STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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August 10, 2017

Parents
[redacted]

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In re: Kent School District
OSPI Cause No. 2016-SE-0111
OAH Docket No. 12-2016-OSPI-00204

Dear Parties:

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

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

Sincerely,

Michelle C. Mentzer
Administrative Law Judge

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

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

IN THE MATTER OF:	OSPI CAUSE NO. 2016-SE-0111
	OAH DOCKET NO. 12-2016-OSPI-00204
KENT SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

For translation of this document, please call OAH, 1-800-583-8271.

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Kent, Washington, on March 13, 14, 15, May 17 and 18, and June 21, 2017. The Parents of the Student whose education is at issue[1] appeared and were represented by Ann Carey and Andres Munoz, attorneys at law. The Parents were assisted by a foreign language interpreter.[2] The Kent School District (District) was represented by David Hokit, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (Complaint) on December 6, 2016. Prehearing conferences were held on January 3, March 1, and March 2, 2017. Prehearing orders were issued on January 3, February 17, and March 3, 2017. Orders adding hearing dates were entered on March 17 and May 23, 2017.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a joint request for continuance. *See* First Prehearing Order of January 3, 2017. The hearing record closed with the filing of post-hearing briefs on July 26, 2017. Thirty days thereafter is August 25, 2017. The due date for the written decision is therefore August 25, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-1, J-3 through J-5, and J-7;
Parent Exhibits: P-1 through P-7, P-9 through P-12, P-14 through P-32, and P-34 through P-39; and
District Exhibits: D-1 through D-4, and D-6 through D-19.

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

[2] The foreign language spoken by the Parents is omitted to provide greater confidentiality for the family.

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

Susanne Cox, District school psychologist;
Jennifer Lewis, District occupational therapist;
Sara Vickers, District developmental preschool teacher;
Charleen Kelly, PhD, District speech language pathologist;
Celina Bournes, District general education teacher;
Ludia Choi, District teacher of English language learners;
Joseph Libby, EdD, District assistant director of inclusive education;
Staci Wiese, District assistant principal;
John Sander, District executive director of inclusive education;
The Father of the Student;
The Mother of the Student;
Jennifer Hickey, District special education teacher;

ISSUES

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

   a. Changing the Student's educational placement in November 2016 without complying with the procedural requirements of the IDEA; and

   b. Adopting an inappropriate educational placement for the Student in November 2016 that is not her least-restrictive environment and not at her neighborhood school.

2. Whether the Parents are entitled to the following requested remedies or other equitable relief as appropriate:

   a. An order retaining the Student in her last implemented educational placement, which was a general education setting the majority of the time, at her neighborhood school; and

   b. An order retaining the Student in the first grade for the 2017-2018 school year.

See Second Prehearing Order of February 17, 2017.

FINDINGS OF FACT

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

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Background

1. The Student is seven years old and completed first grade in the 2016-2017 school year. At all relevant times she has been eligible for special education and related services under the category of Developmental Delay. The Student is a happy, well-behaved child who likes to help others, enjoys playing, shows pride when she finishes tasks on her own, and responds well to direction from adults and peers. J-1:9. She lives with her Parents and an older sibling within the boundaries of the Kent School District (District). The primary language spoken in the home is a foreign language.[3] English is the secondary language spoken in the home. The Student is bilingual. The Mother was an elementary school teacher for nine years in the family's native country. Both she and the Father spend significant amounts of time working with the Student at home on academic skills. Testimony of Mother and Father.

2. Before entering preschool, the Student received services from the South King County Intervention Program. At age three she entered a District developmental preschool. The preschool classes consisted of approximately 12 children eligible for special education plus three typically-developing peers. The classes were taught by one teacher and two paraeducators. The Student's teacher throughout her two and a half years in preschool was Sara Vickers. Testimony of Vickers.

3. The Student's last year in preschool was the 2014-2015 school year. Near the end of that year, the District proposed that for kindergarten, the Student be placed in a special education program called a Support Center rather than in a general education class. There is no Support Center at the Student's neighborhood school,[4] so she was to attend such a center at either Soos Creek Elementary School (Soos Creek) or Scenic View Elementary School (Scenic View).

4. The Mother visited the Soos Creek Support Center in May 2015, accompanied by Ms. Vickers, the Student's preschool teacher. The Mother came away in tears, adamant against a Support Center placement. She felt the program lacked structure, academic content, typically-developing peers, and that the Student would regress there. P-11.[5] Ms. Vickers, by contrast, thought the Support Center was the best placement for the Student. Testimony of Vickers. The Mother requested that the Student be retained for another year in preschool, believing the Student would be more ready for a general education kindergarten thereafter. Testimony of Mother and Vickers.

5. The District declined to retain the Student in preschool. The District informed the Mother that it was committed to strengthening the Soos Creek Support Center program by observing the program and making recommendations to improve teaching and learning. The District also scheduled a September 11, 2015 visit for the Mother to see the other Support Center located at

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[3] See footnote 2, above.

[4] The name of the Student's neighborhood school is omitted to provide greater confidentiality for the family.

[5] Citations to the exhibits are in the following format. "P-11" refers to Parent Exhibit 11. If particular pages are cited within an exhibit, the citation would be, for instance, "P-11:2", to refer to Exhibit P-11, page 2. Joint exhibits are designated with a "J", and District exhibits with a "D".

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Scenic View. The Mother decided, in the meantime, to keep the Student at home when school started in September. P-10; P-11; P-34; Testimony of Mother. However, before the scheduled visit to Scenic View on September 11th, the District acquiesced to the Mother's wishes and placed the Student in a general education kindergarten class. The Student's special education services would be provided on a pull-out basis. Testimony of Mother; J-3:16.

6. The Student's kindergarten class was located in the same building as her preschool -- the Kent Valley Early Learning Center (KVELC). P-19.[6] The Individualized Education Program (IEP) adopted during her kindergarten year, in November 2015, placed her 80% of the time in the general education setting, and 20% of the time in the special education setting for pull-out services. J-3:16.

First Grade 2016-2017

7. KVELC only goes up to kindergarten, so the Student transferred to her neighborhood school for first grade. Her first grade class had approximately 22 students. There was only one paraeducator at the school to serve all special education students from kindergarten through third grade. Testimony of Cox.

8. Very early in first grade, the Student's general education teacher, Susan O'Sullivan,[7] spoke about the Student with Susanne Cox, the school psychologist assigned to the school. Ms. Cox had worked at the school for 17 years, and is in her 19th year with the District. Ms. O'Sullivan expressed her concern that the Student's academic, adaptive and social skills were much lower than those of her peers. Ms. O'Sullivan believed the school needed to address the matter quickly and not wait any longer. They decided that the next step was to seek the Parents' consent for a reevaluation. Testimony of Cox.

Consent for Reevaluation of 2016

9. Ms. Cox prepared a reevaluation consent form for the Parents to sign. The consent form stated: "The decision to refuse/recommend an evaluation of your child was based on the following . . ." To complete this sentence, Ms. Cox checked a box stating that it had been three years since the last reevaluation, and state law required another one. P-5:1. Ms. Cox did not check an alternative box stating the reevaluation has been requested "by _____ because _____." *Id.* This would have been the correct box to check in the situation. Another section of the consent form stated: "Description of any other options considered and rejected." In that section, Ms. Cox typed: "No other options were considered or rejected; [The Student's] re-evaluation is due soon." *Id.*[8]

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[6] The November 2015 IEP mistakenly listed the Student as attending her neighborhood school. J-3:1. She was actually attending KVELC at that time.

[7] Counsel stipulated at the hearing that Ms. O'Sullivan has been on leave since December 2016 and was unavailable to testify at the hearing.

[8] The "by _____ because _____" alternative had been used in the past when the Parents' consent was sought for an early reevaluation. In 2014, there were new concerns in the area of fine motor skills. The consent form did not state it was a triennial reevaluation, because it was not. Rather, it stated that the

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10. Prior to sending home the consent form, Ms. Cox introduced herself to the Mother and told her an envelope would be sent home with the Student containing a reevaluation consent form. Ms. Cox told the Mother that the last evaluation had been done three years earlier, so it was time to do a new one. The Mother signed the consent form on September 20, 2016. She assumed what Ms. Cox had told her, and what was stated on the form – that a triennial reevaluation was due and required by law -- was correct and did not verify it herself. Testimony of Mother; P-5.

11. The Student's last evaluation had actually been completed less than two years earlier, in early-November 2014. D-18. Ms. Cox knew this prior to initiating the 2016 reevaluation. The following exchange occurred during her testimony:

> Q: Before you evaluated Student, did you review the 2014 evaluation?
> A: Yes.
> Q: And so you were aware *before you approached this evaluation* that she was evaluated in 2014; is that right?
> A: Yes.

Tr. 40-41 (Cox) (Italics added).[9]

12. Ms. Cox admitted that the consent form "misrepresents" the reason for the reevaluation. However, she testified it was a "clerical error." Tr. 43-44 (Cox). Ms. Cox acknowledged that the real reason for the reevaluation was to address the mismatch between the Student's needs and her program. Tr. 44-45 (Cox). Ms. Cox further acknowledged that she knows of no one from the District informing the Parents, before the evaluation was completed, that staff were considering a change of placement for the Student. Tr. 48-49 (Cox).

13. It is found by a preponderance of the evidence that Ms. Cox knew a triennial reevaluation was not due when she filled out the consent form stating one was due. It is found she did not make a "clerical error," but acted to conceal from the Parents the real reason for the reevaluation. These findings are made for the following reasons. First, Ms. Cox did not simply mis-check a box. She also typed in her own hand: "No other options were considered or rejected; [the Student's] re-evaluation is due soon." P-5:1. She also told the Mother orally that a triennial reevaluation was due. Second, Ms. Cox was well aware of the 2014 evaluation *before* she initiated the 2016 reevaluation. Tr. 40-41 (Cox). Third, Ms. Cox was a highly experienced school psychologist, in her 19th year with the District. A neophyte might more credibly have made an error of this sort. Fourth, even if the initial preparation of a triennial consent form had been a mistake, Ms. Cox quickly learned that only two years had passed since the prior evaluation. On September 27, 2016 (seven days after obtaining the Mother's consent), Ms. Cox conducted cognitive testing on the Student. During that testing she

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reevaluation was requested "by" the IEP team "because" of new concerns, and specified that the new concerns were in the area of occupational therapy. P-4:1.

[9] Quotations from the transcript of the due process hearing are cited in the following format. "Tr. 40-41 (Cox)" refers to pages 40 and 41 in the transcript, during the testimony of the witness Ms. Cox.

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consulted the District's 2014 evaluation. *See* J-1:11-12. Yet at no time did she issue a *revised* consent form to the Mother stating that it was *not* a triennial reevaluation, and specifying the actual reason for the reevaluation.

14. Fifth and finally, there was a motivation for Ms. Cox to conceal from the Mother the true reason why the District wanted an early reevaluation in 2016. The District had sought to place the Student in a Support Center in 2015, but relented in the face of the Mother's adamant opposition. If the Mother refused consent for a 2016 reevaluation, the District would be barred for another full year from conducting one, until the triennial reevaluation actually came due in fall 2017.[10] Without a reevaluation, the District could not legally make a significant change in educational placement like a move from general education kindergarten to a Support Center.[11] Given the Mother's adamant opposition to the placement the previous year, Ms. Cox had good reason to be concerned that the Mother would refuse consent for an early reevaluation if the real reason for it were revealed.[12] It would be much easier to have the Mother believe it was a legally required triennial reevaluation until after it was completed. With the reevaluation in hand, the IEP team could then change the Student's placement to a Support Center – which it did -- even if it was unable to convince the Mother this was the most appropriate placement.

15. The District asserts that the real reason for the reevaluation appears in the reevaluation report, and this "corrected" the error. District Posthearing Brief, at p. 5. However, the dense, 20-page reevaluation report contains only one hint of the real reason it was undertaken: "Because the team would like to update her program so that it accurately addresses current needs, a re-evaluation was initiated early in the fall of 2016." J-1:1. The wording is unclear: Does it mean a reevaluation was initiated earlier than required? Or does it mean the reevaluation was initiated "early in the fall of 2016," i.e., in September 2016, when consent was obtained? Without a comma after the word "early," the latter reading makes more sense. Thus, the sentence did not make clear that the reevaluation was not triennial. Most importantly, the Mother did not understand this from the document. It was only after she went home, following

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[10] There is only one circumstance under which the District could conduct a reevaluation if the Parents denied consent. The District would have to file a due process hearing request and convince an ALJ that there was cause to override the Parents' refusal to consent. *See* WAC 392-172A-03000(3); *see also* 34 CFR §300.300.

[11] As explained in the Conclusions of Law, below, a reevaluation is required before a significant change of placement can be made. When the District attempted to place the Student in a Support Center for kindergarten in 2015, no reevaluation was needed because the proposed placement did not represent a significant change on the continuum of educational placements: the Student would have moved from a *special education* preschool to the *special education* Support Center. In 2016, by contrast, the proposed change was from a *general education* kindergarten to a *special education* Support Center. Thus, a reevaluation was required in 2016 before such a change could be made.

[12] That concern was well-placed. The Mother testified as follows: If the consent form had stated the District wanted to reevaluate the Student one year early, the Mother would have demanded an explanation. If the explanation was that school staff wanted to see whether the Student's needs warranted a different placement, the Mother would have undertaken to demonstrate that the Student was able to read and write, so a change of placement was not needed. Only if she had been given a sufficient explanation of why the District wanted a change of placement would she have consented to the reevaluation. Testimony of Mother.

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the October 24, 2016 reevaluation meeting, that she discovered it had *not* been a triennial reevaluation. She discovered this by comparing her older records with the new ones, and realized that only two years had passed since the last reevaluation. Testimony of Mother. She did not come to this realization from reading the sentence quoted above. For all of the reasons stated here, it is found that the District did not correct its purposeful misrepresentation about the reason for the October 2016 reevaluation. If Ms. Cox had wanted to correct her "error" she would have issued a revised consent form at some point. She never did.

16. Ms. Cox makes another claim that is found to be untrue. She testified that the Mother was orally informed of the real reason for the reevaluation *and gave her consent based on that real reason.* Ms. Cox testified:

> We approached her [the Mother] to let her know that there was a mismatch between her daughter's program and her apparent needs *so she agreed to the consent.*

Tr. 45 (Cox) (italics added). The Mother testified to the contrary, that no one gave her any reason for the reevaluation except that three years had passed and a new one was legally required. Only after returning home on the evening of the reevaluation review meeting did she discover this was not true. The Mother's testimony on this matter is found more credible than Ms. Cox's for three reasons. First, no witness, including Ms. Cox, testified to having personally told the Mother what is stated in the quote above. Ms. Cox only testified vaguely that "we" told the Mother this. The record reflects no meeting at which Ms. Cox and other District staff ("we") were present together and could have made such a statement to the Mother prior to her signing the consent form. Second, the written language of the consent form -- which gives only one reason for the reevaluation -- is consistent with the Mother's testimony that she was given only one reason for it, and inconsistent with Ms. Cox's testimony that she was given a different reason for it. Finally, Ms. Cox was found not credible concerning an alleged clerical error, so she is found less credible on this matter as well.

Communications Subsequent to Consent for Reevaluation

17. On September 28, 2016, Ms. Cox wrote an email to District members of the Student's IEP team that included the following:

> My recommendation is that we split the [evaluation] feedback and IEP into two meetings as there will be a lot of information given to [the Mother] during the eval feedback (some which [sic] will be tough for her to hear, such as info regarding [the Student's] cognitive abilities).
>
> During this meeting, we cannot talk about program, nor can we talk about placement (this is a legal requirement). A separate IEP meeting will also give us time to get our ducks in a row to discuss placement.
>
> I will also be in touch with Joe Libby [assistant director of inclusive education] as we get nearer to the IEP meeting so that he is aware of our challenges with this case.

P-16:1. On September 29, 2016, Ms. Cox wrote an email to District administrators that included the following:

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> [The Student] was slated for a Support Center program moving from K to 1st grade[13] but the parent was not in agreement. She is now in a gen ed./ IP[14] placement, but her current placement is truly not meeting her needs. We have initiated a re-evaluation and will be completing that in October (we have a meeting tentatively scheduled for 10/24). After that point, we will be holding an IEP meeting and talking more seriously about placement.

P-17.

Reevaluation of October 2016

Cognitive

18. The cognitive portion of the reevaluation found the Student's intellectual abilities to be in the "very low" range. Her composite score (General Conceptual Ability, GCA) was 54. The mean GCA score is 100. The Student's score was three standard deviations below the mean.[15] J-1:11-12; Testimony of Cox. A Special Nonverbal Composite (SNC) score was calculated to minimize the impact of the Student's communication delays and bilingual status. Her SNC score was 56. The closeness of the Student's GCA and SNC scores indicates that her communication delays and bilingual status do not have a significant impact on her overall intellectual abilities, and that her nonverbal abilities as well as her verbal abilities are very low. J-1:11-12.

19. The Student's cognitive scores in this reevaluation were similar to her scores in the District's evaluation conducted two years earlier, in October 2014, by a different school psychologist. The same assessment tool was used in both years: the Differential Ability Scales – 2nd edition (DAS-II). In 2014, the Student's SNC score was 59, which fell at the 0.3 percentile. D-18:15. This was slightly higher than her score of 56 in 2016 (no percentile score was provided in the 2016 report). The Student also had cognitive testing done at Children's Hospital in 2014. The resulting scores were similar to the District's testing of that year. Testimony of Mother.

Adaptive Skills

20. The Student's adaptive skills were assessed using the Vineland Adaptive Behavior Scales, Third Edition (VABS-III). Ms. Cox administered the VABS-III parent questionnaire to the Mother. The Student's composite standard score from the parent questionnaire was 67. A standard score of 100 is the mean. J-1:8-9. The Mother's score for the Student was more than two

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[13] The reference here to the Student moving "from K to 1st grade" is erroneous. The placement dispute actually arose when the Student was moving from preschool to kindergarten, in May 2015. *See* Findings of Fact, above.

[14] "IP" stands for Integrated Program. In other school districts, this kind of program is often described as a Resource Room. Testimony of Cox.

[15] One standard deviation is 15 points on a test where the mean score is 100. The "average" range, where most people fall, is one standard deviation above or below 100, meaning from 85 to 115. J-1:15.

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standard deviations below the mean. The VABS-III also has a teacher questionnaire. However, it was not used because the teachers at the Student's new school had only known her for a few weeks. Instead, Ms. Cox used a narrative questionnaire that she asked both the new teacher (first grade) and the prior year's teacher (kindergarten) to fill out.

21. The Student's kindergarten teacher[16] noted the following problems: The Student was easily distracted and needed constant adult assistance with her academics. She had trouble at times following simple directions given by the teacher, and would instead be prompted by what she saw other children do. The kindergarten teacher was concerned that the Student would continue to struggle, as each school year would get harder for her. D-7.

22. Ms. O'Sullivan, the Student's first grade general education teacher, noted the following problems: Without continuous one-on-one prompting, the Student did not attend or focus on a task. Even in a small group she was very distracted, and had difficulty keeping her hands to herself. Her reading was at early-kindergarten level. Concerning improvements made, Ms. O'Sullivan noted that the Student was able to line up after recess without one-on-one assistance, and was beginning to hang up her backpack and find her desk without help. However, she continued to rely on others to help find her coat, put it on, fasten zippers and buttons, and open doors. The teacher noted the Student tended to communicate her needs by pulling on peers' or adults' arms, and other nonverbal gestures. Concerning recommendations, Ms. O'Sullivan wrote that the Student needed a curriculum appropriate to her level of performance and a setting with fewer distractions. D-6; J-1:7; P-31.

23. The sections of the questionnaire asking about progress made during kindergarten and first grade were not informative. The teachers left some of these sections blank, and in others only stated what the Student's ending skills were, not what her skills had been at the beginning of the year. D-6; D-7.

24. The Student's first grade special education teacher, Jennifer Hickey, explained that on the adaptive skill of bathroom use, the Student would not raise her hand to notify anyone that she needed to go to the bathroom. A schedule was established whereby staff would prompt her to initiate bathroom use. Testimony of Hickey. For this reason, the Student's IEP was amended in October 2016 (while the reevaluation was in progress) to add a one-on-one paraeducator for bathroom needs, both initiating and helping with some of the physical steps of bathroom use, with a plan for this assistance to be faded over time. D-15:11, 16. In the same amendment, recess monitoring was added to the IEP because the Student had several injuries on the playground. J-5. Concerning the adaptive skill of using the sink, the Student had been taught at her prior school how to turn the faucet on and off. Her current classroom had the same faucet fixture, but it was installed on the side of the sink instead of at the back of the sink. The new angle was frustrating for the Student, and she needed to be retaught the same skill from a different position. J-1:14; Testimony of Cox.

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[16] The Student actually had two kindergarten teachers who shared the job, working on different days of the week. One of them filled out the questionnaire, but the other teacher reviewed the responses before the questionnaire was submitted. Testimony of Bournes.

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25. During the evaluation, Ms. Cox tried to teach the Student to operate the school's door handles as part of the assessment of adaptive skills. Ms. Cox had heard that the Student was having difficulty with this task. The handles are straight levers that one pushes downward. To open a door, one pushes the handle downward from the 3:00 position to the 6:00 position. Ms. Cox attempted to teach this skill by placing a sticker at the 6:00 position to show where the handle had to be moved to, by modeling the skill herself, and by doing it hand-over-hand with the Student. In the time she was able to work with the Student, the Student did not learn the skill. (Ms. Cox did not state how long she spent on this instruction.) Ms. Cox then inquired of the Student's occupational therapist and physical therapist whether the barrier was physical strength or was cognitive in nature. The therapists responded that the barrier was not a physical inability but a cognitive barrier – not understanding the steps involved. Testimony of Cox.

Hearing and Vision

26. Testing of the Student's hearing and vision was attempted by the school nurse. The Student was unable to understand the instructions given to her despite the nurse using gestures, modeling, and prompting. The nurse therefore sent the Parents a referral to obtain hearing and vision testing. J-1:6; Testimony of Cox.

Academic Skills

27. The Student's academic skills could not be meaningfully assessed using a standardized test because her skills were below the basal levels on such tests. The standardized tests would thus only show what the Student could not do. They would not show what she *could* do. J-1:3; Testimony of Cox. For this reason, Ms. Cox used classroom-based assessments to ascertain the Student's levels in reading, writing and math. Ms. Cox did not provide the level of cueing and prompting given in class, because she wanted to assess the Student's independent skills. *Id.*

28. In reading, the Student was able to identify 16 lower case letters and 22 upper case letters out of 26. She could identify 21 of the letter sounds, and 13 of 42 high-frequency short words. When given a picture book, she was able to identify the title of the book and where to start reading. She could not identify the front or back covers, words, or spaces, and could not demonstrate which way to read (left to right). Nor could she use her finger to follow along word-by-word as Ms. Cox read to her. She was not able to generate rhymes, and had mixed results in phonetic exercises. She was able to pick out her name from a list of four names beginning with the same letter. J-1:13. The Student was able to read familiar books if they had a repetitive pattern and contained five to eight words per page. Testimony of Hickey. Her independent reading level at that point in first grade was 1Y (beginning of kindergarten), lower than it had been at the end of kindergarten, 2Y (first half of kindergarten). J-1:7; P-31. During the evaluation review meeting, the Mother had the Student demonstrate that she could read from an early reader book that the Mother picked from books available in the classroom. The Student read one page aloud (containing eight words), after which the Mother stopped her, thinking that was sufficient demonstration. The Mother testified it was not a book the Student had read before. Testimony of Mother. This level of independent reading had not been demonstrated at school. The evaluation report stated this indicated how challenging it was to generalize skills learned from one setting or person to another. J-1:14. The Mother alleges that the next day, Ms. Hickey told her the Student was able to read books in the level-G range

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(second half of kindergarten). Testimony of Mother. Ms. Hickey denies that this occurred. She agrees the Student's *instructional* level at that time was within 1G, but her *independent* level was in the level-Y range. Testimony of Hickey.[17]

29. In the area of written language, the Student was able to sing the tune of the alphabet song, but unable to sing the letters clearly, with several passages running together. However, she was able to recite most of the alphabet without singing, missing only four letters. She was able to write 11 of 26 letters dictated. She was struggling to write her entire name. J-1:13-14. When looking at a chart and being cued for each letter, she could write all letters of the alphabet in lower case and upper case. Testimony of Hickey.

30. In math, the Student was unable to label coin names. She could read most numbers up to 20, missing three of them. She could say the numbers up to 20, though she made one mistake. With prompting, she could count from 21 to 29, but then went back to 20. She could match numbers and quantities up to five. When paused while counting, she could not resume but had to start over. She was inconsistent in one-to-one correspondence skills, usually being consistent up to four, and sometimes up to eight. Given a set of number cards, she could place one, two and three in order, but no higher. When given two sets of objects, she struggled to determine which group had more than the other. She did not demonstrate understanding the concept of a number line. She was able to identify some shapes – circle, triangle, and square. J-1:13. As far as writing numbers, she could write up to 15 when copying from a chart and receiving cues for each number. Testimony of Hickey.

31. Overall, the Student was found to require a great deal of repetition, practice, and one-on-one assistance to acquire academic skills. At times she required hand-over-hand guidance in writing. Her attention span was short and she needed a lot of prompting and cueing to stay on task. The Student received intensive, small-group instruction in reading with two other very low-achieving first-grade IEP students. The Student's rate of growth was small, and the gap between her and the other two children was growing. J-1:14. Her special education teacher, Ms. Hickey, gave an example of the process needed to teach the Student. To understand the concept of adding one number to another, Ms. Hickey would place some cubes on a chart, then add more cubes to it to show the answer. The Student would then make an attempt. Ms. Hickey would need to do the exercise at least five times for the Student to understand. For this reason, Ms. Hickey stated the Student needed one-on-one, repetitive instruction broken up into small steps in order to learn. Testimony of Hickey.

Communication Skills

32. On a standardized assessment (Preschool Language Scale – 5th edition) the Student's auditory comprehension standard score was 54. Her expressive communication score was 52. The mean score is 100. The Student's total language standard score was 50.[18] All of these

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[17] This inconsistency in the testimony need not be resolved because the substantive issue of the Student's appropriate placement is not reached herein, for reasons stated in the Conclusions of Law, below.

[18] A child's total language score on this assessment is sometimes lower than either of the two component scores, as occurred here. Scoring is determined by charts provided by the test producer. Testimony of Kelly.

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scores are more than three standard deviations below the mean. J-1:15. In informal assessments, the Student used symbolic play, was interactive, used appropriate eye contact, and used one-to-eight-word utterances, all of which was consistent with her expressive language score on the standardized test. *Id.*

33. The speech-language pathologist (SLP) who conducted this evaluation, Dr. Charlene Kelly, is also the SLP who provides services to the Student. Dr. Kelly provided the following opinion regarding the Student's ability to benefit from the general education classroom:

> She's going to have – she's going to have great struggles understanding language in a typical first grade classroom because her skills are much lower than that. So when she's trying to – when she's in the classroom and things are being explained, she really is going to have a hard time understanding not only the language – well, the language, how it's put together, but also the vocabulary. . . . she isn't understanding the language that is used in a typical first grade classroom.

Tr. 360 (Kelly). When asked whether this challenge could be remediated by adding a one-on-one paraeducator for the Student, Dr. Kelly responded:

> No. . . . Because the language is coming in the classroom, and the para isn't going to be able to then help her understand what that particular word means or sentence means in order to get the concept of what's being taught[.]

Tr. 360-361 (Kelly).

Fine Motor Skills

34. The occupational therapist (OT) who conducted the fine motor evaluation, Jennifer Lewis, is also the OT who provides services to the Student. Ms. Lewis was not able to complete a standardized assessment with the Student because the Student had difficulty following the directions. Ms. Lewis explained that the Student has difficulty problem-solving on fine motor tasks because she processes information very slowly and looks to adults for cues and reassurance on how to continue. Ms. Lewis assessed the Student on a variety of fine motor tasks and concluded that the Student's deficits continue to interfere with her educational performance and she continues to need OT services. J-1:17.

Gross Motor Skills

35. The Student had been receiving services from a physical therapist (PT) only during physical education (PE) class. The PT who conducted the gross motor assessment was unable to administer a standardized test due to the Student's difficulty sustaining attention, imitating, and following directions. The PT therefore used alternative assessments instead of a standardized test. She concluded that the PT assistance the Student received was primarily in following directions, not in gross motor instruction. The reevaluation team determined that another adult could provide this assistance, and a PT was not needed. Therefore, although the Student demonstrated gross motor delays, she would be able to participate in PE class with support from a staff member who is not a PT. The evaluation concluded the Student should be exited from PT services. J-1:18.

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Classroom Observation

36. Ms. Cox, the school psychologist, conducted a classroom observation. She observed the Student during the following activities: small-group instruction in reading; whole-class instruction in reading and writing; and adaptive activities such as washing hands, putting on a coat, and getting in line. The Student required extensive help for every activity. She received this help from a paraeducator, the teacher, and peers. The notes from the classroom observation provide a lot of detail on the Student's participation, non-participation, and help from others. The overall picture is that of a student who is well-behaved, but who understands little, mimics the actions of others, is largely inattentive, and does not comprehend what is being asked of her verbally. She was able to participate better in the small group. However, of the two activities taught during the small group, the Student was able to attend to only one of them. J-1:19-20.

Eligibility Determination

37. The evaluation team, including the Mother, met on October 24, 2016, and determined the Student continued to be eligible for special education and related services under the category of Developmental Delay. The Student was found to need services in adaptive skills, basic reading, reading comprehension, math calculation, math problem solving, written expression, and communication. The Evaluation Summary does not list fine motor skills/occupational therapy as an area of need. However, the body of the evaluation makes clear that the Student was receiving OT services and continued to be eligible for them. J-1:1-4.

Communications Following the October 2016 Reevaluation Meeting

38. On October 27, 2016, Ms. Cox sent an email to the District members of the IEP team including the following:

> I spoke with Joe Libby this morning about this student. I let him know that we are going to talk about a change of placement with the mom, and gave him some background (the KVELC went through the same process and the mom put the brakes on the change of placement). I said that it's likely we'll need assistance from IE [Inclusive Education][19] to work with this parent in helping her see that her daughter will make better progress in a self-contained program.

P-18. In an email that day to the Student's prior school psychologist, Ms. Cox expressed regret that the current team was having to go through the same "rodeo" again with the Mother. P-12. Later in the day, Ms. Cox wrote to some administrators:

> [The Student] is a first grade student who we will be talking about a change of placement to a Support Center when we have the IEP meeting. She was at KVELC last year as a K student. The team there went through the same process of changing her placement. When the parent visited the Support Center classroom (I'm not sure what building), she put the brakes on the change of placement. . . .

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[19] "Inclusive Education" is the District's name for its special education department.

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I believe we will need assistance from one of you during the meetings with the parent as we work with her to discuss our reasoning for a change of placement. . . .

We are trying to set up a staff "pre-meet" to get our ducks in a row. . . .

P-19.

39. Later the same day, Ms. Cox was communicating by email with the school psychologist who had led the Student's reevaluation team two years earlier, in 2014. The other school psychologist agreed with Ms. Cox that the Student needed a different placement very badly. Ms. Cox concurred, replying:

She. Can't. Open. Doors. Literally.

And not because she doesn't have the hand/arm strength. Just can't figure out the handles.

P-12.

40. Ms. Hickey sent the Parents two invitations to the IEP meeting of November 14, 2016, one on October 31st, and one on November 10th. P-6; P-7. The second invitation was sent to inform the Parents of additional staff who would be attending the meeting. Testimony of Hickey. Both invitations stated: "The purpose of this meeting is to (check all that apply) . . ." Three items were checked:

Discuss Annual Goal Progress
Review Current IEP
Review Instructional Needs

P-6; P-7.

41. Another item, "Determine Placement," was not checked. *Id.* Everyone on the IEP team, except for the Mother, knew that determining placement would be discussed at this IEP meeting. Testimony of Cox.

42. Ms. Cox acknowledged that "Determine Placement" should have been checked on the invitations, which were drafted by the special education teacher, Ms. Hickey. Dr. Kelly, the SLP on the team, assumed the invitation had notified the Parents that placement would be discussed, because that is what school staff are to do. Testimony of Kelly. Ms. Cox is not aware of any notice to the Mother, prior to the IEP meeting, that the District intended to discuss a change of placement. Testimony of Cox. Staci Wiese, the vice principal on the IEP team, is not aware if any such notice was provided either. Testimony of Wiese.

43. Ms. Hickey's practice is not to check "Determine Placement" on meeting invitations unless that is the only item to be discussed. Testimony of Hickey. Ms. Hickey's practice is contrary to the instructions on the invitation form: it says to "check *all* that apply." P-6; P-7 (italics added). There is no evidence Ms. Hickey explained her contrary practice to the Mother. Ms. Hickey received help from Dr. Libby in drafting the meeting invitation. Testimony of Hickey

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44. On or about November 10, 2016, Ms. Hickey telephoned the Mother to review the draft IEP with her orally. Testimony of Hickey and Mother. However, at the time of this phone call the Mother had not yet received the draft IEP. It was sent to her by certified mail on the day of the phone call. The Mother did not receive it until the evening of November 14th, after returning from the IEP meeting held that day. P-35; P-39; Testimony of Mother.

45. During the phone call of November 10, 2016, Ms. Hickey went over the annual goals and other aspects of the IEP, but did not discuss the service matrix or the placement section. Testimony of Hickey. She told the Mother that her supervisor, Joe Libby, wanted to be invited to the IEP meeting to talk about the Student's placement. The Mother replied that she did not want to talk about placement, and if that is why he wanted to come, then don't invite him. Testimony of Mother. The Mother was upset and angry during this part of the phone call. Testimony of Hickey. Ms. Hickey responded that she could not refuse to invite Dr. Libby because he was her supervisor. The Mother countered that the IEP meeting was already late (it was due to be held by November 2nd, but would not be held until November 14th (J-3:1)), she was eagerly awaiting a plan for her child, and she did not want to make any late changes to the meeting agenda. She said the meeting should focus on creating a new IEP that would work for her child. The Mother asked that the meeting start at 7:00 a.m. (half an hour earlier than scheduled), so there would be sufficient time to accomplish this. Ms. Hickey declined to change the meeting time. Testimony of Mother.

46. Ms. Hickey agrees that, during this phone conversation, she said the team wanted to discuss placement at the IEP meeting. However, Ms. Hickey disagrees that she mentioned Dr. Libby. Ms. Hickey's memory was faulty on several matters about the IEP meeting,[20] which is understandable given the number of IEP meetings she attends and the passage of time before she testified in this case. It is not found that she purposely testified untruthfully, only that the Mother's recollection of hearing Dr. Libby's name during this conversation – which was a very important conversation to her – is more accurate than Ms. Hickey's recollection of not having mentioned him.

47. Sometime after this phone call of November 10, 2016, the Mother left Ms. Hickey a voice mail reiterating her request that Dr. Libby not be invited to the IEP meeting because she (the Mother) wanted to finally do the IEP. Ms. Hickey called the Mother back and said she was working hard on the draft IEP. In this second phone call, Ms. Hickey said nothing further about Dr. Libby attending the meeting or about placement being discussed there. Testimony of Mother.

48. Ms. Hickey never amended the IEP meeting invitation to add Dr. Libby as a participant. As mentioned above, Ms. Hickey had previously sent an amended invitation when other participants were added. Nor did Ms. Hickey amend the meeting invitation to add "Determine Placement" as one of the purposes of the meeting. P-6; P-7.

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[20] Ms. Hickey believed the IEP meeting was scheduled for around 3:30 p.m. and that it began on time. She also believed that Ms. O'Sullivan remained present for the entire meeting. Testimony of Hickey. Each of these beliefs about the meeting are incorrect, based on the testimony of other District staff, not just the Mother.

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49. Sometime prior to the IEP meeting, school staff held a pre-meeting to prepare for the difficult conversation with the Mother about the Student's placement. They decided it would be Ms. Wiese who raised the topic of a possible change in placement at the IEP meeting. Testimony of Cox, Lewis, Wiese, Hickey.[21]

50. Also sometime prior to the IEP meeting, the Mother asked Ms. Hickey if she could observe the delivery of pull-out special education services to the Student, because she believed the Student should spend more time in general education class and less time pulled out for special services. Ms. Hickey responded that she would need to get the written approval of other members of the IEP team for such observations, and this never happened. Testimony of Mother.

51. If the Parents had received notification that determining placement would be on the meeting agenda, the Mother would have prepared for the meeting differently, and she asserts the meeting should have been conducted differently:

> [F]irst of all, it was not on the agenda of the IEP meeting. And had they wanted to place that on the agenda, they could have continued the meeting to a new date where we could have deliberated that issue. And then because then [sic] I would have wanted to hear input from every member of the IEP team as to why they think placement of my daughter in the support center would be beneficial for her.
>
> . . .
>
> I was not trying to avoid that conversation. But they only raised the issue five minutes to nine so we only had a couple of minutes to discuss. We did not have sufficient time to discuss it. And while I was able to briefly say what I wanted to say, this is a very important issue. It merited a separate meeting to which everyone would be prepared and everyone would be able to give input to the best of their ability.
>
> . . .
>
> So when you get an invitation that has a list of all the people that are going to attend, that has the agenda, this is something that you go by. If it changes then you need to get a new invitation, you need to get a new agenda of the meeting, and the meeting needs to be pushed out by at least two weeks.
>
> . . .
>
> So when I came to the meeting itself, I saw the invitation or the first page [containing the list of invitees] being exactly the same as what I had received previously. Also, the supervisor who said that he might come to our meeting, he didn't actually come.
>
> . . .
>
> [I]f we were going to discuss the question of placement, it should have been discussed before Ms. O'Sullivan had to leave to go to her classroom. . . . [T]his question should have been reached much earlier in the meeting so that we would have had sufficient time to actually discuss it.

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[21] Ms. Cox arranged for the pre-meeting, but at the hearing she could not recall if it had actually occurred. Other witnesses testified it did occur. Testimony of Cox, Lewis, Wiese, Hickey. Ms. Hickey clarified that the pre-meeting was held by telephone conference call, initiated by her, rather than in-person. Testimony of Hickey.

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. . .

[I]t should have been listed on the invitation as one of the subject matters for the meeting. And then it would have meant that I would have been ready to discuss that issue.

. . .

[If "Determine Placement" had been marked with an X on the invitation] I would have taken with me all the works of my child. . . . I would have taken all of my child's medical records and psychological records. And I would have used this evidence to argue for the rights of my child.

Tr. 768-769, 782, 784, 787, 790, 846-847 (Mother).

IEP Meeting of November 14, 2016

52. Dr. Libby did not attend the IEP meeting. When the meeting began, no one proposed that determining placement be added to the agenda set forth in the meeting invitation. The Mother had still not received a copy of the draft IEP by mail. She was therefore unaware the IEP proposed a large increase in special education time and a correspondingly large decrease in general education time. As mentioned above, Ms. Hickey had not discussed the service matrix or the placement section of the IEP during either of their previous phone conversations.

53. The Student's prior IEP stated that the next IEP meeting must be held by November 2, 2016. J-3:1. It was not held until November 14, 2016, which was 12 days late. There was no evidence of any interruption in the Student's services during this interim period.

54. The Student's occupational therapist (OT), Jennifer Lewis, received an invitation to the November 2016 meeting and planned to attend. However, she forgot about it until it was too late to attend. Testimony of Lewis. The Student's physical therapist (PT) was not invited to the meeting and did not attend. P-6; P-7.

55. The IEP meeting was scheduled for 7:30 a.m., but it began 10 to 15 minutes late because extra copies of the draft IEP had to be printed. The Mother informed the team that she had to leave by 9:00 a.m. to care for the Student so that the Father could go to work. (The Student was home from school that day due to an injury.) The team went through all of the IEP goals and other aspects of the IEP in detail. The Mother objected to the increased number of minutes of special education, and advocated for the Student not to be pulled out of general education class so much. Testimony of Mother. Shortly before 9:00 a.m., the assistant principal, Staci Wiese, raised the topic of a change of placement. She did this by asking Ms. Hickey whether they could meet the needs outlined in this IEP on their campus. Ms. Hickey responded that she did not think so, and said that maybe they should think about the idea of a Support Center placement. Testimony of Mother and Wiese.

56. The Mother immediately interjected that her daughter would not go to a Support Center, and she would homeschool her rather than send her to one. The SLP, Dr. Kelly, stated that the Support Center has three staff to help the Student, and that adaptive skills are worked on throughout the day. Ms. Wiese stated there had been many changes at the Support Center since the Mother visited the prior year. The Mother asked if Dr. Kelly or Ms. Wiese had ever visited one of the Support Centers they were proposing. They said they had not. The Mother briefly described her own visit to Soos Creek. No one present at the meeting had ever visited

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the Soos Creek or Scenic View Support Centers. Testimony of Choi, Hickey, Kelly and Wiese. The Mother requested that instead of that placement, the Student be retained in first grade at her current school for another year. She offered to keep the Student at home for the remainder of the current school year to save the District money, and re-enroll her in first grade in the fall. Ms. Wiese said she doubted that retention in first grade would be possible, but she would inquire and get back to the Mother about it. Testimony of Mother, Wiese, Hickey and Kelly. The discussion about a possible change of placement lasted less than five minutes according to the Mother, and approximately ten minutes according to Ms. Wiese. Testimony of Mother and Wiese. Other than Ms. Wiese, Ms. Hickey and Dr. Kelly, the other District members of the team did not share their views on a change of placement. Testimony of Mother. The Mother characterized the discussion as floating an idea at the very end of the meeting, with no resolution before the meeting broke up. She also characterized the opening of the discussion as a pre-scripted dialogue between Ms. Wiese and Ms. Hickey. Testimony of Mother.

57. Teachers are expected to attend their classes starting at 8:43 a.m. Testimony of Wiese. The Mother believes the Student's general education teacher, Ms. O'Sullivan, left for her class at approximately 8:37 a.m., while the details of the IEP were still being reviewed and before the subject of a change of placement was raised. P-38:3; Testimony of Mother. Ms. Wiese, by contrast, testified that Ms. O'Sullivan was present for the initial portion of the placement discussion and left during it. Testimony of Wiese. Without contemporaneous time records to corroborate testimony, it is found that Ms. O'Sullivan was absent for much or all of the discussion concerning a change of placement, and that the full discussion lasted from five to ten minutes.

58. Witnesses differed as to whether a decision to change the Student's placement was announced during the IEP meeting. Ms. Wiese and Ms. Hickey testified a decision was made during the meeting. The Mother, Dr. Kelly, and Ludia Choi (the English Language Learner teacher) testified that no decision was made. Dr. Kelly and Ms. Choi were asked the question several times in several ways, and were definitive in their answers that no decision was made. Their testimony, and that of the Mother, is credited on this matter over the testimony of Ms. Wiese and Ms. Hickey for several reasons.

59. First and most importantly, Ms. Wiese said she would inquire whether the Student could be retained in first grade and would get back to the Mother about this question. Retention meant the Student would repeat general education first grade at her neighborhood school and not go to a Support Center. Testimony of Hickey. Otherwise, the Mother would have no interest in retention. Because the retention question was left open at the end of the meeting, no decision was made to change the Student's placement to a Support Center. Because no decision was made, Ms. Hickey could not write the PWN changing the placement immediately; she had to wait to hear the answer on the retention question from Dr. Libby first. Testimony of Hickey. Second, the Mother was not upset after the IEP meeting as she was after a phone call a few days later from Dr. Libby. It was only during that phone call (which is described in more detail below) that she learned the District had, in fact, changed the Student's placement to a Support Center. Her extremely emotional reaction to that phone call is in stark contrast to her calm reaction after the IEP meeting. Testimony of Mother. The same reactions occurred for the Father after hearing from her: the Mother's description to the Father of the IEP meeting that evening raised no concerns for him. However, her phone call to him after she spoke with Dr. Libby caused the Father to pull off the road while he was working and take 15 minutes to come to his senses. Testimony of Father. Third, the content of the PWN sent on November 22, 2016,

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confirms that the placement decision was left open pending an answer to the question whether the Student could repeat first grade at her current school. Finally, in email correspondence following the IEP meeting, it is only Dr. Libby and Ms. Cox – neither of whom were present at the meeting – who indicate that a decision was made during the meeting. P-20; P-25. There is no correspondence from any actual participant in the meeting that a decision was made there. For all of these reasons, the testimony of the Mother, Dr. Kelly and Ms. Choi that no placement decision was made at the meeting is credited over the contrary testimony of Ms. Wiese and Ms. Hickey.[22]

60. It is found that Ms. Wiese and Ms. Hickey *intended* that the Student's placement be changed during the meeting over the Mother's anticipated objections, and that they are likely correct in testifying that the other District members of the team thought such a change was appropriate. Testimony of Cox, Wiese and Hickey. However, it is found that no one *stated* during the meeting that the Student's placement would, in fact, be changed. No decision was announced, and the matter was instead left open pending a determination whether the Student could repeat general education first grade at her current school.[23]

Communications Following the November 14, 2016 IEP Meeting

61. Later on the morning of the IEP meeting, Ms. Cox (who was not present at that meeting) emailed the IEP team members and Dr. Libby stating, in pertinent part:

> I heard that presenting a change of placement to Support Center did not go over well with [the Student's] mother this morning. So, I'm following up to see what the next steps are. After the IEP is completed with the change of placement (which needs to be explicitly stated in the PWN [prior written notice]), what is the logical next step?

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[22] There is no evidence Dr. Kelly's testimony (that no placement decision was made at the IEP meeting) was colored by her incorrect understanding of the law. She testified that no change of placement could legally occur if the Mother was opposed to it. This is an incorrect statement of the law. *See* Conclusions of Law, below. Dr. Kelly's testimony was emphatic and repeated that she heard no decision made on placement during the meeting. To find that her testimony was colored by an incorrect understanding of the law would require attributing to Dr. Kelly a willingness to change her recollection of what was uttered at the meeting to conform with what she believes was legally required. There is no reason to attribute this untruthfulness to Dr. Kelly, especially where there is corroborating evidence from other witnesses to support her testimony about what she heard.

[23] The fact that grade retention is supposed to be decided by the school principal, not by special education personnel, according to Dr. Libby, does not change the fact that the IEP team left the decision on placement open at the end of the meeting. Whether retention would be granted was the central determining factor in whether the Student's placement would, or would not, be changed to a Support Center. Thus, with the retention question remaining open after the IEP meeting, her placement had not been decided. This would not be the case where, for instance, an IEP team actually decided on a child's placement during the IEP meeting (e.g., 75% time in the general education setting, and 25% time in special education), and the only remaining question was whether the child would repeat a grade. In this hypothetical scenario, the placement decision was clearly made during the IEP meeting. The additional question of which grade the child would attend remained open after the meeting, but that question had no impact on the child's educational placement. That is not the case here.

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P-25. Ms. Wiese replied: "The idea of a change of placement definitely did not go over well with mom." P-20. Ms. Wiese's email went on to mention the Mother's retention inquiry, and the fact that she (Ms. Wiese) said the District generally does not retain students but she would inquire about it. Ms. Wiese also wrote that she brought up the move a second time to ensure there was a plan moving forward. *Id.* Ms. Wiese acknowledges that her email to Dr. Libby did not state that a decision on placement had been made during the meeting over the Mother's objection. Testimony of Wiese.

62. Dr. Libby replied to Ms. Wiese: "*It sounds like the decision was made* by the team for a change of placement". He went on to give instructions on writing the prior written notice and other matters. P-20 (italics added). Dr. Libby explained at the hearing that Ms. Wiese's email (wherein she said the idea of changing placement did not go over well with the Mother) did not indicate that a decision to change placement had been made at the meeting. It was conversations with school staff *before* the meeting that led Dr. Libby to believe a decision was made there, because that had been the plan. Other than receiving Ms. Wiese's email, Dr. Libby does not recall receiving any information from any other source that a placement decision was made during the meeting. From that point forward, he proceeded in the belief that the team had made the decision. Testimony of Libby.

63. Two days later, on November 16, 2016, Dr. Libby telephoned the Mother. Dr. Libby asked if the Mother had any questions or concerns about the IEP meeting. He told the Mother a decision had been made at the meeting to change the Student's placement to a Support Center. He told her it was a team decision and that she had been part of the decision. He said the decision was based on the results of the reevaluation, and discussed some of those results. He said that if the Mother still had questions or concerns about the reevaluation, she could re-call the IEP meeting to discuss the evaluation scores. He made clear that the District was not just proposing a change of placement, but implementing it. The Mother objected to the change of placement and asked if the Student could instead repeat first grade. Dr. Libby responded that the school principal must make that decision, that it was not a special education decision. Testimony of Mother and Libby.[24]

64. The Mother was crying and in shock after Dr. Libby's phone call, and telephoned the Father in that state. By contrast, two days earlier, when the Mother had recounted to the Father what transpired at the IEP meeting, she had not been upset:

> Q: After the IEP meeting on November 14, did you discuss with your husband the change-of-placement subject that had come up at the end of that meeting?

---

[24] The testimony of Dr. Libby and the Mother about this telephone conversation differed on other matters, but the matters set forth in text were not disputed. One of the matters on which they differed was that the Mother thought Dr. Libby told her the change of placement would begin in 15 minutes. (The Student was home sick from school that day and for several days thereafter, so it would not affect her immediately.) Dr. Libby denies saying this. His denial is found credible because the statement does not make sense, and because the PWN states the decision was effective five days later, on November 21st. It is not found that the Mother knowingly testified untruthfully about the 15-minute matter, but that there was some kind of miscommunication between the speakers on this point.

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A: Well, the only thing that I told him was that I had explained to the people who had never visited Soos Creek how it looks like. Because people tend to tell lots of fairy tale things about this place, and in reality it's totally different.
Q: You testified that you were very upset after Dr. Libby's phone call a few days later.
A: Yes.
Q: Were you similarly upset after the IEP meeting?
A: No. I was rushing to get back home. And as far as the meeting itself, I had no reason to be upset. We made the plan, we made the IEP plan for the next year, so the meeting just went as expected.

Tr. 816 (Mother).

65. The Mother subsequently declined an invitation to visit the two Support Centers, and chose not to attend a transition meeting held at Soos Creek on November 21, 2016. Testimony of Cox. The Mother intended to homeschool the Student rather than send her to Soos Creek. Testimony of Mother.

66. The Parents held the Student home from school after the phone call from Dr. Libby because they refused to send her to the Support Center. After obtaining legal advice and filing for a due process hearing on December 6, 2016, they received stay-put rights in the Student's prior placement.[25] She returned to her neighborhood school on December 9, 2016. Testimony of Mother.

67. As mentioned above, the Student was home from school in mid-November due to an injury. She was not ready to return to school for several days after the November 16, 2016 telephone call from Dr. Libby to the Mother. Based on the evidence presented, it is found the Student most likely would have been physically ready to return to school on Monday, November 22nd. She therefore missed 11 school days between November 22nd and December 9th, the day she returned to school in her stay-put placement. *See* D-3.

68. On November 22, 2016, the District sent a PWN and final IEP to the Parents by certified mail. P-36; P-39; J-4. The Parents received them on November 25th. P-36:4. This was the first written notice the Parents received of a change of placement. Testimony of Mother. The PWN states the change of placement and IEP were effective November 21st. J-4:21. The Student's prior IEP stated that the new IEP must go into effect by November 9, 2016. J-3:1. The IEP therefore went into effect 12 days late.

69. Ms. Hickey explained that the effective date of new IEPs is usually set at three days after an IEP meeting, and it was set at seven days after the IEP meeting here. Testimony of Hickey. However, the change of placement was effective on November 21st, four days *before* the Parents received written notice of it on November 25th. The written notice was therefore not "prior" written notice. It was notice after the fact.

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[25] *See* maintenance of placement (stay put) provisions in 20 USC §1415(j); WAC 392-172A-05125; and 34 CFR §300.518.

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70. The PWN informed the Parents that the District was proposing to change the Student's educational placement and IEP. The PWN also included the following information: the IEP was updated to reflect the Student's current abilities; her skills in her current placement were reviewed in order to best provide for her academic and social needs; she needed a placement that would be able to provide the minutes of service discussed in the current IEP; the Student would not be able to repeat first grade at her current school; the special education team recommended a self-contained placement as best able to meet the Student's needs; and the Student requires more support than her current placement is able to provide. In the section for "other factors" relevant to the decision, the PWN carried forward text from an earlier PWN concerning why recess monitoring was added. J-4:21.

71. On November 28, 2016, Ms. Cox sent the Parents a letter providing the name of the Student's teacher at the Soos Creek Support Center and discussing bus transportation to the school, which would begin on December 1st. P-29. Ms. Cox had been instructed by Dr. Libby to make transportation arrangements even though the Parents would not be sending the Student to Soos Creek. P-14; P-28. The change of placement was effective on November 21st, the date stated in the PWN, and this was when the process of transferring records and making logistical arrangements began, a process that was completed on December 1st. Testimony of Wiese.[26]

Content of November 2016 IEP

72. The November 2016 IEP provided annual goals in all of the Student's areas of eligibility. Although the Mother complained in her testimony that some of the goals were below the Student's level, the issues for hearing concern only the Student's placement, not her annual goals. The annual goals are therefore not described here.

73. The November 2016 IEP decreased the amount of time the Student would be spending in the general education setting from 80% in the prior IEP, to 53% in the new IEP. Special education and related service time was increased proportionately. The changes in the service matrix were as follows:

Adaptive skills – 60 minutes per day in general education remained the same, but 30 minutes per day in special education were added, to be delivered concurrently with other services.

Reading – This area of service was new. The Student would receive 60 minutes per day of special education in this area.

Written Expression – This area of service was new. The Student would receive 30 minutes per day of special education in this area.

Math - This area of service was new. The Student would receive 60 minutes per day of special education in this area.

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[26] Ms. Wiese testified that the process of transferring records and materials to the new school began on "December 21st." It appears from the context of her testimony that this was an error, and she meant November 21st. Tr. 875 (Wiese).

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Communication – This was increased from four times per month to six times per month, 30 minutes per session.[27]

Occupational Therapy – This area of service remained the same as in the prior IEP: 30 minutes per week.

Physical Therapy – This area of service was dropped, pursuant to the findings of the recent reevaluation. The prior IEP had provided for 30 minutes per week in this area.

See D-14:3; J-4:19.

74. The Student's neighborhood school did not have sufficient special education staff to provide the higher number of service minutes in her new IEP. For this and other reasons discussed above, the District changed her placement to a Support Center. J-4:21. Because the Parents filed for a due process hearing, the Student's prior placement at her neighborhood school, and the lower number of minutes in the special education setting provided for in her prior IEP, became her stay-put placement.

Services and Supports in the Student's Current (Stay-Put) Placement

75. The Student's special education teacher, Ms. Hickey, set up four separate schedules for personnel to support the Student, drawing on all available staff at the school. First, she created a schedule of paraeducators to help meet the Student's needs in adaptive skills, reading, written expression, and math. Second, she created a schedule of staff to help with the Student's bathroom needs. Third, a recess monitor was assigned to watch the Student on the playground and ensure her safety. Fourth, staff were assigned to ensure the Student arrives and departs from school safely. This is more support than required by the Student's IEP, but Ms. Hickey found the Student needed this level of attention. Testimony of Hickey.[28]

76. The Student's IEP provides a number of program accommodations and modifications to assist the Student: adult proximity; extra time to respond; breaking material into manageable parts; cues to stay on task during tests; short, concise directions; manipulative materials; preferential seating during tests; immediate feedback; reading aloud the directions and content of math tests; repeating directions; small-group testing; visual aids; and the use of alphabet and number charts. J-4:15-16. When Ms. Wiese and Dr. Kelly were asked at the hearing whether the IEP team considered adding modifications or supports so the Student could access the general education curriculum, they responded that those modifications and supports were already in the Student's IEP. Testimony of Wiese and Kelly.

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[27] This appears to have been an error in the new IEP. At the meeting, the IEP team discussed the fact that Dr. Kelly's schedule only allowed her to serve the Student four times a month (not six times), and in fact that was what Dr. Kelly had been doing under the previous IEP and thus far in the 2016-2017 school year. Testimony of Kelly.

[28] As mentioned above, the Student's school has only one paraeducator assigned to grades kindergarten through third. Ms. Hickey must therefore have drawn on other school staff serving in other areas of the school.

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77. The Parents advocate that the general education placement of the November 2015 IEP be retained, but that more supports be added, such as a full-time, one-on-one paraeducator for the Student. District witnesses, however, believe that a one-on-one paraeducator would not be enough to allow the Student to comprehend lessons in the general education class. They also believe she would be in an isolated pair with the paraeducator, and this would result in a more restrictive setting than a Support Center, where she could work together with her peers in small groups. Testimony of Kelly, Cox and Hickey.

Services and Supports in Support Center Placement

78. The District's elementary-level Support Centers have a maximum of 12 students, and are staffed by one special education teacher and two or more paraeducators. With the level of curriculum and staffing in the Support Centers, children are able to learn basic skills for themselves, rather than simply mimicking what they see others do, as might occur in a general education class. The Support Center classrooms are usually grouped into a kindergarten-through-third-grade class, and a fourth-through-sixth-grade class. The District also offers a more restrictive setting called an Adaptive Support Center. The students there are often medically fragile. Testimony of Sander.

79. The Mother and Ms. Vickers (the Student's preschool teacher) visited the Soos Creek Support Center in May 2015, when it was being considered as a kindergarten placement for the Student. Their visit lasted approximately one hour. Testimony of Vickers. They visited only one of the two elementary-level Support Centers. Their visit took place a year and a half before the District placed the Student there in November 2016.

80. During her visit to the Soos Creek Support Center, the Mother observed that the children did not work together and did not communicate with one another. Each was involved in their own activity, and one girl was wandering in the classroom. Two boys were arguing, and a paraeducator intervened. One child screamed or squealed. The Mother characterized the classroom as chaotic. The students ate lunch in the Support Center classroom and had recess in an area separate from other students. Testimony of Mother.

81. During that same visit, Ms. Vickers observed that there was more structure in the Support Center classroom than she had seen the previous year, in 2014. In 2014, she had visited during the first week of school in September and there was a brand-new teacher. In the 2015 visit with the Mother, Ms. Vickers observed some children working on the computer, others working in notebooks, others walking around the classroom, and one having a behavior issue that was resolved by a paraeducator. Ms. Vickers heard one screech or squeal from one student. The Mother asked the teacher a question about class structure that was not answered. Ms. Vickers noted that the classroom may have been disrupted because she and the Mother were pulling the teacher away from her duties by engaging her in conversation. After this visit to the Support Center, Ms. Vickers continued to believe it was the best placement for the Student for kindergarten. Testimony of Vickers.

82. Following this May 2015 visit, the District made improvements to the Support Centers: a standardized curriculum was implemented; District-level training was provided to the Support Center teachers; an autism specialist was added to the program; and a master teacher comes in and models lessons, then debriefs with teachers. Testimony of Sanders.

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83. Three District witnesses -- Ms. Cox, Ms. Wiese and Dr. Kelly -- testified about the programming at elementary-level Support Centers. However, none of them had ever visited one of these Support Center in operation. Their testimony is based entirely on hearsay. Because the persons or documents from which they derived their information are unknown, it would unduly abridge the Parents' ability to confront witnesses and rebut evidence to base any findings of fact on such hearsay.[29]

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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

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

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

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

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

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

Endrew F. v. Douglas County Sch. Dist. RE-1, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

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[29] *See* Administrative Procedure Act, RCW 34.05.461(4).

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

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir. 2017).

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

6. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

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

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

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

> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking 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); 34 CFR §300.513.

8. One of the procedural requirements of the IDEA is that a reevaluation must be completed before a significant change of placement is made. *See Brimmer v. Traverse City Area Pub. Sch.*, 22 IDELR 5 (W.D. Mich. 1994); *Tacoma Sch. Dist.*, 2016-SE-0047, 116 LRP 50574 (SEA WA 2016); *Central Valley Sch. Dist.*, 2014-SE-0008, 115 LRP 17348 (2014); *see also Kelso (WA) Sch. Dist. No. 4*, 20 IDELR 1003 (OCR 1993).

Whether the District changed the Student's educational placement in November 2016 without complying with the procedural requirements of the IDEA

Failing to hold an IEP meeting and adopt an IEP in a timely manner

9. The Student's November 2015 IEP stated that her next IEP meeting must be held by November 2, 2016. It was not held until November 14, 2016, which was 12 days late. The Student's prior IEP also stated that the new IEP must go into effect by November 9, 2016. It went into effect on November 21st, which was also 12 days late.

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10. The IDEA requires that eligible students have an IEP in effect at the beginning of the school year, which implies an IEP must also be in effect throughout the school year, without hiatuses. *See* 20 USC §1414(d)(2)(A); WAC 392-172A-03105(1); 34 CFR §300.323. The IDEA also requires that school districts "review[] the child's IEP periodically, *but not less frequently than annually*". 20 USC §1414(d)(4)(A)(i); *see* WAC 392-172A-03110(3); 34 CFR §300.324. The District violated these provisions, being late by 12 days. However there is no evidence there was any gap in services, nor any deprivation of educational benefits to the Student, as a result of these violations. The Parents actually preferred the level of services and the placement in the expired IEP, which continued to be implemented during the hiatus. The Parents successfully sought to have it established as the Student's stay-put placement. Thus, the District's violations neither deprived the Student of educational benefits nor significantly impeded the Parents' participation rights.

11. For these reasons, the Parents have established that the District violated the IDEA by failing to hold an IEP meeting and adopt a new IEP in a timely manner in November 2016. However, they have not established that these procedural violations resulted in a denial of FAPE.

Failing to provide the Parents notice, in advance of the IEP meeting, of one of the purposes of that meeting

12. School districts are required to notify parents, in advance of an IEP meeting, of "the *purpose*, time, and location of the meeting and who will be in attendance." WAC 392-172A-03100(3)(a) (italics added); *see also* 34 CFR §300.322.

13. The District was scrupulous in amending its meeting invitation to the Parents to reflect a change in the persons who would be attending. However, the District omitted from both meeting invitations a central purpose of the meeting: to determine the Student's placement.

14. Ms. Hickey testified that she routinely omits "Determine Placement" from IEP invitations unless that is the only topic to be discussed. The fact that Ms. Hickey's IEP invitations are routinely non-compliant with the IDEA does nothing to excuse their non-compliance here. Moreover, Dr. Libby, the District's assistant director of inclusive education, helped her draft the invitations. He knew that determining placement was one of the purposes of the IEP meeting, yet that purpose was not included in either invitation.

15. After Ms. Hickey told the Mother on the telephone, a few days before the IEP meeting, that she wanted to invite Dr. Libby to talk about the Student's placement, the Mother had good reason to believe that her forceful rebuff of discussing that subject had been successful. First, she did not receive an amended invitation adding Dr. Libby to the list of participants. Second, she did not receive an amended invitation adding "Determine Placement" to the list of purposes of the meeting. Third, she did not receive a draft IEP before the meeting, which would have disclosed that the District intended to sharply reduce the Student's general education time. Fourth, Ms. Hickey did not mention this aspect of the draft IEP in their telephone call prior to the meeting. Fifth, after the call, the Mother left a follow-up voice mail reiterating her opposition to discussing placement at the upcoming meeting. Ms. Hickey returned her call, they spoke, and Ms. Hickey said nothing further about Dr. Libby attending or placement being on the agenda.

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16. The requirement to provide advance notice of the purposes of an IEP meeting is not a mere technicality. Parents who know a change of placement that they oppose will be on the agenda at an IEP meeting may wish to seek legal advice in advance of the meeting, just as school staff sought advice from special education administrators, who are their in-house experts on IDEA compliance. Such parents may even wish to seek legal representation at the meeting. With advance notice, parents may wish to gather more information or observations about the placement(s) they expect will be discussed in order to be ready with facts to present at the meeting. Such parents may want members of the IEP team to visit the proposed placements in advance of the discussion about them. Such parents may decide the meeting is important enough for both of them to attend, instead of just one. They might wish to gather documents from private service providers to present at the meeting, or have private providers participate in the IEP meeting. As found above, if determining the Student's placement had been on the agenda, the Mother here would have requested two weeks to prepare for the meeting, would have brought the Student's work samples to the meeting, would have brought her medical and psychological records to the meeting, and would have wanted time to question each member of the team individually about their views on placement. The school members of the IEP team would still be free, after hearing the Mother's presentation, to select a placement the Mother opposed. Parents do not have a "veto" on the IEP team. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). However, parents do have a statutorily protected right to notice and an opportunity to be heard at IEP meetings.

17. It is noted here that the Parents' Complaint did not include a claim about lack of informed consent for the reevaluation (or any other claim about the reevaluation). Their closing brief argues that lack of informed consent was an IDEA violation. However, that alleged violation will not be adjudicated because it was not in the Complaint. *See* 20 USC §1415(f)(3)(B).[30] Rather, the Findings of Fact on the District's concealment of the real reason for the early reevaluation were made for several reasons. First, this concealment was part of a course of conduct that allowed the Mother to walk into the IEP meeting without notice that a change of placement was on the table for decision. The District's additional actions in this regard included: the IEP meeting invitations did not list "Determine Placement" among its purposes; Ms. Hickey did not mention the service matrix's large reduction in general education time in her pre-meeting telephone call to the Mother; and the Mother did not receive the draft IEP showing a large reduction in general education time until she walked into the IEP meeting. All of these actions significantly blunted the Mother's ability to get her "ducks in a row" (P-16; P-19) to address a change-of-placement debate that she did not see coming. The District, on the other hand, began getting its "ducks in a row" back in September 2016, when it initiated the early reevaluation to support a change of placement, and continued its preparations thereafter for the debate it knew was coming at the November 2016 IEP meeting. The second reason that Findings of Fact were made on the District's concealment of the reason for the reevaluation is that the relative conduct of the parties is weighed in determining equitable relief. *See* Remedies section, below. The final reason why these Findings of Fact were made is that the credibility of witnesses is always an issue. Ms. Cox testified on a wide variety of subjects in this case. Findings on her credibility are relevant to the weight to be given her testimony on other matters.

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[30] That statute provides: "The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [due process hearing] notice . . . unless the other party agrees otherwise. 20 USC §1415(f)(3)(B). *See* WAC 392-172A-05100(3); 34 CFR §300.511. The District did not agree to any additional issues. *See* District's Posthearing Brief, at p. 2.

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18. The Parents have established that the District violated the IDEA by failing to provide them notice, in advance of the November 2016 IEP meeting, that one of the purposes of that meeting was to determine the Student's placement. For the reasons discussed above, this violation significantly impeded the Parents' opportunity to participate in the decision-making process about the Student's placement, thus resulting in a denial of FAPE.

Whether the District predetermined Student's placement in advance of the IEP meeting

19. The school members of an IEP team are not required to come to an IEP meeting with a blank mind regarding what they believe should be in the IEP. Rather, they must listen to parents' views with an open mind. *See H.B. v. Las Virgenes Unif'd Sch. Dist.*, 239 Fed. Appx. 342, 345 (9th Cir. 2007 unpublished); *D.M. v. Seattle Sch. Dist.*, 2016 U.S. Dist. LEXIS 122519, 68 IDELR 165 (W.D. WA 2016); *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (cited with approval in *K.D. v. Hawaii Dept. of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011)), *affirmed*, 1994 U.S. App. LEXIS 30495, 110 LRP 18163 (4th Cir. 1994 unpublished).

20. It is prohibited to enter an IEP meeting with a decision finalized, and employ a "take it or leave it" approach. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). The IEP team's willingness to investigate the option of retaining the Student in first grade as an alternative to a placement change shows they did not use a "take it or leave it" approach. School members of the team may come to the table "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 (6th Cir. 2006) (internal citation omitted); *see H.B.*, 239 Fed. Appx. at 345 (no predetermination occurred even though district desired that student return to public school and came to the IEP meeting believing its proposed placement provided FAPE). In *M.C.E. v. Bd. of Educ. of Frederick County*, 2011 U.S. Dist. LEXIS 74266, 57 IDELR 44 (D. Md. 2011), the court found the parents were allowed meaningful input regarding the student's placement, and that predetermination was not established:

> Though the school board may have come to the meeting with the idea that the Pyramid Program was the best place for M.C.E., that is not a violation of the IDEA. . . . [The board] came prepared to recommend placing M.C.E. at the Pyramid Program, but had not predetermined where she would go.

Id.

21. Neither is predetermination established by a pre-meeting discussion among district staff to prepare for an IEP meeting. By regulation, an IEP meeting "does not include preparatory activities that school district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." WAC 392-172A-05000(2)(c); *see also* 34 CFR §300.501. *See S.P. v. Scottsdale Unif'd Sch. Dist. No. 48*, 2013 U.S. Dist. LEXIS 150293, 62 IDELR 86 (D. Ariz. 2013); *Lee's Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012). Also, the fact that District staff expressed concerns ahead of the meeting that they would be unable to reach an agreement with the Parents is not tantamount to predetermination. *See Ka.D. v. Solana Beach Sch. Dist.*, 2010 U.S. Dist. LEXIS 74355, 54 IDELR 310 (S.D. Cal. 2010), *affirmed*, 475 Fed. Appx. 658, IDELR (9th Cir. unpublished), *cert. denied*, 568 U.S. 1026 (2012).

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22. Internal emails make clear that District staff strongly believed a change of placement was in the Student's best interests based on her in-class performance, even before the reevaluation took place. However, District emails used words such as preparing "to discuss placement" (P-16:1), "talk[] more seriously about placement", "a possible change of placement" (P-17), "help[] [the Mother] see that her daughter will make better progress" in a different placement (P-18), "discuss our reasoning for a change of placement" (P-19). None of these emails say the Student's placement *will* be changed, nor do they begin planning logistics as if the decision had already been made. Most importantly, District members of the team listened to and considered the Mother's alternative views: they delayed a final decision on placement for several days after the IEP meeting while they investigated the Mother's preferred option of retaining the Student in general education first grade. Regarding their strong beliefs going into the reevaluation and the IEP meeting, school staff are educators, and cannot be prohibited from forming beliefs as to what is best for their students. The Parents rely on *D.B. v. Gloucester Township Sch. Dist.*, 751 F. Supp.2d 764, 772 (D.N.J. 2010), *affirmed*, 489 Fed. Appx. 564 (3rd Cir. 2012 unpublished), in which predetermination was found. The facts in that case are not comparable to the facts here.[31] Also, the court in *D.B.* cautioned: "The Court does not hold that it is a violation of the IDEA for members of the IEP team to come to preliminary conclusions prior to the IEP meeting. Members of the IEP team interact with the student over a period of time, and are expected to analyze the child based on those experiences." *D.B.*, 751 F. Supp. 2d at 772, n. 11.

23. It is acknowledged that predetermination is a very close question here because of the District's course of conduct (described above), which was aimed from the start at blunting the Mother's ability to fight a change of placement that the District intended to adopt. Nevertheless, for the reasons set forth above, the Parents have not established that the District violated the IDEA by predetermining the Student's placement prior to the November 2016 IEP meeting.

Absence of general education teacher from part of the IEP meeting

24. For an IEP team member whose area of the curriculum will be discussed at an IEP meeting to be excused from all or part of that meeting, the IDEA requires written consent from parents:

> (ii) Excusal - A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if –
>
> (I) the parent and the local educational agency consent to the excusal; and
> (II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.
>
> (iii) Written agreement and consent required - A parent's . . . consent under clause (ii) shall be in writing.

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[31] In *D.B.*, the court found: "Plaintiffs have shown that for each of the IEPs before the Court, the School District had come to definitive conclusions on H.B's placement without parental input, failed to incorporate any suggestions of the parents or discuss with the parents the prospective placements, and in some instances even failed to listen to the concerns of the parents." *D.B.*, 751 F. Supp. 2d at 772.

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20 USC §1414(d)(1)(C); *see* WAC 392-172A-03095(5)(b); 34 CFR §300.321.

25. Here, the member of the IEP team who knew the most about the Student's general education participation – general education teacher Ms. O'Sullivan -- was excused without parental written consent for much or all of the discussion of the Student's general education vs. Support Center placement. There was no effort to schedule a continuation of the meeting so Ms. O'Sullivan could be present for this important discussion. The Mother testified that if she had been notified in advance that determining the Student's placement was on the agenda for the meeting, she would have asked to hear individually from each team member on this question. It is likely, based on the Mother's prior course of conduct, that she would have had questions and challenges for Ms. O'Sullivan concerning the success or lack of success the Student experienced in Ms. O'Sullivan's class. The Mother was denied the opportunity to do this.

26. Moreover, compliance with the IDEA's requirement of seeking written consent for excusal would have informed the Mother that she had a statutory right and a *choice* whether to require Ms. O'Sullivan's presence (which would likely have meant continuing the meeting to another date). Instead, she was *told* that Ms. O'Sullivan had to leave for class and no other option was presented to her. Presentation of a written document allowing her to choose whether to excuse Ms. Sullivan's presence would have informed the Mother that a statutory right was involved, and that it was her option, not a fait accompli.[32]

27. For the reasons stated above, the Parents have established that the District violated the IDEA by failing to obtain written parental consent for Ms. O'Sullivan to be excused from part of the November 2016 IEP meeting. Because Ms. O'Sullivan was the member of the IEP team with the greatest knowledge about the Student's general education placement, and because the portion of the meeting she missed concerned whether to retain the Student in that general education placement, the violation significantly impeded the Parents' participation rights, resulting in a denial of FAPE.

Absence of OT and PT from the IEP meeting

28. Where a child may be participating in the general education environment, the required members of the child's IEP team are: a general education teacher, a special education teacher or provider, a district administrative representative, the parents, and if appropriate, the student. The district members of the team must include someone able to interpret the instructional implications of evaluation results. *See* 20 USC §1414(d)(1)(B); WAC 392-172A-03095; 34 CFR §300.321. At the discretion of the parents or the district, the team may also include "other individuals who have knowledge or special expertise regarding the child, *including related services personnel as appropriate.*" 20 USC §1414(d)(1)(B)(vi) (italics added); *see* WAC 392-172A-03095(1)(f); 34 CFR §300.321.

[32] There was no testimony that the Mother was verbally *asked* whether Ms. Sullivan could depart, as opposed to being *informed* that Ms. Sullivan had to depart. Even if the Mother had been verbally asked, this does not carry the same weight as a written consent form: the verbal question would more likely appear as a social nicety than a statutory right. More importantly, verbal consent does not meet the IDEA's explicit requirements.

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29. The U.S. Department of Education, Office of Special Education Programs (OSEP) has stated that the IDEA does not expressly require related services providers to attend IEP meetings, unless the district has designated them to fulfill the mandatory role of the special education teacher or provider. *See Letter to Rangel-Diaz*, 58 IDELR 78 (OSEP 2011). If a related service provider is invited at the *discretion* of the parent or district, the excusal provisions of the regulations are not applicable to them. *Id.* The requirement that an absent member of the team submit written input into the development of the IEP prior to the meeting is part of the excusal provisions, and thus does not apply to discretionary invitees. *See* 20 USC §1414(d)(1)(C)(ii); WAC 392-172A-03095(5); 34 CFR §300.321.

30. In the present case, the evaluation team had recently determined the Student was no longer in need of PT services, and the PT was not invited to the IEP meeting. The Parents did not invite her as a discretionary participant.

31. Regarding the OT, the Student continued to be eligible for OT services. The OT was invited to the IEP meeting but forgot to attend. The OT was not the mandatory special education teacher or provider on the team; that role was fulfilled by Ms. Hickey, the special education teacher. Because the OT was a discretionary invitee of the District, no written parental consent was required for her excusal and no written input was required from her prior to the meeting.

32. The only possible violation that could have arisen from the OT forgetting to attend was if the Parents establish that they *would have* invited her as a discretionary member had her name not already been listed on the meeting invitation. However, no such evidence was presented. Moreover, the Parents have never voiced any objection to the OT provisions of the IEP. The number of OT service minutes did not change from the previous IEP. Therefore, the Parents' objection to expanding the special education time in the new IEP did not apply to the OT provisions.

33. For these reasons, the Parents have not established that the absence of the Student's PT or OT from the November 2016 IEP meeting constituted a violation of the IDEA.

Failing to allow time for the Parents to meaningfully participate in the change-of-placement decision

34. The Ninth Circuit has repeatedly stated that parents must be afforded the opportunity for "meaningful" participation in the formulation of IEPs. *H.B.*, 239 Fed. Appx. at 344; *Ms. S.*, 337 F.3d at 1131; *Shapiro v. Paradise Valley Unif'd Sch. Dist. No. 69*, 317 F.3d 1072, 1078 (9th Cir. 2003); *W.G. v. Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir 1992). The IDEA does not, of course, specify the number of minutes that must be spent on particular topics at an IEP meeting in order to allow for meaningful participation. Whether parents have been afforded an opportunity for meaningful participation must therefore be determined in light of the circumstances in each case.

35. The District was correct in addressing other aspects of the IEP at the meeting first, before turning to the question of placement. A student's needs and services must first be identified before a placement able to provide for those needs and services is selected. See *K.D. v. Hawaii Dept. of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011) ("the Act requires that the placement

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be based on the IEP, and not vice versa.") However, this does not answer the question whether the amount of time that remained at the end of the IEP meeting for the change-of-placement discussion significantly impeded the Parents' opportunity for meaningful participation in decision-making.

36. A five-to-ten minute discussion was clearly inadequate to allow meaningful participation in the circumstances of this case. First, all of the District's activities – starting with obtaining consent for an early reevaluation two months previously and proceeding through crafting an IEP that greatly increased the Student's special education time -- had been aimed at this precise moment in time, when the District would propose a change of placement. Internal emails show this was the aim of the District's activities all along. Having this aim did not establish predetermination in and of itself, as found above. However, leaving only five to ten minutes to discuss and decide upon a change of placement allowed the Parents to participate only at the very tail end of what had been quite a long course of development. Second, District staff knew, in advance of the meeting, the great importance the Parents placed on this topic, so they should have set aside more time for discussion and decision on it. Third, five to ten minutes was especially inadequate given that the Parents were not notified in advance that placement would be on the meeting agenda, so the Mother did not prepare for the meeting as she would have if the topic had been on the agenda. In summary, the District needed to either start the change-of-placement discussion earlier in the meeting, or schedule a second meeting when it realized that only five to ten minutes remained for the topic. The fact that the Mother did not request a second IEP meeting does not excuse the District's violation. It was the District's obligation -- not the Parents' – to comply with the procedural requirements of the IDEA, which include providing an opportunity for the Parents to have meaningful participation in decision-making. The analysis would have been different if the District had offered to continue the placement discussion at another IEP meeting and the Mother had refused. That did not occur.

37. The fact that adoption of a new IEP was overdue by the time of the IEP meeting did not excuse the District's failure to schedule a second IEP meeting when only five to ten minutes remained for discussion of placement. In *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038 (9th Cir. 2013), the parent notified the Department of Education that he would be unable to attend a scheduled IEP meeting, but the Department went ahead with the meeting without him because the prior IEP was going to expire in four days. The court stated:

> [T]he Department was allegedly confronted with two options: including Doug C. [the parent] in the meeting and missing the IEP annual deadline by several days or proceeding with the IEP meeting without Doug C. but meeting the annual deadline. . . . [T]he Supreme Court and this court have both repeatedly stressed the vital importance of parental participation in the IEP creation process. We have further held that delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit. [Citation omitted] Under the circumstances of this case, the Department's decision to prioritize strict deadline compliance over parental participation was clearly not reasonable.

Id., 720 F.3d at 1046.

38. For the reasons stated above, the Parents have established that allowing only five to ten minutes for discussion and decision on whether to change the Student's placement to a Support

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Center significantly impeded the Parents' participation rights at the November 2016 IEP meeting, resulting in a denial of FAPE.[33]

Making decision to change the Student's placement outside of the IEP meeting

39. The requirement that decisions about a student's IEP and placement must be made *during* an IEP meeting, in the presence of a properly constituted IEP team, is repeated in several IDEA regulations. An IEP is defined as "a written statement . . . that is developed, reviewed, and revised *in a meeting* in accordance with" the regulations that follow. WAC 392-172A-03090(1) (italics added); *see also* 34 CFR §300.320. Another regulation provides that changes to an IEP must be made "*by the entire IEP team at an IEP team meeting*" unless the parents and district agree to amend the IEP without a meeting under specified circumstances not applicable here. WAC 392-172A-03110(2)(d) (italics added); *see also* 34 CFR §300.324. A third regulation concerns educational placements. It requires that school districts "must ensure that the *parents* of each student eligible for special education *are members of any group that makes decisions* on the educational placement of the student." WAC 392-172A-03115 (italics added); *see also* 34 CFR §300.327.

40. As stated in the Findings of Fact, above, the District made the decision to change the Student's placement after the IEP meeting had ended, and outside the presence of the IEP team. This was a violation of the IDEA. This violation significantly impeded the Parents' opportunity to participate in the decision-making process, especially given that the discussion at the meeting took only five to ten minutes. The Mother was not present and was not even aware -- until receiving a phone call two days after the IEP meeting -- that a decision had been made.

41. For the reasons stated above, the Parents have established that the District violated the IDEA by making the decision to change the Student's placement outside of the IEP meeting. This significantly impeded the Parents' participation rights, resulting in a denial of FAPE.

Failing to provide PWN of the change of placement within a reasonable time before the effective date of the change

42. The IDEA requires school districts to provide written notice to parents *prior* to the effective date of an action, not after the fact. *See* 20 USC §1415(b)(3) and (c)(1); WAC 392-172A-05010; 34 CFR §300.503. Moreover, written notice must be provided "a reasonable time" prior to the effective date. WAC 392-172A-05010(1); 34 CFR §300.503(a).

43. OSEP interprets "a reasonable time" to be at least ten calendar days:

> [T]he district must provide parents with a written notice of the proposed changes a reasonable time prior to implementing the proposed changes and must

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[33] This decision does not imply that all placement discussions at IEP meetings must last longer than five to ten minutes. Team members may be in agreement on placement, the questions on placement may be few, or there may be other reasons why an abbreviated discussion of placement is appropriate. As stated above, the determination of what constitutes an opportunity for meaningful participation must be judged in light of the circumstances of each case.

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> maintain the child in the current program and placement during this reasonable period of time.
>
> . . .
>
> We have interpreted a "reasonable time" to be at least 10 calendar days, although some fact situations would justify a more extended period of time. Whether a shorter period of time would be acceptable in the presence of parental consent is an issue not presented by your letter and remains to be addressed by this office.

Letter to Winston, 213 IDELR 102 (OSEP 1987). "The purpose of the notice is to provide sufficient information to protect the parents' rights under the Act." *Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992).

44. Here, the Parents received written notice of the change of placement on November 25, 2016, four days *after* it became effective on November 21st. They were entitled to receive written notice of the change at least ten days *prior to* it becoming effective.[34]

45. As Ms. Hickey, the Student's special education teacher, testified, it is common for schools to issue PWNs stating that an action will be initiated only three days hence, not ten days hence. If parents who receive such belated PWNs file for a due process hearing within ten days after receiving the PWN, and the school district grants them stay-put rights, then the district will often have cured the harm done by the untimely PWN. However, there are situations where the harm is not fully cured.[35] One of those is where parents who do not immediately understand the stay-put provision of the IDEA oppose a new placement so adamantly that they hold their child out of school to avoid it, only to later understand their rights and timely file for a due process hearing, allowing the child to return to school in the prior placement. The child will have lost educational benefits in the interim. That is what happened here. If the Student's change of placement was to be effective November 21, 2016 (as stated on the PWN), the Parents were entitled to receive the PWN by November 11th. They would not have held the Student out of school for those ten days if they had been properly informed that the change would *not* be effective during that period. They would have had those ten days to file for a due process hearing and obtain stay-put rights, so the Student would not have missed any school.

46. For the reasons stated above, the Parents have established that the District violated the IDEA by failing to provide them with PWN of the Student's change of placement within a reasonable time before the effective date of that change. This significantly impeded the Parents' right to participate in educational decision-making and also resulted in the Student being deprived of educational benefits for 11 school days. This IDEA violation therefore constituted a denial of FAPE.

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[34] It is irrelevant that bus transportation to the new placement was not scheduled to begin until December 1, 2016. The legally effective date of the new placement was the one stated on the PWN: November 21st. That is when the process of transferring records and making bus arrangements began, according to Ms. Wiese.

[35] *See Seattle School District*, 2017-SE-0038, Order Denying Parents' Stay-Put Motion (June 2, 2017). A copy of this order is available by contacting OSPI's Public Records Officer.

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Whether PWN failed to contain required information

47. PWNs under the IDEA must contain: (a) a description of the action proposed or refused; (b) an explanation of why the district proposes or refuses to take the action; (c) a description of each evaluation or other record used as a basis for the action; (d) a statement about the parents' procedural safeguards; (e) sources for parents to obtain assistance in understanding the PWN or the procedural safeguards; (f) a description of other options considered and the reasons why they were rejected; and (g) a description of other factors relevant to the proposal. *See* 20 USC §1414(c)(1); WAC 392-172A-05010(2); 34 CFR §300.503.

48. The Parents argue that the November 2016 PWN did not contain the information required by (b), (f) and (g), above. Parents' Closing Brief, at pp. 25-26. Regarding (b), the PWN did state why the district proposed to change the Student's placement: the Student has a "need for a placement that is able to provide the minutes discussed in the current IEP . . . The special education team recommended Self Contained Placement for [the Student] to best meet her needs." J-4:21.[36] While these are summary statements, more detailed explanations as to why the Student's needs are not being met in her current placement were provided to the Parents in the reevaluation report and the IEP's section on present levels of performance. Regarding (f), the PWN explains the option of grade retention that was proposed by the Mother and why it was rejected by the IEP team: it was rejected because the Student requires more support than retention in her current (general education) placement is able to provide. Finally, regarding (g), the Parents are correct that no other factors relevant to the action are listed there. (This section of the PWN populated forward text from a prior PWN about recess monitoring that should have been deleted.) However, there is no requirement that there be "other factors" relevant to the action. The Parents do not indicate what other relevant factors should have been listed here that were not.

49. For these reasons, the Parents have not established that the PWN of November 2016 failed to contain the information required by the IDEA.

Substantive Compliance with the IDEA

50. As concluded above, the District significantly impeded the Parents' opportunity for meaningful participation in the November 2016 change-of-placement decision. Whatever evidence and arguments the Parents would have presented to the IEP team at that time (had they been given the opportunity), they have now had the opportunity to present at the due process hearing. That evidence, together with the District's evidence, will now be analyzed to decide the substantive compliance issue in this case: Whether the District violated the IDEA and denied the Student a FAPE by adopting an inappropriate educational placement for the Student in November 2016.

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[36] The quoted statements appear in the wrong section of the PWN, but they are present in the PWN and this establishes substantial compliance with the IDEA's requirement. They appear in the section for options considered and rejected rather than in the section immediately above it, which concerns the reason why the District is proposing or refusing the action. *See* J-4:21.

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51. The Student's educational placement encompasses: the percentage of time she will participate in the general education environment vs. the special education environment; the Support Center program to which she is assigned; and the location of the Support Center away from her neighborhood school.

52. Regarding the percentage of time in general vs. special education, the Student's current stay-put placement has her in the general education environment 80% of the time; the placement adopted in November 2016 has her in general education 53% of the time, for non-academic classes, lunch and recess. To determine whether the District's placement is the Student's least-restrictive environment (LRE), the following factors must be weighed: (1) the educational benefits of the placement; (2) the non-academic benefits of the placement; (3) the effect the Student has on the teacher and children in the general education class; and (4) the costs of mainstreaming in the general education environment. *See Sacramento City Unif'd Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir.), *cert. denied*, 512 U.S. 1207, 114 S. Ct. 2679 (1994).

53. Regarding factor (1), the Parents have not established that the Student would receive greater academic benefit from continuing her stay-put placement than from increasing the percentage of time she spends in special education and correspondingly decreasing the time she spends in general education. The evidence establishes that the Student understands little of the academic content in the general education class, and that she needs academic content at a much more basic level, and presented at a much slower pace, in order to master academics. The Parents assert that a full-time, one-on-one paraeducator added to the general education environment would be enough to bridge the gap, so that the Student would receive greater academic benefit from remaining in the general education environment than from shifting to more special education time. The Parents presented no evidence from any educational professional to support this assertion. The District presented persuasive evidence from its educational professionals that a one-on-one paraeducator would be insufficient to bridge the Student's wide comprehension gap. The District's evidence was also persuasive that the Student would be isolated in a pair with the paraeducator, resulting in a more restrictive environment than the special education setting, where she would work together with peers in small groups. The Parents also assert that other modifications and supports would allow the Student to comprehend and receive greater academic benefits from the general education environment. However, the Parents have not established that any modification or support not already provided to the Student would have this effect. Moreover, school districts are not required to try all modifications and supports before selecting a more restrictive placement. *See I.L. v. Knox County Bd. of Educ.*, 2017 U.S. Dist. LEXIS 92257, 70 IDELR 71 (E.D. Tenn. 2017); *Analysis of Comments and Changes*, 64 Fed. Reg. 12,406, 12,638 (OSEP 1999).

54. Regarding factor (2), there are certainly non-academic benefits when the Student participates with typically-developing peers. The Student imitates their actions and receives prompting and help from them, especially on adaptive skills. A reduction in general education participation from 80% to 53% of the Student's time would reduce her opportunities for receiving these non-academic benefits.

55. Regarding factor (3), the evidence establishes that the general education teacher cannot meet the Student's extensive needs in a class of 22 students. The District has tried to limit the negative effect on the teacher and other students by making extensive use of other staff from around the school to provide services well beyond those outlined in the Student's IEP. These

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other services mostly focus on the Student's adaptive and safety needs, and are insufficient to meet her academic needs, as discussed above. It is concluded that the Student's general education teacher could not meet her academic needs without having significant negative effects on meeting the needs of the other 21 students in the class, and in fact the Student's academic needs are not being met. Neither are her adaptive needs being sufficiently met: she requires explicit, repeated instruction on adaptive skills in order to learn them herself, as opposed to simply mimicking the actions of others.

56. Regarding factor (4), the costs of mainstreaming the Student in the general education environment, the District has had to draw staff from elsewhere in the school to meet four schedules it set up in an attempt to meet the Student's needs, yet they are not meeting her needs, as found above. There are obviously costs to drawing on extra staff, but the District did not put on evidence of the dollar amount involved, and so this factor is not given much weight.

57. The result of this four-factor balancing test is that the Parents have not met their burden of proof regarding the Student's LRE. The most important factors in this particular case are the first two – the academic and non-academic benefits of more general education participation. The Student's academic needs are not being met in her general education class. The non-academic benefits of interacting with typically-developing peers will be available to the Student the majority of the time under the District's placement – 53% of the time. This is less than 80% of the time, but this factor must be balanced against her academic needs. The fact that the Parents are content with the amount of academic benefit the Student receives in her stay-put placement is not determinative. The Parents supplement her academics significantly at home. However, the District is obligated to choose placements that provide students with FAPE. The District cannot select educational placements that fail to do so, and rely on parents to fill in the gap.

58. The next aspect of the District's placement that must be examined is the Support Center program to which the District has assigned the Student. The Parents have not met their burden of proof that a Support Center is inappropriate for the Student. Their evidence consists of an observation by the Mother that occurred a year and a half before the change-of-placement was adopted, lasted only one hour, and included only one of the two elementary-level Support Centers. The observation was not a silent one, but involved the Mother and Ms. Vickers conversing with the teacher, drawing her away from her duties and influencing what was observed. Also, the District took several steps to improve the Support Center program subsequent to the Mother's visit.

59. The District established that the Support Centers have a much lower student-educator ratio than the Student's general education class: a maximum of 12 students, one teacher, and at least two paraeducators, as opposed to 22 students, one teacher, and part-time paraeducator assistance. The District also established that the Student requires a great deal of staff assistance in order to learn and to function in the classroom. Thus, the lower ratio of students to educators makes the Support Center a better placement for the Student. The one District witness who testified based on personal knowledge about the programming at Support Centers, Ms. Vickers, observed the same programming that the Mother did, but came away with an opposite opinion: Ms. Vickers believed the placement was the best, most appropriate one for the Student at that time. The District's remaining testimony on the programming offered at the Support Centers was hearsay. No findings were made based on this hearsay for the reasons explained above, in the Findings of Fact. However, the District did not have the burden of

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proving its placement appropriate; rather, the Parents had the burden of proving it inappropriate. The Parents' extremely limited and outdated evidence failed to do so. The Parents could have observed more recently, could have observed at both of the Support Centers, and/or could have employed an educational professional to conduct such observations on their behalf. They could have called a Support Center teacher or supervisor as a witness. Parents cannot rely on past issues at a placement location to support speculation that the location will be unable to properly implement a student's IEP. *See Y.F. v. New York City Dept. of Educ.*, 659 Fed. Appx. 3, 5, 68 IDELR 92 (2nd Cir. 2016 unpublished).

60. Finally, the Parents argue that neither of the Support Centers are located at the Student's neighborhood school, so they are additionally inappropriate for this reason. WAC 392-172A-02060 provides in pertinent part:

> (2) The selection of the appropriate placement for each student shall be based upon:
>
> (a) The student's IEP;
> (b) The least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070, including this section;
> (c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and
> (d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.
>
> (3) *Unless the IEP of a student requires some other arrangement*, the student shall be educated in the school that he or she would attend if nondisabled. In the event the student needs other arrangements, placement shall be as close as possible to the student's home.

(Italics added). *See also* 34 CFR §300.116.

61. The IDEA does not require that each school building in a district be able to provide all the special education and related services for all types and severities of disabilities. *See Letter to Trigg*, 50 IDELR 48 (OSEP 2007). There is no absolute right under the IDEA to attend a neighborhood school. Proximity is merely one of many factors to consider in determining a proper placement. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 381 (5th Cir. 2003). The court in *White* summarized the case law from other circuit courts on this issue:

> All of our sister circuits that have addressed the issue agree that, for provision of services to an IDEA student, a school system may designate a school other than a neighborhood school. Restated, no federal appellate court has recognized a right to a neighborhood school assignment under the IDEA. *See, e.g., McLaughlin v. Holt Pub. Schs. Bd.*, 320 F.3d 663, 672 (6th Cir. 2003) (LRE provisions and regulations do not mandate placement in neighborhood school); *Kevin G. by Robert G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 (1st Cir. 1997) ("While it may be preferable for Kevin G. to attend a school located minutes from his home, placement [where full-time nurse located] satisfies [the IDEA].... The school district has an obligation to provide a school placement which includes a nurse on duty full time, but it is not required to change the district's placement of nurses when, as in this case, care is readily available at

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> another easily accessible school".); *Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112 (6th Cir. 1997) (IDEA does not require placement in neighborhood school); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996) (IDEA does not give student a right to placement at a neighborhood school); *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 928-29 (10th Cir.) (no presumption in IDEA that child must attend neighborhood school -- proximity to home only one factor), *cert. denied*, 516 U.S. 909, 133 L. Ed. 2d 198, 116 S. Ct. 278 (1995); *Schuldt ex. rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361-63 (8th Cir. 1991) (school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child's disability); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir.) (school district complied with IDEA by providing deaf student with "cued speech" program in a centralized school approximately five miles farther than neighborhood school), *cert. denied*, 502 U.S. 859, 116 L. Ed. 2d 138, 112 S. Ct. 175 (1991); *Wilson v. Marana Unified Sch. Dist. of Pima County*, 735 F.2d 1178 (9th Cir. 1984) (school district may assign child to school 30 minutes away because teacher certified in child's disability was assigned there, rather than move the service to the neighborhood school).

White, 343 F.3d at 381. Since *White* was decided in 2003, an additional circuit court has held similarly. *See J.T. v. Dumont Pub. Schs.*, 533 Fed. Appx. 44, 51 (3rd Cir. 2013 unpublished).

62. For the reasons set forth above, the Parents have not carried their burden of proof that the District violated the IDEA by adopting an inappropriate educational placement for the Student in November 2016.

Remedies

63. The District committed six procedural violations of the IDEA in the process of changing the Student's educational placement, five of which denied the Student a FAPE. The Parents request that the Student be awarded a year of retention in first grade as compensatory education for lost educational benefits. Parents' Closing Brief at p. 40. The Student lost educational benefits for 11 school days due to the District's belated PWN. Other than on those days, the Student was in the placement advocated for by the Parents. They have pointed to no other loss of educational benefits. An award of a full year of retention is disproportionate for 11 days of educational loss. Also, such an award is rejected because the evidence establishes that the Student's current level of special education services is insufficient for her.

64. The Parents will be awarded compensatory education for the District's procedural violations that denied the Student a FAPE. Although tutoring as a form of compensatory education was not a remedy requested by the Parents, the Issues Statement provides that this tribunal may award "other equitable relief as appropriate." *See* Issues Statement, above. The Parents are awarded 106 hours of tutoring from a fully certificated special education teacher. This represents the 66 hours of schooling (11 days) that the Student missed due to one of the District's procedural violations, plus another 40 hours for the District's remaining procedural violations. Starting with the initial award of 66 hours, this represents one-to-one compensation for the Student's lost educational hours. A one-to-one award is made for several reasons. First, the Student did not merely receive inappropriate education during those 11 days, she received

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no education. Second, the common ratio of one hour of tutoring for every three hours of in-class time lost is based on the fact that tutoring is more intensive and children learn more than they do in a busy class environment with distractions. *See South Kitsap Sch. Dist.,* 109 LRP 19054, 2008-SE-0047 (SEA WA 2009). However, this Student can only learn with one-on-one assistance, or at most in a very small group. Thus, the normal ratio is not applicable to her. Third, the equities in this case weigh against the District and in favor of the Parents. *See Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) *cited with approval in R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). There is no evidence the Parents engaged in any inequitable conduct toward the District, while the reverse is not true due to some deception engaged in by the District toward the Parents. For all of these reasons, one-to-one compensation for all lost educational hours is awarded. An additional 40 hours of tutoring is awarded to compensate for the District's four other procedural violations that denied the Student FAPE. It is impossible to quantify the loss incurred by students when they are denied FAPE due to procedural violations that prevented their parents from participating in decision-making about their education. The additional award of 40 hours of tutoring is based on the benefits the Student can derive from such tutoring and on the relative equities between the parties.

65. The parties shall collaborate in choosing the subject area(s) for the compensatory tutoring, with the Parents having the final say if the parties do not agree. The parties shall collaborate on the scheduling and personnel for the tutoring, with the District having the final say if the parties do not agree (provided the District takes into account the reasonable scheduling needs of the family). All tutoring hours shall be used within one year from the date of this decision. If the Student does not appear for a tutoring session, or it is cancelled with less than 24 hours' notice, it shall be counted against the compensatory education award unless the non-appearance or cancellation was due to an unforeseeable urgent event.

66. The District will also be ordered to provide four hours of training on the IDEA's procedural requirements concerning parental participation to the teachers, school psychologist, and administrators who were involved with this case. Related service providers who were involved with this case need not attend the training.

67. Finally, the District will further be ordered to use a facilitator from Sound Options at the Student's next IEP meeting in order to promote productive communication between the parties and to discourage both parties from maintaining fixed positions.

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

ORDER

1. The District violated five of the Parents' procedural rights under the IDEA that resulted in denials of FAPE to the Student.

2. As compensatory education for these violations, the Student is awarded 106 hours of tutoring on the terms set forth in the Conclusions of Law, above.

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3. The District is ordered to provide four hours of training on the IDEA's procedural requirements concerning parental participation to the teachers, school psychologist, and administrators who were involved with this case.

4. At the Student's next IEP meeting, the District shall use a facilitator from Sound Options to promote communication between the parties.

5. The Parents have not established that the District adopted an inappropriate placement for the Student in November 2016.

Signed at Seattle, Washington on August 10, 2017.

Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parents
[redacted]

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