STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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May 2, 2018

Grandparent
[redacted]

Steven Mondragon, Director, Elementary Student Services
Tacoma School District
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Tacoma, WA 98401-1357

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In re: Tacoma School District
OSPI Cause No. 2017-SE-0115
OAH Docket No. 12-2017-OSPI-00446

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,

MATTHEW D. WACKER
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. 2017-SE-0115
	OAH DOCKET NO. 12-2017-OSPI-00446
TACOMA SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A due process hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Tacoma, Washington, on February 27 and 28, 2018. The Parent of the Student whose education is at issue[1] appeared and represented herself. The Parent was accompanied and advised during most of the due process hearing by Vanessa Lewis. The Tacoma School District (the District) was represented by Susan Winkelman, attorney at law. Also present for the District was Malik Gbenro, assistant general counsel. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) on December 19, 2017. A Scheduling Notice was entered on December 21, 2017. The Scheduling Notice, in part, assigned ALJ Anne Senter as the presiding ALJ, set a prehearing conference for January 19, 2018, and a due process hearing for February 2, 2018. The District filed its Response to the Complaint on January 2, 2018. Also on January 2, 2018, the Parent timely filed a Motion of Prejudice, asking that the matter be reassigned to another ALJ.

On January 3, 2018, an Order of Reassignment was entered, granting the Parent's motion for a new ALJ, and assigning the above matter to ALJ Matthew D. Wacker. The Order of Reassignment set a new time still on January 19, 2018 for the prehearing conference, and set February 8, 2018, for the due process hearing. Also on January 3, 2018, the District agreed in writing to waive the resolution meeting after the Parent informed the District in writing that she would not attend a resolution meeting.

After review of the District's Response, a First Prehearing Order was entered on January 5, 2018. The First Prehearing Order determined that the District's Response did not meet the regulatory requirements, and ordered the District to file a response that did so. See *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189 (9th Cir. 2017). The District filed an Amended Response on January 17, 2018.

[1] In the interest of preserving the family's privacy, this decision does not use the actual names of the parent or the student. Instead, they are each identified as the "Parent," and the "Student." The Parent is also the grandmother of the Student, and meets the definition of a parent. Washington Administrative Code (WAC) 392-172A-01125; 34 Code of Federal Regulations (CFR) § 300.30.

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On January 19, 2018, an Order Continuing Prehearing Conference was entered which continued the first prehearing conference to January 24, 2018. The prehearing conference was held on January 24th, and on February 6, 2018 a Second Prehearing Order was entered. The Second Prehearing Order, in part, set the due process hearing for February 27-28, and March 1, 2018.[2]

Due Date for Written Decision

The due date for a written decision in the above matter was extended to thirty (30) calendar days from the close of record. *See* February 6, 2018 Second Prehearing Order. On the last day of the due process hearing, the parties agreed to file written closing arguments by March 28, 2018, on which day the record would close. The District timely filed its Closing Brief on March 28, 2018. However, the Parent's Closing Argument was not received until April 2, 2018.[3] The District has not objected to the Parent's late-filed Closing Argument, and therefore the Closing Argument will be considered.

The record closed with the late-filing of Parent's Closing Argument on April 2, 2018. Thirty calendar days from April 2, 2018 is May 2, 2018. Therefore, the due date for a written decision in the above matter is **May 2, 2018**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits:[4] P1-P4, P6-P8, P9 (except for page 3 which was excluded), P10-P11, P12 (except for pages 1-4, 7, and 17 which were excluded), P13, and P15 (which was admitted for the limited purpose of impeachment and not to otherwise establish any finding of fact).

District Exhibits: D1-D18.

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

Jana Holcombe, District general education teacher;
Teresa Wickens, District special education teacher;
Donna Green, District special education teacher;
Jill Hess, District occupational therapist;
Ann Jones Almlie, former District director of elementary student services;
Steven Mondragon, District director of elementary student services;

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[2] The due process hearing was completed on February 28th. No hearing was held on March 1, 2018.

[3] The Parent's Closing Argument was received via mail on April 2, 2018. It was postmarked March 29, 2018. It could not be determined from the face of the Closing Argument whether the Parent had also sent a copy to District's counsel. As a courtesy to the Parent, a copy of her Closing Argument was emailed to District's counsel on April 2, 2018.

[4] The Parent's exhibit list included identification of a proposed Exhibit P14, but the Parent did not offer the identified exhibit at hearing.

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Leslie Sampson, District school psychologist;
Christian Jordan, District principal; and,
The Parent.

ISSUES AND REMEDIES

The statement of the issues and remedies for the due process hearing is:

a. Whether the District violated the IDEA and denied the Student a free appropriate public education (FAPE) beginning April 1, 2017, by:

i. Failing to implement recommendations in Dr. Uherek's independent educational evaluation (IEE), including providing home-based educational services;

ii. Failing to provide services to the Student between the time the Grandparent requested an IEE and completion of Dr. Uherek's IEE;

iii. Dis-enrolling the Student from the District without any prior notice to the Grandparent;

iv. Failing to implement the Student's February 2017 individualized education program (IEP);

v. Isolating the Student from his general-education peers during recess, lunch and on the school bus;

vi. Allowing the Student's placement for the 2016-2017 school year (a self-contained therapeutic learning center) to become "toxic and harmful" by labelling the Student as a "sex offender."

The Grandparent's Complaint did not identify what remedies she was requesting if the evidence at hearing proves the District denied the Student FAPE. A due process hearing request or complaint need only include a proposed resolution of the problem raised in the complaint (i.e. the remedies) "to the extent known and available to the party at the time" the complaint is filed. See WAC 392-172A-05085(2)(f). No discussion was had at the prehearing conference regarding the Grandparent's requested remedies. However, the burden is on the Grandparent to offer evidence at the due process hearing to support whatever remedies she believes are appropriate for the Student.

See February 6, 2018 Second Prehearing Order.

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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General Background

1. The Student began attending kindergarten in the District for the 2014-2015 school year. During kindergarten, the Student improved "tremendously" in reading writing, and math. However, the Student displayed very significant and aggressive behavior during kindergarten. D1pp2-3.[5]

2. The Student began first grade in the District for the 2015-2016 school year. On December 8, 2015, the Parent requested that the District conduct an initial evaluation of the Student to determine if he was eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA). D1p1.

3. On February 9, 2016, a team consisting of District staff and the Parent held a meeting to consider the results of the Student's initial evaluation. D1.

4. At the time of his initial evaluation, the Student was six years old. District team members reported daily challenging behaviors by the Student at school. The Student had already been suspended for 9 days during the school year. The Parent told the team that the Student did not display the same significant behavioral difficulties at home or at his grandparents' home. The Student's overall cognitive functioning fell in the below-average range, and he had significant social, emotional, behavioral and executive functioning deficits for his age. Based on his estimated cognitive functioning, the evaluation concluded that the Student's academic achievement would be within the low-average to average range for his age. The Student had also been diagnosed with attention deficit hyperactivity disorder (ADHD). After considering the results of the evaluation, the team determined the Student was eligible under the other health impairment (OHI) eligibility category. The evaluation team recommended specially designed instruction (SDI) in reading and the social/emotional/behavioral domains. During the course of the initial evaluation, the Student began taking medication. His general education teacher reported that when taking medication, the Student's behaviors, interest in learning, and ability to participate were "greatly improved," but he didn't consistently receive his medication at home. Exhibit D1pp1-11.

5. On February 9, 2016, a Prior Written Notice (PWN) was sent to the Parent. The PWN stated that the team was proposing to initiate an eligibility category for the Student. It noted that when the Student was not taking his medication, he "is unable to safely participate with his peers and removed or isolated often." It went on to state that the Student's individualized education program (IEP) team might consider "a self-contained placement with integration into the general education setting as his behaviors and safety become consistent." D1p30.

6. On April 19, 2016, a meeting was held to consider the results of a functional behavioral assessment (FBA) of the Student. The FBA noted that the Student often displayed behaviors that impeded his learning and the learning of other students, especially on days when he did not have his medication. The FBA team recommended that the Student's IEP team consider creation of a behavior intervention plan (BIP) for the Student. D2pp1-5.

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[5] References to the exhibits of record will be to the exhibit number and page number(s). Accordingly, reference to D1pp2-3 is a reference to District's Exhibit D1 at pages 2-3.

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7. The Student began second grade in the District for the 2016-2017 school year.[6] The Student's IEP placed him in a self-contained Therapeutic Learning Center (TLC) classroom. This is a classroom consisting solely of students eligible for special education with severe social, emotional, and behavioral disabilities. D3p6.

8. Donna Green was the special education teacher assigned to the Student's TLC classroom. Along with Ms. Green, the TLC classroom had two paraeducators to serve between 10 and 11 students. T137-T139.[7]

Allowing the Student's Placement for the 2016-2017 School Year to Become "Toxic" and "Harmful" to the Student by Labeling him a "sex offender"

9. On November 4, 2016, the Student was emergency expelled after an event on his school bus with a female student.[8] D17. The emergency expulsion was subsequently changed to a 10- or 11-day suspension from school. The Student's TLC teacher, Ms. Green believes the Student's school record refers to "sexually aggressive behavior," and she recalls a recommendation that the Student undergo a "sexually aggressive youth assessment." Once the Student returned from his suspension, his transportation was changed such that he rode a bus by himself, along with a bus monitor and bus driver. Testimony of Green.

10. Christian Jordan, the Student's principal, characterized the event as involving "sexual misconduct on the bus with another student." The Tacoma police were contacted, came to District, and met with her. At no time did the District label the Student as a "sex offender." Testimony of Jordan. Jill Hess, District occupational therapist, recalls a request for a "psychosexual evaluation" of the Student during a meeting in November 2016. Testimony of Hess. The School District wanted to conduct a "sexually aggressive youth assessment" of the Student. Testimony of Almlie.

11. The Student was emergency expelled again for 10 or 11 days in January 2017 for another incident on his bus. Testimony of Green.

12. The evidence of record contains no document or testimony which supports the Parent's assertion that the District ever labeled or referred to the Student as a sex offender. As can best be determined, this characterization of the Student arises in the Parent's perception based upon how she believes the Student was treated at his elementary school after the two incidents described above.

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[6] The record does not include a copy of the Student's IEP that would have been in effect at the start of the 2016-2017 school year. But there was no dispute between the parties that the Student's placement in the TLC classroom would have been based on his IEP.

[7] References to the testimony of record will either be to a specific page of the transcript, or more broadly to the testimony of an individual witness. Accordingly, reference to T137-T139 is a reference to the Transcript at pages 137-139. More broadly, the same testimony may be referenced as "Testimony of Green."

[8] All of the evidence presented at the due process hearing regarding the details of this incident was testimony; no exhibits were offered.

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13. During the 2016-2017 school year, the Student typically ate breakfast in his school cafeteria along with general education students. However, the Student's morning bus was "often late" arriving at his elementary school, and on those days he would eat his breakfast in Ms. Green's TLC classroom. The Student was never required to eat breakfast alone. Testimony of Green.

14. During the 2016-2017 school year, the Student would generally eat lunch in the cafeteria with general education students. Occasionally, about once every three weeks, the Student would eat his lunch in his TLC classroom. This would occur only when the Student was "exceptionally aggressive" in the cafeteria, and Ms. Green required him to eat in her classroom. Ms. Green also required other students in her TLC classroom to eat lunch in her classroom when they were too aggressive in the cafeteria. Testimony of Green.

15. The Parent was present at the Student's school some number of times for breakfast during the 2016-2017 school year. Testimony of Parent. However, the Parent did not testify at the due process hearing that she was present at the Student's school during any day when he ate his breakfast in his TLC classroom.

16. The Parent testified that on one occasion the Student told her that he eats his breakfast and lunch in his TLC classroom "all the time," and that it started after the incident on his bus in November 2016. Testimony of Parent. The Student did not appear as a witness at the due process hearing. Therefore, the testimony of the Parent on this subject must be considered hearsay testimony, which means that the Parent's testimony is based upon what the Student told her. The Parent's testimony on this subject is not based on any personal knowledge of the Parent, that is to say the Parent's testimony is based on what someone else told her, not on what she personally saw or heard at the Student's school or in the Student's TLC classroom. The Parent's hearsay testimony is not sufficient credible evidence upon which to find any facts. To make any finding of fact regarding whether or how many times the Student was required to eat his breakfast and/or lunch in his TLC classroom, as opposed to the cafeteria with general education students, would unduly abridge the District's right to cross-examine the source of the Parent's hearsay testimony, i.e., the Student.

17. During the 2016-2017 school year there were two occasions when the Student was allowed to play at recess with another student in a separate, smaller playground than the larger playground where the general education students at the Student's elementary school had recess. On both occasions when Ms. Green permitted the Student and the other student to play in the smaller playground, it was at the request of the Student and the other student. On both occasions an adult was present on the smaller playground to supervise the Student and the other student playing together. Testimony of Green.

18. There were occasions during outside recess when Ms. Green required the Student to stay in her TLC classroom. This only occurred when the Student was acting "aggressively," including hitting and kicking. Testimony of Green.

19. The Parent testified that during the same conversation with the Student referenced above regarding breakfast and lunch, the Student told her that he played on the small playground, and the Parent understood that to mean all the time as well. Again, as discussed above, the Parent's hearsay testimony regarding whether or how often the Student went to recess on the small playground cannot be the basis for any finding of fact.

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The Student's February 2017 IEP and BIP

20. On February 23, 2017, an IEP team meeting was held to develop a new annual IEP for the Student. D3p4. The Parent and the Student's biological mother both attended as team members. The IEP included annual goals in reading, reading comprehension, and three goals in the social/emotional domains. D3p8. One of the reading goals involved recognition of sight words. *Id.* It states "[b]y 02/23/18, when given basic sight words [the Student] will read each one improving ability to read words quickly from 27 sight words to 150 sight words as measured by sight word checklist." *Id.*

21. The Student's IEP provided the Student with a bus monitor twice each day and special transportation. D3pp13-14.

22. The Student's IEP also provided that his participation "in non-academic and extracurricular activities will be examined on a case by case basis whether (sic) they are appropriate for [the Student] and if he can be successful." D3p14.

23. The Student's IEP team, including the Parent and the Student's biological mother, also held a meeting on February 23, 2017 to develop a new BIP for the Student. D3p16; P3. The Student's BIP noted that:

> [The Student] is often oppositional and defiant. He frequently displays non-compliant behaviors that can quickly escalate into unsafe behaviors. When given a direction by an adult, his first response is to usually say no. He is often argumentative and contrary with adults. [The Student] frequently interrupts or intrudes on others and engages in physical and verbal conflict. He will often "front" his peers and look for opportunities to pick fights with peers. He is aggressive and hands on in his interactions with others. Upon redirection to an undesired task, [the Student] will often resort to physical or verbal aggression. [The Student] is driven by impulse and often acts without thinking. He struggles to take personal responsibility for his own actions and will often perceive difficulties as the other person's fault. His perception of incidents is off and he struggles to see the incident from another person's point of view. These behaviors occur throughout the school day and in all school settings, with the majority of the behaviors occurring during unstructured times such as lunch or recess and during specialist times.

Id.

24. Beginning April 1, 2017,[9] there were a total of 10 school days when there was no monitor on the Student's bus in the morning when it arrived to pick up the Student. P1p11; Testimony of Parent. There is no evidence to find the lack of a bus monitor prevented the Student from riding his bus to school in the morning.

25. The Student's academic progress and progress towards meeting his IEP goals were reported at the end of the 2016-2017 school year. D6. By the end of the school year, the Student was meeting or approaching end-of-year standards in all his academic subjects except reading.

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[9] April 1, 2017 is the first day of the period at issue with respect to most of the issues raised by the Parent in her Complaint. See February 6, 2018 Second Prehearing Order.

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D6p1. The Student was also making sufficient progress on all of his IEP goals, including his reading goals, to achieve those goals by the end of the IEP's one-year term. D6pp3-5.

The Student's Independent Educational Evaluation

26. On April 25, 2017, the Parent requested that the District pay for an independent educational evaluation (IEE) of the Student. P1p11. The District agreed to pay for the IEE on May 1, 2017. P9p2.

27. The Parent selected a clinical psychologist, Anne M. Uherek, Psy.D., to conduct the Student's IEE. On September 11, 2017, the Parent requested a meeting with the Student's IEP team so Dr. Uherek could present her IEE report. D10; P11p18. The District first received a copy of Dr. Uherek's IEE report on September 15, 2017. D8p1 (Rec'd Sep. 15 2017).

28. Dr. Uherek conducted her evaluation of the Student on multiple dates spanning July and August 2017. The purpose of the evaluation was to determine the Student's then-current cognitive functioning and make recommendations for his school placement and programming. The Student was 8 years old at the time of the evaluation. The Student exhibited overall low-average cognitive functioning, but Dr. Uherek concluded that the Student's problems with attention affected his ability to consistently demonstrate his knowledge. Accordingly, Dr. Uherek concluded that the results of the Student's cognitive functioning assessment were likely an underestimation of his inherent intelligence. Dr. Uherek noted the Student's prior diagnosis of ADHD, along with the medication and individual counselling he received to address the symptoms of his ADHD. Dr. Uherek concluded the Student demonstrated specific learning disabilities (SLDs) in reading and written expression, a developmental coordination disorder, and a possible nonverbal learning disability (NLD). D8; P10.

29. Dr. Uherek's IEE report included recommendations for the Student's educational programming and placement. She recommended the Student be served in a small classroom with supports so he would not feel inadequate and frustrated at school, and receive services from an occupational therapist (OT). She recommended the Student receive direct instruction in reading via intensive and prescriptive intervention and additional time to complete assignments. The length and quantity of his writing assignments should be modified to reduce his frustration and limit fatigue. The Student should be provided with visual supports to address his organization and working memory deficits. Dr. Uherek also recommended a number of accommodations for the Student in his classroom. D8pp9-11.

30. Nowhere in Dr. Uherek's IEE report does she identify or recommend any need for the Student to receive any home-based services from the District. D8. Dr. Uherek did not appear as a witness at the due process hearing.

31. On September 15, 2017, the District agreed to convene a meeting so Dr. Uherek could present the results of the Student's IEE. D11.

32. On November 29, 2017, a meeting with the Student's IEP team, including the Parent, was held to consider the results of the Student's IEE. Dr. Uherek attended the meeting and presented the results of the Student's IEE. Testimony of Mondragon; Parent.

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33. There is conflicting testimony from Steven Mondragon, the District's director of elementary student services, and the Parent regarding statements or questions by Dr. Uherek during the November 29, 2017 meeting. The Parent testified that Dr. Uherek made a recommendation that the District provide home-based educational services for the Student because at that time the Student was not attending school. Mr. Mondragon testified that Dr. Uherek asked a question about home-based services for the Student, but did not recommend any such services for the Student. Testimony of Mondragon; Parent. No other witness gave testimony regarding whether Dr. Uherek merely asked a question about home-based services, or actually recommended that the District provide such services to the Student. In light of evidence regarding events at a subsequent meeting to consider the results of the Student's IEE where Dr. Uherek again appeared and discussed the IEE, see below, and the fact that Dr. Uherek's IEE report makes no mention of, or recommendation for, home-based services for the Student, it is concluded that Mr. Mondragon's testimony is more credible on this point than the Parent's testimony. Accordingly, it is found as fact that Dr. Uherek simply asked a question about home-based services for the Student; Dr. Uherek did not recommend that the District provide such services for the Student at the November 29, 2017 meeting.

34. Recognizing the Parent was not satisfied with the discussion and consideration of the IEE for the Student's IEP, the District scheduled another meeting so the IEP team could further discuss and consider the Student's IEE.

35. On December 1, 2017, the Parent called the District with her proposed dates for the second meeting to consider the Student's IEE. D14. On December 4, 2017, Mr. Mondragon sent an email to the Parent, asking if she could meet on December 14, 2017 with the IEP team to further consider the Student's IEE. D14p2. On December 6, 2017, the Parent sent an email to Mr. Mondragon, confirming Dr. Uherek was available to meet again on December 14, 2017. D14p2; P12p21. In the same email, the Parent stated that she was waiting for the District to set up services at home for the Student. On December 8, 2017, Mr. Mondragon confirmed in an email to the Parent that the team would meet on December 14, 2017 to further consider the Student's IEE. D14p2.

36. The Student's IEP team, including the Parent, met again with Dr. Uherek on December 14, 2017. D15p8. In attendance was Jana Holcombe, a District general education teacher, Teresa Wickens, the Student's special education teacher, Jill Hess, District OT, Anne Jones Almlie, former District director of elementary student services, Mr. Mondragon, Leslie Sampson, District school psychologist, and Christian Jordan, the principal at the Student's elementary school. D15p1.

37. A careful and thorough review of the extensive notes made at the meeting reflects no mention or recommendation for home-based services for the Student by Dr. Uherek. D15. Ms. Almlie does not recall Dr. Uherek making any such recommendations. Ms. Sampson is confident Dr. Uherek did not recommend home-based services at the meeting. Testimony of Almlie; Sampson.

38. After consideration of the Student's IEE, the IEP team agreed to create a writing goal for the Student's IEP. D15p7. Ms. Wickens and Ms. Hess agreed to meet with the Parent to work on creating the writing goal for the Student's IEP. Testimony of Wickens; Hess.

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39. With respect to the recommendation in the Student's IEE for occupational therapy services, none of the assessments conducted by Dr. Uherek would have assessed the Student's fine motor skills. Ms. Hess recommended continuing the Student's consultative OT services. Testimony of Hess. Ms. Wickens was also capable of implementing many of the IEE recommendations in her TLC classroom. Testimony of Wickens.

40. The Parent asserted in her testimony that no one asked questions at the meeting. Testimony of Parent. This assertion by the Parent is not supported by other evidence in the record. The extensive notes taken at the meeting document questions from the team members. Members of the team were asked at the meeting if they had any questions. Testimony of Holcombe. Dr. Uherek was asked questions by team members. Testimony of Mondragon. Ms. Sampson asked questions during the meeting. Testimony of Sampson. It is found as fact that the IEP team asked questions about the IEE during the meeting, and considered the IEE.

Un-enrollment of the Student From his Elementary School

41. The Student was enrolled to start third grade in the District for the 2017-2018 school year. The first day of school was September 6, 2017. D7p2. He was again assigned to a self-contained TLC classroom. His TLC special education teacher was Teresa Wickens. D3p6

42. Pursuant to the Student's then-current IEP, the District had arranged for the Student to be transported to and from his elementary school on a special education bus with a bus monitor. (D3p13-14). This arrangement was in place effective the first day of school. Testimony of Wickens; D7pp1-2.

43. The Student did not appear for the first day of school, and by September 11, 2017, had not appeared at all, despite his special education bus being sent to pick him up at the Parent's residence. Ms. Wickens spoke with the school principal, Christian Jordan, about discontinuing the Student's special transportation. Testimony of Wickens.

44. Principal Jordan attempted to contact both the Student's biological mother and the Parent regarding the Student's absence from school, but received no response. Testimony of Jordan; D9p1.

45. On September 11, 2017, Principal Jordan sent an email to another District employee, inquiring whether the District could stop sending the special education bus and bus monitor to the Parent's residence until the District heard from the family. D9p1.

46. It is standard policy or procedure for the District to stop providing transportation if a student is not using the transportation and not attending school. Testimony of Jordan.

47. The Student was un-enrolled or dis-enrolled from the District effective September 12, 2017, because he had not appeared for school since the start of the school year.[10] D18. It is the

[10] In fact, through February 28, 2018, the Student has not attended school in the District at all during the 2017-2018 school year because the Parent has not allowed the Student to attend; not because the Student's special transportation had been stopped by the District or because he was un-enrolled. The

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District's policy to un-enroll any student who does not appear or attend the first five school days in a school year. Testimony of Jordan.

48. On November 8, 2017, Mr. Mondragon sent a letter to the Parent. D13. The letter, in part, informed the Parent that state law requires that a student who is absent for more than 20 consecutive days cannot be counted as an enrolled student until attendance is resumed, citing Washington Administrative Code (WAC) 392-121-108. The letter went on to ask the Parent to please work with the attendance office at the Student's elementary school return the Student to an enrolled status.

49. If the Parent wished to re-enroll the Student, the Parent had to contact the school and submit new enrollment paperwork. Testimony of Jordan.

50. For reasons unknown, the Parent first became aware the Student had been un-enrolled at the first meeting to consider the results of the Student's IEE on November 29, 2017. Testimony of Parent; Jordan. The Parent re-enrolled the Student effective November 30, 2017. D18.

51. The Parent filed her request for a due process hearing on December 19, 2017, the day after the second meeting with Dr. Uherek to review the Student's IEE.

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

3. 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

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Parent believes the Student's school environment had become "toxic" and "poisonous," and the District had labeled the Student as a "sex offender." Testimony of Parent at T334-T335.

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requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

4. *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.

5. 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:

> 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.), *cert. denied*, ___ U.S. ___, 138 S. Ct. 556 (2017).

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. Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

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(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.

Failing to Implement Recommendations in Dr. Uherek's IEE, Beginning April 1, 2017, Including Providing for Home-Based Educational Services

9. In her closing argument, the Parent asserts that Dr. Uherek recommended the District provide home-based educational services for the Student. Parent's Closing Argument, p.1. This is the only specific item or service which the Parent argues the District failed to implement from Dr. Uherek's IEE. Accordingly, that is the only item or service that will be considered. Absent the Parent specifically identifying some other recommendation in the IEE, the undersigned ALJ will not speculate what other recommendations the Parent may believe should have been implemented by the District.

10. As determined in Finding of Fact 32, above, the testimony of Mr. Mondragon was found more credible than the Parent's testimony, and as a result it was found as fact that Dr. Uherek did not make any recommendation for home-based educational services for the Student at the first meeting on November 29, 2017. This finding is bolstered by the fact that nowhere in Dr. Uherek's IEE report does she mention or recommend home-based services. Similarly, the extensive notes from the second meeting to consider Dr. Uherek's IEE reflect no mention of home-based services, and no witness testified Dr. Uherek made any such recommendation at the second meeting. Home-based educational services is a highly restrictive educational placement. It is extraordinarily unlikely that a professional such as Dr. Uherek would make such a recommendation without including it in her IEE report, or making a very express recommendation at a meeting. Having found as fact that Dr. Uherek never made any recommendation for home-based educational services, it is concluded the Parent has failed to establish any violation on the part of the District in failing to implement home-based educational services for the Student.

Failing to Provide Services to the Student Between the Time the Parent Requested an IEE and Completion of Dr. Uherek's independent educational evaluation (IEE)

11. The Parent first requested an IEE on April 25, 2017. The exact date that Dr. Uherek completed the IEE is unknown, but the District first received a copy of the IEE report on September 15, 2017. Therefore, the period of time at issue is April 25, 2017, through September 15, 2017.

12. It is clear from the Parent's own testimony that she made a unilateral decision to hold the Student out of school beginning September 6, 2017, the first day of the new school year. It is therefore concluded that the party responsible for any failure to provide the Student with the services called for in his IEP beginning September 6, 2017 is the Parent, not the District.

13. With respect to the remaining time period at issue, April 25, 2017 through the end of the 2016-2017 school year, the Parent's Closing Argument identifies four ways in which she asserts

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the District failed to provide the Student with the services in his IEP. Each will be considered in turn.

14. The Parent first asserts that the District failed to provide the bus monitor required in the Student's IEP. Beginning April 1, 2017, the Parent identified 10 specific school days when the bus sent to her residence pick up the Student did not have a bus monitor on board. However, the period at issue with respect to this alleged implementation failure begins April 25, the date the Parent requested an IEE, not April 1, 2017. None of the 10 school days identified by the Parent fall on or after April 25, 2017. It must therefore be concluded that the Parent has not proven any failure of the District to provide a bus monitor beginning April 25, 2017.

15. The Parent next asserts that the Student was made to eat breakfast and lunch in his TLC classroom rather than the cafeteria with general education students. For the same reasons identified above, the period of time regarding these alleged failures to provide services is limited to April 25, 2017, when the Parent requested the IEE, and the end of the 2016-2017 school year.

16. First, it must be noted that the Student's IEP provided that his participation in non-academic and extracurricular activities, like lunch and breakfast, would be determined on a case-by-case basis. Ms. Green credibly testified, and it was found as fact, that the only times she required the Student to eat breakfast or lunch in her TLC classroom was when the Student was exhibiting overly aggressive behaviors. This is a competent judgment made by an experienced TLC teacher, and is consistent with the requirements of the Student's IEP. There is no compelling evidence to dispute the legitimacy or appropriateness of Ms. Green decisions on a case-by-case basis. It is concluded that the Parent has not proven any failure to provide services with respect to the Student eating breakfast and/or lunch in Ms. Green's TLC classroom instead of the cafeteria.

17. Finally, the Parent makes essentially the same argument she made regarding eating breakfast and/or lunch in his TLC classroom with respect to the Student attending recess on the small playground, or being required to stay in his TLC classroom during recess. The evidence establishes that on two occasions the Student *requested* he be allowed to play with another student in the smaller playground, and that suitable adult supervision was provided. Any remaining occasions when the Student was not allowed to go out to recess and stay in his TLC classroom where due to his inappropriately aggressive behaviors at school. Again, there is no evidence to conclude any decision by Ms. Green to keep the Student in her TLC classroom during recess due to his aggressive behaviors was not the correct and appropriate decision regarding non-academic activities for the Student, or was inconsistent with his IEP.

Dis-enrolling the Student From the District Without any Prior Notice to the Parent

18. As a preliminary matter, it is important to recognize that the Student was dis- or un-enrolled from the District effective September 12, 2017 due to the fact that the Parent made a *unilateral* decision to hold the Student out of school at the start of the 2017-2018 school year. There is absolutely no evidence of record to find the District was responsible for the Student's absence from school regardless of any un-enrollment. It is also important to recognize that the Student's un-enrollment under the facts in this case is likely not an issue that can be heard and decided under the IDEA. But assuming for the sake of argument this is an issue that can be heard and decided under the IDEA, the undersigned concludes the District did not violate any provision of the IDEA.

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19. There is no compelling legal argument to be made that by un-enrolling the Student the District somehow changed his educational placement without first conducting a reevaluation or including the Parent in the decision-making process. Rather, it is clear from the evidence that the Student could have returned to his placement and program at the District within a day or two at most of the Parent re-enrolling the Student. It is clear the re-enrollment process was not overly lengthy or burdensome, or would be the cause of undue delay in returning the Student to his educational placement in a TLC classroom. Once the Parent decided to re-enroll the Student, it was accomplished apparently within one day. And the Parent has identified no applicable law or regulation, and the undersigned ALJ is aware of none, that would require prior notification of un-enrollment to the Parent under the facts in this case. It is concluded the Parent has not established any violation of the IDEA.

Failing to Implement the Student's February 2017 Individualized Education Program (IEP)

20. The period at issue for determination of this issue begins April 1, 2017, and terminates with the end of the 2016-2017 school years for reasons already discussed above.

21. In her Closing Argument, the Parent for the first time identifies seven different ways in which she believes the District failed to implement the Student's IEP. Parent's Closing Argument, p. 2. Each will be considered in turn.

22. The Parent argues the Student's IEP did not list a baseline or grade level for the Student's sight words. The IEP does identify a baseline (27 sight words) and a goal (150 sight words), but does not expressly identify a grade level. However, this is not an *implementation* failure. An implementation failure occurs when a school district does not carry out or implement what is in an IEP. That is not the case here; there is no evidence the District did not provide the services necessary to implement the reading goal. Rather, the Parent appears to argue that the reading goal is *substantively* inappropriate or wrong because it does not specify a grade level for the sight words. This would be an allegation of a substantive defect in the Student's IEP, not an implementation failure. It is concluded the Parent has not proved any failure to implement the Student's IEP with respect to the reading goal.

23. The Parent argues the Student's IEP was "already deemed inappropriate and had missing information that would allow the Student to receive FAPE. This was also supported by Dr. Uherek." Parent's Closing Argument, p. 2. Without further clarification from the Parent, this argument does not appear to make sense or is supported by the evidence. There is nothing in the record upon which to conclude the Student's IEP was somehow already deemed inappropriate. Nor does Dr. Uherek's IEE conclude the Student's February 2017 IEP was inappropriate. While Dr. Uherek made recommendations for the Student future education, there is nothing in the IEE report to conclude she found his then-current IEP to be inappropriate. The purpose of the IEE was to determine the Student's then-current cognitive functioning and make recommendations for his school placement and programming. The Parent has not proven any violation of the IDEA.

24. The Parent argues there were no math goals and or support for reading story math problems in the Student's IEP. Parent's Closing Argument, p. 2. As already discussed above, this is not an allegation of an implementation failure, but rather an argument that the IEP was substantively inappropriate. The Parent has not proven any implementation failure because there were no math goals or reading story math problems goals in the IEP to implement.

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25. The Parent argues the IEP isolated the Student away from his disabled and non-disabled peers which was determined by staff and administrators. Parent's Closing Argument, p. 2. While this assertion is somewhat unclear, to the extent it refers to Ms. Green's decisions regarding where the Student would eat his breakfast and/or lunch and whether he would go out for recess or stay in her TLC classroom, those decisions have already been considered and determined not to constitute any violation of the Student's IEP or the IDEA.

26. The Parent argues the Student's IEP team determined, without the Parent, that the Student was a safety hazard and not allowed to be around other students. Parent's Closing Argument, p. 2. Again, this argument is somewhat unclear. To the extent it concerns the Student's breakfast and/or lunch or recess, those issues have already been considered

27. The Parent next makes assertions regarding the incident on the bus with a female peer, and the alleged labeling of the Student as a "sex offender". Parent's Closing Argument, p. 2. It has already been concluded that the District did not "label" the Student. Nor is it in any manner clear how the Parent's argument or assertion would fall under the category of a failure to implement an IEP. The Parent has proven no violation of the IDEA.

28. Finally, the Parent argues that the District did not provide a bus monitor on the bus for the Student. This is argument has already been considered for the period of April 25, 2017 through the end of the school year. However, the period at issue for this alleged implementation failure begins on April 1st, not April 25th. The Parent has identified 10 school days starting April 1, 2017, when there was no bus monitor on the Student's morning bus.

29. Only material failures to implement an IEP will result in a violation of the IDEA. Minor failures to implement an IEP do not violate the IDEA. *Van Duyn v. Baker SD*, 502 F.3d 811, 107 LRP 51958 (9th Cir. 2007). Therefore, the question is whether failure to provide a bus monitor was a material failure on the part of the District. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled student and those required by the disabled student's IEP. The court in *Van Duyn* held that a disabled student need not suffer demonstrable harm from a material failure to implement an IEP in order to prevail. However, it held that a disabled student's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.

30. After consideration of all the evidence of record, it is concluded that the District's failure to ensure there was a bus monitor on the Student bus for 10 school days does not rise to the level of a material failure to implement the Student's IEP. First, there is no evidence that on those 10 days the lack of a bus monitor was the cause or reason for the Student not attending school. Second, the record reflects that by the end of the school year the Student met or was approaching end-of-year standards in all academic subjects apart from reading, and he was making sufficient progress towards *all* of his IEP goals, including reading, to meet those goals by the end of the IEP. In light of the Student's progress over the school year, it is concluded the District's failure to implement the Student's IEP and provide a bus monitor was not a material failure to implement his IEP, and therefore there was no violation of the IDEA.

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Isolating the Student From his General Education Peers During Recess, Lunch, and on the School Bus

31. This argument has already been addressed above. The was no violation of the IDEA on the part of the District.

Allowing the Student's Placement for the 2016-2017 School Year to Become "Toxic" and "Harmful" by Labeling the Student as a "Sex Offender"

32. It is abundantly clear that the Parent is a loving and support grandparent, who is very concerned with the education and well-being of the Student. The Parent was a strong and vocal advocate for the Student throughout the due process hearing. But it is equally clear that the evidence does not support the Parent's contention that District staff labeled the Student a sex offender, nor allowed the Student's educational placement to become toxic, harmful, or poisonous during the 2016-2017 school year. Rather, the evidence supports a conclusion that the Student was making significant academic progress, and to perhaps a lesser extent progress towards learning to more appropriately focus this behavior and gain control over his emotions. While the undersigned acknowledges the fundamental differences in perception and opinion between the Parent and the District staff who worked with the Student every day at school, the findings of fact and conclusions of law herein must be based solely on the evidence the parties have presented at the due process hearing. And that evidence does not support concluding the District committed any violation of the IDEA with respect to somehow allowing the Student's environment at school to so deteriorate that it became harmful or toxic for the Student during the 2016-2017 school year. The Student has missed the majority of the current school year because the Parent has not allowed him to attend school in the District. The undersigned strongly encourages the Parent to return the Student to school, either in the District or some other school district, as soon as possible. The Student would be in third grade this school year. These are absolutely critical years for the Student's education, and will be very hard to replicate later on.

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

ORDER

The Tacoma School District has not violated the Individuals with Disabilities Education Act or denied the Student a free appropriate education. The Parent's requested remedies are therefore denied.

Signed at Seattle, Washington on May 2, 2018.

Matthew D. Wacker
Administrative Law Judge
Office of Administrative Hearings

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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 this 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. MDW

Grandparent
[redacted]

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