STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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January 7, 2016

Parents
[redacted]

John Sander, Executive Director of Inclusive Education Services
Kent School District
12033 SE 256th Street
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PO Box 140
Kent, WA 98035

In re: Kent School District
OSPI Cause No. 2015-SE-0088
OAH Docket No. 09-2015-OSPI-00197

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,

Michelle C. Mentzer
Administrative Law Judge

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

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

IN THE MATTER OF:	OSPI CAUSE NO. 2015-SE-0088
	OAH DOCKET NO. 09-2015-OSPI-00197
KENT SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Kent, Washington, on December 8 and 9, 2015. The Mother of the Student whose education is at issue[1] appeared on behalf of the Parents. The Kent School District (District) was represented by David Hokit, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request with the Office of Superintendent of Public Instruction (OSPI) on September 29, 2015. Prehearing conferences were held on November 4, and 30, 2015. Prehearing orders were issued on October 9, and November 4, and 30, 2015.

The due date for the written decision was continued to fourteen (14) days after the close of the hearing record, pursuant to a District request for continuance that was not opposed by the Parents. *See* First Prehearing Order of November 4, 2015. The hearing record closed with the filing of post-hearing briefs on December 31, 2015. Fourteen days thereafter is January 14, 2016. The due date for the written decision is therefore January 14, 2016.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence: Parents Exhibits P-1 through P-11, and District Exhibits D-1 through D-12.

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

Deena Hook, vice president for outreach, National Tuberous Sclerosis Alliance;
The Mother of the Student;
Holly Bailey, District assistant director of inclusive education services;
John Sander, District executive director of inclusive education services; and
Mary Newell, District coordinator for health services.

[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/or "Student."

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ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

a. Failing to provide a one-on-one (1:1) nurse for the Student when her regular nurse is absent, resulting in the Student being unable to attend school;
b. Allowing the Student's 1:1 nurse to attend to other student(s) on the school bus, in violation of the Student's individualized education program (IEP);

2. Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate. An order requiring the District to:

a. Call in a substitute nurse from a nursing agency to cover days when the Student's regular nurse will be absent; and
b. Not allow the Student's 1:1 nurse to attend to other students on the school bus.

See First Prehearing Order of November 4, 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 is seven years old and in the first grade. She lives with the Parents within the Kent School District, where she attends school. The Student is eligible for special education and related services under the category Health Impairments. P-2:13.[2] Her IEP describes the Student as sweet-natured and happy, and states she loves to interact socially with teachers and peers. D-4:1. The Student is served in a self-contained program called the Adaptive Support Center (ASC).

3. The Student has multiple disabilities including Tuberous Sclerosis, Lennox-Gastaut Syndrome (LGS, a type of epilepsy), and West Syndrome. She has intellectual delays, frequent seizures, and she is incontinent and non-ambulatory. The Student requires adult assistance for all of her physical needs. The Student does not receive food or liquid via her mouth, and is fed by a gastrostomy tube (G-tube). Exposure to sugar, either by ingestion or skin contact, can lead to seizure activity. During the school day, seven medications must be ground in a certain order, soaked, and then administered together through the G-tube. P-2:16; P-7. The regimen of her medical care at school is set forth in two Individualized Health Care Plans, one for her seizure disorder and one for her G-tube feedings. P-7. In addition to nursing care, the Student's IEP

[2] References to the exhibits are in the following format. "P-2:13" means Parents' Exhibit P-2, page 13.

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provides for services from a speech-language pathologist, an occupational therapist, and a physical therapist. D-3:17.

4. LGS is the most difficult form of epilepsy because it is almost impossible to control and seizures are unpredictable. Testimony of Hook and Mother. The Student experiences a variety of seizure types, from grand mal to those with subtle symptoms. Her "absence" seizures are evident primarily by noticing that she is staring. Her petit mal seizures are evident by eye motions and hand clenching. Even the Mother has missed the signs of an absence seizure for 30 seconds, thinking the Student was just zoning out before realizing that her pupils were dilated and she was having a seizure. Testimony of Mother.

5. The Student must receive the medication Diastat by rectal injection if any seizure, even one of the more subtle ones, continues for three minutes. She must also receive Diastat if she experiences three seizures, regardless of length, within a period of five minutes. Testimony of Mother; D-10. Because of this, the Student is watched as she sleeps at night so that any seizures can be noted and timed, and Diastat can be administered if necessary. The Mother, the Father, and a paid nurse rotate shifts watching the Student at night. Testimony of Mother.

6. When Diastat is administered at school to stop seizures, it can only be administered by a licensed nurse; the task cannot be delegated to unlicensed staff. 911 is called so that medics can monitor the Student following the nurse's administration of Diastat, because the medication may cause breathing difficulties and because seizures may continue after a first administration of the medication. Testimony of Newell. The Student experienced seizures at school that required the administration of Diastat on May 28, 2014 and November 24, 2014. Testimony of Mother.

7. The Student has experienced long-term loss of function due to seizures in the past. On May 28, 2014, while at school, the Student had a six-minute seizure, followed by 20 minutes of frequent seizures, and received two doses of Diastat. P-7:3; Testimony of Mother. She lost function thereafter: Prior to the date of these seizures, she was able to clap her hands, use the sign language sign for "more," and sit up unaided for long periods. Since that date, she has never recovered the ability to clap or sign "more," and she can only sit up unaided for two to five minutes. It took a full year until her level of engagement recovered in other respects to the level it had been prior to May 28, 2014. Testimony of Mother.[3]

8. The Student continues to have serious seizure activity. A few days before the due process hearing, she was sent home from school vomiting and was hospitalized overnight after having a grand mal seizure and two complex partial seizures. Testimony of Mother.

9. Regarding the Student's G-tube feedings, she has an unusual type of abdominal implant. Because she tends to pull and grab at her implant, she does not have the more

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[3] The Mother also testified that the Student's neurologist stated that irreparable brain damage can occur if a seizure continues untreated for five minutes. However, this is uncorroborated hearsay concerning what the neurologist said. It would unduly abridge the District's opportunity to cross-examine witnesses and rebut evidence to base a finding of fact exclusively on this hearsay testimony. *See* RCW 34.05.461(4).

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common balloon-type feeding tube that can be fairly easily replaced. Instead, she has a mushroom-shaped implant with a valve. Only a surgeon, not a nurse or physician, can replace this type of implant. Testimony of Mother.

Student's Health Care at School

10. The Student has had IEPs in the District since preschool. Her November 2014 IEP, adopted during kindergarten, provided for a full-time, one-on-one (1:1) paraeducator. P-1:18. The paraeducator attended to the Student's physical and educational services, and a nurse at the school attended to her medical needs.

11. During the Student's kindergarten year, 2014-2015, there were numerous days when her 1:1 paraeducator was absent, no substitute was provided, and the Student could not attend school as a result. The District's executive director of inclusive education testified that the District has a pool of substitute paraeducators, or else can assign a general classroom paraeducator to serve as a 1:1 when a 1:1 paraeducator is absent. Testimony of Sander. However, the school told the Mother to keep the Student home on the days when the Student's 1:1 paraeducator was absent. Testimony of Mother. During kindergarten, the Student's 1:1 paraeducator was absent on four days through late-May, then she resigned on May 29, 2015, resulting in the Student being unable to attend school for the remaining 15 school days of kindergarten. Testimony of Mother; D-11:3. The Student missed 11% of kindergarten school days as a result (19 school days out of 180).

12. There were five accidents during the Student's kindergarten year that ultimately led the Parents to request a change of school and change of staffing for the Student. On three occasions, the Student came home with a part of her surgically implanted device damaged. On two of these occasions, the damaged part had been removed from the implant and came home in a plastic bag. Another time, a part had been jammed back into the implant upside-down. Each time, the implant had to be replaced by a surgeon, which was painful for the Student and expensive for the Parents. There was inadequate communication between the nurse and the 1:1 paraeducator in each of these instances, in the Mother's view: the Mother would discover the damaged part herself when the Student came home, call the paraeducator to find out what happened, and the paraeducator would have no knowledge that anything occurred. Testimony of Mother.

13. Another accident during kindergarten occurred when the 1:1 paraeducator did not properly tilt the Student's wheelchair, resulting in one of the hydraulic parts being broken. The Student was without the wheelchair for approximately 1.5 weeks while waiting for parts. *Id.*

14. In April 2015, as a result of the three G-tube accidents discussed above, the Parents paid to have school staff trained by the medical device company on proper use of the G-tube. The Parents thought this training would resolve the problems. However, another and more serious accident happened on May 28, 2015. A nurse at school was performing the Student's G-tube feeding. The nurse went to lunch while the feeding tube was still connected to the Student. The Student's 1:1 paraeducator did not know the Student was still connected to the feeding apparatus, and lifted her up. The G-tube caught on the Student's wheelchair and her implant was physically torn out of her abdomen as a result. This was especially painful because the mushroom-shaped device was not compressed before it was pulled out. P-10; Testimony of Mother.

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15. The Mother was called to school and heard the Student screaming in pain from a distance. The Student's implant had been completely torn out. A new implant was put in by a surgeon, the fourth one that year due to school accidents. This caused additional pain to the Student and expense to the Parents. The Student was on narcotic pain medication for the first time in her life. Her recovery took six weeks. Since that time, the Student has not responded well to people coming near her G-tube site. The Mother must now employ stealth, or else do it in the Student's sleep. Testimony of Mother; P-10:1, 8.

16. After the final accident of May 28, 2015, the Student did not return to school for the remainder of the school year. This was partly because the 1:1 paraeducator resigned the next day and was not replaced, and partly because the Parents did not feel it was safe to return the Student to school given all of the accidents that had occurred. None of the types of accidents that occurred during kindergarten have ever occurred when the Student was cared for at home. Testimony of Mother.

17. In early June 2015, the parties participated in mediation to try to resolve their differences concerning what care the District would provide for the Student going forward. They entered into a mediation agreement under which the Student would switch from School 1 to School 2[4] in the fall. The mediation agreement also provided the Student would be assigned a 1:1 nurse instead of a 1:1 paraeducator. P-6:2-3. The Student's IEP was amended a few days later to reflect the mediation agreement. It specified that a "1:1 Licensed Nurse" would attend the Student "daily," both "[o]n the bus and at school." P-2:27. The parties understood this to mean a licensed practical nurse (LPN). The nurse would provide the Student's educational services as well as her physical care and medical services. The prior written notice adopting the June 2015 IEP amendment stated the following regarding days when a nurse would be unavailable:

> In the event that a nurse is not available on a given day, [the Student's] parent will be notified and have the option to attend school with her daughter.

P-2:2. This provision about the Mother's option to substitute for the nurse was also in the mediation agreement. P-6:3. The Mother understood it to mean that if the District was unable to find "a nurse" on a given day -- i.e., neither the regular 1:1 nurse nor a substitute nurse was available -- then the Mother would have the option to attend with the Student. She did not understand it to mean that the District would not attempt to find a substitute in the event of an absence. Testimony of Mother. In support of their reading of this provision, the Parents note that it does not say "In the event that *the Student's regular 1:1 nurse* is not available," but rather says "In the event that *a nurse* is not available." P-2:2 (italics added).

18. At a meeting on August 28, 2015, the Mother asked Holly Bailey, assistant director of inclusive education services, what procedure would be followed when the Student's 1:1 nurse was absent. Ms. Bailey responded that she believed the school would not be calling a substitute nurse, but stated she would double check. Ms. Bailey told the 1:1 nurse (who was present at the meeting): You better not get sick, otherwise the Student can't go. Testimony of

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[4] To provide greater confidentiality for the family, the names of the elementary schools the Student attended in kindergarten and first grade are omitted. They are referred to herein as School 1 (the school she attended for kindergarten) and School 2 (the school she is attending for first grade).

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Mother. The Parent argued with Ms. Bailey that a substitute nurse needed to be called. The Student already misses many days of school due to illness and medical appointments, so she needs every available remaining school day, in the Mother's view. *Id.*

19. On September 1, 2015, Ms. Bailey got back to the Mother by telephone. Testimony of Bailey. Ms. Bailey told her the mediation agreement did not specify that the District was required to call a substitute nurse when the regular 1:1 nurse was absent. The Mother asked what would happen on such days. Ms. Bailey responded that the Student would need to stay at home unless a Parent wanted to spend the day at school. Testimony of Mother.

20. To memorialize the rejection of the Parents' request in this regard, the District issued a prior written notice on September 1, 2015. It stated the District was "[r]efusing to provide a nurse if one is unavailable for a given school day." P-9:1. It stated that the Parent could come to school and care for the Student herself. *Id.*

21. In the fall of 2015, the District's coordinator for health services, Dr. Mary Newell, inquired of 23 employment agencies about their services. Five of those agencies provide nurses, but all five told her they do not provide substitute or per diem nurses. Testimony of Newell.[5]

22. Dr. Newell explained that when a nurse leaves employment, it takes an average of two weeks to refill the position from a nursing agency. *Id.* There are a total of 34.9 full-time equivalent nursing positions in the District, most of which are filled by District employees and the remainder of which are filled by agency employees. *Id.* At the hearing, Dr. Newell was asked whether the District could hire a full-time designated floater nurse to fill in when there are absences among any of these nurses. Dr. Newell stated that it would be disconcerting and cause nervousness to have to fill in at schools where one is unfamiliar with the students' needs. *Id.*

23. On September 24, 2015, the Parents filed their due process hearing request (complaint) with the District. On September 28, 2015, the Student's 1:1 nurse was absent for the first time. P-5. On September 29, 2015, OSPI received its copy of the complaint. P-11.

24. In subsequent settlement discussions between the parties, the District's proposed back-up plan for absences of the Student's 1:1 nurse was that the 1:1 nurse of another student (Classmate A herein) would care for both Classmate A and the Student. However, District administrators Mr. Sanders and Dr. Newell acknowledged that this plan would not be in compliance with the Student's IEP, because the ratio of care on those days would change from 1:1 to 2:1. Testimony of Sanders and Newell. The record contains no evidence about the

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[5] Dr. Newell's testimony about what the nursing agencies told her is hearsay. However, it does not unduly abridge the Parents' ability to rebut evidence or cross-examine witnesses to base a finding of fact exclusively on this hearsay. *See* RCW 34.05.461(4). This is because the Parents knew as early as September 2015 that Dr. Newell had contacted nursing agencies and that she claimed none of them had per diem nurses available. Testimony of Mother. The Parents could have challenged this testimony by contacting nursing agencies themselves regarding per diem services and presenting their own hearsay testimony about the responses (or by calling nursing agency representatives as witnesses). The Mother has contacted at least one nursing agency in the past, having hired a nighttime nurse for the Student through an agency, so she knew how to make such contacts. Testimony of Mother.

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extent of Classmate A's physical or medical care needs, or whether her 1:1 nurse is also responsible for delivering her educational services, as the Student's nurse is. The Mother believes Classmate A requires diaper changes, but does not know this. The Mother rejected the District's proposed back-up plan for several reasons: (1) It violates the Student's IEP, which requires 1:1, not 2:1, staffing; (2) Classmate A's nurse would not be able to keep eyes on the Student to note the onset of subtle seizures and to time them, as well as provide for all of the Student's physical, medical, and educational needs, while also caring for Classmate A; and (3) Classmate A's nurse does not attend school on days Classmate A is absent, so she could not serve as a substitute on those days. Testimony of Mother; Parents' closing brief.

25. Another District back-up proposal would be to rely on calling 911 when there is no nurse in the building and the Student has a seizure. However, the District's coordinator for health services, Dr. Newell, does not know how long it takes for medics to arrive at School 2, or to arrive at the Student's school bus when it is in route. Testimony of Newell. The District did not present evidence to contradict the Mother's testimony that medics generally arrive in an average of six minutes, and that it takes them another several minutes to walk up to the Student's classroom (they do not run) and assess the Student's condition before deciding whether administration of medication is warranted. Testimony of Mother. This significantly exceeds the three-minute window from the start of a seizure after which Diastat must be administered to the Student.

26. The District's other proposed back-up plan is to provide compensatory education during the summer for days the Student had to stay home due to the absence of her 1:1 nurse. P-8:6. The Mother questioned how the Student would receive all of her therapies, socialization, and classroom activities in this situation. P-8:4. The Student loves socialization and becomes depressed without it. Testimony of Mother; D-4:1.

27. The Parents proposed different back-up plans. First, they proposed that a substitute 1:1 nurse be called. Barring that, they proposed that a 1:1 paraeducator be trained in seizure recognition and substitute for the Student's 1:1 nurse when the latter is absent. The paraeducator would take the Student to the school nurse in the event the paraeducator perceived the start of a seizure, and also for G-tube feedings and medication administration. The substitute paraeducator would provide the Student's 1:1 educational services, just as the 1:1 nurse does. Testimony of Mother; P-8:3-4. The District rejected this proposal because School 2 has only a part-time school nurse, and no full-time nurse other than 1:1 nurses assigned to other students (the sharing of which the Parents rejected).

28. The Student's bus ride was another area of contention. The ride is 40 minutes in the morning and 20-25 minutes in the afternoon, for a total of about one hour. Testimony of Newell. For the first two months of the 2015-2016 school year, Classmate A's 1:1 nurse did not ride the bus with Classmate A, and instead met Classmate A at school. Classmate A's IEP requires a 1:1 nurse on the bus, so the Student's 1:1 nurse was responsible for the needs of both children on the bus, changing the ratio of care from 1:1 to 2:1. In late October 2015, the District obtained a 1:1 nurse on the bus for Classmate A, so the sharing arrangement ended. However, the 2:1 ratio will occur again when either of the two 1:1 nurses is absent. Testimony of Mother and Newell.

29. On October 22, 2015, the Student's annual IEP review meeting was held. The PWN issued shortly after the meeting stated:

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> [The Parents] are concerned that a substitute nurse is not called when [the Student's] 1:1 nurse is absent. Without a substitute nurse, [the Student] is not able to attend school unless a parent attends with her. They disagree and want it to be discussed further.

D-4:20. The Parents were permitted to add a handwritten note to the IEP's accommodations page to express their disagreement:

> Access/use of 1:1 licensed nurse – daily – means every day. This should include days when her regular nurse is absent. No sharing the nurse on the bus. . . . Wheel chair accessible bus transportation – daily – should include days when her regular nurse is absent and a substitute should be called in.
> However, since the school is denying her right to attend school on the days when her regular nurse is absent, a back-up plan needs to be put in place.

D-4:15 (emphasis in original).

30. Another IEP meeting was held on November 9, 2015. There the Mother learned for the first time that there was no full-time school nurse at School 2. Testimony of Mother. The school nurse at School 2 is present from 8:15 to 11:45 a.m. four days a week, and all day on Wednesdays. Testimony of Newell.

31. Also in early November 2015, Dr. Newell and District staff began to consider creating a District per diem nursing pool. The District is considering attracting LPNs to the per diem pool by offering educational benefits for them to continue their schooling and become registered nurses (RNs), in exchange for serving in the per diem pool. No such pool is in existence yet. Testimony of Newell.

32. Regarding other elementary schools in the District that have full-time nurses who are not assigned 1:1 to any student, the only such school that also has the educational program the Student needs is School 1 – where the Student attended kindergarten. There, a full-time nurse is assigned to the ASC program, and not 1:1 to any child. Testimony of Newell.

33. The Student's 1:1 nurse during the current school year, 2015-2016, is Nashira Valdez. The Student has suffered no accidents or injuries under her care. Testimony of Mother. Ms. Valdez was absent twice in the first four months of the school year. The Parents were informed in advance about the first absence, September 28, 2015. They were able to switch one of the Student's medical appointments to that day since the Student would not be able to attend school. The second absence was on November 20, 2015, when Ms. Valdez was ill. The Student was unable to attend school as a result of Ms. Valdez's absence that day. Testimony of Mother; P-5.

34. The District's plan has not changed for days when Ms. Valdez is absent: The current plan is for Student to remain at home. Testimony of Sanders. If Ms. Valdez were to leave employment, the District would look at other options, such as having the Student's schooling take place in the home setting. Testimony of Newell. The District concedes that these plans are different than when a teacher is absent. When a teacher is absent the District will attempt to call a substitute. If a substitute cannot be found, the District will bring in a librarian, counselor,

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or other staff person who can fill the position. The students will not be told to stay at home. Testimony of Sander.

35. District administrators expressed their view at the hearing that the Student does not "need" a 1:1 nurse, noting that her health care plan has not changed in any significant way from last year (kindergarten), when her care was split between a 1:1 paraeducator and a school nurse. Testimony of Sander and Newell. The District overlooks the fact that last year the Student's care was terribly inadequate. It resulted in the Student's G-tube implant being damaged four times at school, each time requiring surgery on the Student and expense for the Parents to have a new implant installed. The final accident resulted in the implant being ripped out of the Student's abdomen with no anesthesia, requiring a six-week recovery period. There was also an accident involving her wheelchair, resulting in her being without it for 1.5 weeks, not to mention 11% of school days missed due to the absence of the 1:1 paraeducator. The District's closing brief makes no mention of any of these events from the prior school year. What changed over the course of that year was not the Student's health care plan, but the evidence that the District's staffing model had failed to safely implement it.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the 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:

> 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

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> 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, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

6. "Related services" under the IDEA are such supportive services as are required to assist a child with a disability to benefit from special education. 20 USC § 1401(26)(A); *see* WAC 392-172A-01155(1); 34 CFR §300.34. "Related services" include "school nurse services" designed to enable a child with a disability to receive a free appropriate public education. *Id.* IEPs must include a statement of the related services and supplementary aids and services to be provided to the student. 20 USC § 1414(d)(1)(A)(i)(IV); WAC 392-172A-03090(1)(d); 34 CFR §300.320 .

7. In a recent Ninth Circuit case involving G-tube feedings at school, the student's "fundamental complaint [was] that he has been prevented from attending public school safely" due to a lack of nursing care. *T.B. v. San Diego Unif'd Sch. Dist.*, 795 F.3d 1067, 1084 (9th Cir. 2015). The Ninth Circuit emphasized the right of the student who required such services "to attend public school". *Id.* An ALJ and a district court had found the student's IEP was silent about *who* would perform his G-tube feedings, and also found evidence that the district planned to have the feedings performed by a behavioral aide with only three hours of training. The aide was not found qualified to perform the G-tube feedings, even though the student was older and actually performed his own feedings with assistance from the aide. The ALJ ordered modification of the IEP to provide that a nurse would personally assist the student with his G-tube feedings. The ALJ also ruled that nothing prevented the district, in a future IEP, from designating another classification of employee to perform the feedings provided that employee was adequately trained. The ALJ's ruling was affirmed by the district court and the Ninth Circuit, with most of the courts' decisions focusing on statutes that are not at issue here.[6] Of interest to

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[6] The Parents argue that the legal standard of "deliberate indifference," which is utilized under some of the statutes that are not at issue here, should be considered herein. Parents' Closing Brief at 12. However, "deliberate indifference" is not a legal standard that is utilized under the IDEA. It is therefore not considered here.

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the present case is that the IEP drafted in *T.B.* following the ALJ's decision contained a back-up plan: the nurse would train two back-up aides on the G-tube feedings in case the primary aide responsible for them, plus one of the back-up aides, were to be absent on the same day, so that the student could still attend school. *Id.* at 1079.[7]

8. A number of other cases demonstrate that back-up plans and substitutes are routinely provided so that students are able to attend school when their regular provider is absent. *See T.B. v. San Diego Unified Sch. Dist.*, 2012 U.S. Dist. Lexis 64563, 58 IDELR 278 (S.D. Cal. 2012) (district court decision underlying 9th Circuit's *T.B.* decision; concerning situations where both the school's regular *and* itinerant nurse might be absent on the same day: "These ordinary scheduling problems were adequately addressed by the School District. It had another nurse [a third nurse] available to fulfill the duties set forth in the proposed IEP."); *San Diego Unif'd Sch. Dist.*, 107 LRP 64067 (SEA CA) (ALJ decision underlying court decisions in *T.B.*; student had special dietary needs and a district dietician was responsible for providing his food; "Student also contends that if [the dietician] is absent, there would be no back-up individual to maintain Student's diet. However, [the dietician] would be preparing a meal plan for Student. There is no indication the cafeteria staff would be unable to follow that plan in [the dietician's] absence."); *Montgomery County Pub. Schs.*, 114 LRP 23039 (SEA MD 2014) (in citizen complaint case, student with a seizure disorder was unable to attend school on one day because school nurse was absent. State department of education concurred with school district's corrective action of adopting a back-up plan to assure presence of a nurse at school when the regular nurse was absent in the future); *In re: Student with a Disability*, 114 LRP 9544 (SEA MT 2013) (in citizen complaint case, the school district's nurse was not available and none of the three back up nurses were available on one day, and on part of another day, so the student could not attend school at those times. State department of education found that, given the rural location and the school district's rigorous three-person back-up plan for nursing, no violation would be found, though the district was ordered to provide compensatory education); *St. Johns County Sch. Dist.*, 64 IDELR 124 (SEA FL 2013) (in citizen complaint case, state department of education found violation where student missed 10 days of school due to absence of 1:1 nurse, where school district did not have back-up plan for nurse's absence); *Jamestown (PA) Area Sch. Dist.*, 37 IDELR 260 (OCR 2002) (in Section 504 case, the Office of Civil Rights (OCR) of the U.S. Department of Education ordered a district to "implement a procedure including a designated back-up person for the school nurse to administer glucagons [sic] to the student as needed."); *Hays (KS) Unif'd Sch. Dist.*, 18 IDELR 866 (OCR 1991) (in Section 504 case, OCR found violation where the district's substitute nurse was unavailable a number of times when the school nurse was absent, resulting in three children with tracheotomies being unable to attend unless their parents accompanied them. OCR approved district's plan for hiring and training five more substitute nurses).[8]

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[7] *T.B.* relied in part on California regulations, but that reliance is not relevant to the analysis here.

[8] The last two cases cited here, *Jamestown* and *Hays*, arose in the context of Section 504 of the Rehabilitation Act of 1973, 29 USC §794. Some cases under Section 504 present issues irrelevant to the IDEA (e.g., the "deliberate indifference" standard for establishing financial liability under Section 504). Other cases, like *Jamestown* and *Hays*, present very similar issues to ones that arise under the IDEA, as is evident from the IDEA cases on similar issues cited in the same paragraph.

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9. The absence of a back-up plan for a substitute when the Student's 1:1 nurse is absent renders the Student's educational plan inappropriate. Any staff person may become injured or ill at any time. They may also take vacation days, resign, be discharged, or transfer. Any of these circumstances can result in prolonged absences, as well as individual days of absence. Last year the Student could not attend school for 11% of the school year due to the absence of her 1:1 paraeducator. Paraeducators are easier to replace with substitutes than nurses are, according to District witnesses, and so the lack of a plan for substitutes is even more inappropriate this year than last year.

10. The same problems exist during the one hour per day that the Student spends on the school bus as during the time she spends in the classroom. The same emergencies can occur in both places. Her IEP provides for a 1:1 nurse on the bus, just as it does in the classroom.

11. The District's proposals for back-up plans were inappropriate and unsafe, and the Parents justifiably rejected them. Having Classmate A's 1:1 nurse care for and provide educational services to the Student would violate the Student's IEP, which calls for 1:1, not 2:1, nursing and educational services. District witnesses acknowledged this plan would not comply with the Student's IEP. The extent of Classmate A's physical and medical needs is unknown on the present record. Presumably those needs are fairly extensive, since the District provides Classmate A with a full-time, 1:1 nurse. It is also unknown whether that nurse is responsible for Classmate A's educational needs, as well. When that nurse is providing care and/or education to Classmate A, she cannot be assumed to be keeping eyes on the Student to notice subtle signs of the onset of a seizure, signs that must be addressed with an injection within three minutes of onset. If Classmate A requires diaper changes, the nurse will be out of the room and occupied several times a day, unable to watch the Student for the onset of a seizure or time her seizures. Classmate A's nurse also cannot be assumed to be available to provide the Student's 1:1 educational services, as well as meeting all of her physical (non-medical) needs, while caring for Classmate A. The District's other proposed back-up plan of calling 911 is also unsafe. It would take medics significantly longer than the three-minute window for Diastat administration to arrive, assess the Student, and decide whether to administer the medication.

12. Having two children cared for by a single nurse may be safer for others than it is for this Student. If a child receives G-tube feedings or needs tracheotomy care, for instance, there may be a range of time significantly longer than three minutes within which care can be administered. There may also be no need for constant observation, as there is with this Student due to her LGS seizure disorder. Other students may not need physical assistance with every task of daily living, as the Student does, so that shared care would be a more reasonable choice.

13. The District refers to a less specific back-up option of "using other nurses in the building" (there are two other 1:1 nurses and a part-time school nurse in the building) and "having other educational staff . . . in the ASC class provide her educational support." District brief at 3. The District has never presented a plan for covering the Student's many needs by people who already have full-time jobs. Who will do the Student's diaper changes? Who will tend to her many other physical needs for assistance? Who will keep eyes on her to recognize and time seizures? Who will prepare her medications and do her G-tube feedings? Who will provide all of her educational services? The vague assertion that others will take over for the Student's 1:1 nurse is not a schedule or a plan. If such a plan had been presented, the Parents would have had the opportunity to cross-examine witnesses about it and test its adequacy. Such a vague

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back-up idea cannot be found adequate for a student with this level of need where no plan was presented.

14. Again, not every student who receives some amount of nursing care at school needs a detailed plan for coverage in the nurse's absence. However, the Student's care needs are extensive, and lapses in her care can be life-threatening or cause serious injury, as happened last year at school. Moreover, this Student already misses numerous school days due to illness and medical appointments. Thus, a back-up plan for substitute nursing care is needed here.

15. Regarding the Mother serving as an unpaid substitute for the 1:1 nurse on days when the latter is absent, it is a school district's obligation to provide the related services necessary for a student to attend school. Pushing this obligation onto parents renders a student's education neither appropriate nor free. Regarding the District's idea of providing homebound education if the Student's 1:1 nurse leaves employment, homebound education is not the Student's least restrictive environment (LRE). The Student is being successfully educated in a classroom environment. Homebound education would violate the IDEA's LRE mandate. *See* 20 USC §1412(a)(5)(A). *See also* WAC 392-172A-02050; 34 CFR §300.114.

16. In summary, the District's educational plan for the Student is not reasonably calculated to allow her to safely attend school on days when her 1:1 nurse is absent, or for a period of approximately two weeks if that nurse leaves the position and a replacement must be hired. The District has adopted several IEPs for the Student since her kindergarten year, after all five of the accidents had occurred in that year and after the Student had missed 11% of the school days that year due to the absence of her 1:1 caregiver. None of these IEPs have provided a back-up plan for such absences. A back-up plan need not be foolproof or perfect, but it must be reasonably calculated to provide substitute care so that the Student does not need to stay home when her regular 1:1 nurse is absent or leaves the position. *See Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (setting forth the "reasonably calculated" standard). In light of what the District knew by the end of the Student's kindergarten year, the IEPs it subsequently adopted, without a back-up plan for the Student's care, were not reasonably calculated to permit consistent and safe attendance at school. A back-up plan is not needed for the Student's other related service providers. If an SLP, occupational therapist, or physical therapist is absent, their services can be more easily made up on another day. Their absence would not prevent the Student from attending school altogether

17. The District prefers to view this case as focused only on the two days thus far[9] in the current school year that the Student's 1:1 nurse has been absent. The District argues that two days in four months is not a "material" failure to implement the IEP, but only a "minor discrepancy," under the standard set forth in *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821-822 (9th Cir. 2007), and thus not a denial of FAPE. However, the Parents' complaint does not focus on the two days of absence. In fact, the complaint was filed with the District before either of those two absences had occurred. Rather, the complaint concerns the lack of a back-

[9] The record contains information only through the dates of the due process hearing, December 8 – 9, 2015, not through the date of this decision, which is being issued approximately one month later. It is unknown whether there were additional absences of the Student's 1:1 nurse during the intervening month.

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up plan, and was motivated by the 11% of school days that the Student was unable to attend school during the prior school year due to the lack of such a plan. The Parents are entitled to not only compensatory education for days missed thus far, but to the adoption of a back-up plan reasonably calculated to prevent the additional loss of school days. Once the District has adopted a back-up plan that is reasonably calculated to allow the Student to consistently attend school, any days when that plan fails, and the Student is unable to attend due to the absence of her 1:1 nurse, can be calculated to see whether they amount to a material failure to implement the IEP, or only a minor discrepancy in its implementation.

18. The District relies on several cases that are inapposite. In *Fisher v. Stafford Township Bd. of Educ.*, 2007 U.S. Dist. Lexis 14003, 47 IDELR 134 (D.N.J. 2007), *aff'd*, 289 Fed. Appx. 520 (3rd Cir. 2008, unpublished), an autistic student's IEP called for a full-time, 1:1 aide, among whose duties was delivery of Applied Behavior Analysis (ABA) therapy. The student's regular 1:1 aide, who had ABA training, was unavailable two days a week for a period of approximately five weeks, and was absent on some other unspecified days. The parent chose not to send the student to school on all of these days, though the district had a pool of eight substitute 1:1 aides who could have served the student. While those substitutes could not have provided the student's ABA therapy, they would have enabled him to participate in classroom activities, accompanied him on class trips into the community, and helped him generalize and apply the life skills he had learned. The availability of eight substitutes distinguishes *Fisher* from the present case, where no substitutes were available and the Student missed not only one particular therapy service, but was unable to attend school at all. The court found the parent was unwarranted in refusing to utilize the pool of eight substitute aides, thus depriving the student of participation in the activities described above. Another significant distinguishing fact is that the parent in *Fisher*, unlike the Parents here, did not argue that the district's educational plan for the student was inappropriate for lack of a back-up plan before any absences had occurred. Therefore, the court analyzed the case only under the rubric of failure-to-implement. The court found that the availability of substitute aides, even though they were not ABA-trained, meant the parent could not show the district "failed to implement substantial or significant provisions of the IEP such that the child was denied a meaningful educational benefit," which is the Third Circuit's standard in failure-to-implement cases. *Fisher, supra,* 2007 U.S. Dist. Lexis 14003, n. 15. In the present case, unlike in *Fisher*, the Parents filed their due process complaint before any failure-to-implement (i.e. nurse absences) had occurred, and made a written objection on the IEP document stating it was inadequate for lack of a back-up plan.[10]

19. Another case cited by the District is likewise inapposite: *Catalan v. District of Columbia,* 478 F. Supp.2d 73 (D.C.D.C.), *aff'd sub nom. E.C. v. District of Columbia*, 2007 U.S. App. Lexis

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[10] The parent in *Fisher* also made the error of categorizing as "compensatory education" her request that the district be ordered to train one of the substitute aides in ABA, so the substitute could provide the student's ABA therapy when his regular aide was absent. The court agreed with the ALJ that "compensatory education" was not appropriate "because Fisher's request was not intended to redress actual harm, but, rather, to prevent the possibility that such harm might be experienced in the future." The court also noted that there was no future harm to address, since the student was no longer attending school in the district. *Fisher, supra*, 2007 U.S. Dist. Lexis 14003, n. 14. This is the only claim in *Fisher* that is similar to the Parents' request here for a back-up plan in the event of absences. However, the parent in *Fisher* wrongly asked for it as "compensatory education," and the court declined to overlook the error and award training prospectively because the student had disenrolled from the district.

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21928, 114 LRP 32783 (D.C. Cir. 2007). There the parents did not challenge the appropriateness of the student's educational plan, so, unlike the present case, the only legal challenge raised was a failure to implement the IEP. Also unlike the present case, the student in *Catalan* was not prevented from attending school altogether due to the absence of a service provider, as was the Student here. Rather, the student in *Catalan* attended school and only missed occasional sessions with a speech-language pathologist (SLP). The court found the missed sessions did not constitute a material failure to implement the IEP.

20. The District also cites *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 Fed. Appx. 184 (3d Cir. 2006, unpublished). There, when the student's full-time, 1:1 aide left the position, a substitute teacher served the student 1:1 until a replacement aide could be hired. However, the parent alleged that there were several additional days when the student had to stay home due to the absence of the aide, but the court found these absences *de minimus*. Unlike the present case, the only legal challenge raised in *Melissa S.* was a failure-to-implement. There was no challenge to the educational plan as inappropriate for lack of a back-up plan. Likewise in *Ellensburg Sch. Dist.*, 114 LRP 25526 (SEA WA 2013), only a failure-to-implement challenge was raised regarding the weeks when an in-class math aide required by the IEP was not provided. The parent there did not challenge the IEP as substantively inappropriate for lacking a back-up plan for the aide, and only brought a failure-to-implement challenge. The same is true in another case cited by the District. *See Manalansan v. Bd. of Educ. of Baltimore City,* 2001 U.S. Dist. Lexis 12608, 35 IDELR 122 (D.C. Md. 2001), discussed in *Van Duyn, supra,* 502 F.3d at 819. It may be that the parents in the cases cited above did not challenge the substantive appropriateness of the IEPs for lacking back-up plans because attendance of the service provider in question was not a *sin qua non* for the student to attend school in those cases, as it is here. For whatever reason, the legal claim was not raised, and was not addressed, in any of the cases cited by the District. This is not to imply that such a claim would have been successful under the facts of those cases, which are very distinct from the facts here; only that it was not raised or addressed in those cases.

21. The District cites only one case where the parent brought a substantive challenge to an IEP as lacking a back-up plan for a service provider. In *In re: Student with a Disability*, 109 LRP 22284 (SEA NY 2002), the student's IEP included a transportation aide on the school bus due to his asthma. District witnesses testified that in the event the regular aide was absent, the district would "just make an all-out effort to try to find a para as best they can" and had no objection to developing a back-up plan. The Hearing Officer found "the district is willing to accommodate the need for a backup para" and this willingness did not need to be formally adopted – all contingencies did not have to be covered within the IEP document. *In re: Student with a Disability* is inapposite for two reasons. First, there is no evidence the student there had any history of being unable to attend school due to lack of a back-up plan. In the present case, the Student had already missed 11% of the prior school year due to lack of a back-up plan. The problem here is not just a speculative contingency, but a reality that has already deeply impacted the Student's ability to attend school. The second reason that *In re: Student with a Disability* is inapposite is that district witnesses there testified the district was willing to make an all-out effort to try to find a substitute. In the present case, by contrast, the District knew that five nursing agencies did not offer substitutes, yet waited until two months after the Parents filed for a due process hearing -- and long after the Student had missed 11% of the prior school year for lack of a substitute -- before beginning to consider the formation of a per diem nursing pool. The District also declined to convert School 2's staffing model from a part-time school nurse to a full-time school nurse. (This would have allowed the Parents' suggested back-up plan: using a

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substitute paraeducator plus the school nurse to care for the Student in the absence of her regular 1:1 nurse.)

22. For the reasons set forth in the Findings of Fact and Conclusions of Law above, the Parents have established that the District violated the IDEA and denied the Student a FAPE by failing to provide a back-up plan reasonably calculated to allow the Student to attend school safely on days when her regular 1:1 nurse is absent or has left the position.

Remedies

Compensatory Education

23. 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.

24. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524. The District did violate the IDEA, and its administrators knew they were not acting in compliance with the Student's IEP. However, they did not engage in inequitable conduct above and beyond this violation. The Parents, for their part, did not act in an inequitable manner. They proposed flexible solutions and acted cooperatively. The equities on both sides of the case therefore do not require an adjustment of the remedy that would otherwise be awarded.

25. The Parents will be awarded compensatory education on a day-for-day basis for the two days the Student has thus far[11] been unable to attend school in the current school year due to the absence of her 1:1 nurse. The reason for the day-for-day award is that the Student was entirely excluded from school on those days. In other cases, compensatory education is often awarded on less than a day-for-day basis. This may occur because, although some services were inappropriate, the student was not completely excluded from school, or because the missed class time will be compensated for by 1:1 tutoring, which is more concentrated and efficient than in-class time. Neither of these situations is present here, and one-for-one days of compensatory education are warranted.[12]

26. The compensatory education days may be delivered during school break times, but shall not substitute for any extended year services (ESY) that the Student would otherwise receive.

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[11] *See* footnote 9, above.

[12] The relief requested by the Parents did not include compensatory education, though it is something that the District has offered. It is awarded as part of "other equitable relief as appropriate." *See* Issues Statement, above.

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All of the Student's therapies that would have been delivered on the missed days of school shall be delivered on the compensatory days if they have not already been made up at other times.

Prospective Relief

27. The District will be ordered to implement one of the following two options within three weeks of the date of this Order:

Option (1): Provide for substitute 1:1 nurses in any of the following ways: through a nursing agency that consistently maintains at least two potential per diem substitutes on its roster (or two nursing agencies that consistently maintain one such substitute on their respective rosters);[13] through creation of the District's own per diem pool consisting of at least two nurses; or through creation of one full-time floater nurse position in the District.[14]

Option (2): Train two substitute paraeducators to serve the Student when her 1:1 nurse is absent,[15] and convert the part-time school nurse position at the Student's school (School 2) to a full-time position. The substitute paraeducators must be appropriately trained in seizure recognition and providing the Student's physical and educational needs, while the full-time school nurse must be trained in providing the Student's G-tube feedings, seizure assessment, seizure treatment, and any other school-based medical needs of the Student.

28. Another option would be acceptable if the Parents are willing to release the District from one provision of the parties' mediation agreement: the change from School 1 to School 2. If the Student returns to School 1, the Parents' suggested back-up plan (which is similar to Option (2)), could be realized there: two substitute paraeducators could be trained to recognize the Student's seizures, time them properly, and provide the Student's 1:1 physical and educational services. The substitute paraeducator would take the Student to the full-time nurse at School 1 for G-tube feedings, seizure assessment (in the event the paraeducator perceives the start of a seizure), and for any other school-based medical needs. Since there are no other elementary schools in the District with both a full-time nurse and the ASC program the Student needs, School 1 would be the most logical choice for the Student to attend. The District precluded this option by agreeing in mediation to transfer the Student to School 2, where (unbeknownst to the Parents) there was no full-time nurse not assigned 1:1 to another student. There is nothing inherent in School 1 that caused the accidents that occurred to the Student during kindergarten; it was the staffing model that caused those accidents. The staffing model has now been changed to a full-time, 1:1 nurse, and the accidents have stopped. At the time the Parents requested a transfer from School 1 to School 2, they did not know that School 2 (unlike School 1) lacked a full-time nurse. Having achieved the 1:1 nursing model that they sought, the

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[13] The reason for requiring *two* substitute nurses is that one of them may be unavailable or unwilling to work on any given day. That is why more than one substitute was required in several of the cases from other jurisdictions cited above.

[14] The reason only *one* full-time floater nurse is required, whereas at least *two* substitute nurses are required to comprise a pool, is that the floater nurse would be a full-time employee without the option that substitutes have of declining work on any given day.

[15] The reason for requiring two substitutes instead of one is set forth in footnote 13, above.

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Parents may be open to returning to School 1, where there is a better back-up system for nursing absences than at School 2.[16]

29. The District will be further ordered to provide make-up days prospectively for any future days in the current school year when the Student is unable to attend school because her 1:1 nurse is absent and no substitute is provided. If partial days are missed for this reason, they will be compensated for *pro rata*. The make-up days may be delivered during school break times, but shall not substitute for any ESY that the Student would otherwise receive. All of the Student's therapies that would have been delivered on the missed days of school shall be delivered on the make-up days if they have not already been made up at other times. If the Student misses more than five school days[17] (or partial days adding up to five full school days) due to the absence of a 1:1 nurse during the current school year, then any days above five that are made up must include socialization and classroom-type experiences similar to what the Student would have received if she had not been excluded from school due to the absence of a 1:1 nurse.[18]

30. 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

1. The District violated the IDEA and denied the Student a FAPE by failing provide a back-up plan reasonably calculated to allow the Student to attend school safely on days when her regular 1:1 nurse is absent or has left the position.

2. Within three weeks of the date of this Order, the District shall implement a back-up plan for days when the Student's 1:1 nurse is absent or has left the position, on the terms set forth in the Conclusions of Law, above.

3. The District shall provide day-for-day compensatory education for days during the 2015-2016 school year on which the Student is unable to attend school due to the absence of a 1:1 nurse. The terms of the compensatory education days (for past nurse absences) and make-up days (for future nurse absences during this school year) are set forth in the Conclusions of Law, above.

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[16] In their closing brief, the Parents state that School 2 is a huge improvement over School 1 in terms of teachers and therapists, and that the Student is blossoming there. These statements were not made under oath during the hearing, so they do not constitute evidence and play no part in this decision. However, they indicate that the Parents may not be open to releasing the District from the portion of the mediation agreement that transferred the Student from School 1 to School 2.

[17] These five days shall include the two days already missed this school year due to the absence of the Student's 1:1 nurse.

[18] The Parents are not receiving a double remedy by being awarded both a back-up plan and make-up days. If the District's back-up plan adopted pursuant to this Order is successful, then no make-up days will be needed.

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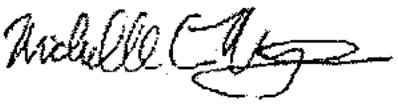
Signed at Seattle, Washington on January 7, 2016.



Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parents
[redacted]

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