the SDI would be provided in a 1:1 setting. According to Ms. Matz's testimony, it appears the IEP team contemplated providing the Student services in a small-group setting within the special education classroom. *See generally*, Ex. D3 p. 12. All of the Student's other instruction would continue in the general education classes with appropriate accommodations. *Id.* At the time, the Parents were exploring the option of Home Hospital Instruction (HHI) for the Student. *Id.* p. 15; *see also*, Matz, Tr. 782.

Home Hospital Instruction

24. Home Hospital Instruction (HHI) is a program which allows a student with significant medical issues to continue receiving educational services at home on a temporary basis. Ex. D10 p. 1; *see generally*, Stevens, Tr. 363-364; *see also* Matz, Tr. 782. The State of Washington, not the District, sets the guidelines for HHI. Ex. D10 p. 1; *see generally*, Stevens, Tr. 363-364. Students participate in the program on a temporary basis ranging from four to eighteen weeks. Stevens, Tr. 364. The District has no discretion in whether to approve HHI. *Id.*, Tr. 365. Once a student's treating physician submits the appropriate paperwork for HHI, the request is granted. *Id.*; *see generally*, Ex. D4 p. 1.

25. Shortly after the October 1, 2014 IEP meeting, on October 8, 2014, the Student stopped attending MMS and began HHI. Matz, Tr. 782; Mother, Tr. 104; *see also*, Ex. P5 p. 16. At the time, the Parents felt this was needed to address the Student's heightened anxiety level, which in part was manifesting in the Student refusing to go to school. Mother, Tr. 104, 242; *see also*, Cota, Tr. 323-324. The Student remained in HHI until February 2015. Olson, Tr. 722; Mother, Tr. 180, 224-225. Initially, the Student was approved for only two weeks of HHI. Ex. D5 p. 16; Cota, Tr. 293. However, based upon the treating physician's request, the initial approval was extended twice. *See generally*, *id.*; *see also*, Matz, Tr. 803.

26. While on HHI, two different tutors provided the Student's instruction. Matz, Tr. 784; *see also* Mother, Tr. 170, 180. The first HHI tutor stopped working with the Student after a few weeks. *Id.* In November 2014, Janet Olson began working with the Student. Olson, Tr. 722.

27. Ms. Olson has worked as an educator with the District since 1982. Olson, Tr. 720. Her career includes working at the elementary school level for fifteen years, the middle school level for twelve years and two years at the high school level in general education and as a librarian. *Id.* She does not have a special education endorsement. *Id.*, p. 721.

28. Ms. Olson worked with the Student for two hours¹² each week at the public library in Marysville. Olson, Tr. 723. The time had to be divided between all of the Student's school work and subject areas. Olson, Tr. 725, 745; Matz, Tr. 784. As the liaison between the Student and her teachers, Ms. Olson obtained the Student's assignments from the MMS teachers. Following the weekly HHI sessions, Ms. Olson sent the Student's MMS teachers progress notes via email regarding the Student's work product. Olson, Tr. 726; Matz, Tr. 784; *see also*, Exs. D9 and D17.

29. During the entire period HHI, the Student was eligible for SDI in math--specifically 250 minutes of SDI in math per week. Matz, Tr. 801; Ex. D3 p. 12. Additionally, in her September 17, 2014 Physical Therapy Evaluation, Heidi Sanford, an independent physical therapist hired by the Parents, recommended a number of accommodations to assist the Student with sensory deprivations and other learning challenges. *See generally*, Ex. P5 p. 5. While on HHI, the Student's special education math teacher, Caryn Matz, was responsible for monitoring the Student's progress through the work assignments she provided the Student's HHI tutor. Stevens, Tr. 422-423; Olson, Tr. 726, 748-750; Matz, Tr. 801.

30. Ms. Matz also served as the Student's special education case manager and was responsible for overseeing the Student's IEP. Matz, Tr. 779. This included serving as the "main contact person for anything that [had] to do with the Student's IEP." *Id.* However, other than reviewing the emails and providing math work related to the Student's IEP math goals, Ms. Matz provided no supervision over the methodology used during the Student's HHI. Matz, Tr. 784; 801-802; 807-808.

31. Although the Student's IEP required 250 minutes of SDI per week in math, the District failed to provide any SDI to the Student while she participated in HHI. *Id.*; *see also*, Matz, Tr. 795-796. Instead, Ms. Olson, who is not a certificated special education teacher, structured the tutoring session in accordance with what she thought would best serve the Student's learning needs. Olson, Tr. 750.

32. Based upon her educational training, Ms. Olson estimated the Student's reading level was significantly below her same-age peers. Olson, Tr. 734. At best, she thought the Student was reading at a 6th grade level. *Id.* The Student's reading deficiencies were evident across all academic areas, including written expression and science. Olson, Tr. 744-747; *see also*, D17.

33. The Student's lack of instruction a part from the two hours per week of HHI further exacerbated her learning deficiencies. Although Ms. Olson provided the Student with specific and detailed homework lists, "nothing would come back done...her comment over and over was 'I go to my room' [and read]." Olson, Tr. 753-754. Indeed, work completed outside of HHI tutoring "became nonexistent." Olson, Tr. 756. When asked why, the Mother responded, "we're so busy, we're going to all these different places." Olson, Tr. 757. However, according to the Mother, she tried to work with the Student on assigned homework but the Student refused to do it. Mother, Tr. 226.

¹² The State of Washington sets the maximum amount of HHI at two hours per week. Stevens, Tr. 364; *see also*, Ex. D10.

October 8, 2014 IEP

34. After the Student entered HHI, the District attempted to reconvene the IEP team to discuss amending the Student's IEP. See generally, Exs. D5, D11 and D13. A meeting never took place. *Id.* Instead, Ms. Matz prepared an Amended IEP for the Student dated October 8, 2014. *Id.* Ms. Matz then met individually with the District staff members of the Student's IEP team who had been "involved with the Student's education." Matz, Tr. 783. With the Student's Amended IEP in hand, she spoke with the individual IEP team members about the reason for the amendment—the Student would not be attending school because she was in HHI. *Id.* After Ms. Matz "reviewed the document with [each individual], and they signed [the IEP]." *Id.* The amended IEP was signed by Ms. Matz, Mr. Cota, a general education teacher and a representative from the District. Ex. D5 p. 3.

35. The Parents were not participants in this process. Ex. D5, P. 4. The Parents did not receive a copy of the Amended IEP until the Mother requested a copy via email on October 13, 2014. Ex. D7 p.1; see also, P43.

36. The Amended IEP, dated October 8, 2014, provided the Student with 250 minutes per week¹³ of SDI in math and no general education instruction from October 8, 2014 to February 10, 2015 (while the Student received HHI). Ex. D5 p. 13. Upon returning to school, the Amended IEP provided 250 minutes per week of SDI in math, with the remaining subjects in a general education setting from February 10, 2015 to October 5, 2015. *Id.* The Amended IEP included the following accommodations and modifications:

Accommodation/Modification	Frequency	Location	Duration
Access/Use of the following: calculator	as needed	Math and Science	10/08/2014-10/05/2015
Access/Use of the following: visual aids	as needed	Instructional Setting	10/08/2014-10/05/2015
Access/Use of the following: manipulative materials	as needed and requested	Math and Science	10/08/2014-10/05/2015
Access/Use of the following: word processor/computer	as needed	Instructional Setting	10/08/2014-10/05/2015
Content Area: allow extra time to respond	as needed	Instructional Setting	10/08/2014-10/05/2015

¹³ Ms. Matz testified that including any SDI in the Amended IEP was a mistake. She testified, the provision for 250 minutes of SDI should *not* have been included because the Student was ineligible for SDI while receiving HHI. Matz, Tr. 795.

Content Area: break material into manageable parts	as needed	Instructional Setting	10/08/2014-10/05/2015
Content Area: preferential seating	daily	Instructional Setting	10/08/2014-10/05/2015
Content Area: check work frequently to ensure understanding	daily	Instructional Setting	10/08/2014-10/05/2015
Content Area: difficult assignments to be completed in resource room	as needed	Instructional Setting	10/08/2014-10/05/2015
Content Area: provide a copy of the notes/study guides	as needed and as requested by Student	Instructional Setting	10/08/2014-10/05/2015
Testing Accommodations: Presentation Accommodation: [Reading/Math/Science/Writing] Read Aloud Tools: Human Readers (Text to Speech Software/Technology may NOT be used for Reading the Reading Test in Grades 3-8)	at Student request and according to WA St. Accom. Guidelines	Testing site	10/08/2014-10/05/2015

Ex. D5 p. 9. The Amended IEP stated the Student's reading and writing needs were:

currently being met in the general education environment with general education supports and interventions.

Id., p. 7. As of October 8, 2014, the Student's teachers agreed that for the short time during which she had attended MMS, she was making academic progress in all of her classes with support and intervention techniques. *Id.* No behavior issues were noted but her frequent absences raised concern that she would "fall behind in class." *Id.*, p. 6.

January 12, 2015 Independent Education Evaluation (IEE)

37. On September 25, 2014, the Parents requested the District provide an IEE at public expense. Ex. D4 p. 1. The District agreed and provided the Parents a list of possible professionals who could conduct the IEE. *Id.*; see also, Ex. D8. Dr. Leihue Edstrom was selected. See generally, Ex. D6 p. 2.

38. Dr. Leihua Edstrom is a school neuropsychologist. Edstrom, Tr. 456. She has a Ph.D. in educational psychology with a specialization in school psychology. *Id.* She also has a Diplomate in school neuropsychology. *Id.* She has training as a school psychologist and worked in that field for eleven years. *Id.*, see also, Edstrom, Tr. 539. As a school psychologist,

she received "training in assessment, in evaluation [and] in counseling." *Id.*, p. 456. She is currently employed as a faculty member at Northwest University as a professor of psychology. *Id.* She also maintains a private practice at Neuropsychology Associates in Mill Creek, Washington. *Id.*

39. Dr. Edstrom began evaluating the Student on October 23, 2014. Ex. D12. She completed her written report on December 11, 2014. *Id.* She presented her report to the District and the Parents at an IEE meeting on January 12, 2015. See *generally*, Ex. D13 and D14.

40. In preparing her written report, Dr. Edstrom considered: the District's prior evaluations and assessments (2010-forward); Dr. Tyson Bailey's two psychological evaluations (3/8/2012 and 4/27/2014); the reports of Dr. Kathi Jackson (May 2014); reports from the Neurodevelopmental Clinic at Seattle Children's Hospital (6/4/2014 and 9/11/2014); the Student's Seattle Children's Hospital records; information and numerous chart notes from Nurse Practitioner Ellyn Cavanagh from Everett Clinic; Heidi Sanford's physical therapy evaluation (9/17/2014); Lindsay Beard's accommodation recommendation letter (11/20/2014); and information from interviewing the Parents, the Student, Mr. Cull, and Ms. Jung. See *generally*, Ex. D12 p. 5; see *also*, Edstrom, Tr. 520, 522-523. Dr. Edstrom also administered additional diagnostic assessments during her evaluation of the Student. *Id.*; see *also*, Edstrom, Tr. 462. To insure consistency, Dr. Edstrom limited the Student's testing sessions to no more than 90 minutes at a time. Edstrom, Tr. 495.

41. In summary, Dr. Edstrom opined the Student has significant learning challenges. The Student's reading and writing fluency are not as developed as that of her typically developing peers. Ex. D12 p. 29. She has "deficits in her general learning and memory processes...her rate of learning and retaining new material is therefore much slower than others her age." *Id.*, see *also*, Edstrom, Tr. 469. She "also exhibits executive function delays in concepts recognition, problem solving, and reasoning." *Id.* Additionally, she has "deficits in megacognitive skills...which cause her difficulty in approaching classroom assignments and completing them accurately and in entirety." Ex. D12 p. 29-30. This causes "profound limitations in working memory that further impede her ability to engage effectively in academic lessons." *Id.*, p. 29. Furthermore, her:

intellectual functioning tested at the lower end of the borderline range...her academic achievement lags far behind others of her age...[d]espite average basic reading skills [she] struggles to comprehend what she reads. [Her] overall global functioning testing is nearly two standard deviations below the mean...[She] meets the diagnostic criteria for Generalized Anxiety Disorder.

Id., p. 30; see *also*, Edstrom, Tr. 465, 474. Dr. Edstrom opined the Student also met the diagnostic criteria for ASD. *Id.* Based upon her findings, Dr. Edstrom recommended the Student receive special education services and accommodations to address the adverse impact on her educational achievement and progress due to her disabilities. Ex. D12; see *also*, Edstrom, Tr. 470, 564.

42. Dr. Edstrom noted that the difference between the Student's friendly demeanor and active engagement with peers at school but aggressive behavior at home was not unusual. She

noted, in her experience, "students with anxiety can often look together or look like they are keeping it together at school...but then at home have a complete meltdown." Edstrom, Tr. 646. Accordingly, Dr. Edstrom:

there may be particular courses or activities that she may be successful in and enjoy and adjust well to in a general education setting. However, the academic expectations [and rigors that academically focused course work generate] the most anxiety for her.

Edstrom, Tr. 649.

43. In her written report, Dr. Edstrom recommended providing the Student SDI in all academic courses; social and emotional skills; executive functioning and organizational skills and adaptive skills. Ex. D12 p. 30-31. She also provided an extensive and detailed list of teaching strategies and accommodations the Student needed to succeed. *See generally, Id.*, p. 30-33. In terms of the Student's classroom needs, Dr. Edstrom recommended placement in a small classroom with a "greater adult to student ratio" and the ability to have individualized academic instruction when needed. *Id.* She also suggested providing the Student with accommodations to address the Student's sensory and anxiety needs. *Id.*, p. 31.

44. In light of these recommendations, Dr. Edstrom opined that with appropriate support, the Student could succeed in a public school environment. *See generally, Edstrom, Tr. 649-651.* The Student would need SDI in all of her academic classes with a program adapted to her need for presentation of small segments of information at a time. *Id.* However, the schedule should include the ability to interact with her "typically-developing peers at lunch, during sport activities, et cetera." *Id.*, Tr. 651. Because the Student has high anxiety related to school performance, her success would need to include "tiered structure [in the high-school setting] having a few classes, slowly building up to a longer and longer day." *Id.*, Tr. 653. Her IEP team will need to "think out of the box to design a program that meets her needs, not fit her into a pre-existing program." *Id.*

Dr. Brooks's Review of Dr. Edstrom's IEE

45. The District hired Dr. Allison Brooks to review Dr. Edstrom's report and recommendations. Dr. Brooks previously served as the Director of Professional Training for the Autism Center at the University of Washington. *See generally, Ex. D52.* She is qualified to diagnose numerous disorders including learning disabilities, anxiety disorders, neurodevelopmental disorders, and autism. Brooks, Tr. 657-658.

46. Dr. Brooks reviewed Dr. Edstrom's IEE, the supporting reports and the evaluations of Dr. Jackson and Dr. Bailey. Dr. Brooks noted concerns with the methodologies used by Dr. Edstrom and Dr. Bailey in diagnosing the Student with ASD. ¹⁴ *See generally, Brooks, Tr. 676-*

¹⁴ The District disagrees with the Student's ASD. However, it is undisputed that the Student is eligible for special education and related services under the category of OHI. Therefore, the undersigned does not need to address whether the Student is autistic.

678, 680-681. However, she agreed the Student's significant anxiety disorder made diagnosing her "tricky" because it is not always displayed in every setting. Brooks, Tr. 688. She stated:

[a]nxiety is really a common factor in school refusal...it's not unusual for [a student] to hold it together...look good and functional in a school setting and then sort of have all of their resources depleted by the time they get home and be exhausted.

Brooks, Tr. 689-690. The Student's anxiety disorder in combination with her other medical issues make her a "very complex" situation when it comes to diagnosis. Brooks, Tr. 695. In spite of the Student's high anxiety levels, learning challenges, and low average IQ, Dr. Brooks opined that with substantial accommodations and modifications she could participate in a general education classroom setting. Brooks, Tr. 702.

February 5, 2015 IEP Meeting

47. Prior to the Student's return to school from HHI, the IEP team met to discuss "next steps." Ex. D16. It was decided, in light of Dr. Edstrom's report, that the Student would be evaluated in the area of communication. Stevens, Tr. 384-385; see *generally*, Ex. D19. In the meantime, the Student returned to school on a half-day schedule. See *generally*, Ex. D20.

February 23, 2015 Re-Evaluation Meeting

48. District Speech-Language Pathologist MaryAnn Walters completed an evaluation of the Student's communication needs in February 2015. See *generally*, Ex. D21. The evaluation included review of the prior evaluations, assessments, Dr. Edstrom's IEE and input from the Student's current teachers.¹⁵ *Id.* In her written evaluation report, Ms. Walters summarized that in the classroom setting, the Student:

demonstrated appropriate...communication...appeared on task...while following routines and teacher's instructions. She initiated a conversation with a peer when she did not understand part of the task. The Student's teachers report no significant concerns with communication...[she] can express her thoughts adequately, given time to process what she needs to say. [She] appears to be reconnecting with school culture.

Ex. D21 p. 7. No behavior concerns were noted by teachers. Indeed, Ms. Grandbois¹⁶ observed that although the Student would sometimes exhibit nervous behaviors, such as rocking, those nervous behaviors would disappear "the longer she was in class." Grandbois, Tr. 766. For instance, if she attended class multiple days in a row, the behaviors stopped. *Id.*

49. Regarding the results of the Student's communication evaluation, Ms. Walters opined,

¹⁵ At the time, the Student had returned to MMS for less than two weeks.

¹⁶ Shannon Grandbois was the Student's language arts and social studies general education teacher at MMS during Spring Quarter 2014.

[b]ased on standardized testing performed by Ms. Walters, informal observations, and teacher reports, [the Student] does not meet eligibility criteria in the area of communication. [The Student] does not demonstrate significant deficits in social communication in the 1:1 setting, or in the classroom environment. While pragmatic evaluation revealed areas of relative strength and need, [the Student] presented with functional and adequate communication when compared with children her age. Recommendations for classroom performance include pre-teaching new concepts, modifying task demands, linking new concepts to known information and clarifying new concepts with a variety of models. [The Student] may also benefit from organizational supports and teaching strategies for attention to task and completion.

Id. Based upon this information, the team agreed to find the Student eligible for SDI in social cognition. *Id.*, p. 10. Her eligibility category remained OHI. *See generally*, Ex. D24.

March 2015 IEP Meeting

50. After the February re-evaluation meeting, the team reconvened on March 19, 2015, to address amending the Student's IEP. *See generally*, Exs. D26, D27. The Parents both appeared. *Id.* At the meeting, the team agreed to continue the Student's SDI in math and the associated goals but to also include social pragmatic skills as a new area of SDI along with an accompanying annual goal of reading social cues. Ex. D27 p. 7, 9. The Team did not include SDI in other academic areas. *Id.* The team also considered the information and recommendations as outlined in Dr. Edstrom's IEE. *Compare* Ex. D12 with Ex. D27. The Student's accommodations and modifications were revised as well to include the following:

Accommodation/Modification	Frequency	Location	Duration
Access/Use of the following: use of fidgets	as needed	all classes	03/19/2015- 10/05/2015
Access/Use of the following: use of reading tracking guide tool	as needed	all classes	03/19/2015- 10/05/2015
Content Area: reduce length of assignments, student must still demonstrate knowledge of content/strand (sic) requirements	as needed	instructional site	03/19/2015- 10/05/2015
Content Area: student has a designated area to go to for frequent breaks	as needed and/or requested do (sic) to eye fatigue and/or anxiety	to be located in the classroom or hallway	03/19/2015- 10/05/2015
Content Area: give short, concise directions	daily	instructional setting	03/19/2015- 10/05/2015

Extra time to complete assignments	daily	all classes	03/19/2015-10/05/2015
Testing Accommodations: Setting Accommodation: Separate Testing Location (Non School Based) for Home Based, Hospital or Other Unique Testing Location	as requested	testing site	03/19/2015-10/05/2015
Testing Accommodations: for only calculator approved items	during tests	testing site	03/19/2015-10/05/2015

Ex. D27 p.10-11. The additional modifications and accommodations were included at the request of the Mother. Ex. D28. At the time, the Student's teachers reported the Student was doing "great" in her general education classes with appropriate modifications and accommodations. See generally, Ex. D25; see also, Grandbois, Tr. 770-771. However, her frequent absences continued impacting her work quality, and her ability to complete assignments and retain concepts. See generally, Grandbois, Tr. 773-776.

51. Despite the Amended IEP dated March 2015, the Student continued intermittently refusing to attend school. Ex. D29. Her medical professionals adjusted her medications to include increased doses of sertraline and abilify for anxiety and depression. Ex. P36. The Parents reengaged Lindsay Beard for bi-weekly counseling sessions. Ex. D30.

Transition to High School

52. In preparation for the Student's transition to high school, the District initiated a meeting between the Parents, the Student's MMS IEP team, and the high school staff to determine the correct placement for the Student, and what changes were needed for proper implementation of her IEP at the high-school level. Ex. D32.

53. At the time, the Parents were concerned about placing the Student in general education classes at the high-school level. Ex. D33 p. 1. During the transition meeting, the Parents proposed full-time placement of the Student in a more restrictive environment at the high school. *Id.* In response, the District proposed placing the Student in a more restrictive environment for a limited amount of time, one semester, to allow her to adjust from middle to high school. *Id.* The team decided to re-evaluate the Student to determine her needs as she transitioned to high school. *Id.*

54. The June 2015 re-evaluation report recommended continued eligibility under the OHI category with SDI in math and social cognition. Ex. D35. Based upon the re-evaluation, the team created another Amended IEP, dated June 10, 2015, to address the Student's needs as she transitioned into high school. Ex. D36.

55. The Student's June 2015 IEP and the associated accommodations remained the same, except the majority of her class time was scheduled to occur in a special education setting¹⁷ (1625 out of 1650 minutes of class time per week). Ex. D36 p. 14. Specifically, the team concluded that increasing "special education support to full day for the transition to high school given [the Student's] identified somatic concerns" was appropriate. Ex. D37 p. 1.

56. During the June 15, 2015 IEP meeting, the team discussed the restrictive nature of the high school autism program versus allowing the Student to participate in the program as a way to gain "self-determination and self-advocacy skills." Ex. D37. As the Student became more comfortable in the high-school setting and her anxiety lessened, the goal was for her to transition into more general education classes with the necessary support and modifications of the curriculum. *Id.* No time limits were placed on the length of time for this transition process. *Id.*

Summer of 2015

57. During the summer months of 2015, Karin Weissert¹⁸ tutored the Student in math at the Student's home. Weissert, Tr. 942. The math services were to occur every day, beginning July 5 or July 6, for a total of 30 hours. *Id.*; see also, *Id.* p. 957. At the beginning, the Student was reluctant to participate. *Id.* However, over the course of the summer, she became more engaged. *Id.* By September, Ms. Weissert and the Student were conducting the tutoring sessions at the high school where the Student was scheduled to begin classes in the fall. *Id.*, p. 943. Ms. Weissert opined that familiarizing the Student with the high-school setting and the special education classroom where most of her classes would take place would help to ease the Student's level of anxiety. *Id.* Ms. Weissert noted the Student was easier to work with away from the home environment. *Id.*, Tr. 942. Specifically, "[the Student] was more willing to do math. She seemed more engaged. She seemed more excited. She was more lively." *Id.*

Fall 2015

58. The 2015-2016 school year began on September 9, 2015. *Id.*, Tr. 942; Ex. D55. Soon after classes began, the Mother asked to change the Student's schedule to include general education electives. Mother, Tr. 186-187; see generally, Weissert, Tr. 944. On September 11, 2015, the District issued a Prior Written Notice (PWN) confirming the Student's fall class schedule would include three general education electives (aerobics, design in interiors and fashion, and concert choir) in addition to her academic classes (pre-algebra, literacy and social skills). Ex. P81. The PWN served as an invitation for the IEP team to discuss the changes but the IEP team never reconvened prior to introducing the schedule change.¹⁹ Mother, Tr. 188; see

¹⁷ The Parents proposed and the District agreed the majority of the Student's education would take place in the Autism Connections Program classroom.

¹⁸ Ms. Weissert is employed by the District as a secondary teacher in the Autism Connections Program at Marysville High School. Weissert, Tr. 938. The Autism Connections Program is a self-contained classroom.

¹⁹ The record is void of an Amended IEP affirmatively adopting the change in the Student's schedule by the IEP team.

generally, Ex. P81. This decision decreased the percentage of time the Student received educational services in the special education classroom. *See generally, Id.*

59. Within a few days, the Student began the new schedule. *See generally, Ex. D41.* During the first few weeks of school, progress reports from the Student's teachers indicated she was adjusting well to classes and communicating with her peers. *See generally, Testimony of Weissert and Caskey. Ms. Caskey.* The Student's general education teacher for interior and fashion design teacher, reported the Student agreeing to go "first" for a classroom presentation on a project she completed. Caskey, Tr. 926. The Student's presentation earned her "29 out of 30 points". *Id.* Similarly, Ms. Weissert reported the Student was "doing awesome. She was really good. I was really proud of her... because my [students] don't usually volunteer to be the first one." Weissert, Tr. 946.

60. Although the Student presented little to no anxiety at high school, at home the Student's demeanor drastically changed. Mother, Tr. 187. The Student began refusing to attend high school. Her absences significantly affected her grades. *See generally, Weissert, Tr. 949; Caskey, Tr. 927-928.*

61. On or about October 2, 2015, the Student stopped going to school. Weissert, Tr. 948. On October 4, 2015, the Student threatened to commit suicide. *See generally, Exs. D45-D47.* The Student told her parents and medical professionals she was feeling overwhelmed at school. *Id.* The Parents immediately sent the District notice of their intent to remove the Student from public school and to enroll her at a private school. *Id.*

62. After the Student's suicide threats, the IEP team again reconvened to discuss amending the Student's IEP. Exs. D47-D50. Despite the Student's setback, the new Amended IEP only provided 550 minutes per week of special education services out of a total of 1830 school minutes. Ex. D50 p. 19. The Mother was present for the IEP meeting but refused to sign the new Amended IEP. *Id.* She no longer trusted the District was able to provide an appropriate education for the Student. *See generally, Testimony of Mother.*

Dolan Academy

63. On or about November 1, 2014, the Parents enrolled the Student in Dolan Academy. Mother, Tr.190. The Parents thought this would be a good fit for the Student because she could receive 1:1 instruction. *Id.*

64. Janet Dolan is the director and founder of Dolan Academy. Dolan, Tr. 821. Ms. Dolan holds a "P-12 teaching credential and a master's degree in special education from the University of Washington." Ex. D51 p.1; *see also, Dolan, Tr. 821-822.* She taught special education in the public school system for two years. Dolan, Tr. 866. Her public school teaching experience includes, "[o]ne year for Northshore School District and one year for Lake Stevens School District." Dolan, Tr. 866. Ms. Dolan does not hold a Ph.D., and is not qualified to perform formal assessments of a student. Dolan, Tr. 850.

65. Dolan Academy opened in 2004 and is a small "learning center [which] offers individual one-to-one education." Ex. D51; *see also, Dolan, Tr. 821.* Current enrollment is "approximately 55 students...including daytime students as well as hourly students after school for tutoring."

Dolan, Tr. 867. Of the 55 students, three are "chronologically in the Student's age range: two 9th graders and one 11th grader." Dolan, Tr. 868. The teaching staff is small. See generally, Dolan, Tr. 866. Only three of the seven staff members are full time. Dolan, Tr. 866. Two members of the teaching staff, Ms. Dolan and one other teacher, are certificated to teach special education. One member has a degree in special education but is not certificated to teach special education. See generally, Dolan, Tr. 867. Jennifer Ward, the Student's primary teacher at Dolan Academy, is not a certificated special education teacher and does not have a degree in special education. Dolan, Tr. 872.

66. The proposed Dolan Academy educational plan for the Student included:

5.5 hours per day...[of instruction] in the core subjects of English, math, physical education...science...and electives such as Spanish and graphic design.

Ex. P75. Dolan Academy's proposed educational plan for the Student offers additional services and accommodations, which for the most part parallel the educational services and accommodations contained in the Student's District-prepared IEP. Compare, Ex. D50 to Ex. D51. Indeed, the primary difference between the two plans is the 1:1 instruction at Dolan Academy. *Id.*, see also, Dolan, Tr. 863.

67. Currently, the Student attends 1:1 instruction at Dolan Academy two times per week for 90 minutes per session. Dolan, Tr. 832, 844, 859; see also, Ex. D56. Since being enrolled, the Student has shown less anxiety. *Id.*, p. 862. Additionally, she has made progress with her reading and math skills. See generally, Exs. D53, P74; Dolan, Tr. 877-880. As of December 2015, the Student's educational cost at Dolan Academy totaled \$560.00.²⁰ Ex. D53.

CONCLUSIONS OF LAW

The IDEA

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

2. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

²⁰ At the time of hearing, the Student remained enrolled at Dolan Academy. Therefore, the actual amount paid for her education at Dolan Academy from November 2015 through the date of this decision is likely much higher.

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

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

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

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

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

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "[A] school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement[]." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014) (internal citation and quotation marks omitted).

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Accordingly, in this case the Parents bear the burden of presenting sufficient evidence to support a conclusion the District violated the IDEA and denied the Student FAPE with respect to all issues raised in this case.

Procedural Compliance with the IDEA

6. Procedural safeguards are essential under the IDEA:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to

know.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001).

7. Procedural violations of the IDEA amount to a denial of FAPE only if they:
- (I) impeded the child's right to a free appropriate public education;
 - (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
 - (III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii); see WAC 392-172A-05105(2)(a)-(c).

Substantive Compliance with the IDEA

8. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007).

"[S]pecial education and related services" need only be provided "in conformity with" the IEP. [20 USC §1401(9)] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

Van Duyn, supra, 502 F.3d at 821 and 822 (italics in original).

Failing to Provide an Appropriate IEP in October 2014

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

10. An IEP must include a statement of the special education to be provided to enable the student to make progress towards 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, in those activities. WAC 392-172A-03090(1)(d); 34 CFR §300.320.

11. The Student met the eligibility criteria for special education under the Other Health Impairment category on September 12, 2014. As such, she is entitled to appropriate educational services through an IEP.²¹ WAC 392-172A-03040.

12. The District argues the Student's academic performance in no way indicated she needed specially designed instruction (SDI) in areas other than math. 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).

13. For this Student to access the general education curriculum, she needs a multitude of modifications and accommodations, including providing information in small segments. She also needs the opportunity to have additional individual instruction for more difficult assignments.

14. In December 2013, the Student scored below average on reading comprehension, fluency, and written expression. Her Spring 2014 standardized tests scores improved from the previous semesters but remained below the academic passing standard. During her first months at MMS her Measure of Academic Progress (MAPS) test scores in reading improved from 203 to 208, "about a year's growth in 68 days." Ex. D3 p. 6. She was "placed in a Reading Focus class to continue her progress." *Id.*

15. Although the Student's October 2014 IEP does not specifically state she is to receive SDI in areas other than math and social cognition, the accommodations and modifications contained therein were designed to address her need for supplemental support, as outlined in the Student's 2014 evaluations and assessments. At the time, the Student's teachers indicated that through the use of those supports and accommodations, the Student was able to meaningfully access the educational curriculum.

16. The Parents argue that the District should have provided SDI in areas other than math. However, as discussed in the Findings of Fact, at that time the evaluations and assessments did not support SDI in any area other than math.

17. With respect to social/emotional behavior, the Parents argue the District failed to provide appropriate services to address the Student's school-related anxiety. However, other than providing school-related accommodations, all of which were adopted in the Student's IEPs, no evaluation, including Dr. Bailey's 2014 re-evaluation, recommended specific SDI to anxiety. While during this time, her school attendance was not consistent, the District assumed the Student was still adjusting to the transition from home schooling to a public school education and that her absences were related to the adjustment. Although the Parents expressed concerns that the Student's ongoing anxiety impacted her school attendance, none of the

²¹ The District incorrectly argues the Student is not eligible for services because she does not meet the "severe discrepancy" test. However, the District found the Student eligible for SDI under the OHI category *not* the Specific Learning Disability Category. The Student is therefore entitled to receive whatever services are necessary to provide FAPE.

Student's teachers identified this as a behavior concern within the classroom. Indeed, Ms. Weissert noted when the Student's attendance was regular, her anxiety decreased.

18. Accordingly, the Parents have not demonstrated that the October 2014 IEP was not reasonably calculated to provide an educational benefit and, therefore, have not proven a violation of the IDEA.

Failing to Consider the Recommendations of December 2014 IEE

19. When a parent obtains an IEE at public or private expense, the District must consider the results of the evaluation in any decision regarding providing FAPE to the student. WAC 392-172A-05005 (5)(a). The IEP team is only required to consider the results. *Id.* The IEP team is not required to adopt a recommendation contained within the IEE. *Id.* In this matter, the District reviewed the results of Dr. Edstrom's IEE and, based upon her recommendations, initiated an additional evaluation of the Student in the area of communication. See, Finding of Fact #47. Therefore, the Parents have not proven a violation of the IDEA.

Failing to Provide SDI in Areas Other Than Math and Social Cognition From March 2015 Forward (including failing to adopt most of the recommendations of the IEE)

20. Once determined eligible for special education and related services, a school District must develop an IEP which allows the student to make educational progress and addresses the student's educational needs resulting from the student's disability. See generally, WAC 392-172A-03040(4) and WAC 392-172A-03090(i)(b)(A)-(B).

21. The District argues the Student's academic performance in no way indicated she needed SDI in areas other than math. Specifically, the District argues the Student did not need the restrictive nature of a self-contained classroom or the Autism Connections Program in the high-school setting. This narrow view of SDI is contrary to the regulations.

22. As mentioned above, SDI is one component of an educational program tailored to meet a student's individual needs. In this instance, by March 2015, the Student had undergone a number of assessments and evaluations. The Student's medical diagnoses were extensive and complex. Multiple medical professionals opined she had learning disabilities and medical challenges which exaggerated her educational challenges. It was undisputed that the Student's heightened levels of anxiety related to school. Her medications included increased amounts and types of anxiety-reducing drugs. The Mother continually voiced concerns about the Student's refusal to attend school due to anxiety. By March 2015, her teachers affirmed her absences were affecting her school work and grades. As documented in Dr. Edstrom's IEE, the Student was several standard deviations below her same-age peers in a number of critical learning areas, and her overall intellectual functioning tested at the lower end of the borderline range.

23. Beginning with the March 2015 IEP, the IEP team adopted the majority of Dr. Edstrom's proposed accommodations and modifications but the team did not include SDI in all academic areas—only math and social cognition. Compare Ex. D12 with Ex. D27. In consideration of the totality of the information available to the District by March 2015, it is concluded, beginning with the Student's March 2015 IEP, the District violated the IDEA and denied the Student FAPE by

failing to provide the Student with SDI in areas other than math and social cognition. The Parents have proven the District committed a substantive violation of the IDEA.

24. The failure to develop an IEP which addressed the Student's educational challenges in all of her other academic classes more likely than not led to increased anxiety and school refusal. The District's failure to appropriately address the Student's emotional needs denied the Student a FAPE. The Parents have proven the District committed a substantive violation of the IDEA.

Home Hospital Instruction

25. The District argues it was not responsible for implementing the Student's IEP while she received HHI services. In pertinent part the regulation provides:

Home or hospital instruction shall be provided to students eligible for special education and other students who are unable to attend school for an estimated period of four weeks or more because of disability or illness.

...

Home/hospital instructional services funded in accordance with the provisions of this section shall not be used for the initial or ongoing delivery of services to students eligible for special education. It shall be limited to services necessary to provide temporary intervention as a result of a physical disability or illness.

WAC 392-172A-02100

26. HHI services are often utilized for students with severe medical conditions who are unable to physically attend school. In Washington State, the program is overseen by OSPI. Individual school districts have no authority to exceed two hours per week of HHI services. However, the restrictive nature of HHI funding and the allotted hours in no way relieves a District from the obligation of providing a FAPE to students who are eligible for special education and related services. See, e.g. *In re: Student with a Disability*, 116 LRP 1744, 67 IDELR 105 (SEA WI 2015) (District found to have denied FAPE to an autistic student by failing to revise his IEP to accommodate his medical needs while he participated in home instruction); *Polk County School Dist.*, 114 LRP 47035 (SEA FL 2014) (Districts are required consider a student's individual needs and to develop and oversee all services on a student's IEP, including homebound instruction).

27. In this matter, the District failed to ensure the Student received the SDI services listed in her September 2014 IEP while she was on HHI. Indeed, Ms. Matz admitted that she assumed the District was not responsible for implementing the Student's IEP during HHI. Ms. Matz did not provide any directions to the HHI tutor regarding the Student's SDI needs in math. It is concluded this was a material failure to implement the Student's September 2014 IEP. This was a substantive violation of the IDEA and denied the Student FAPE.

Failing to Convene IEP Team Meeting

28. A District is required to convene a meeting of a student's IEP team prior to a change in a student's educational placement. See generally, WAC 392-172A-03110 (2)(c). During the IEP team meeting, the IEP team, which includes the student's parents, should consider and discuss a student's individual needs. See generally, WAC 392-172A-03095, -3100, -03110.

29. In this matter, the District failed to convene an IEP Team meeting before or after the Student's placement changed to HHI in October 2014. Instead of convening an IEP team meeting, Ms. Matz met individually with the IEP team members, obtained their signatures and then forwarded the IEP to the Parents for signature. This was a procedural violation of the IDEA. By doing so, Ms. Matz precluded the Parents from participating in the IEP Team process. It is concluded this procedural violation of the IDEA warrants a remedy.

Prospective Placement at Dolan Academy at Public Expense

30. Parents who unilaterally enroll a student in a private school are entitled to reimbursement only if 1) the district placement violated the IDEA, and 2) the parent's private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Thus, parents who unilaterally change their child's placement do so at their own financial risk. *Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 374 (1985). The Supreme Court explained that reimbursement for a private placement is allowed because Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education. *Id.* at 370.

31. The Parents have not proven that with an appropriate IEP, the District is unable to address Student's educational needs in the public school environment. The Parents have not proven Dolan Academy, where the Student's interactions with her typically-developing peers are significantly limited, is an appropriate placement. It is concluded Parents have not established that a prospective private placement is appropriate for the Student.

REMEDIES

32. The Parents have proven violations of the IDEA which precluded them from participating in the decision-making process, and which resulted in a denial of FAPE to the Student. The Parents were precluded from participating in the decision-making process by the District's failure to convene an IEP team meeting when the Student's placement was changed to HHI. The Student was denied FAPE due to the District's failures to implement her SDI in math during HHI, and provide her SDI in areas other than math and social cognition since March 2015 IEP.

Failure to Convene an IEP Team Meeting

33. For failing to convene a meeting of the Student's IEP team after she entered HHI, the District must ensure Caryn Matz and James Stevens both receive one hour of training regarding the IDEA requirements for convening a meeting of the IEP team before a student's educational

placement is changed.²² This training must occur prior to commencement of the 2016-2017 school year. The training will be provided by an individual qualified by education, training and experience to provide such training.

Compensatory Education

34. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia*, *supra*, 401 F.3d at 523-524.

Compensatory Education Award for Failure to provide SDI during HHI

35. Pursuant to the September 2014 IEP, the Student was entitled to 250 minutes per week of SDI in math. Between October 2014 and February 2015, there were 18 weeks of school. This equates to a total of 4500 minutes (75 hours) of SDI to which the Student was entitled. However, those minutes were not intended to provide 1:1 instruction, which the Student would have received during HHI. As such, the undersigned concludes, an hour-for-hour award is not appropriate.

36. In determining the appropriate compensatory award, it is concluded the District shall provide 1:1 math SDI at the rate of one hour of tutoring for every three class hours for a total of 25 hours of compensatory education. This calculation is consistent with the acknowledgment that 1:1 instruction is more effective than instruction in a group setting. *See, Seattle School Dist.*, (115 LRP 17346 (SEA WA 2014). The 25 hours of compensatory SDI shall be provided by a fully certificated special education teacher.

Compensatory Education Award for Failure to Provide SDI Beginning with the March 2015 IEP

37. At hearing, the record was poorly developed with respect to what and how much compensatory education is required in order to remedy the denial of FAPE beginning with the March 2015 IEP. Yet, the duration and severity of the denial of FAPE to the Student nevertheless warrants a remedy.

38. The Student's reading and writing fluency are not as developed as her typically developing peers. Despite her average basic reading skills, the Student struggles to comprehend what she reads. Her rate of learning and retaining new material is much slower than her typically developing peers. She has executive functioning deficits and profound limitations in her working memory. Her intellectual functioning is at the lower end of the

²² The District is only required to provide this training to Ms. Matz and Mr. Stevens if are currently employed by the District.

borderline range, and her overall global functioning is nearly two standard deviations below the mean. The Student has general learning and megacognitive deficits which substantially impact her overall ability to learn. See, Finding of Fact #41. Careful consideration of all these facts leads to a reasonable conclusion that the deleterious impact of the Student's multiple impairments more likely than not manifests across all her academic subjects at school.

39. As of March 19, 2015, the Student's IEP called for 250 minutes of SDI per week to address the Student's need for math instruction. It is concluded that the Student more likely than not required the same or closely similar amount of SDI in each of her other academic subjects. Accordingly, it is concluded that the Student should receive the equivalent of 250 minutes per week of SDI in each of her other academic subjects beginning March 19, 2015 and continuing through the first 35 school days of the 2016-2017 school year.²³

40. During the 2014-2015 school year in high school, the Student's class schedule included three academic courses: social skills, literacy and pre-algebra. Therefore, the Student is entitled to receive 250 minutes per week of SDI in each of these three academic subjects, for a total of 750 minutes per week of SDI.

41. Calculation of the compensatory education remedy necessarily depends upon the number of school days or school weeks over which the denial of FAPE took place. The Tribunal therefore admits, *sua sponte*, the District school year calendars for the 2014-2015 and 2015-2016 school years.²⁴ Either party may object to admission of these additional exhibits in the event of any appeal of this final order.

42. Beginning March 19, 2015, the date of the IEP meeting, through the end of the 2014-2015 school year, there were 55 school days, or the equivalent of 11 school weeks (assuming 5 school days per school week). The 2015-2016 school year was 180 school days, or the equivalent of 36 school weeks. Thirty-five school days of the 2016-2017 school year is equivalent to 7 school weeks. Therefore, it is concluded that for computation of the compensatory education award, the period at issue is a total of 54 school weeks.

43. There were fifty-four school weeks during which the Student should have received 750 minutes of SDI per week in her three academic classes. This is a total of 40,500 minutes of compensatory SDI, or 675 hours of compensatory SDI.

44. The compensatory education award for the denial of FAPE beginning March 19, 2015, should be adjusted in the same manner to account for the greater efficacy of 1:1 instruction

²³ Thirty-five school days are added to the period for calculation of compensatory education to allow for sufficient time to reevaluate the Student.

²⁴ The 2014-2015 school year calendar is found at <https://docs.google.com/file/d/0B6kzdjSYMeXALXZISFRPS2pLcGM/edit?pref=2&pli=1>. The 2015-2016 school year calendar is found at <https://drive.google.com/file/d/0B7GGaL3ZAI4HN3paVVJ1TFVLU0k/edit?pref=2&pli=1>.

versus small-group instruction. The compensatory education award is adjusted to 225 hours, as the District shall be ordered to provide the compensatory education in a 1:1 setting. The compensatory education shall be provided by a fully certificated special education teacher.

45. The compensatory education award for SDI will be provided to the Student by a fully-certificated teacher. If the individual is not certificated as a special education teacher, the individual must be fully certificated as a general education teacher who is qualified by education, training and experience to provide the necessary SDI, and the District shall provide supervision of the individual by a fully-certificated special education teacher. The SDI may be provided by either a District teacher, or by a fully-certificated teacher with the necessary education, training and experience retained and supervised by the District to provide the SDI.

46. Of the total 225 hours of the compensatory education award, a minimum of 150 hours shall be provided to the Student within the twelve-month period following entry of this Order. Any remaining compensatory education shall be provided within the next six-month period, such that all compensatory education shall be provided no later than eighteen months following entry of this order.

47. The Parents and the Student's IEP team shall determine the frequency, duration and location of the compensatory education SDI for the Student, and establish a regular schedule for the SDI to be provided.

48. Once a regular schedule to provide SDI is established, the Parents shall, except in an emergency situation, give the District notice 24 hours in advance when the Student will be unavailable for a scheduled session. If the Student fails to attend a scheduled session and does not provide such notice, the session will count towards the total amount of the compensatory education award.

Consultation with Education Specialist

49. Parents have proven the Student's medical and emotional challenges and their impact on her educational needs are complex. Additionally, given the length of the Student's absence from the public school setting, it is not possible to know her current educational needs. Therefore, at public expense, the District shall immediately conduct a re-evaluation of the Student and develop a new and appropriate IEP for the Student. The re-evaluation and development of a new IEP shall be conducted pursuant to the applicable regulations. The re-evaluation will be completed within 35 school days after the parents provide written consent.

Reimbursement for Private Education at Dolan Academy

50. The District denied the Student a FAPE after the she returned to school in March 2015 because the District did not provide SDI in areas other than math and social cognition. The Parents are entitled to reimbursement for the private placement beginning with the Student's enrollment at Dolan Academy in November 2015 through the re-evaluation of the Student and the development of a new IEP, as ordered herein. The District shall reimburse the Parents for up to 180 minutes per week of 1:1 instruction at Dolan Academy. The Parents must provide the District written confirmation of the educational costs for the Student's tutoring at Dolan Academy prior to payment by the District.

Rejection of all other arguments

51. All arguments made by the parties have been considered. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

1. The District violated the IDEA by precluding the Parents from participating in the decision-making process when the District failed to convene a meeting of the IEP team when the Student's placement changed to HHI. The District also violated the IDEA and denied the Student FAPE by failing to implement her SDI in math during HHI, and failing to provide her SDI in areas other than math and social cognition in the March 2015 IEP.

2. For failing to convene a meeting of the IEP team, the District must ensure Caryn Matz and James Stevens both receive one hour of training regarding the IDEA requirements for convening a meeting of the IEP team prior to a change in a student's educational placement.²⁵ This training must occur prior to commencement of the 2016-2017 school year.

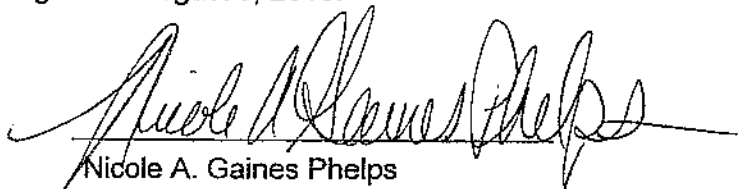
3. For failing to provide the Student SDI during HHI, the District shall provide the Student 25 hours of SDI in math in a 1:1 setting.

4. For failing to provide the Student SDI beginning since March 2015, the District shall provide an additional 225 hours of compensatory education as outlined herein.

5. At public expense, the District shall immediately conduct a re-evaluation of the Student and develop a new IEP for the Student. The re-evaluation shall be conducted and the IEP shall be developed pursuant to the applicable regulations.

6. *The Parents are entitled to reimbursement for the private placement beginning with the Student's enrollment at Dolan Academy in November 2015 through the re-evaluation of the Student and the development of a new IEP, as ordered herein.*

Signed at Seattle, Washington on August 5, 2016.



Nicole A. Gaines Phelps
Administrative Law Judge
Office of Administrative Hearings

²⁵ The District is only required to provide this training to Ms. Matz and Mr. Stevens if they are currently employed by the District.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. *kan*

Parents



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