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*One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101*  
*(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • [www.oah.wa.gov](http://www.oah.wa.gov)*

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December 16, 2016

Parent



Rachel Davenport, Director of Special Services  
 North Kitsap School District  
 18360 Caldart Avenue NE  
 Poulsbo, WA 98370-8775

Lynette M. Baisch  
 Tim Reynolds  
 Attorneys at Law  
 Porter Foster Rorick LLP  
 800 Two Union Square  
 601 Union Street  
 Seattle, WA 98101

RECEIVED

DEC 23 2016

Superintendent of Public Instruction  
 Administrative Resource Services

**In re: North Kitsap School District**  
**OSPI Cause Nos. 2016-SE-0018; 2016-SE-0021; 2016-SE-0034**  
**OAH Docket Nos. 02-2016-OSPI-00021; 03-2016-OSPI-00025; 03-2016-OSPI-00045**

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,

Nicole A. Gaines Phelps  
 Administrative Law Judge

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

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

MAILED  
DEC 16 2016  
SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NOS. 2016-SE-0018  
2016-SE-0021  
2016-SE-0034

OAH DOCKET NOS. 02-2016-OSPI-00021  
03-2016-OSPI-00025  
03-2016-OSPI-00045

NORTH KITSAP SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Nicole A. Gaines Phelps in Poulsbo, Washington, on June 10, 13, 14, 15, and September 12, 15 and 16, 2016. The Mother of the Student whose education is at issue<sup>1</sup> appeared and represented herself. The North Kitsap School District (District) was represented by Lynette M. Baisch and Tim Reynolds, attorneys at law. The following is hereby entered:

**STATEMENT OF THE CASE**

The District filed a due process hearing request (Complaint) on February 24, 2016 (2016-SE-0018). The Parent filed a Complaint on March 2, 2016 (2016-SE-0021) and another Complaint on March 25, 2016 (2016-SE-0034). Prehearing conferences were held on March 3, April 12, April 18, May 23, June 2, June 6, and June 8, 2016. Prehearing orders were issued on March 4, April 14, April 18, May 23, June 2, June 6, and June 8, 2016. The Parent's Stay-Put Motion was argued on March 23, 2016. An order on the Parent's Stay-Put Motion was issued on March 29, 2016. A Status Conference Order was issued on August 29, 2016. A Status Conference was held on September 8, 2016. The corresponding Status Conference Order was issued on September 9, 2016.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a request for continuance made jointly by the parties. See Prehearing Order of April 18, 2016. The hearing record closed with the filing of post-hearing briefs on November 16, 2016. The due date for the written decision is therefore December 16, 2016.

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<sup>1</sup> In the interests 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."

## EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P4-P12; P14-P17; P19-P22; P24; P26-P27; P33; P35-P48; P54-P56; P61; P67; P85; P87-P89; P91-P92; P94-P103; P106; and P108 were admitted into evidence. Parent Exhibits P109 and P110 were admitted<sup>2</sup> for identification purposes only.

District Exhibits: D1-D44 were admitted into evidence. District Exhibit D45, D46-D47 were admitted for identification purposes only.

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

Jill Davidson, Ph.D., school psychologist;  
Christopher Claesson, school psychologist;  
The Student;  
Holly Patten, Student's private math tutor;  
Catherine Schwartz, high school science teacher;  
Joseph Power, elementary school academic and behavior intervention coach;  
The Parent;  
Jennifer Pippin-Montanez, high school English teacher;  
Tamera Jahrman, high school math teacher;  
Holly Van Weezendonk, high school health teacher;  
Terry Duncan, middle school math teacher;  
Deborah Weinmann; middle school math teacher;  
John Waller, high school assistant principal;  
Rachel Davenport, director of special education;  
Debbie Deerwester, high school special education teacher;  
Mike McCorkle, high school math teacher.

## ISSUES

The issue(s) for the due process hearing are:

- a. Whether the District denied the Student a free appropriate public education (FAPE) during the 2015-2016 school year, by:
  - i. Failing to establish an appropriate Individualized Education Program (IEP) to meet the Student's medical needs;
  - ii. Failing to find the Student eligible for specially designed instruction (SDI) in math which has caused an adverse educational impact on the Student;

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<sup>2</sup> For purposes of preserving the record, the undersigned "admitted" rather than "marked" the exhibits for identification purposes only. Doing so allowed the exhibits to be included in the Parties' respective exhibit binders for appeal purposes. The undersigned neither reviewed nor considered any of the exhibits which were admitted for identification purposes only.

- iii. Failing to ensure the Parent's and Student's participation in the IEP Team meetings by:
    - (a) not providing the Parent with proper notice of IEP Team meetings;
    - (b) scheduling the IEP Team meetings at times which were not mutually agreed upon by the Parent;
    - (c) not considering the Student's concerns, preferences and interests during IEP Team discussions; and
    - (d) not considering the Parent's concerns during the IEP Team meeting discussions.
  - iv. Failing to implement his IEP by:
    - (a) not providing the required accommodations during the Student's general education math class; and
    - (b) not providing 35 minutes per week of SDI in reading and written language.
- b. Whether the District's January 2016 evaluation of the Student was appropriate;
  - c. Whether the District violated the IDEA by requiring the presence of a special education and local education agency (LEA) representative during a parent teacher conference in the general education setting; and
  - d. Whether the Parent is entitled to her requested remedies:
    - (a) Compensatory education for the period of denial of FAPE;
    - (b) Independent education evaluation (IEE) paid at public expense;
    - (c) Creation of an IEP which includes SDI in math;
    - (d) And/or other equitable remedies, as appropriate

See Prehearing Order of April 18, 2016.

## FINDINGS OF FACT

### Background

1. The primary dispute in this matter is whether the Student's IEP should include SDI in math. The Mother is also concerned that the District failed to implement the Student's IEP. Mother, Tr. 1222, 1224.<sup>3</sup> It is undisputed that the Student has significant deficits in executive functioning and therefore needs different teaching techniques than his typically developing peers. McCorkle, Tr. 1117; Deerwester, Tr. 994. It is also undisputed that the Student's disability impacts all educational subject areas, but especially math, because of the number of processes that need to occur to solve a math problem. Deerwester, Tr. 1033. However, the District and the Mother do not agree whether the Student's current extensive list of accommodations and modifications within the Student's IEP are sufficient for him to make

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<sup>3</sup> Testimony from the hearing record is identified to by the witness's last name followed by the page number where the testimony is located in the transcript (e.g. *Mother*, Tr. \_\_\_\_). References to exhibits are identified by the party's exhibit and page number (e.g. Ex. S1 p. \_\_\_\_). General citations to witness testimony are identified by the witness's name (e.g. *Mother Testimony*).

progress in his general education math class. The Mother argues under his current IEP, the Student is not receiving an educational benefit in his general education Algebra I class and therefore needs SDI in math added to his IEP.

2. The Student is 15 years old and began his high school career in the fall of 2015. His family previously lived in the Bainbridge Island School District, where he was eligible for special education in the category of communication disorder during his elementary school years. Mother Testimony; see, Ex. P108; see also generally Ex. D1. His eligibility category was later changed to health impairment and specific learning disorder due to a diagnosis of ADHD and dyslexia. Ex. D1. The Student continued receiving special education and related services, including SDI in reading, math, and written expression until his Mother withdrew consent for services during his fifth grade year. *Id.*

3. The Mother reinstated consent for the Student to receive special education and related services at the beginning of the Student's 6<sup>th</sup> grade year. Mother Testimony. At the time, the Student's eligibility category included both health impairment and specific learning disability. See generally, Mother Testimony; *Id.* Characteristics of his disability include slower processing speeds due to executive functioning delays and short-term memory issues. *Id.* From 6<sup>th</sup> grade through the Student's 8<sup>th</sup> grade year, his IEP included substantial accommodations and modifications to the general education curriculum as well as specially designed instruction in reading, math and written expression. *Id.*

#### June 2015 Triennial Evaluation

4. In May 2015, when the Student was in the 8<sup>th</sup> grade, Christopher Claesson conducted the Student's triennial evaluation (Claesson Evaluation). Ex. D1. Mr. Claesson has a school psychology degree from Seattle University. He is a certificated special education teacher with a Master's degree in Education and an endorsement in special education. *Id.* at 331. Mr. Claesson has worked as a school psychologist for the District for two years but previously worked for four-years as a school psychologist at another school district. He has ten years of combined experience as a special education teacher and a school psychologist. Claesson, Tr. 330.

5. Mr. Claesson evaluated the Student in the areas of reading, math, written language, cognitive, social, emotional and behavioral, and executive functioning/ADHD. Ex. D1. Claesson's evaluation incorporated input from the Mother; the Student; the Student's teachers; the Student's private math tutor, information obtained through two separate classroom observations of the Student and data from the Student's previous evaluations in 2010 and 2012. *Id.* The Claesson Evaluation included standardized test results from the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV); the Woodcock Johnson Tests of Academic Achievement, Third Edition (WJ-III); the Behavior Assessment System for Children, Second Edition (BASC-II); the Behavior Rating Inventory of Executive Function (BRIEF); and the Conners 3<sup>rd</sup> Edition-Teacher (Conners 3-T).

6. The cognitive portion of Mr. Claesson's evaluation references the Student's previous evaluation from 2010. Ex. D1 p. 6. During the Student's 2010 evaluation, the WISC-IV was administered, the same test used by Mr. Claesson during his 2015 evaluation. *Id.* It is unclear if

Mr. Claesson or the 2010 evaluator were able to calculate either a full-scale intelligence score or a general index score for the Student.<sup>4</sup> In the absence of this information, the undersigned assumed the evaluation team, including Mr. Claesson, used their professional judgment in concluding the Student did not have a "severe discrepancy between his cognitive abilities and his mathematics achievement." *Id.* at 14.

7. At the end of the Student's 8<sup>th</sup> grade year, Mr. Claesson presented his written evaluation to the Student's evaluation team.<sup>5</sup> As part of the evaluation process, Joe Power, the Student's 8<sup>th</sup> grade general education math teacher, noted:

[The Student] does better one-on-one and in smaller groups...he needs constant prompting and guidance while completing an assignment or tests...teaching [the Student] with smaller 'chucks' of information that are specific to one target is helpful. [The Student] has difficulty making connections with multiple strategies and/or targets to achieve a math solution. [The Student] will need constant reinforcement to keep up with assignments and understanding of daily learning targets. He should probably have an additional period of math support if offered at the high school.

Ex. D1 p. 3; see also Claesson, Tr. 336. At the time, the Student's math calculation score fell in the low average range and his math reasoning score fell in the average range on the WJ-III. *Id.*, at 14. Both of these scores were lower than the Student's previous test scores, leading the evaluator to conclude, "[the Student] lost ground since 2012 when compared to his same age peers." *Id.* As such, Mr. Claesson opined,

it would not be inconsistent with [the] evaluation if the IEP team determined...that the Student would qualify for support in math as a supplemental aid and service as a result of executive functioning deficits.

Ex. D1 p. 15.

8. At the time, the Student's overall math grade was a C. *Id.*, at 2. However, the grade was a reflection of the substantial modifications and accommodations<sup>6</sup> offered to the Student in

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<sup>4</sup> The absence of either a full-scale intelligence score or a general index score for the Student is concerning. In general, one or the other is needed to determine if a student meets the severe discrepancy test, which is required for establishing a student has a SLD. See, WACs 392-172A-03060 through 392-172A-03070. The regulations allow the use of "professional judgment" in absence of this information to determine the presence of a SLD. In doing so, the evaluation group must provide a written narrative explaining why the student meets the severe discrepancy test and the data used to make the determination. WAC 392-172A-03070. Since the Claesson Evaluation is not at issue in this matter, the undersigned chose not address this issue.

<sup>5</sup> The following people were present at the Claesson Evaluation team meeting: Student; the Parent; general education teachers Joe Power (math); Marshall Mirands (social studies); and Sam Walder (band); District Representative Rachel Davenport; a special education teacher from the middle school, and from the high school, special education teachers Debbie Deerwester and Connie Mayer. See generally, Ex. D1 p. 18.

accordance with his IEP, and the assistance of his middle school math instructors. Indeed, Joe Power, the Student's 8<sup>th</sup> grade math teacher, and the Student regularly met one-on-one at least two days a week, if not every day, during Student's lunch hour for extra teaching time. Student, Tr. 408-410. During these sessions, Mr. Power retaught the Student math concepts. Also, the Student's special education case manager offered additional math tutoring time to the Student every Tuesday and Thursday after school. *Id.*, at 411. The Student's grade reflected accommodations such as the ability to retake exams, the use of prepared notes, and providing lesson materials in "small chunks." The Student also worked with a private math teacher one night each week. The Student needed all of these tools to succeed in his math class. Power, Tr. 661; *see also*, Claesson, Tr. 335, 349.

9. In summary, the evaluation report opined the Student was experiencing an adverse impact on his education due to his disabilities. Specifically, the evaluation noted the Student's progress was lower than that of his typically developing peers in reading, written expression and math. Ex. D1 p. 15. However, after further discussion, the evaluation team determined the Student only qualified for SDI in the areas of basic reading and written expression. *Id.*, at 16. The evaluation does not include SDI in math because the evaluation team thought, despite the Student's challenges, with extra help from his math teacher and the appropriate modifications and accommodations, the Student could succeed in a general education math class. Claesson, Tr. 353.

#### June 2015 IEP Meeting

10. The Student's IEP team accepted Claesson's Evaluation and drafted an IEP adopting its recommendations. *See generally*, Ex. D2. The team intended for the IEP to remain in place until his annual IEP meeting in October 2015. *See* Ex. D2. In creating the IEP, the team agreed, the Student's executive function deficits meant "he needed more than a regular general education student." Therefore, his IEP provided for a substantial number of accommodations and modifications to support his education in the high school environment. *See generally*, D2 p. 5; *see also*, Claesson, Tr. 380. The IEP team also agreed it would be best if the special education teacher delivered the Student's special education services in reading and written language through pull-out services for ten minutes five times per week in the general education setting. Ex. D2 p. 9.

#### First Semester Freshman Year

11. The 2015-2016 school year began on September 1, 2015. Ex. D44. In August, prior to the start of the school year, the Parent and District worked together via email to create the Student's 9<sup>th</sup> grade class schedule based upon his preferences. The class schedule included general education Algebra I as the Student's 9<sup>th</sup> grade math class. Ex. D5. The District and the

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<sup>6</sup> According to Debbie Deerwester, the Student's high school special education teacher, accommodations and modifications are meant to help a student perform at par with his typically developing peers. An example of an accommodation is asking a student to show mastery of a skill by completing 25 questions instead of the 50 questions his typically developing peers are required to complete. Modifications are creating a "modified" version of an assignment to show mastery of a skill. For instance, instead of writing an entire paragraph a student is required to a complete sentence. The skill of writing is the same but the skill level required is different. Deerwester, Tr. 1039.

Mother deemed it necessary to convene the Student's IEP Team for to discuss how his SDI would be provided in his new high school setting. See *generally*, Exs. D5-D9. After receiving the District's invitation request, the Mother expressed concerns that a specific District staff member had previously expressed strong disapproval of the Student's numerous accommodations and modifications. At the Mother's request, the Student's case manager replaced the staff member on the Student's IEP team. See *generally*, Exs. D4 and D6.

12. After consulting with the Mother, the District scheduled an IEP meeting for 10:00 a.m. on September 1, 2015. Ex. D7. Neither the Mother nor the Student appeared at the scheduled time but the IEP team went forward with the meeting. Ex. D10; Davenport Testimony. Due to the Mother's scheduling error, the Mother and Student appeared for the meeting at 1:00 p.m. Mother, Tr. 698; see also Ex. D8. In order to obtain input from the Mother and the Student, the IEP team agreed to reconvene later that same day. Ex. D9 p. 3; see *also* Ex. D11.

#### September 1, 2015 IEP Meeting

13. During the second September 1, 2016 meeting, the Student's IEP team discussed the Student's educational needs in the high school setting. Mother, Tr. 695. According to the Mother, neither she nor the Student were given an opportunity to review a "draft" of the proposed IEP prior to this meeting. Mother, Tr. 697. In reviewing the proposed IEP, the Parent and the Student were concerned with the IEP's lack of completeness in the accommodations necessary for his educational success, particularly in the subject of math. Mother, Tr. 697,700; see *also*, Ex. D12. The Mother also expressed concern that the accommodations did not include the recommendations from Dr. Laura Plawner, the pediatric neurologist who had evaluated the Student in 2012. Mother, Tr. 704.

14. The District proposed an IEP which would cover only the first month of the school year, and provided SDI services during the weekly tutorial period as follows:<sup>7</sup>

Services	Provider	Mins	Freq	Start	End	Location	Monitored By
Reading Written	Sp Ed Teacher	20	1/Wk	09/02/15	10/07/15	Sp Ed	Sp Ed Teacher
Language	Sp Ed Teacher	15	1/Wk	09/02/15	10/07/15	Sp Ed	Sp Ed Teacher

Ex. D10 p. 12. All SDI was to be delivered in a "small group setting."

15. The IEP included annual goals in reading and written expression. The annual reading goal required the Student to apply "fluency to enhance comprehension using grade level text from 60% on comprehensive tests to 80%." Ex. D10 p. 4. For the reading portion, the Student would read out-loud on unpracticed grade-level text. *Id.*, at 4. The Student's reading SDI progress was to be recorded on a graph prepared by the Student. *Id.* The Objective was to

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<sup>7</sup> Tutorial is a 40-minute class period which occurs weekly on Wednesdays for 9<sup>th</sup> grade students. Deerwester, Tr. 989. Students report to their assigned "tutorial" classroom where they can use the time to complete missing assignments, retake quizzes, complete homework, etc. The Student was assigned to Ms. Deerwester's classroom for his weekly "tutorial" period.



increase his “fluency cold reading and hot<sup>8</sup> reading scores with 10% growth per month every grading period.” *Id.* The special education teacher was responsible for delivery of all SDI services. *Id.*

16. Similarly, the IEP contained written language goals requiring the Student demonstrate the ability to select effective strategies for generating ideas at the prewriting stage by selecting manageable topics and elaborating using specific, relevant examples or data in a “3 to 5” paragraph essay from “50% to 80%.” *Id.* at 5.

17. The Mother and the Student agreed with the proposed SDI services but had reservations about the appropriateness of the other portions of the IEP. By the end of the meeting, Mother only agreed to implementation of the SDI pull-out services during the tutorial period. Ex. D11 p. 15, 18.

September 25, 2015 IEP Meeting (Annual IEP Meeting)

18. Following the September 1, 2015 IEP meeting, the Mother and District began discussing a date for the Student’s upcoming annual IEP review. Ex. D12. The parties mutually agreed upon September 25, 2015 at 12:00 noon. *See generally*, D13. The District issued a Prior Written Notice (PWN) advising the Mother of the IEP team meeting and a draft copy of the proposed IEP. Ex. D14; *see also* Ex. D13 p. 4.

19. Prior to the September 25, 2016 annual IEP meeting, the Parent and the Student reviewed the proposed IEP. Together, they added notes regarding their suggested additions and improvements. *See generally* Ex. D15.

20. The IEP proposed by the District includes special education and related services, specifically SDI in reading and written language as follows:

Services	Provider	Mins	Freq	Start	End	Location	Monitored By
Reading	Sp Ed Teacher	20	1/Wk	09/28/15	9/24/16	Sp Ed	Sp Ed Teacher
Written Language	Sp Ed Teacher	15	1/Wk	09/28/15	9/24/16	Sp Ed	Sp Ed Teacher

Ex. D16 p. 17. These services were to be delivered during the Student’s Wednesday tutorial period in the special education classroom. *Id.*, p. 18.

21. Although the Student has no specific memory of receiving SDI during the tutorial period, in preparation of the IEP meeting, Ms. Deerwester worked with the Student to complete several standardized tests measuring his current reading and written language performance levels. *Id.* The reading assessment included: the San Diego Quick Assessment; the MAZE Basic Reading Comprehension Test; and the Ohio Fluency Test. Ex. D16 p. 5-6. Based upon the Student’s test results, the proposed IEP included the following reading goals:

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<sup>8</sup> “Hot” reading means reading text he has previously read or practiced reading.

### **Basic Reading**

Annual Goal: [The Student] will read ninth grade level text and novels from the general education curriculum and answer related comprehensive questions from 50% questions correct to 70% of questions correct in 4 out of 5 trials as measured by the following evaluation methods: [Student] work samples by 9/24/16.

### **Reading Fluency**

Annual Goal: [The Student] will read out loud unpracticed 9<sup>th</sup> grade level text with fluency of 140 words per minute from 108 words per minute as measured by the following evaluation methods: Observation [of the Student] by 9/24/16.

Objective: Given in a one-on-one setting, materials at his grade level, [the Student] will read out-loud at a fluency rate of 130 words per minute from 108 words per minute as measured by the following evaluation methods: Observation every grading period by 1/31/16.

Ex. D16 p. 6-7.

22. Ms. Deerwester used a curriculum based measurement for writing to determine the Student's current written language performance. *Id.*, p. 7. Based upon the Student's performance, the proposed IEP contained the following written language goals.

### **Pre-writing strategies**

Annual Goal: [The Student] will, when given a topic to write about, independently select graphic organizer to write his ideas from one main idea per paragraph to one main idea per paragraph with two supporting details as measured by the following evaluation methods: Work Samples by 9/24/16.

### **Written Language**

Annual Goal: [The Student] will when given a topic, compose a multi-paragraph essay from each paragraph having from minimal elaboration (approaching standard/level 2 on English 9 paragraph response rubric) to having specific examples and elaboration (meeting standard/level 3 on English 9 paragraph) as measured by the following evaluation methods: Work Samples by 9/24/2016.

Ex. D16 p. 8. The Student's progress was to be reported based upon his report card and copies of goal pages which were to "include data (fluency rate, work sample, rubrics)" to show the Student's progress in each area. *Id.*, p. 10.

23. After hearing from the Mother and the Student, the IEP team agreed to a number of their suggested changes. *Compare* Ex. D15 to Ex. D16. Significant changes included: changing the learning objective in reading from a "small group setting" to a "1:1 setting"; revising his written language goals to a "grade appropriate standard"; requiring data to show the Student's

progression towards his stated goals; use of assistive technology and an extensive list of curricular adaptations (accommodations and modifications). *Id.* The IEP team agreed to maintain the Student's SDI in reading and written language as previously agreed during the September 1, 2016 IEP meeting. Ex. D16 p. 17. The undersigned finds, in light of all the information available at the time, the goals and learning objectives contained in the September 25, 2016 IEP were appropriate.

24. Unlike the September 1, 2016 IEP, the Student's September 25, 2016 IEP contained very specific information pertaining to the Student's preferences and interests, including post-secondary educational goals. Ex. D16. The Student provided this information to the IEP team. Pursuant to his request, his transition plan does not include participation by any outside agencies. See, Ex. D16 p. 3.

25. The IEP team adopted the IEP at the conclusion of the September 25, 2016 meeting. Ex. D16 p. 19.

#### Student's Ongoing Math Challenges

26. The Student worked with a private tutor, Holly Patten, throughout the 2015-2016 school year for one hour per week. Patton, Tr. 550. Ms. Patton has a Bachelor's degree in special education from the University of the Pacific. She is a certificated special education teacher for grades K-21.<sup>9</sup> She also has a preschool special education endorsement. Over the course of her career, she has worked with special education students from ages three through adulthood with a wide range of disabilities including learning disabilities. She is an experienced public school special education teacher but has been a private tutor for the past fifteen years. Additionally, she works at the college level as an adjunct professor teaching compliance with special education evaluations. *Id.*, Tr. 532. She is currently preparing to defend her doctoral dissertation at the University of Washington in special education. *Id.*, Tr. 489-493.

27. Mike McCorkle served as the Student's general education 9<sup>th</sup> grade Algebra I teacher during the Student's first semester of 9<sup>th</sup> grade. Mr. McCorkle is a math teacher at the Student's high school. He has a Bachelor's degree in accounting economics from Claremont McKenna College. He obtained his Master's degree in Teaching from the University of Puget Sound. He has been a teacher for about 23 years. McCorkle, Tr. 1107.

28. While teaching the Student, Mr. McCorkle was aware the Student's IEP contained numerous accommodations and modifications. As such, Mr. McCorkle offered additional assistance to the Student outside of regular class time. This included during the Student's weekly tutorial period, before school, during lunch and after school, when Mr. McCorkle's schedule allowed. McCorkle Testimony. Unfortunately, the Student was unable to take advantage of the before-school hours due to transportation issues. Mother, Tr. 762; Student Testimony.

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<sup>9</sup> Ms. Patton is certificated K-21 because special education students are eligible for education services until they turn 21 years of age. Patton, Tr. 489.

29. Pursuant to the Student's IEP, Mr. McCorkle gave the Student preferred seating in the front of the class, and during small group work, he tried to place the Student with classmates with whom the Student felt comfortable.<sup>10</sup> McCorkle, Tr. 1168. Mr. McCorkle also allowed the Student extra time on tests, provided the Student with study guides, allowed the Student to retake quizzes and exams to increase the Student's grade average. *Id.*, at 1133, 1124. In spite of these accommodations and modifications, the Student was still struggling to retain the basic math concepts. His struggles led the Mother to request another IEP meeting early in the school year. See generally, Ex. D17; Ex. 18 p. 7.

#### November 4, 2015 IEP Meeting

30. The IEP team reconvened on November 4, 2015, at the Mother's request. Ex. D18. During the meeting, the team discussed the Student's need for additional math support, specifically SDI. Mother Testimony. The Student completed the first grading period of the semester with a C- in math. Ex. D36 p. 8. However, over the first few weeks of the second grading period, the Student's struggles in math had increased and his grades were declining. Mother Testimony. The Student's teachers opined the Student's needs could be met with additional accommodations and modifications. Deerwester Testimony; Davenport Testimony. After hearing from the Mother and the Student, the IEP team agreed to add several of Dr. Plawner's recommendations as accommodations. The changes allowed the Student to bring incomplete work home to finish and to "extend due dates and adjust timelines" of assignments. The IEP team also agreed it was appropriate to send weekly progress report emails to Parent from Student's teachers. Compare Ex. D16 p. 9, 12-13 to D19 p. 9, 12-13; see also, Mother, Tr. 771; Ex. D20; Ex. P67. The undersigned finds at the time, the IEP team's decision appeared to appropriately provide the Student with the support he needed to access the general education math curriculum.

31. The November 2015 IEP continued the Student's previous SDI pull-out services during his tutorial period. Ex. D19 p. 17. The Student's annual goals related to his SDI and the method of delivery also remained the same as in the September 25, 2015 IEP. Ex. D19. p. 6-8, 18.

#### December 2015 – Student's Preparation for Finals

32. As the first semester drew to a close, the Mother asked for another IEP meeting. Mother, Tr. 1201; Ex. D22. At the time, the Student's math grades consisted of three failed cumulative math tests. Ex. P5. The Student was consistently showing a lack of comprehension of the basics needed to perform in his general education Algebra I class. Mother, Tr. 769. He routinely spent excessive hours per night on math homework. Deerwester, Tr. 1031. By this time, the Student himself was completely discouraged about the possibility that he could succeed in Algebra I class. Student, Tr. 434. Additionally, the communication between the Mother and Mr. McCorkle had become strained. See, Ex. D21 and Ex. D22. As result, the District requested the Mother not speak directly with the Student's teachers in-person or via

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<sup>10</sup> Both the Student and one of the Student's friends (bandmate) from band class were in the same math class. The bandmate quickly grasped math concepts and was comfortable helping other students to learn. Therefore, when "small group" work was necessary, Mr. McCorkle placed the Student in a small group with his bandmate.

email without including the assistant principal, John Waller. Mother, Tr. 1226. This frustrated the Mother. *Id.*

33. During this first semester, the Student routinely spent up to four hours per night on his Algebra homework alone. Mother Tr. 1201; Student Tr. 434, 436. By contrast, the expectation for his typically developing peers was no more than 30 minutes of math homework per night and a maximum of 1-2 hours of total homework time for all subjects. McCorkle, Tr. 1138 -1139; Deerwester, Tr. 1029; 1031, Patton, Tr. 504. When possible, the Student attended after-school homework club to work on math. Mother, Tr. 1201. The Student also received private tutoring in math from Ms. Patton, a special education teacher, as well as seeking help from Mr. McCorkle and other staff members. Mother Testimony; Student Testimony; Patton Testimony. At times, the Student used the Wednesday tutorial period to complete make-up work and retake tests. Mother, Tr. 1222; Pippin-Montanez, Tr. 717; Student Testimony.

34. At the time, Student's accommodations included the ability to retake exams. Yet towards the end of the semester, when the Student requested to re-take prior cumulative exams, Mr. McCorkle encouraged him to concentrate on the upcoming exams which contained new material. Ex. D21 p.1; Mother, Tr. 1203. Mr. McCorkle felt the Student's resources were best used concentrating on material contained in the cumulative exam instead of chapter tests. McCorkle Testimony. Mr. McCorkle opined retaking a test and earning a higher grade demonstrated the Student had increased his mastery of the material. McCorkle Testimony. According to Mr. McCorkle this was why he used "standards-based grading," meaning if a student's grade on a cumulative test was better than the chapter test, he would increase his final grade to reflect the grade of the cumulative test. In his opinion, the ability to perform better on a cumulative test showed a student's mastery of a concept. He believed a student's overall grade should reflect their overall mastery of concepts tested. McCorkle Testimony.

35. While teaching the Student, Mr. McCorkle did not routinely offer the Student options to complete shorter assignments. When shorter assignments were offered, it was only after the Student unsuccessfully struggled to complete the same amount of work as his typically developing peers. McCorkle, Tr. 1153, 1156; 1179-1182. At the time, the Student's November IEP contained the expectation that he would complete the work "similar to grade level peers." Ex. D19 p. 12.

36. The Student's accommodation of taking tests and quizzes in a separate location was discussed with him at an IEP meeting, and he was aware that he could ask to do so. Deerwester Testimony. However, he never requested to complete algebra tests or quizzes in a location other than Mr. McCorkle's classroom.<sup>11</sup> McCorkle Testimony.

37. In preparation for his Algebra final, the Student worked independently for over 20 hours on Algebra I in workbooks purchased by his mother over his winter break vacation. Mother, Tr. 769; *see also* Student Testimony. Despite this additional effort, the Student still failed his final semester math exam." Mother, Tr. 770; Ex. P5; Ex. P6 p. 42; Ex P19. The Student's final grade at the end of first semester was a D+. Ex. D40; McCorkle, Tr. 1161. The Student was

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<sup>11</sup> The November 2015 IEP states, "[t]ests and quizzes may be taken in a separate location per [the Student's] requests. Ex. D19 p. 12.

completely discouraged and “had just given up at that point [because he] was failing all of the tests. Student, Tr. 434.

January 26, 2016 IEP Team Meeting

38. In December 2015, the Mother requested another IEP meeting. Ex. D22. The District and Parent agreed to meet on January 26, 2016. Ex. D22 p. 6-15. Prior to the January 26 meeting, Mr. Waller asked Dr. Jill Davidson, the school psychologist,<sup>12</sup> about the Student’s most current evaluation, the Claesson Evaluation. Davidson Testimony; see also, Ex. P87. In response to this inquiry, Dr. Davidson sent Mr. Waller an email with her thoughts on the Claesson Evaluation, and indicated that the decision regarding whether the Student qualified for SDI in math is not as clear-cut as it would be in the case of a SLD. Ex. P7. Dr. Davidson’s email stated that she would be willing to reevaluate the Student in math if that was what the team decided. *Id.*

39. The Parent, Student, Ms. Deerwester, Mr. Waller, Dr. Davidson, and Mr. McCorkle were all present at the January 26, 2016 meeting. Ex. D23 p. 2. The IEP team reviewed the Claesson Evaluation. *Id.* Dr. Davidson expressed the need to reevaluate the Student in math. Davidson, Tr. 91. She strongly believed more data was needed to determine what “obstacles” were presenting challenges for the Student in math. Ex. P86. Specifically, Dr. Davidson wanted to assess whether the Student’s executive function deficits were significantly affecting his math skills to a level that required SDI. Davidson Testimony; see also, Ex. D25 p. 2. She hoped by having “him talk through a few Algebra problem sets with [her she could] get a sense of his thinking around math problem solving.” Exs. D24 and D26.

40. Because the Student was eligible for special education “as long as his identified disability [caused] an adverse effect on educational progress” he could receive SDI.<sup>13</sup> Ex. D26 p. 1. However, Dr. Davidson hoped evaluating the Student would provide information to determine if he met the SLD severe-achievement discrepancy score<sup>14</sup> in math. Davidson Testimony; *Id.*, p. 2.

41. The Mother felt the District did not come open-minded to the meeting but had predetermined that an evaluation was needed. Mother, Tr. 1202; 1206. Indeed, soon after the Mother began addressing her concerns, Mr. McCorkle interrupted and asked the Student to tell the Mother “he could be more motivated” to do better in class. See generally, Student Tr. 439,

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<sup>12</sup> Dr. Davidson has worked as a school psychologist since 1990. Prior to 1990, she completed school psychology training at the Austin Independent School District and Mental Health Services of Southern Oklahoma. She has a Ph.D. in school psychology from the University of Texas and a Bachelor’s degree in psychology and sociology from the University of New York at Buffalo. She also holds a Washington State Educational Certificate endorsement in school psychology. Davidson, Tr. 88.

<sup>13</sup> Simply put because the Student is eligible for special education, he is entitled to services in any area of need as long as his identified disability is having an adverse impact on his education.

<sup>14</sup> If Dr. Davidson’s reevaluation demonstrated the Student had severe discrepancy in math, the IEP team could have found he had a SLD in math. If this were the case, the Student would have automatically qualified for SDI in math.

McCorkle, Tr. 1145-1146; Mother, Tr. 1202; Ex. D23 p. 2. Mr. McCorkle's response made the Student uncomfortable and caused the Student to shut down. Student, Tr. 440. The Student did not attempt to speak again during the January 26, 2016 meeting. *Id.* After Mr. McCorkle's comments, the Mother requested the District remove the Student from Mr. McCorkle's math class. Mother Testimony; see *also*, Ex. D23 p. 2.

42. The Mother provided written consent for the evaluation but continued expressing concerns about Dr. Davidson's methodology, including asking the Student to work through math problems out-loud when that is not his normal method. See *generally*, Exs. D24 and 25. Dr. Davidson proposed having the Student first complete the math problem without speaking and only after he had completed the work have the Student explain his thought process. *Id.* The Parent agreed this was a "reasonable method". *Id.*

43. The day after the evaluation meeting, Ms. Patton sent an email to Dr. Davidson addressing her concerns about the Student's educational needs. Ex. P11. Ms. Patton was exceptionally concerned that, even with substantial accommodations and modification, the Student was still struggling with math. The amount of time he spent on math homework far exceeded that of his peers. Patton, Tr. 504; 509-514. From Ms. Patton's perspective, the Student's current IEP was not providing him the support he needed. Patton, Tr. 538, 544. He was failing his general education Algebra I class. Patton, Tr. 526, 528. Based upon her experience, Ms. Patton opined that the Student's disability was having an adverse impact on his math education. Ex. P11. The only way she thought the Student could succeed in a general education math class was if he was given SDI. Patton, Tr. 546.

44. After the evaluation meeting, Ms. Deerwester prepared an IEP Progress Report for the Student. Ex. D27. Her report indicates based upon the Student's work samples and assessments given by Ms. Deerwester throughout the first semester, the Student was making progress towards his IEP goals. *Id.* Although the Student has no specific memory of receiving SDI during tutorial period, he does recall completing assessments with Ms. Deerwester. Student Testimony. However, the record also reflects he often used this time to work on missing homework assignments, re-taking math exams, other school work, and to socialize with his friends.

45. As explained by Ms. Deerwester, she often presented the Student's SDI lessons in various ways, including general group assignments, because the IEP does not require one-on-one SDI during tutorial period. Deerwester Tr. 1071-1073. Indeed, the Student's IEP is vague on the manner in which SDI services would be provided to the Student. The record is void of any charts or other documentation which would definitively confirm the Student's weekly receipt of 35 minutes of SDI. Ms. Deerwester did not keep specific notes or an ongoing record of the Student's SDI lessons. Deerwester, Tr. 1073.

### 2016 Evaluation

46. Dr. Davidson's evaluation compiled information from: the existing data from prior assessments and evaluations, including the Claesson Evaluation,<sup>15</sup> and additional testing

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<sup>15</sup> Dr. Davidson did not perform new cognitive assessments on the Student during her evaluation. Instead, she relied on the WISC-IV scores, as reported in the Claesson Evaluation. Ex. D36 p. 6.

through the use of: the WIAT-III; completion of grade level multi-step math problems; interviewing the Student; and recording the Student explaining his cognitive process as he completed multi-step grade level math problems.<sup>16</sup> See generally, Exs. D28-D32. Dr. Davidson also reviewed the Student's STAR results from his 9<sup>th</sup> grade year.<sup>17</sup>

47. During the evaluation period, Dr. Davidson exchanged several emails with the Student's private tutor, Holly Patton. Ex. D26. This exchange included an email by Ms. Patton explaining the types of errors she saw the Student making when they worked together. Ex. D26 p. 3. Ms. Patton indicated that the Student remembered the formula for finding the slope of a line between two points, but made errors in arithmetic, including calculations with negative numbers, and transcription. She felt that these types of mistakes are typically related to the Student's difficulty with focus. *Id.* Ms. Patton's email was consistent with the input she provided to Mr. Claesson six months earlier. Ex. D35 p. 4-5 ("When writing down math problems, he will frequently write the wrong question..."; endorsing the statement that Student "appears to pay little attention to the quality/accuracy of work and is often unaware of errors"). Ms. Patton stated that she believed Student had a need for SDI in math. *Id.*, p. 1; Ex. P11. More specifically, she opined the current level of math support was not sufficient for the Student, despite the numerous accommodations and modifications contained in his IEP. *Id.* Ms. Patton and Dr. Davidson did not have an opportunity to communicate other than by email until after Dr. Davidson had completed her draft evaluation. Davidson Testimony; Ex. P11.

48. Dr. Davidson sent the following responsive email to Ms. Patton:

[The Student] doesn't have to demonstrate a severe ability-achievement discrepancy in math to qualify for SDI in math -- his identified disability is not only SLD -- we just have to make the case that his identified disabilities cause an adverse effect on educational progress to such an extent that he needs SDI in math in order to make educational progress.

Ex. D26 p. 1.

49. Dr. Davidson assessed the Student's math skills using the WIAT-III on February 1, 2016. Ex. D36 p. 8. The WIAT-III assesses numerical operations, math problem solving, and math fluency. Davidson Testimony. Dr. Davidson is trained and knowledgeable regarding special education assessments. *Id.* This test was administered in English, which is the Student's native language. *Id.* The Student has no impaired sensory, manual, or speaking skills that would have interfered with the administration of this test. *Id.* There were no concerns regarding this test being discriminatory on a racial or cultural basis. *Id.* The WIAT-III is a reliable and valuable test, and is considered one of the "gold standard" tests according to OSPI, meaning that it is reliable and valid under most conditions when administered according to its instructions. Dr. Davidson administered the WIAT-III in accordance with its instructions. *Id.* The Student had previously

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<sup>16</sup> Dr. Davidson used math problems provided by Mr. McCorkle to explore the Student's cognitive ability to complete multi-step grade level math problems.

<sup>17</sup> The Student Diagnostic Report Enterprise Test (STAR) is a standardized assessment given to students each Fall and Spring. The Student took the District's STAR exam for reading and math skills on November 9, 2015, and February 2, 2016. Ex. D42; Ex. P94 p.8.



taken the same subtests of the WIAT-III in 2012 and WJ-III in 2015.<sup>18</sup> Ex. D28 p. 3–4. Thus, Dr. Davidson thought it best to use the WIAT-III during her testing session to see if the Student performed differently. Davidson, Tr. 281-282.

50. The math problem-solving subtest measures math content knowledge, math skills, such as computation, single and multi-step problems, and real-life examples. Davidson Testimony. Of note, the Student incorrectly answered a question that involved reading a calendar, which he had answered correctly in 2012. *Id.* Dr. Davidson found the loss of this skill to be unusual because students depend on calendars in their daily lives. *Id.* According to Dr. Davidson, any single one of the mistakes made by the Student could have been attributed to his executive function deficits, but these types of mistakes happened more consistently during the 2016 test administration than during the 2012 administration. *Id.* The Student's score on this subtest was an outlier when compared to previous years, which led Dr. Davidson to question the validity of the Student's test results. Davidson Testimony. *Id.*

51. The Student received a standard score of 90, at the 25<sup>th</sup> percentile, on the numerical operations subtest of the WIAT-III. This is within the average range. The Student incorrectly answered five items he had gotten correct on the same subtest in 2012. Ex. D30. In the absence of an intervening incident such as a traumatic brain injury, it is unexpected for a student to incorrectly answer questions the student has previously answered correctly. Davidson Testimony. In examining Student's errors, Dr. Davidson found that they were primarily metacognitive. For example, the Student's errors included selecting the wrong operation (subtracting instead of adding), using the correct operation but making a number fact error, and leaving out a negative sign when adding two numbers. *Id.* Rather than representing a deficit in the Student's numerical operations skills, Dr. Davidson opined these errors of executive control could be addressed by Student checking his work or using a calculator. *Id.*

52. On the math problem solving subtest in 2016, the Student incorrectly responded to seven items he had gotten correct in 2012. Ex. D28; Davidson Testimony. He obtained a standard score of 78, at the 7<sup>th</sup> percentile, which is in the below-average range. All of the Student's previous scores on this subtest were in the average range. In 2012 the Student scored 105 on the same subtest compared to the 78 he scored in 2016. Ex. D36 p. 9. It is highly unusual to have a 27 point drop in scores.<sup>19</sup> Davidson Testimony; see also Ex. D36 p. 9. As such, Dr. Davidson had concerns about the validity of the Student's math problem solving scores. Davidson, Tr. 130.

53. In the past, there had been inconsistencies in the Student's test scores. Davidson, Tr. 236. However, this time the "substantial drop" raised concerns for the evaluator, Dr. Davidson. *Id.*, at 236-238. She opined that, although Student stated he "was trying his hardest" on the test, his desire to please his Mother may have affected the validity of the test results. Ex. D36 p. 25; Davidson, Tr. 313,315. The undersigned does not adopt Dr. Davidson's

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<sup>18</sup> If a student repeats the same assessment questions within a short period of time, the results may prove invalid due to the "practice effect" meaning the student's score could increase by way of having previously completed the questions in a relatively short timeframe.

<sup>19</sup> In 2015, the Student scored a 95 on a similar math subtest on the WJ-III.

opinion as a complete truth. Instead, the undersigned finds a number of factors are attributable to the decrease in the Student's scores, including his level of discouragement about math at the time of the evaluation.

54. The Student obtained a standard score of 79, at the 8<sup>th</sup> percentile, on the math fluency subtest.<sup>20</sup> The math fluency subtest determines how accessible number facts are to students along with how quickly they are able to retrieve those number facts to solve problems. *Id.* Students are given 30 seconds to perform sets of addition, subtraction, and multiplication problems. *Id.* The Student performed multiplication problems much faster than addition problems. His performance on addition represented a decrease from the last time he was assessed, which Dr. Davidson also found to be unusual.

55. Dr. Davidson obtained a set of grade level algebra problems from Mr. McCorkle to assess the Student. *See*, Ex. P85. These problems included multi-step problems. Selecting real world general education problems enabled her to see how the Student performed on his current math skills as opposed to on standardized tests, which reduce the load on a student's working memory. Dr. Davidson decided on this method of testing because she was concerned that the other diagnostic tests were designed to isolate skills, and she wanted to be sure she was not missing something regarding his performance in class. *Id.* Dr. Davidson had the Student talk through the problems as he was solving them so she could learn the steps he was taking to answer them. The Student appeared to Dr. Davidson to be engaged and eager as he worked through the problems.

56. The recordings she made of the Student explaining his work demonstrate the Student can solve multi-step equations and is able to provide a correct reporting of the steps he took to solve each problem. *Id.*; *see also*, Ex. D32. Dr. Davidson noted the time the Student spent on each problem so she could determine whether he was getting stuck. The Student solved 7 of 10 problems correctly.<sup>21</sup> Two of his three incorrect answers were directly attributable to the Student's executive function deficits. The Student correctly solved problem 5, but confused the signs on the list of multiple choice answers and marked the incorrect choice. On problem 7, the Student left out a variable as he worked the problem, but otherwise used correct operations. Davidson Testimony; *see also* Ex. D31.

57. Despite the variances between the Student's current and prior WIAT-III math scores, Dr. Davidson opined the reevaluation was valid. In reaching this opinion, she gave great weight to her observation of the Student completing grade-level math problems as part of her evaluation. The results she recorded were consistent with Mr. McCorkle's observations of the Student's abilities. Davidson Testimony. Based upon all of information, in Dr. Davidson's professional opinion, the challenges the Student demonstrated in completing multi-step grade level math problems were directly attributable to his executive function deficits but were not

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<sup>20</sup> The standard math fluency score is an average of the Student's scores on the three subparts (addition, subtraction, and multiplication). Ex. D36 p. 8.

<sup>21</sup> There is no problem number 6.

severe enough cognitively to find the Student met the “severe discrepancy” test<sup>22</sup> to qualify for SDI in math due to an SLD. Davidson Testimony.

58. During the evaluation, the Parent asked Dr. Davidson whether the Student’s one-on-one instruction from his math teacher, Ms. Jahrman, impacted Dr. Davidson’s evaluation. Ex. D33. Dr. Davidson responded, “I don’t think the time with Ms. Jahrman would have made much difference in how he did with me, unless she was practicing with him the same items I chose. She would’ve had to practice a script with him – I don’t think that was likely.” Ex. D33.

59. The Mother also provided Dr. Davidson numerous articles and other materials regarding the effects of the Student’s disabilities in an educational setting. See *generally*, Ex. P10; Exs. P20-P22; Ex. P24. Dr. Davidson reviewed the material as part of her evaluation and even made note that one of the articles was written by George McCloskey, Ph.D., whose work Dr. Davidson admired. Ex. P40; P9.

60. The IEP team asked Dr. Davidson to expedite the Student’s evaluation. Davidson Testimony. The expedited evaluation request and the change in the Student’s math class schedule<sup>23</sup> prevented Dr. Davidson from observing the Student during his general education math class. Dr. Davidson admits observation of the Student would have been helpful but surmised the observation was not necessary because as part of the evaluation process, she herself had observed the Student completing math problems and the results were consistent with Mr. McCorkle’s observation of the Student’s abilities. Davidson Testimony.

61. Dr. Davidson completed the Student’s evaluation around the first part of February 2016. The District issued a PWN setting the evaluation review meeting for February 16, 2016 at 2:30 p.m. Ex. D34. A copy of Dr. Davidson’s draft evaluation was emailed to the entire IEP team, including the Mother and the Student. See also, Exs. D34 and D37.

February 16, 2016 Evaluation Meeting

62. An evaluation review meeting was held on February 16, 2016. Parent received an invitation to the meeting. Ex. D34. The Parent, Student, assistant principal John Waller, general education teacher Catherine Schwartz, Dr. Davidson, Ms. Deerwester, general education teacher Bryce Adams, general education teacher Stephen Nolet, and special education director Rachel Davenport all attended. Dr. Davidson and Mr. McCorkle had a brief discussion via email about Dr. Davidson’s findings prior to the evaluation meeting. Mr. McCorkle, Tr. 1175. Mr. McCorkle was present at the start of the meeting, but the Parent requested that he leave. Mr. McCorkle left when requested by Parent to do so. *Id.*

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<sup>22</sup> Dr. Davidson reached this conclusion despite not performing a cognitive assessment on the Student and the absence of a data driven Full Scale Intelligence IQ Score or General Ability Index in the Claesson evaluation.

<sup>23</sup> After Mr. McCorkle commented about the Student’s lack of motivation, the Student no longer felt comfortable in Mr. McCorkle’s classroom. Ex. P27. For several weeks, the Parent and the District were in conflict over the student’s class schedule, specifically, what math class he should attend. See *generally*, Exs. P26-P32. During this time, the Student did not participate in his scheduled math class. See *generally*, Ex. P32 p. 3.

63. Dr. Davidson discussed her thoughts about the evaluation with the team at the evaluation review meeting. Ex. D35; Davidson Testimony. The draft included existing data from the Claesson Evaluation, including the comments Ms. Patton had previously provided to Mr. Claesson, information from Student's private medical provider regarding his diagnosis of attention deficit disorder and recommended accommodations, and the results of the standardized testing administered by Mr. Claesson and Mr. Davidson. Ex. D35.

64. Based upon her professional judgment, Dr. Davison opined the Student's scores on the WIAT-III math test were an underestimation of Student's actual math calculation and math problem solving skills. When compared to his February 2, 2016, STAR math scores,<sup>24</sup> it was clear to Dr. Davidson that the results of the 2016 WIAT-III math performance were an outlier, and demonstrated "substantial underperformance." Ex. P94 p. 8; Davidson Testimony. The STAR assessment performed on February 2, 2016, indicated that the student was at grade level in math. *Id.* Dr. Davidson had this information at the time of the evaluation report, and took it into account when concluding that the WIAT-III math test was not an accurate assessment of the Student's math ability. Davidson Testimony. At the evaluation review meeting, Dr. Davidson asked the Student if he had tried his hardest on the test, and if perhaps he was trying to please Parent. *Id.*

65. The Student testified he had done his best even though Dr. Davidson's testing took place during his engineering class, which he had been eager to participate in that day, and he was tired after just returning from Alaska. Student Testimony. He said Dr. Davidson's assessment was "definitely weird" for him because he had never been in her office or tested with her before, and that he did not take medication for the first day of Dr. Davidson's testing, which makes it harder to organize information. *Id.*

66. Based upon her evaluation, Dr. Davidson believed the Student would continue to make progress in general education math and that he did not need SDI in math to receive educational benefit. She believed the Student's evaluation results showed he was capable of learning the material in a general education setting but had problems consistently producing results that reflected what he had learned. Davidson, Tr. 288. She strongly believed his extensive list of accommodations and modifications could alleviate the Student's struggles. Davidson Testimony.

67. District representatives strongly opined the Student did not need SDI and received an educational benefit in the general education math class with the accommodations and modifications. Ms. Deerwester<sup>25</sup> thought placing the Student in a special education math class would "not challenge" him enough since he is college bound. Deerwester, Tr. 1037. Instead, he should remain in general education math classes because "with the right teaching method he can access" the math concepts. Deerwester, Tr. 1041. Ms. Deerwester felt addressing the Student's needs through accommodations and modifications, instead of SDI, was appropriate.

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<sup>24</sup> The Student's November 5, 2015 STAR math scores were below grade level. His February 2, 2016, scores were at grade level. Ex. P94 p. 8.

<sup>25</sup> Ms. Deerwester teaches a SDI algebra class.

For example, Mr. McCorkle had three different versions of tests for all of his students. The "A" version is the easiest and the "C" version is the hardest. The Student usually took the B version. Student Testimony. When the Student retook his tests, he would sometimes retake a different version.

68. The Parent disagreed with the District's conclusion. At the evaluation review meeting, she dictated an email into her phone requesting an IEE at public expense. Exs. D36 p. 25.

69. After the meeting, the Mother sent an email to the District requesting the addition of several items to the evaluation report. Ex. D39 p. 3. The Mother also requested that Dr. Davidson interview Ms. Patton and include the information from the interview in the evaluation. Dr. Davidson subsequently spoke to Ms. Patton and added that information in response to Parent's request. Ex. P11; Ex. D39 p. 1-2; *compare* D35 with D36. None of the information the Parent asked to be included in the revised evaluation report was new information to the District. Indeed, the majority of Dr. Davidson's evaluation relied upon the information from Claesson's Evaluation and was discussed at the evaluation review meeting. A final copy of the evaluation was emailed to the Parent on February 19, 2016. Ex. P15. Ms. Davenport also emailed the Parent a copy of Dr. Davidson's revised report with a PWN. Ex. P15.

70. The District's PWN, dated February 22, 2016, denied the Student SDI services in math. Ex. D36 p. 24. The explanation section states: "the current evaluation was 78 in Math problem solving, which did not show a severe enough discrepancy to qualify for services." *Id.* Under "other factors", the PWN states, "he did not meet the criteria for qualifications for math. There was not a severe enough discrepancy." *Id.*, p. 25. The Mother noted her objection to the evaluation and the findings. She requested an IEE at public expense. *Id.*; *see also*, Ex. D38. Shortly thereafter, the District and the Parent each filed due process hearing requests. Therefore, the IEP team took no further action regarding the January 2016 Student Evaluation.

71. In a letter dated March 8, 2016, the Mother wrote a Letter of Objection to Dr. Davidson's revised evaluation. Exs. P16; P17; D39 p. 6-80. The Mother sent her objection to the District but Dr. Davidson did not receive the letter until after the District received the Parent's due process hearing request. Ex. D39; Davidson Testimony; Ex. P32 p. 3.

#### Algebra I Class Options for the Student

72. During the 2015-2016 school year, Mr. McCorkle and Tamara Jahrman<sup>26</sup> both taught 9<sup>th</sup> grade Algebra I general education math classes. Pursuant to District teaching standards, Mr. McCorkle and Ms. Jahrman taught the same material in their classes. Jahrman, Tr. 1161; McCorkle Tr. 1161. In order to assure they were both covering the same material, they regularly conferenced with one another. *Id.* In their general education classes, they focused on covering as much material as possible during the academic year.

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<sup>26</sup> Ms. Jahrman is a certificated general education math teacher. Jahrman, Tr. 721. She has a Bachelor's degree in secondary education and mathematics and is currently working to complete her Master's degree in education technology. Jahrman, Tr. 719.

73. On the other hand, Ms. Deerwester, the special education teacher, who also taught Algebra I, approached the subject with a different focus. Instead of presenting the same material as the general education teachers, Ms. Deerwester focused on the basic Algebra concepts and proceeded at a slower pace in her SDI math classes. Deerwester, Tr. 1006; 1013. She does not give homework to her SDI students. Deerwester Testimony.

74. After the first semester, the District agreed to move the Student from Mr. McCorkle's Algebra I class to Ms. Jahrman's. The Student preferred Ms. Jahrman's teaching style because she broke the information into smaller sections he could understand. Student Testimony. In addition to in-class teaching time, Ms. Jahrman also provided additional educational support to the Student every Tuesday after school.<sup>27</sup> Jahrman, Tr. 721. During this time, she worked with the Student correcting mistakes on tests, working on incomplete homework assignments, re-teaching him concepts, and answering questions to help him understand the math assignments. *Id.* According to Ms. Jahrman, her ability to work with the Student on a weekly basis in a small environment was key to his success in her Algebra I class. *See generally*, Jahrman, Tr. 725,733; *see generally*, Ex. P6. Based upon her experience with the Student, he needs substantial accommodations and modifications, but not SDI, as long as he is receiving extensive assistance. Jahrman, Tr. 735-736. At the time of her testimony, Ms. Jahrman anticipated the Student would conclude his second semester of 9<sup>th</sup> Algebra I with a final grade of a C in her class.<sup>28</sup> Jahrman Testimony.

75. The Student testified that his ADHD makes it harder for him to want to do his work. He gets frustrated, which makes him want to stop and do something that interests him: something that is fun and not hard. When he is working at school and wants to quit, he shuts down and thinks about other things. He feels like he can ask for help, and does, if a teacher he feels comfortable with is around. Student testified he was comfortable with Ms. Jahrman but not with Mr. McCorkle.

76. The Student's observations of his needs were consistent with the observations of his behavior by his teachers. His 9<sup>th</sup> grade teachers testified the Student often needed redirection of his attention during class, particularly if the class activity was one that the Student found challenging. He often had to be reminded to turn in homework assignments, and overall needed more assistance than other students in math or problems involving math. McCorkle, Deerwester, Jahrman Testimony; Van Weezendonk, Tr. 781,788.

77. In spite of the Student's final Algebra I grade of a C, the Parent argues the Student needs SDI in math. She argues the effort required by the Student to raise his math grade to a C far exceeded a reasonable effort level expected of a 9<sup>th</sup> grade student. In support of her position, she cites the Student's extensive needs including: extra private tutoring sessions; the re-teaching of concepts; one-on-one instruction from his math teacher outside of class time; and the retaking of exams, tests, and quizzes in order for him to grasp math concepts.

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<sup>27</sup> Ms. Jahrman provides the opportunity for this extra math support to all of her students. Jahrman, Tr. 722, 734.

<sup>28</sup> Algebra I is a cumulative class. The Student's ability to conclude the year with a C average shows an understanding of general algebra concepts, including concepts introduced during the first semester of the Student's 9<sup>th</sup> grade year. Jahrman Testimony.

78. She argues these accommodations and modifications would not be necessary if the Student received SDI in math similar to Ms. Deerwester's teaching style. She opines the SDI would allow the Student to receive a smaller amount of information at a slower pace, which is what the Student needs because his executive learning deficits prevent him from comprehending math concepts at the same rate as his typically developing peers. Furthermore, she argues, the Student's needs for extensive accommodations and modifications to obtain an educational benefit in the general education class is definitive evidence that his disability is having a negative impact on his education.

79. The high school held parent-teacher conference events March 30, through April 1, 2016. Ex. D43. Prior to conferences, the Mother emailed Ms. Deerwester requesting appointments to meet with the Student's general education teachers on March 30 or 31. Ex. P6 p. 23. These conference days were planned to serve as walk-in only teacher-parent conferences. *Id.* Ms. Deerwester nevertheless arranged the appointments requested by the Mother. Ms. Deerwester and Mr. Waller planned to attend these conferences as well so that they could address any issues regarding implementation of Student's IEP in general education. The Mother objected to their attendance and did not attend the appointments Ms. Deerwester had scheduled with the general education teachers. The Mother attended walk-in parent-teacher conferences on March 30, 2016. Neither Ms. Deerwester nor Mr. Waller attended any of Mother's parent-teacher conferences. Ex. D43; Deerwester and Parent Testimony.

80. Over the course of the 2015-2016 school year, the Parent paid Holly Patton \$1,800.00<sup>29</sup> for private math tutoring sessions with the Student. Mother, Tr. 1249-1251. Ms. Patton worked with the Student once per week from September through June. *Id.*

81. 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.

## CONCLUSIONS OF LAW

### The IDEA

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

2. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central*

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<sup>29</sup> This figure is based on the following payments: \$100.00 for September 2015; \$200.00 per month for October 2015 to May 2016; and \$100.00 for June 2016.

*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 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 (9<sup>th</sup> Cir. 2014) (internal citation and quotation marks omitted).

5. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. In this case, the statement of the issues asks whether the District's IEPs provided appropriate SDI, related services, and educational placements for the Student during the 2015-2016 school year.

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

7. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Accordingly, the District bears the



burden of establishing the January 2016 evaluation was appropriate.<sup>30</sup> The Parent bears the burden establishing the District violated the IDEA and denied the Student FAPE with respect to the other issues raised in this case.<sup>31</sup>

Procedural Compliance with the IDEA

8. Procedural safeguards are essential under the IDEA:

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

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

9. Procedural violations of the IDEA amount to a denial of FAPE only if they:

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

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

10. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342, 48 IDELR 31 (9<sup>th</sup> Cir. 2007).

Substantive Compliance with the IDEA

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

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

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<sup>30</sup> The District filed the due process request in OSPI cause number 2016-SE-0018.

<sup>31</sup> The Parent filed the due process requests in OSPI cause numbers 2016-SE-0021 and 2016-SE-0034.

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

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

*Failing to Establish an Appropriate IEP to Meet the Student's Disability-Related Needs by Providing SDI in Math during the 2015-2016 school year*

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

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

14. An IEP must include a statement of measurable annual goals, including academic and functional goals, designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability. WAC 392-172A-03090(1)(b)(i); 34 CFR §300.320(a)(2).

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

16. In this case, the Student has consistently met the eligibility criteria for special education under the Other Health Impairment category. Additionally, the District has consistency found the Student has a SLD in reading and written language. This finding is included in Dr. Davidson's January 2016 Evaluation. Ex. D36 p1. As such, he is entitled to appropriate educational services through an IEP as long as his disability is having an adverse impact on his education. Regardless of whether he meets the severe discrepancy test for an SLD in math. WAC 392-172A-03040.

17. As discussed in the above Findings of Fact, during the June 2015 evaluation and IEP meetings, the team thoroughly discussed what services and supports the Student needed to succeed in 9<sup>th</sup> grade general education. After hearing from the Mother, the Student and the Student's current math teacher, the team created an appropriate IEP based upon this information, and the IEP included appropriate goals. The IEP team decided the Student could succeed in a general education 9<sup>th</sup> grade math class with extensive accommodations and modifications. As such, SDI in math was not recommended. The team did recommend SDI in reading and written language. Appropriate annual goals were created for each area of need.

18. From September through December 2015, the IEP team reconvened several times. The discussions centered on the Student's need for additional math support. Each time, the IEP team adopted additional accommodations and modifications, often at the suggestion of the Parent and the Student. Given the information known at the time, the additions appeared to provide the Student with the support needed for him to access the general education math curriculum. As such, it is concluded the Parent has not met the burden of demonstrating the IEPs adopted for the Student in September and November 2015 were inappropriate or should have included SDI in math.

19. However, as the Student progressed into his 9<sup>th</sup> grade year his need for more extensive support became apparent. After the District implemented the Student's September 25, 2015 IEP, the Mother requested IEP team meetings in October and December. Both times, the Mother stressed the Student's need for additional math support. As discussed in the above Findings of Fact, by December the Student was spending excessive time and resources trying to learn the basic skills needed to pass his Algebra I class. Yet his grades were not reflecting his effort. By the January 2016, meeting the Student was in crisis mode. As discussed, in the Findings of Fact, the Student's challenges in math were a direct result of his executive function deficits, and his executive function deficits are directly related to his disabilities.

20. The District responded by conducting an evaluation of his math skills and changing the Student's assigned math teacher. In Ms. Jahrman's class, the Student received extensive support. Ms. Jahrman indicated she would provide that level of service for "any of her students." Jahrman Testimony. The Student needed that level of support to pass his Algebra class so he regularly took advantage of the additional support. By the end of the 9<sup>th</sup> grade, he achieved an average grade in his final semester of Algebra class. See, Findings of Fact 75-76.

21. Parent argues the District should have found the Student needed SDI in math because despite substantial support through accommodations and modifications his disabilities were directly impacting his ability to make progress in his general education math class. The District disagrees. The District asserts the Student's ability to achieve an average grade in Algebra I by the end of his 9<sup>th</sup> grade year establishes he did not need SDI and that services provided through his extensive accommodations and modifications were appropriate. Based upon the record, the undersigned finds the District's argument persuasive.

22. While the undersigned is greatly troubled by the level of support the Student needed to pass his Algebra class, the substantial amount of time he spent completing homework, and the extensive resources the Student utilized to achieve his final semester grade, the law does not support the Mother's argument. It is undisputed that by the end of the Student's 9<sup>th</sup> grade he achieved a C average in Algebra I. Therefore, the evidence overwhelmingly supports the

District's position: the Student did not need SDI to receive a meaningful educational benefit from his general education setting. The Parent has not met her burden on this issue.

23. In the alternative, the Mother argues the District was already providing the Student SDI in math. Therefore, the District's denial of the Student's need for SDI in math was appropriate. While legally, at times the line between regular education and special education is sometimes unclear, the courts have consistently held SDI means the instruction provided is: (1) adapted in content; (2) truly necessary, rather than merely beneficial to the Student; (3) designed or implemented by certified special education personnel; and (4) not available regularly in a general education setting. *West Chester Area Sch. Dist.*, 35 IDELR 235 (SEA PA 2001 ALJ Perry Zirkel). In contrast, in *L.J. v. Pittsburg United Sch. Dist.*, 116 LRP 37786; No. 14-16139 (9<sup>th</sup> Cir. Sept 1, 2016), the District denied the student was eligible for SDI. However, the Court found by providing the student additional educational support, including a one-on-one behavioral aide, which was not offered or available in a general education setting, the school district was in fact providing the student SDI.

24. Similarly to the student in *L.J.*, this Student needs extensive educational supports in math. However, unlike the student in *L.J.*, here the additional instruction provided to the Student by his general education math teachers was available to all students. While the Student may have availed himself of the additional support more than his peers, it does not negate the fact that the additional instruction was available to his general education classmates. Therefore, as a matter of law, it is hereby concluded the Parent has not met her burden on this issue.<sup>32</sup>

#### Failing to Ensure the Parent's and Student's Participation in the IEP Team Meetings

25. The Parent argues the District failed to provide the Parent with proper notice of IEP team meetings. The record does not support the Parent's argument. The record contains extensive emails between the Parent and the District corresponding about IEP meeting dates and times. Therefore, the Parent has not met her burden of proof on this issue.

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<sup>32</sup> The undersigned is greatly sympathetic to the Parent and the Student's frustration over the services he received during the 2015-2016 school year. Likewise, the undersigned has concerns that the Student's educational progress is dependent upon his teacher's ability to connect with the Student. However, the undersigned did not locate any caselaw nor did the Parent cite to caselaw which supports the Parent's argument, in light of the totality of all the evidence presented herein. The undersigned understands the frustration this brings the Parent and Student but the undersigned must make rulings based on the law. The record shows over the course of the Student's first semester in Algebra, and prior to moving to Ms. Jahrman's class, his emotional state was negatively impacted. In contrast, the record is void of information about what negative emotional impacts, if any, he experienced once he changed teachers. It is also unclear if he continued expending extensive hours on math homework outside of school hours. The evidence presented shows the Student worked better with Ms. Jahrman than Mr. McCorkle. His STAR score improved and he achieved a final semester grade of C: neither of which he could have achieved if he did not receive some educational benefit from his 9<sup>th</sup> grade general education math class. All of this information suggests the accommodations and modifications contained within the Student's IEP allowed him to receive an educational benefit in his Algebra 1 general education class. See *generally*, *South Kitsap Sch. Dist.*, 110 LRP 66270, (SEA WA 2009).

record contains numerous emails between the Parent and the District coordinating IEP meeting dates and times. Therefore, the Parent has not met her burden of proof on this issue.

27. The Parent argues the District failed to consider the Student's concerns, preferences, and interests. Likewise, the Parent argues the District failed to consider her concerns during IEP team discussions.

28. It is undeniable that Mr. McCorkle's comments during the January 26, 2016 evaluation review meeting had a chilling effect on the Student's and Parent's level of comfort with him. However, the record in no way supports a finding that the District failed to consider the Student's or the Parent's concerns, preferences, or interests. When the Parent requested the removal of certain staff members from the IEP team or IEP meetings, the District consented. When the Parent and Student requested to have the Student removed from Mr. McCorkle's class, the District eventually placed the Student in Ms. Jahrman's class. The Student's IEPs contain specific information provided by the Student regarding his preferences and interests. Additionally, at the request of the Parent and Student, proposed IEPs were revised to incorporate their specific requests, including additional accommodations, modifications, historical information from previous evaluations, and a class schedule with specific classes at specific times that the Parent thought would best serve the Student. Therefore, the Parent has not met her burden of proof on this issue.

#### Predetermination

29. District personnel must arrive at an IEP meeting with an open mind, but they need not arrive with a blank mind. *M.C.E. v. Bd. of Educ. of Frederick County*, 2011 U.S. Dist. LEX.IS 74266, 57 IDELR 44 (D. Md. 2011). A district may research and gather information about placement options without violating the parent's right to participate in decisions about the Student's placement. The district must keep an open mind and be willing to consider the parents' proposals. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173 (11<sup>th</sup> Cir. 2014); *Deal v. Hamilton County Bd. Of Education*, 392 F.3d 840 (6<sup>th</sup> Cir. 2004).

[P]redetermination is not synonymous with preparation. Federal law prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.

*Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6<sup>th</sup> Cir. 2006). Parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S., v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003).

30. The Parent argues the District predetermined the content of the Student's IEPs prior to the IEP Team meetings. As discussed in the above Findings of Fact, the Student's IEPs were a reflection of input from IEP team members, the Parent and the Student. While the IEP team did not adopt all of the Parent's or the Student's requests this is not required under the law. The evidence does show the IEP team discussed and considered the Parent's and Student's suggestions, including the adoptions of suggestions via email after the IEP meetings had concluded. Therefore, it is concluded the Parent has not met her burden on this issue.

31. The Parent argues the District predetermined the necessity of evaluating the Student for SDI in math. As discussed below in Conclusion of Law 34, a reevaluation must be conducted if warranted. In this matter, based upon the Claesson Evaluation, it was determined the Student did not qualify for SDI in math. The purpose of having Dr. Davidson complete her evaluation was to determine if the Student's needs had change enough to warrant a finding that he had developed an SLD in math. During the January 2016 meeting, the IEP team, including the Parent, agreed evaluating the Student in math would be beneficial. In light of the evidence, it is concluded the Parent has not met the burden of proof on this issue.

32. The Parent argues the District predetermined the Student did not require SDI in math prior to the February evaluation review meeting. Prior to presenting her evaluation report at the February evaluation review meeting, Dr. Davidson spoke with Mr. McCorkle and other members of the IEP team. The individual IEP team members had strong opinions about the Student's needs but the record does not support a finding that the team predetermined that the Student not need SDI in math but rather relied upon the information presented during the February meeting. Therefore, it is concluded the Parent has not met the burden of proof on this issue.

Failing to Implement the Student's IEP

33. As discussed in *Van Duyn*, not every failure to implement a Student's IEP results in a violation of the IDEA. The failure must amount to a material failure, which is defined as "more than a minor discrepancy" between services the District provided and the "services required by the child's IEP." *Van Duyn*, 502 F.3d at 822.

Failing to Provide the Accommodations Required by the Student's IEP in His General Education Math Class

34. The Parent argues the District failed to provide the Student's accommodations during his math class. Mr. McCorkle and Ms. Jahrman outlined the number of ways they accommodated the Student's educational needs. See, Findings of Fact 26-29. While the undersigned has concerns that Mr. McCorkle did not provide clear instructions regarding when the Student could shorten his homework and other assignments, the Student's IEP states the Student was expected to complete assignments similar to grade level peers. Additionally, the Student himself chose not to take advantage of some of his accommodations, e.g. taking exams in a different area. Pursuant to the Student's IEP, the decision of where to take his exams was his choice. See, Finding of Fact # 36. Therefore, the undersigned cannot legally conclude the District materially failed to implement the Student's accommodations. The Parent has not met her burden on this issue.

Failing to provide 35 minutes per week of SDI in reading and writing

35. The Parent argues the District failed to provide the Student 35 minutes of SDI per week, as required by his IEP. It is undisputed that Ms. Deerwester was required to provide the Student SDI during her tutorial class each Wednesday. According to the record, Ms. Deerwester did provide the Student some level of SDI during tutorial. However, it is clear the Student also used this time to complete other assignments, retake exams, and make-up work from other classes. This evidence, together with the absence of documentation substantiating the Student's receipt of the required 35 minutes of weekly SDI, leads the undersigned to conclude as a matter of law,

the District failed to comply with the Student's IEP. This is a substantive violation of the IDEA. Therefore, the Parent has met her burden of proof on this issue.

36. However, under *Van Duyn* analysis, the District's violation was not a material violation. Other than requiring 35 minutes of SDI each week, the Student's IEP is vague on the exact delivery method. See, Finding of Fact 44. Furthermore, according to the record, during the first semester of the 9<sup>th</sup> grade, the Student made progress towards his IEP goals in reading and written language. See, Conclusion of Law 11. As such, the undersigned cannot find the Student was denied a FAPE.

*Appropriateness of the District's 2016 evaluation of the Student*

37. A reevaluation must be conducted if a district determines that the educational or related service needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the child's parent or teacher requests a reevaluation. WAC 392-172A-03015(1); 34 CFR §300.303(a)(1)-(2).

38. When a school district conducts a special education evaluation, a "group of qualified professionals selected by the school district" must use a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . ." The group must not use "any single measure or assessment as the sole criterion" for determining eligibility or educational programming. The group must use technically sound instruments that may assess the relative contribution of cognitive, behavioral, physical, and developmental factors. WAC 392-172A-03020; 34 CFR §300.304. A school district generally has the right to choose its evaluators so long as they are trained and knowledgeable personnel as required by WAC 392-172A-03020(3)(a)(iv).

39. If the parent of a student eligible for special education disagrees with a school district's evaluation, the parent has the right to obtain an IEE, which is an evaluation conducted by a qualified examiner not employed by the school district. If a parent requests an IEE at public expense, the district must either initiate a due process hearing within 15 days to defend the appropriateness of its evaluation, or else ensure that a publicly funded IEE is provided without unnecessary delay. If the district initiates a hearing, and the final decision is that the district's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. WAC 392-172A-05005; 34 CFR §300.502.

40. The District has established that its reevaluation met the requirements of WAC 392-172A-03020. The Parent requested the District provide the Student SDI in math, an area which was not previously included in the Student's most recent IEP. As such, it was appropriate for the District to reevaluate the Student. In doing so, a group of qualified professionals used a variety of assessment tools and strategies to gather relevant information, including input from the Parent, and did not use a single measure as the sole criterion to determine eligibility. Qualified personnel, in this case Dr. Davidson, selected technical instruments that assessed the relative contribution of a variety of factors. The evaluation was comprehensive and assessed the Student in all areas of suspected disability, which for the Student included math, cognitive, and executive functioning/ADHD.

Dr. Davidson's Determination that the Student Did Not Meet the Severe-Discrepancy Test for SLD

41. When determining if a Student with a SLD<sup>33</sup> is eligible for special education and related services, the District must also apply the additional procedures as outlined in WAC 392-172A-03045 through WAC 392-172A-03075. This includes observation of the student in the student's specific learning environment. Specifically, WAC 392-172A-03075 states:

**Observation of students suspected of having a specific learning disability.**

(1) School districts must ensure that a student who is suspected of having a specific learning disability is observed in the student's learning environment, including the general education classroom setting, to document the student's academic performance and behavior in the areas of difficulty.

(2) The evaluation group must:

(a) Use information from an observation in routine classroom instruction and monitoring of the student's performance that was done before the student was referred for an evaluation; or

(b) Have at least one member of the evaluation group conduct an observation of the student's academic performance in the general education classroom after the student has been referred for an evaluation and parental consent is obtained.

....

(emphasis added.)

42. Pursuant to the above regulation, during her evaluation, Dr. Davidson was required to either observe the Student in his general education classroom or obtain information from a member of the evaluation team. At the time of the Dr. Davidson's evaluation, Mr. McCorkle, was a member of the evaluation team. Dr. Davidson consulted Mr. McCorkle about his observations of the Student during math class. Dr. Davidson took Mr. McCorkle's observations into account as part of the evaluation. See, Findings of Fact 57, 62. Therefore, it is legally concluded that Dr. Davidson's actions complied with the regulation on class observation. The District has met the burden of proof on this issue.

43. The District argues in accordance with the regulations, the evaluation team used their professional judgment in determining the Student did not meet the severe discrepancy test. In pertinent part, the applicable regulation states:

....

*(2) Where the evaluation results do not appear to accurately represent the student's intellectual ability or where the discrepancy between the student's intellectual ability and academic achievement does not appear to be accurate*

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<sup>33</sup> To some extent, this argument is moot. The Student is eligible for special education and related services under the Other Health Impairment category. As such, he is entitled to *whatever special education and related services* he requires to receive "an educational benefit". However, the District's PWN stated, the Student did not qualify for SDI in math because he did not meet the SLD severe discrepancy test. Therefore, the undersigned is addressing this issue.



upon application of the discrepancy tables, the evaluation group...may apply professional judgment in order to determine the presence of a specific learning disability. *Data obtained from formal assessments, reviewing of existing data, assessments of student progress, observation of the student, and information gathered from all other evaluation processes for students being identified for a specific learning disability must be used when applying professional judgment to determine if a severe discrepancy exists.* When applying professional judgment, the group shall document in a written narrative an explanation as to why the student has a severe discrepancy, including a description of all data used to make the determination through the use of professional judgment.

WAC 392-172A-03070(2) (emphasis added.)

44. In this instance, Dr. Davidson relied on the Claesson Evaluation's cognitive tests. As explained in Finding of Fact 5, the Claesson Evaluation is sparse of analytical data supporting his conclusion that the Student did not have a severe discrepancy score. As such, if Dr. Davidson's analysis only included the Claesson data, the undersigned might conclude Dr. Davidson's evaluation was inappropriate.

45. However, as Dr. Davidson explained during testimony and her written report, she gathered and compared data collected from numerous sources in assessing the Student's math skills. *See generally*, Findings of Fact 46-60. When she believed the data she collected was invalid, she reviewed and compared the results of data collected from other sources, which assessed Student's math skills. Applying her professional judgment, which includes her extensive experience, she determined the Student did not meet the severe discrepancy score for SDI in math. During the evaluation review meeting, the team had an opportunity to review and discuss Dr. Davidson's conclusion. The evaluation team reached the same result.<sup>34</sup> Therefore, it is concluded as a matter of law, that the District's January 2016 Evaluation was appropriate.

*Presence of a special education teacher and LEA representative at Parent-teacher conferences*

46. The Parent argues she was required to include Mr. Waller and Ms. Deerwester in all email correspondence and during parent teacher conferences. Although the District may have made this request of the Parent and as such the Parent did include Mr. Waller and Ms. Deerwester in all email correspondence, the IDEA does not address requests of this nature. Additionally, the evidence is uncontroverted that no administrator of the District attended a parent-teacher conference with any of Student's general education teachers during the spring 2016 conference schedule. The IDEA does not regulate the conduct of general education parent-teacher conferences. Therefore, the parent has not met her burden of establishing the conduct violated the IDEA.

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<sup>34</sup> Although the Parent disagreed with the other team members, the Parent does not have veto power over the evaluation team's decision. The Parent's recourse was to request an IEE. *See*, Conclusion of Law 28.

Rejection of all other arguments

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

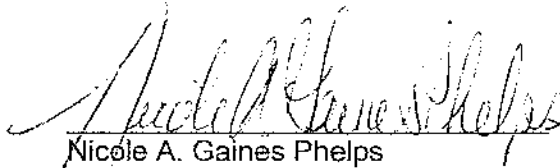
Summary

48. The Parent proved the District violated the IDEA by failing to provide 35 minutes per week of SDI in reading and written expression. However, violation did not deny the Student a FAPE. As such, no remedy is warranted.

ORDER

The District violated the IDEA by failing to provide the Student 35 minutes per week of SDI in reading and written expression. However, the violation did not deny the Student a FAPE: no remedy is ordered.

Signed at Seattle, Washington on December 16, 2016.

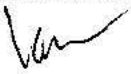


Nicole A. Gaines Phelps  
Administrative Law Judge  
Office of Administrative Hearings

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



Rachel Davenport, Director of Special Services  
North Kitsap School District  
18360 Caldart Avenue NE  
Poulsbo, WA 98370-8775

Lynette M. Baisch  
Tim Reynolds  
Attorneys at Law  
Porter Foster Rorick LLP  
800 Two Union Square  
601 Union Street  
Seattle, WA 98101

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