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Superintendent of Public Instruction
Administrative Resource Services

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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December 1, 2017

Parent
[REDACTED]

Lisa Pitsch, Director of Special Education
Mukilteo School District
9401 Sharon Drive
Everett, WA 98204-2699

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

In re: Mukilteo School District
OSPI Cause No. 2017-SE-0086
OAH Docket No. 09-2017-OSPI-00395

Dear Parties:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Camille J. Schaefer".

Camille J. Schaefer
Administrative Law Judge

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

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FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

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IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0086

OAH DOCKET NO. 09-2017-OSPI-00395

MUKILTEO SCHOOL DISTRICT

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

A due process hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Camille J. Schaefer in Mukilteo, Washington on November 9, 2017. The Parent of the Student whose education is at issue¹ appeared and represented herself (*pro se*). The Mukilteo School District (the District) was represented by Carlos Chavez, attorney at law. Lisa Pitsch, District Director of Special Education, also appeared.

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 19, 2017. The Complaint was assigned Cause No. 2017-SE-0086 and forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered September 21, 2017, which assigned the matter to ALJ Camille Schaefer. The District filed its Response to the Complaint on September 28, 2017.

A prehearing conference was held October 23, 2017. A Prehearing Order was entered October 25, 2017. A Corrected Prehearing Order was entered October 26, 2017.

The hearing record closed on November 17, 2017 with the parties' submissions of post-hearing briefs. As set forth in the Scheduling Notice, the due date for a written decision in this matter is December 3, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence without objection:

- Joint Exhibits: J1 – J3
- Parent's Exhibits: P1 – P9
- District's Exhibits: D1 – D6

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

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

family friend, Family Friend of Parent;
parent's boyfriend, Boyfriend of Parent;
family friend, Family Friend of Parent;
Mother of the Student;
Cindy Steigerwald, District Director of Transportation;
Graham Wood, District Special Education Teacher; and
Lissan Wipfli, District Assistant Director for Special Education.

ISSUE

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2016-2017 and 2017-2018 schoolyears by not providing special transportation as required in the Student's individualized education program (IEP) in the form of out-of-district transportation to and from the Student's childcare facility.²

FINDINGS OF FACT

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

1. The Student is seven years old. J1, p.1.³ He is in second grade. J2. At all times material to resolution of the issue herein, the Student attended school in the District and was a student eligible for special education and related services. Testimony of Parent (Parent) at T53;⁴ J2, p. 1; D2, p. 1; D3, p. 1; D4, p. 1; D5, p. 1. The Student's last triennial reevaluation was conducted during March 2017 and resulted in an Evaluation Summary dated March 10, 2017. J1. The Student was found eligible for special education and related services under the eligibility category of Autism, which was a change from the Student's prior eligibility under the category of Developmental Delay. *Id.*

² The Corrected Prehearing Order entered October 26, 2017 identified the issue as beginning with the current (2017-2018) schoolyear and noted it was unclear whether the Parent was also alleging a denial of FAPE for the 2016-2017 schoolyear. On November 2, 2017, the Parent clarified in writing that she was also alleging a denial of FAPE for the 2016-2017 schoolyear and requesting compensatory remedies and reimbursement for lost wages and other costs. At the due process hearing on November 9, 2017, the District had no objection to the issue as clarified by the Parent.

³ References to exhibits from the due process hearing are by the exhibit number (J1) and page number(s) within the exhibit (p. 1).

⁴ References to the transcript of the due process hearing are by the name of the particular witness (Parent) and page number where the testimony appears in the transcript (T53).

2. It is undisputed that the Student enjoys and benefits from school and is excited to attend. Testimony of family friend at T21-22; Testimony of parent's boyfriend at T33-34; Testimony of family friend at T48; Testimony of Wood (Wood) at T152, T162. Since starting school in the District, the Student verbalizes better and is calmer and more social. Kent at T22. The Student is sensitive to changes in routine and prone to meltdowns or outbursts that have included screaming, crying, biting, and hitting. parent's boyfriend at T30, T42-43; Wood at T169. In first grade during the 2016-2017 schoolyear, the Student had meltdowns in the classroom three times a week or more which could be triggered by overstimulation, noise, a lot of work or activity, or if the Student was tired or hungry. Wood at T169. However, the Student does not have a behavior plan as part of his IEP. Wood at T152.

3. The above notwithstanding, in August 2017, the Parent went out of town and left the Student with her friend. Parent at T100. The Student constantly wondered when the Parent would return home but "overall, I think he did okay given that it's the first time he'd ever experienced that." *Id.* The Student "had a couple of meltdowns, but...appropriate steps were taken to stop those as quickly as possible." *Id.* The Parent's characterization of the Student's experience staying with her friend was that he "struggled." *Id.*

4. Since 2013, the Student has attended educational programs at four different locations within the District. The Student attended the same preschool for two consecutive years and then attended a new school for kindergarten. D1, p. 1; D2, p. 1; D3, p. 1; D4, p. 1; *see generally* Testimony of Wipfli (Wipfli) at T175-178. The Student was successful and made progress, and he was moved to the Intensive Support program for first grade that provided for more general education time and resource room time for support. D5, p. 1; Wipfli at T178. The Student experienced a difficult transition at the start of first grade, but the Parent attributed it to instability and staff changes in the program rather than to the transition itself. Parent at T101. An agreed change of placement moved the Student to the Connections Program for second grade at a different school. J2, pp. 19-21. The Student "did excellent" and had a smooth transition changing schools to second grade. Parent at T100. The Student's meltdowns have decreased during the current schoolyear since he started spending 25 minutes per day in the general education classroom. Parent at T104. Overall, no significant concerns were reported in relation to the Student changing schools. Wipfli at T197.

5. Graham Wood, the Student's special education teacher during the 2016-2017 schoolyear, had 17 students in the Student's Intensive Support class. Wood at T151. There were four paraeducators, two of which were assigned one-on-one to specific students. *Id.* The Student did not have a one-on-one paraeducator. *Id.* at 152.

6. The Student's current IEP provides for "special transportation." J2, pp. 19-20. Each of the Student's prior IEPs included special transportation as well. D1, p. 19; D2, p. 20; D3, p. 20; D4, p. 19; D5, p. 16. Special transportation involves using a different bus or routing requirements based on a student's IEP. Testimony of Steigerwald (Steigerwald) at T126. The District's rationale for providing special transportation for the Student is that his programs are and have been located in non-neighborhood schools within the District. Steigerwald at T146-147; Wipfli at T178-179. The Student also uses a STAR seat on the bus, which is like a car seat that goes over his shoulders and clips in the front. Wood at T154, T166-167; *see also generally* Wood at T153-155.

7. From 2013 until the spring of 2016, the Student received special transportation from the District between his schools and various daycare providers within the District. Parent at T53, T67, T96.

8. The Student started attending Another Best Childcare (ABC Childcare) in June 2016.⁵ Parent at T60; P2, p. 6. Staff at ABC Childcare have experience interacting with and caring for children on the autism spectrum. P2, pp. 5-6; Parent at T107. The Student has developed friendships at ABC Childcare, bonded with staff, and benefits from the continuity of caregivers. *Id.* ABC Childcare staff work with the Student to be more social, taught him how to write, and assisted with learning to read. Parent at T62. ABC Childcare provides a staff-to-child ratio of 1:10, or 1:7, as needed. P2, pp. 5-6. ABC Childcare keeps relatively low ratios as a matter of practice; they are not providing lower ratios just to accommodate the Student. Parent at T109. ABC Childcare is not licensed to nor does it provide specialized services to the Student such as speech or occupational therapy. P3, p. 5; Parent at T62, T107.

9. The Student's younger brother attends ABC Childcare as well. Parent at T66; P2, pp. 5-6. Staff at ABC Childcare have observed the Student being calmed by interaction with his sibling. P2, p. 5. The Student's younger brother has attended each childcare provider the Student has attended: "It is a bit difficult to split children up between daycares and have to be two places at once for pick-up." *Id.* at T66. The Student's younger brother is not yet in school but will start kindergarten next year. *Id.* at T116. The Parent may have to find a different daycare provider for him since he will attend school in the District and will not have an IEP. *Id.* at T116-117. ABC Childcare is directly on the Parent's way to work. *Id.* at T109.

10. ABC Childcare is located on 7th Avenue, which is on the border of the District's territorial boundary. Steigerwald at T132. The south side of 7th Avenue is within the District boundary, and the north side of 7th Avenue is in a different school district. *Id.* 7th Avenue is a multiple-lane road, and in order for the District to have a bus stop there, it would have to be on the south side of 7th Avenue. Steigerwald at T133. However, ABC Childcare is located on the north side of the street, outside the District boundary. *Id.* at T143; [REDACTED] at T37.

11. The District's general policy is to transport students within the District unless it is related to a program. Steigerwald at T127. The District does not transport students outside the District's boundaries other than students entitled to out-of-district transportation as homeless students under the McKinney-Vento Act,⁶ or students placed by the District in an out-of-district educational setting. *Id.* at T127-128.

⁵ In both her Due Process Hearing Request (P4, p. 2) and testimony (Parent at T60), the Parent stated that the Student started attending ABC Childcare in 2015. She corrected this to 2016 upon cross-examination at the due process hearing.

⁶ 42 U.S.C. § 11301 *et seq.*

12. None of the Student's IEPs have expressly provided for out-of-district transportation. D1, p. 19; D2, p. 20; D3, p. 20; D4, p. 19; D5, p. 16.

13. The Parent transported the Student between ABC Childcare and his school for "the first little bit" of the 2016-2107 schoolyear, which she estimated was two or three weeks. Parent at T113. Then her own school schedule changed abruptly, and she was no longer able to transport him. *Id.* The Parent was in danger of failing her own classes, so she talked with Cindy Steigerwald to see if there was any way that the Student could be transported between school and ABC Childcare. *Id.* at T113-114.

14. Cindy Steigerwald is the director of transportation for the District. Steigerwald at T123. Ms. Steigerwald was initially contacted by the Parent in early September 2016, shortly after school started. *Id.* at T129. Then on September 6, 2016, the Parent and Ms. Steigerwald met in Ms. Steigerwald's office. *Id.* at T130. The Parent again requested that the District transport the Student to ABC Childcare. *Id.* They discussed whether ABC Childcare would be willing to have a staff person accompany the Student across the road to the south side of 7th Avenue, where a District bus could pick up the Student within the District's boundary. *Id.* The Parent said that ABC Childcare would not do that. *Id.* Ms. Steigerwald told the Parent that the decision to deny out-of-district transportation was based on District policy, and asked the Parent to look at other daycare providers. *Id.*

15. In mid-October 2016, Ms. Steigerwald was contacted by the Student's school due to concern that the Student was not attending. *See generally* Steigerwald at T134-137. After several conversations between Ms. Steigerwald and the Parent, the Parent said that if the District could provide morning transportation for the Student from ABC Childcare to school, the Parent could take the Student home. *Id.* at T134. Ms. Steigerwald agreed in order to get the Student back into school with the understanding that the Parent needed to continue looking for an in-District daycare provider. *Id.* at T134-135.

16. Within a couple of months, the Parent contacted Ms. Steigerwald again and asked if the District would transport the Student to ABC Childcare when school dismissed early at 12:30 p.m. because the Parent was missing work on early release days. Steigerwald at T137. Ms. Steigerwald agreed and asked if the Parent had any luck finding an in-District daycare provider. *Id.* It was Ms. Steigerwald's understanding that while the District was transporting the Student to ABC Childcare, the Parent was working toward the end goal of finding a daycare located within the District. *Id.*

17. In the Spring of 2017, Ms. Steigerwald received another call from the Parent, asking if the District would transport the Student every day to and from ABC Childcare. *Id.* at T138. Ms. Steigerwald agreed since it was near the end of the schoolyear, which would give the Parent time to look for a different daycare provider and allow transition time during the summer. *Id.* Ultimately, granting out-of-district transportation during the 2016-2017 schoolyear was an opportunity for the Student to mature while the Parent looked at different childcare provider options within the District boundaries. *Id.* at T144-145.

18. The Student's IEP was reviewed and amended in June 2017 to reflect the Student's change of placement to the Connections Program for second grade. J2, p. 21; Wood at T157-158. At the IEP team meeting, the Parent expressed concern that the Student continue to be

provided District transportation to and from ABC Childcare and school. J2, p. 21. According to Mr. [parent's boyfriend], the Parent's boyfriend, "[W]e talked about that [out-of-district transportation] absolutely had to be in [the Student's] IEP. We were told by Mr. Wood that it would be." [parent's boyfriend] at T29. "We went to an IEP meeting...and were guaranteed by Graham Wood yes, it would be in there." *Id.* at T37-38. "[The Parent] wanted to put in there that he would continue to receive out-of-district transportation to ABC daycare, to school, and return to ABC daycare in the afternoon after school." *Id.* at T39. The Parent claimed that "Graham Wood assured me that it wouldn't be a problem to...have my request placed in [The Student's] IEP...that parent requests typically aren't denied..." Parent at T79.

19. However, Mr. Wood denied promising that out-of-district transportation would be included in the IEP, and he explained that the IEP team determined it was not necessary. Wood at T156-157. The IEP team as a whole did not agree that the Student required the services of ABC Childcare in order to access or benefit from his special education program and placement. Wood at T186; J2, p. 21. Out-of-district transportation was not included in the IEP because it was not based on an educational need. Wipfli at T182. It is found that the Parent and Mr. [parent's boyfriend] misunderstood that just because they asked that out-of-district transportation be included in the Student's IEP, it did not guarantee it would be agreed to by the IEP team.

20. In June 2017, the Parent took time off work to meet and discuss with Mr. Wood her concern that the Amended IEP did not include out-of-district transportation to ABC Childcare. Parent at T80. During the summer months that followed, there were multiple conversations between the Parent and District staff regarding her request that the District provide out-of-district transportation between the Student's school and ABC Childcare. Wipfli at T180; Steigerwald at T128-130. On at least one occasion, the Parent met with Lissan Wipfli, the District's Assistant Director for Special Education, at her office. Wipfli at T180-181.

21. In response to the Parent's ongoing requests that the District provide out-of-district transportation between the Student's school and ABC Childcare, the Student's IEP team met again during the last week of August 2017. J3, p. 1; Wipfli at T185. The team met to review whether ABC Childcare was providing the Student anything related to his special education and related services, or whether the Student was receiving any services at ABC Childcare that would help with progress toward his IEP goals. Wipfli at T184-185. Mr. Wood, who as the Student's teacher was also a member of the IEP team, had no contact with ABC Childcare regarding the Student. Wood at T155, T158, T165. The team did not know whether ABC Childcare was providing specially designed instruction or therapy; the team only knew that the Parent mentioned the Student had been kicked out of several other daycare providers. Wood at T166. However, Mr. Wood had no reason to believe that he would not be able to help the Student meet his IEP goals without the Student attending ABC Childcare. Wood at T157-158.

22. Following the August 2017 meeting, the District issued a Prior Written Notice (PWN) stating that the District was refusing to initiate out-of-district transportation to childcare. J3, p. 1.⁷ The PWN states that the IEP team reviewed records, parent input, and staff input and considered whether or not out-of-district transportation to childcare is required in order for the

⁷ The PWN is dated August 1, 2017. During the hearing, this was identified as a typographical error with the correct date being September 1, 2017. Wipfli at T185.

Student to access his education. *Id.* “The team rejected the option of out-of-district transportation to childcare as it is not required for him to access his special education services.” *Id.* The PWN indicates that the Parent disagreed with the decision. *Id.* “The parent shared that the child care facility [the Student] attends has been patient, understanding and beneficial to his social skills development. The parent shared her concern that [the Student] will regress if he is not provided transportation to the out-of-district childcare facility.” *Id.*

23. The Parent maintains it is in the Student’s best interest to remain at ABC Childcare, which she describes as the only childcare center willing to be flexible and work with his needs. Parent at T55; *see generally* Parent at T53-56. The Student has had several childcare providers. Kent at T22. Prior to attending ABC Childcare, the Student was expelled from three daycare centers between 2013 and 2016. P2, pp. 3-4,⁸ Parent at T54-55, T63-65. He was “disenrolled” from Early Connections Learning Center, LLC because of his behavior in a classroom with 30 students and two teachers. P2, p. 3. He was expelled from Kids Planet Learning Center, LLC because his “violent outbursts were just to [sic] hard to handle.” P2, p.4; Parent at T65. He was also expelled from ABC Child Care in Mukilteo⁹ for violent outbursts. Parent at T63. The Parent claims that the Student:

[C]annot function in a large-group setting without harming himself or others and he...experiences meltdowns almost immediately upon being placed in a large-group setting, such as a setting of one teacher or adult figure per upwards of 15 children. It’s just too much stimulation and input for [the Student], and he reacts by throwing chairs, flipping over full-size tables, hitting, kicking, biting, screaming, scratching himself, other students, and other teachers.

Id. at T54.

24. The Student also hit and scratched an in-home caregiver when he was the only child being cared for in his own home. Parent at T65-66, T98. A friend of the family volunteered to sit with the Student while she was in between jobs and the Student was in between daycare providers. *Id.* at T65-66, T97-98. The in-home caregiver “could not work with [the Student] because of his violent outbursts.” *Id.* at T66. “[The Student] was very upset that he did not have

⁸ The authors of these letters did not testify, and thus were not subject to cross-examination, at the due process hearing. Hearsay evidence is admissible in administrative hearings if, in the judgement of the presiding officer, it is the kind of evidence on which reasonably prudent people are accustomed to rely in the conduct of their affairs. Revised Code of Washington (RCW) 34.05.452(1). Findings of fact, however, may not be based exclusively on hearsay unless the presiding officer determines that doing so would not unduly abridge the parties’ opportunities to confront witnesses and rebut evidence. RCW 34.05.461(4). To the extent Findings of Fact herein are based on hearsay, it is concluded that the findings did not unduly abridge the District’s opportunity to confront witnesses and rebut evidence because the letters were admitted without objection. Although admissible, the letters were not signed under penalty of perjury, which consequently diminishes the weight of that evidence.

⁹ ABC Child Care in Mukilteo is a separate entity from Another Best Child Care, which was also referred to in abbreviated form during the due process hearing and in this decision as “ABC Childcare.” Parent at T63.

peers his age to play with. And he was extremely upset that his brother got to go to daycare but he did not during the summer. So he felt secluded and acted out accordingly.” *Id.*

25. The Parent submitted a written statement that she “called every daycare in the [District] [b]oundaries between October 2013 and September 2017 in an attempt to find childcare” for the Student. P2, p. 1. She also claimed to have “contacted over 30 childcare providers” and “even tried finding a private, in home (sic) care provider, but [has] not found anyone with the skill to care for my son.” *Id.*

26. The Parent testified that prior to the 2016-2017 schoolyear, she Googled and wrote down names and phone numbers of over 30 daycare centers within the District boundaries. Parent at T105. She took two days off from school to visit 20 daycare centers within the District boundaries, and the rest she called. *Id.* The Parent claims these daycare centers were unwilling to accept the Student due to his autism, or because they didn’t accept children over five, or they had no more room for students who were the Student’s age. *Id.*

27. The Parent testified that during the week prior to the 2017-2018 schoolyear, she contacted 27 daycare providers located within the District. Parent at T105, T109-110. A majority were the same daycare providers she contacted the prior schoolyear, and two were new in-home childcare centers. Parent at T106. Since the start of the 2017-2018 schoolyear, the Parent claims she contacted eight additional daycare providers in addition to the 27 she previously contacted. Parent at T111. The Parent told prospective daycare providers that the Student has autism. Parent at T106. When asked by prospective daycare providers about the Student’s daycare history, the Parent disclosed that the Student has been “expelled from several centers due to violence, and that’s when daycares say that they cannot accept him.” *Id.*

28. In contrast to the above, the Parent testified that prior to the Student attending ABC Childcare, when the Student was in need of a new daycare provider, she was able to find a new provider the same day or it could take a week. Parent at T74. During the time when the Parent’s friend provided care for the Student at home, it took the Parent nearly a month to find childcare because of the Student’s violent history. *Id.* This testimony by the Parent appeared credible, in contrast to her claims about the large number of daycare providers who refused to accept the Student between the summer of 2016 and fall of 2017.

29. The Parent testified that she talked with the Boys & Girls Club in September 2017 and learned that their program ratio includes two to three staff for 45 to 60 children. Parent at T56. According to the Parent, she was also informed that “if [the Student] had previous violent experience at other childcare centers, he would most likely be almost immediately expelled” by the Boys & Girls Club. *Id.* The Parent went on to testify: “I do not feel that it is appropriate to uproot [the Student] from a situation that is functional and working quite well for him to test the theory of him being placed in an environment that he will not thrive in, must less function in.” *Id.* However, the Parent later stated she would be “absolutely willing to try it” if the District were able to find a daycare that offered something similar to the Boys & Girls Club or YMCA program for special-needs kids. Parent at T109.

30. The District works with the Boys & Girls Club and the YMCA, which have programs open to all students, including students with special needs. Wipfli at T190-191. There are students eligible for special education in the District who attend these programs and need supports, in

which case the IEP team and case manager work with the programs to support the particular student. *Id.* The Boys & Girls Club is not a District program but rents space in District buildings. *Id.* at T201. When Ms. Wipfli and the Parent met at the beginning of the 2017-2018 schoolyear, they discussed the possibility of the Student's case manager working with the Boys & Girls Club to develop strategies, if needed, to address any difficulties the Student might experience were he to attend. *Id.* at T191, T199-200. While it was recognized that the Boys & Girls Club was a larger group than what the Parent wanted, the Student's case manager was willing to work with the Boys & Girls Club to help support the Student there. *Id.* The Boys & Girls Club was one of several childcare-related brainstorming ideas that District staff offered to the Parent. *Id.* at 192. The District provided the Parent with a list of ideas, some of which are utilized by other families in the District to get their students between schools and out-of-district daycare providers. *Id.* at T193-194; P6.

31. The Parent's uncorroborated testimony about the number of daycare providers and the timeframe in which she contacted them does not seem probable in the absence of more specific, reliable, and independent evidence supporting her efforts. Letters from two childcare providers who did not testify at the due process hearing are insufficient to verify the number of daycare providers that allegedly turned down the Student for the 2016-2017 and 2017-2018 schoolyears. I do not find it plausible that someone could contact, much less visit, this number of daycare providers in such a short period of time, discuss the needs of a child, and evaluate the centers' suitability. This unlikelihood, combined with the Parent's credible testimony of being able to make new daycare arrangements within a day or a week, raises questions about the overall reliability of this evidence.

32. The evidence that the Student was expelled from three daycare centers *and* that a one-on-one caregiver in his own home could not work with the Student suggests that the size of the group or the staff to student ratio may not be the issue. Instead, a key factor in ABC Childcare's success appears to be its willingness to work with the Student. The District provided a brainstorming list to the Parent of childcare and transportation ideas, including the Boys & Girls Club, located within the District. The District offered the Parent additional time to find a daycare provider that would allow the Student to utilize available school bus transportation within the District, but the Parent did not take advantage of this and instead insists that the District should continue to make an exception and transport the Student to ABC Childcare. The Parent has not exhausted all potential childcare and transportation options within the District. As a result, the Student missed 23 days of school during the 2016-2017 schoolyear. Parent at T58.

33. September 6, 2017 was the first day of school for the 2017-2018 schoolyear. D6. October 26, 2017 was the first day of school that the Student attended. Parent at T57. The Student missed 35 days of school at the beginning of the 2017-2018 schoolyear. Parent at T57; T97.

34. On September 18, 2017, the Parent filed a Due Process Hearing Request. P4. On October 26, 2017, the District resumed providing out-of-district transportation between the Student's school and ABC Childcare pursuant to an Order Granting Parent's Stay-Put Motion. P8; *see also* P7.

35. The Parent claims she is unable to transport the Student between school and ABC Childcare twice a day because she has to be at work. Parent at T58. However, between

September 7, 2017 and November 2, 2017, the Parent missed 138 hours of work while she prepared for the due process hearing. P9, p. 1-2; Parent at T91-93. The Student missed school between September 6, 2017 and October 26, 2017, which overlaps with the days when the Parent missed work. However, the Parent did not transport the Student to school during this period. See Parent at T93.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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 burden of proof in an administrative hearing under the IDEA is on the party challenging the appropriateness of a student's special education program and seeking relief. See *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). The Parent is the party seeking relief in this case, so the Parent has the burden of proof.
3. A party must prove its case by a preponderance of the evidence. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*). This standard of proof means it is more likely than not that something happened or exists.

The Individuals with Disabilities Education Act (IDEA)

4. The primary purpose of the IDEA is to ensure that all children eligible for special education have available to them a free appropriate public education (FAPE). 20 USC §1400(c)-(d). This is achieved through development of an IEP appropriate to the individual needs of a student with a qualifying disability, of which autism is one. See WAC 392-172A-01035(2)(a).
5. 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 *Rowley*, the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

Id. at 206-207 (footnotes omitted).

6. A “free appropriate public education” consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). 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’ [FAPE] as defined by the Act.

Id. at 188-189.

7. A district is not required to provide a “potential-maximizing” education in order to provide FAPE, but only a “basic floor of opportunity” that provides “some educational benefit” to the Student. *Id.* at 200-201. A district must provide a student with a “meaningful benefit” in order to satisfy the FAPE requirement. *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014).

8. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances...[H]is educational program must be appropriately ambitious in light of his circumstances...

Andrew F. v. Douglas County Sch. Dist. RE-1, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017).

9. The Ninth Circuit has explained the *Andrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can ‘make progress in the general education curriculum,’ 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child’s potential.

M.C. v. Antelope Valley Union High Sch. Dist., ___ F.3d ___, 2017 U.S. App. LEXIS 9359, at 22 (9th Cir. 2017).

Related Services

10. The rules set forth in Chapter 392-172A WAC are meant to “ensure that all students eligible for special education have available to them a free appropriate public education (FAPE)

that emphasizes special education and *related services* designed to meet their unique needs and prepare them for further education, employment, and independent living.” WAC 392-172A-01005(2); 34 CFR §300.1(a) (emphasis added).

11. “Related services” means transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education. WAC 392-172A-01155(1); 34 CFR §300.34(a). “Transportation” includes travel to and from school and between schools. *Id.*, (3)(p)(i); (c)(16).

12. The IDEA makes specific provision for services, like transportation, that enable a child to be physically present in class. *Irving Independent School Distr. v. Tatro*, 468 U.S. 883, 891 (1984)(Without CIC services available during the school day, respondents’ child cannot attend school and thereby benefit from special education.)

13. Transportation that is not necessary to assist a student eligible for special education to be present in class and benefit from that education, including transportation that is geared toward parental convenience or non-educational preferences, is not a service designed to meet their unique education needs. *See N. Allegheny Sch. Dist. v. Gregory P.*, 687 A.2d 37, 40 (Pa. Commw. Ct. 1996)(The IDEA “require[s] that the district provide each exceptional student with an appropriate education, transportation between his residence and his school, and additional transportation or other related services *where needed to address his educational needs*. This is an important and sometimes heavy responsibility, but it does not extend to accommodating all the lifestyle preferences and personal needs of parents whose children happen to have special educational needs” (emphasis in original)); *see also Fick v. Sioux Falls Sch. Dist.*, 39 IDELR 151 (8th Cir. 2003)(upholding the district’s denial of transportation to an out-of-district daycare when the transportation request was made for personal reasons unrelated to the student’s educational needs); *see also Mukilteo Sch. Dist.*, 43 IDELR 231 (SEA WA 2005)(district not required to transport student to childcare location convenient to parent, both in price and consistency of care, when student’s IEP does not require after school childcare in order for student to achieve educational benefit); *see also Kimberly Area Sch. Dist.*, 114 LRP 36099 (SEA WI, 2014)(rejecting the parents’ challenge to the district’s denial of out-of-district transportation to the student’s daycare when district’s program met the student’s needs and the daycare was a private decision made by the parents and despite assertions that the daycare provided a small, stable environment which led to improvement in the student’s development and stabilization).¹⁰

14. The issue in this case is whether the District denied the Student FAPE by refusing to provide him with special transportation to and from his childcare provider located outside the District’s

¹⁰ There are a few very early cases addressing the issue of whether a school district must provide transportation as a related service for a student eligible for special education to a childcare provider located outside a school district’s geographical boundaries. *See e.g., In the Matter of Ameer W.*, 1986-87 EHLR Dec. 508:234 (SEA WA 1986); *In re Jesse D. v. Hartford Board of Ed.*, 401 IDELR 356 (SEA CT 1989). In both cases it was held that a school district must provide such transportation to an out-of-district childcare provider. These early cases, however, conflict with the greater weight of authority of the subsequent decisions cited above, and it is concluded these earlier cases are not controlling under the facts in the present case.

boundaries. The Parent can prevail on this issue only if the evidence establishes two circumstances. First, the evidence must establish that because of his disability, the Student requires a particular childcare structure, service, support, or other unique characteristic in order to benefit from the special education and related services in his IEP, i.e., to obtain an educational benefit and hence FAPE. Second, the evidence must establish that no childcare provider exists within the District's boundaries with the capacity and program to serve the Student. Unless both of these circumstances are proven by the Parent, it must be concluded that her placement of the Student at ABC Childcare is for her preference or convenience, rather than necessary to provide the Student with FAPE.

15. The evidence does not support a conclusion that the Student requires a particular childcare provider in order to benefit from the special education and related services in his IEP. During all relevant periods, the Student's educational placement has been the special education program at each of his District schools. The Student has moved from one District school to another multiple times, and the District has made special transportation available for the Student within District boundaries to and from each placement. The IEP team met twice during 2017, and both times it concluded that the Student's educational placement did not require out-of-district transportation to ABC Childcare. There is no evidence to support a conclusion that ABC Childcare provides special education or therapeutic services to the Student.

16. The evidence also does not support a conclusion that no childcare provider exists within the District boundaries with the program and capacity to serve the Student. Courts and fact-finders have concluded that a parent's own convenience, whether due to work schedule or preference for child care provider, is not a basis to require out-of-district transportation for a student because the student also has special needs. *See N. Allegheny Sch. Dist., supra* (the additional transportation requested does not serve any of the student's special needs but only to accommodate the parents' particular domestic arrangements); *see also Mukilteo Sch. Dist., supra* (no evidence that student's aunt, who resided out-of-district and provided childcare, was an educational necessity or that parent was unable to find childcare within the district); *see also Middletown Township Bd. of Educ., 53 IDELR 203 (SEA NJ, 2009)* (rejecting challenge to district's denial of transportation when guardian's request stemmed from her work schedule rather than a determination in the IEP that transportation was a related service).

17. Although the Parent claims ABC Childcare is the only daycare provider that will accept the Student, the evidence provided is not persuasive. The Student has become more verbal, calmer, and more social since starting school. Given that, it is speculative to now suggest that all childcare providers within District boundaries would be unwilling to accept the Student. Further, testimony was provided that at least one daycare provider, the Boys & Girls Club located in a District building, would work with the Student to provide support if needed. The weight of the evidence supports a conclusion that choosing ABC Childcare is a matter of parental convenience or preference rather than based upon the Student's individualized educational needs.

18. The Parent's argument that the District should make an exception because the Student's daycare provider is on the other side of the street from the District boundary is unpersuasive. It does not change the fact that the evidence does not establish that attendance at ABC Childcare is necessary for the Student to receive FAPE. While it may seem to the Parent like an easy exception for the District to make, it is not supported by or required under the law. The court in

Alamo Heights addressed a similar argument but distinguishable situation where a student's caretaker lived one mile outside the school boundary and the district would not provide transportation. *Alamo Heights Ind. Sch. Dist. v. Steven G.*, 557 IDELR 315 (5th Cir. 1986). In *Alamo Heights*, the only caretaker the student's mother could find was located a mile outside of the school district boundary. Unlike the case at hand, the student's ARD Committee in *Alamo Heights*, which is the equivalent of the Student's IEP team, recommended that the student receive out-of-district transportation, but the school district did not act on that recommendation and did not provide transportation. The *Alamo Heights* court adopted the analysis from *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981), in which the services required by a handicapped child were not available in her home school district but were available in a neighboring district. Relying on that analysis, the *Alamo Heights* court found that the "'transportation' required as a 'related service' under the Act is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the handicapped child and is reasonable when all facts are considered." This is distinguishable from the case at hand because while the geographic issue is similar, there is no evidence to find that ABC Childcare is a required component of the Student's educational services. Further, the Student's IEP team did not recommend out-of-district transportation despite the Parent's repeated requests.

19. The record does not support a conclusion that by declining to provide transportation to and from the Student's out-of-district daycare, the District has failed to provide the Student with the opportunity to access and receive FAPE. Instead, by choosing to send the Student to a childcare program located outside of the District boundaries, the Parent has caused the Student to miss important classroom learning and therapy opportunities. In a cooperative effort to mitigate the impact of this, the District made a temporary exception to its transportation policy during the 2016-2017 schoolyear so that the Student could attend school while giving the Parent additional time to locate childcare within the District boundaries.

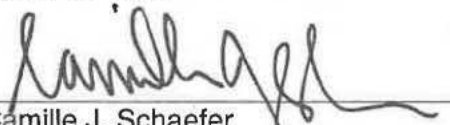
20. It is concluded that the Parent has not carried her burden to prove that the Student required out-of-district transportation in order to receive FAPE. Requiring the District to make an exception to its policy by providing out-of-district transportation to and from ABC Childcare goes beyond the IDEA's mandate of making FAPE available to the Student. The District has not violated the IDEA as implemented by Chapter 28A.155 RCW and Chapter 392-172A WAC.

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

ORDER

The Parent has not established that the District violated the IDEA and denied the Student FAPE by refusing to provide out-of-district transportation to and from ABC Childcare. The Parent is therefore not entitled to any of her requested remedies.


Signed at Seattle, Washington on December 1, 2017.


Camille J. Schaefer
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parent



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