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SEATTLE-OAH

January 16, 2019

Parents



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In re: Mercer Island School District
Cause No. 2018-SE-0023
Docket No. 02-2018-OSPI-00481

Dear Parties:

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

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

Sincerely,

A handwritten signature in blue ink that reads "Matthew D. Wacker".

MATTHEW D. WACKER
Administrative Law Judge

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

STATE OF WASHINGTON
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FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

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IN THE MATTER OF:

OSPI CAUSE NO. 2018-SE-0023

MERCER ISLAND SCHOOL DISTRICT

OAH DOCKET NO. 02-2018-OSPI-00481

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Mercer Island, Washington, over seven days on June 11, 12, 13, 14, 15, 18, and July 17, 2018. The Parents of the Student whose education is at issue¹ appeared and were represented by Jeannette Cohen, attorney at law. The Mercer Island School District ("the District") was represented by Carlos Chavez, attorney at law. Also appearing for the District were Lindsay Myatich, director of special education, and Erin Battersby, senior director of compliance, legal affairs, and human resources. A certified court reporter was also present at the due process hearing.

STATEMENT OF THE CASE

Procedural History

The Parents filed a Due Process Hearing Request ("the Complaint") on February 27, 2018. On March 1, 2018, a Scheduling Notice was entered, setting a prehearing conference for April 2, 2018 and a due process hearing for April 16, 2018. On March 9, 2018, the District filed its Response to Hearing Request. On March 12, 2018, the parties agreed to waive a resolution meeting. On March 15, 2018, an Order Adjusting Decision Due Date and Resetting Prehearing Conference was entered. The Order struck the prehearing conference set for April 2, 2018, and set a new prehearing conference for March 23, 2018.

The prehearing conference was held as scheduled on March 23, 2018. On March 30, 2018, the First Prehearing Order was entered. The First Prehearing Order set another prehearing conference for April 16, 2018, struck the due process hearing set for April 16, 2018, set a new due process hearing for June 11-15, and 18, 2018, and granted the District's motion to extend the due date for a written decision. Pursuant to the agreement of the parties, on April 10, 2018, the Parents filed a clarification of the issues raised in the Complaint. On May 17, 2018, the Second Prehearing Order was entered. The Second Prehearing Order set out the issues for the due process hearing. On May 25, 2018, the Parents filed an objection regarding the statement of the issues in the Second Prehearing Order. On May 31, 2018, the Third Prehearing Order was entered, granting the Parents' objection.

¹ In the interest of preserving the family's privacy, this decision does not use the actual names of the parents or the student. Instead, they are identified as the "Mother," "Father," or "Parents," and the "Student."

At the conclusion of the parties' cases in chief on June 18, 2018, the Parents moved to take rebuttal testimony from one witness. Counsel for the District initially objected, and the parties were ordered to brief the issue of whether the Parents should be permitted the rebuttal witness. On June 22, 2018, the Parents filed their Motion for Rebuttal Testimony. Later the same day, counsel for the District informed the Parents and the undersigned ALJ that it would not file a response to the Parents' motion. On June 25, 2018, an Order on Parents' Motion for Rebuttal Testimony was entered, granting the motion to take rebuttal testimony. The same Order set July 17, 2018 to take the rebuttal testimony.

Due Date for Written Decision

The due date for a written decision in the above matter is the close of record plus thirty (30) calendar days. See March 30, 2018 First Prehearing Order. The record of the hearing closed with the filing of post-hearing briefs on July 30, 2018. Thirty calendar days from July 30, 2018, is August 29, 2018. Therefore, the due date for a written decision in the above matter is **August 29, 2018**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J1 - J32;

Parents Exhibits: P1 – P38, P40 – P61, P63 – P68;

District Exhibits: D1 – D34.

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

The Mother of the Student;
Brien Vlcek, M.D.;
Rachael Kakach, M.Ed., Board Certified Behavior Analyst (BCBA);
Danielle Funk, M.A., BCBA;
Dana Mott, Principal, Dolan Learning Center;
Anne Uherek, Psy.D.;
Adrienne Litman;
Julianne Riccio, District Special Education Teacher, BCBA;
Noreen Bucknum, District Speech Language Pathologist;
Kristina Olafsson, District Special Education Teacher;
Kassi Picci;
David Breiger, Ph.D., by telephone;
Bonnie Barthelme, District Registered Nurse;
Kathleen Prosch-Jensen, Ph.D., BCBA-D, L.M.H.C.;
Christine Kanyon, District Special Education Teacher;
Lindsay Myatich, Ph.D., District Director of Special Education;
Janet Dolan, M.Ed., Director and Teacher, Dolan Learning Center & Learning Center.

ISSUES AND REMEDIES

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

a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) from February 27, 2016 through February 27, 2018, by:

i. Amending an individualized education program (IEP) in May 2016 that:

- a. Did not accurately determine the Student's present levels of performance (PLOPs) based upon "data" (goal-progress reports) the Parents were given in the summer of 2017;
- b. Did not include appropriate goals based on the Student's academic needs and accurate PLOPs;
- c. Decreased the Student's time in general education classes, thereby denying the Student meaningful inclusion;

ii. Creating an IEP in November 2016 that:

- a. Did not accurately determine the Student's PLOPs based on an October 2016 reevaluation of the Student;
- b. Did not include appropriate goals based on the Student's academic needs and accurate PLOPs;
- c. Did not include an appropriate educational placement for the Student;

iii. Creating an IEP in December 2017 that:

- a. Did not accurately determine the Student's PLOPs based on an October 2017 reevaluation of the Student;
- b. Did not include appropriate goals based on the Student's academic needs and accurate PLOPs;
- c. Did not correctly allocate time for specially designed instruction (SDI) and related services in the Service Matrix;
- d. Did not include an appropriate educational placement for the Student;

iv. Denying the Parents meaningful participation in the District's reevaluation of the Student in October 2017 by:

- a. Failing to timely complete the District's reevaluation of the Student in October 2017;
- b. Failing to consider the results of the Parents' April 2017 independent educational evaluation (IEE) of the Student by Dr. Uherek;
- c. Failing to consider the recommendations in Dr. Uherek's IEE, from the Student's teachers at the Dolan Learning Center and Yellow Wood School, and from providers with SBCT;
- d. Denying the Parents meaningful participation in the development and/or amendment of the Student's IEPs by not providing the Parents

with goal-progress reports for the May 2016 IEP Amendment or the November 2016 IEP until the summer of 2017;

- v. Denying the Parents meaningful participation in the development and/or amendment of the Student's IEPs by not providing them with "data" (goal-progress reports) for the May 2016 IEP Amendment or the November 2016 IEP until the summer of 2017;
 - vi. Drafting a Health/Emergency Care Plan for the Student that was not consistent with the medical directives of the Student's treating physician;
- b. And, whether the Parents are entitled to their requested remedies:
- i. An order that the Student was denied FAPE under the IDEA beginning February 27, 2016;
 - ii. An order that the appropriate educational placement for the Student for the 2017-18 and 2018-19 school years is at the Dolan Learning Center with appropriate special education and related services and a transition plan;
 - iii. An order that the District provide the Student with appropriate speech and language services individually and/or as consultative services;
 - iv. Reimbursement to the Parents for the educational expenses to place the Student at Yellow Wood School and Dolan Learning Center, including transportation, from February 27, 2016 to the present;
 - v. Reimbursement to the Parents for co-payments and deductible payments to SBCT for appropriate behavioral services since February 27, 2016;
 - vi. Compensatory education for the Student during the 2019-20 school year due to her loss of educational opportunity from August 2016 to the present;
 - vii. Or other equitable remedies, as appropriate;

See May 17, 2018 Second Prehearing Order, and;

Whether the District's October 2017 Reevaluation violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) for the reasons identified in the Parents' Dissenting Opinion.²

See May 31, 2018 Third Prehearing Order.

² The Parents' Dissenting Opinion appears in the record as J19pp45-72.

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.

General Background

1. The Student has been eligible to receive special education and related services under the Individuals with Disabilities Education Act ("IDEA") and has had an individualized education program ("IEP") since entering elementary school in the District. J1p1.³

2. The Student qualifies for special education and related services under the Multiple Disabilities eligibility category. J1p2, J19p2. The Student has diagnoses including encephalopathy and Autism Spectrum Disorder. The Student's encephalopathy is manifested by intractable epilepsy, dysphasia, verbal dyspraxia, more generalized dyspraxia, and mild to moderate intellectual disability. J1p6, J19p6. The Student's last seizure occurred in September 2017. D23p2.

2013-2014 School Year

3. The Student began attending the District's Islander Middle School ("IMS") for sixth grade during the 2013-2014 school year. Her special education teacher and case manager was Julianne Riccio. Ms. Riccio's special education classroom was one of the District's Personalized Learning Program ("PLP") classrooms. Riccio, T741-T742.⁴ Ms. Riccio is a certificated special education teacher and a Board Certified Behavior Analyst ("BCBA"). *Id.* at T740-T741.

2014-2015 School Year

4. The Student remained in Ms. Riccio's PLP classroom for seventh grade at IMS.

5. On December 12, 2014, the Student had a behavioral incident at the end of the school day, which required Ms. Riccio to implement a "reverse isolation" strategy with the Student. Ms. Riccio stayed by herself in the "student office" with the Student until the Student calmed down

³ Citation to the exhibits of record are by party (Joint, Parents, Districts) and by page number. For example, citation to J1p1 is a citation to Joint Exhibit 1 at page 1).

⁴ Citation to the testimony of a witness is by last name and page number of the Transcript. For example, citation to Riccio, T741-T742 is a citation to the testimony of Julianne Riccio at pages 741 to 742 of the transcript.

enough that the Student could be driven home. Ms. Riccio accompanied the Student home in the car.⁵ *Id.* at T747-T751.

6. On January 5, 2015 and again on January 12, 2015, the Parents completed Request for Part-Time Attendance or Ancillary Services from Private School Student or Student Receiving Home-Based Instruction forms. This notified the District that the Student would attend school on a part-time basis because the Parents would be providing the Student with an in-home Applied Behavioral Analysis ("ABA") program four days a week. P2pp1-4.

7. The Parents provided the Student with an in-home ABA program through Seattle Behavior Consulting and Therapy ("SBCT"), a private, contract provider. Registered Behavior Therapists ("RBTs") employed by SBCT provided direct ABA therapy services to the Student in the family home. The RBT service providers were supervised by BCBA's. By March 25, 2015, the Student was reported to be receiving 20 hours of in-home ABA services each week. D1p2, P31p2.

2015-2016 School Year

8. The Student remained enrolled part-time at IMS for eighth grade during the 2015-2016 school year, and continued to receive her in-home ABA therapy services through SBCT. D2. The Student remained in a PLP classroom, and her special education teacher was Kristina Olafsson. The Student had a 1:1 paraeducator assigned to her. Ms. Olafsson mailed the Student's IEP progress reports to the Parents during eighth grade. P24p9; Olafsson, T802.

9. In October 2015, the District conducted a reevaluation of the Student, and the reevaluation team met to consider the results of the reevaluation. J1.

10. In November 2015, the Student's IEP team developed a new IEP for the Student. The Mother was present as one of the IEP team members. J2p3.

April 2016 IEP Amendment⁶

11. By April 2016, the Student had met or mastered the self-management goal in her November 2015 IEP. J2p16 (Annual Goal: 3. Self-Management Checklists); J3p3 (Annual Goal: 3. Self-Management Checklists, Progress of Goals: 04/26/16 "M" or mastered); J4p11 ("[The Student] met her self-management goal during the IEP period."); J4p31 (5/7/16 Prior Written Notice: Goals – Mastered Adaptive Goal #3).

12. On April 26, 2016, an IEP team meeting was held to consider amending the Student's November 2015 IEP. J4p3. The Parents attended as members of the IEP team. *Id.*

⁵ The Mother would later testify at the due process hearing that Ms. Riccio's use of reverse isolation was one of the reasons why the Parents requested in August 2016 that the District fund a private placement for the Student. See P5pp1-2.

⁶ The Statement of the Issues and the Parents' Closing Brief identify this Amended IEP as the May 2016 IEP. In fact, the IEP meeting where the IEP amendment was developed was held on April 26, 2016. Therefore, the amended IEP will be identified herein as the April 2016 IEP Amendment.

13. The Student's IEP was amended by adding new adaptive goals. Changes were also made to the services and least restrictive environment ("LRE") sections of the IEP because the Student would be moving to Mercer Island High School ("MIHS") during the duration of the amended IEP, and to provide the Student with modified grading. J4p31.

14. The Mother believes this meeting was held to transition the Student to MIHS. Mother, T36, T1173. Kristina Olafsson, the Student's special education teacher, convened the IEP meeting because the Student had already mastered one goal in her November 2015 IEP, and an amendment was required in order to create or add a new goal to the Student's existing IEP. Olafsson, T807.

15. The Mother's belief and Ms. Olafsson's stated purpose regarding the reason or reasons why the IEP meeting was held can be reconciled. The evidence supports a finding that the IEP meeting was held to both add new goals and to address the Student's anticipated transition from eighth grade at IMS to ninth grade at MIHS in September 2016.

16. The Parents believe the April 2016 IEP Amendment did not accurately determine the Student's then-current present levels of educational performance ("PLOPs"). See Statement of Issues and Requested Remedies. The Parents base their belief on "data" and IEP goal-progress reports they would not receive until mid-October 2017.⁷ P24pp1-138. However, other than identifying P24 as the Student's progress data they received in mid-October 2017, there is simply no evidence of record to establish as fact that the data and goal-progress reports at P24 do not accurately determine the Student's PLOPs as of April 2016. There was no testimony from anyone qualified by education, training and experience to offer an opinion regarding how the data and goal-progress reports the Parents finally received in mid-October 2017 were inconsistent with PLOPs in the April 2016 IEP Amendment.

17. The full school-week schedule at IMS is 1,685 minutes spent in school. J2p24. The Student's November 2015 IEP at IMS placed the Student in a special education setting for 1,135 minutes per week, and in a general education setting for 550 minutes per week. *Id.* This is the equivalent of spending 67.35% of the school week in a special education setting, and 32.64% of the school week in a general education setting.

18. The April 2016 amendment to the Student's November 2015 IEP maintained the same percentages of time in special education and general education settings for the Student from May 10, 2016 through June 23, 2016, the end of the school year.

19. The full school-week schedule at MIHS is 1,875 minutes spent in school. J4p26. The April 2016 amendment to the Student's November 2015 IEP placed the Student in a special education setting for 1,247.5 minutes per week upon the Student's entry to MIHS for ninth grade. This represented an increase of 112.5 minutes per week spent in a special education setting over what the Student had spent in a special education setting at IMS.

⁷ Although the statement of issues and requested remedies identifies the Parents as receiving this data and progress reporting in the summer of 2017, the Mother confirmed during her testimony that the Parents received it in mid-October 2017. Mother T122.

20. However, due to the longer school week in high school, the Student would spend 627.5 minutes per week in a general education setting at MIHS, which is 77.5 minutes *more* per week in a general education setting than what the Student spent in general education at IMS. The April 2016 IEP amendment actually *increased* the percentage of the school week the Student would spend in a general education setting from 32.64% at IMS to 33.47% at MIHS. J4p26.

21. Rachel Kakach has been employed as a program supervisor with SBCT since February 2016. Among her duties, Ms. Kakach supervises RBTs who provide direct therapy services using ABA to private clients, conducts initial client intakes, writes and revises client treatment plans, and monitors client progress. Ms. Kakach earned her Master in Education (M.Ed) degree from the University of Washington, with a concentration in special education and ABA in 2013. She is also certified as a Licensed Behavior Analyst in Washington State. P66.

22. However, Ms. Kakach is not certificated in Washington State as a teacher, and affirmatively declared during her testimony that, "I am not a teacher." Kakach, T276, T271. Ms. Kakach has never taught in a public school. Kakach, T276. She has no reason to question the education, training or experience of the District teachers and staff who assessed the Student. Kakach, T260-T261. Ms. Kakach has never observed the Student in a District setting, or any school setting. Kakach, T282.

23. Ms. Kakach met the Student in February 2016. Kakach, T197. Ms. Kakach wrote and revised treatment plans for the Student, and supervised the RBTs who provided direct ABA services to the Student at the family home. At the due process hearing, Ms. Kakach gave testimony attempting to compare ABA goals developed by her for the Student and the Student's progress towards those goals, with the Student's IEP PLOPs at the time of the April 2016 IEP Amendment developed by the District. Ms. Kakach had no contact with the District and had no input into development of the goals in the Student's April 2016 IEP amendment.

24. While Ms. Kakach disagreed with some of the PLOPs associated with some of the Student's goals in the April 2016 IEP Amendment, based upon what she determined the Student's progress or present level of performance was on the ABA goals she developed for the Student (See, e.g., Kakach, T203, T222, T229, T247, T250), many of her attempted comparisons fall short. The majority of her attempts to compare the Student's performance between the SBCT ABA goals she developed and the IEP goals were qualified, conditional, or admittedly difficult. See, e.g., Kakach, T203 (Goals are "similar"); T217 (Goals are "somewhat similar"); T218 (Goals are "not exactly" the same); T222 (SBCT did not have same goal); T227 (Cannot offer opinion on Student's reading level); T227 (No SBCT goal that is equivalent); T279 ("It's hard to compare" SBCT goals with IEP goals); T208-T209 (SBCT goal is different than IEP goal); T203 (SBCT was not working with the Student in a social group – was working 1:1 with the Student in her home).

25. Many of the goals in the Student's April 2016 IEP Amendment and later November 2016 IEP did not have even similar goals in the SBCT treatment plans. See, e.g., Kakach, T222, T223, T227, T237, T238, T240, T243, T244, T245, T247-T248.

26. Ms. Kakach also expressed opinions regarding other aspects of the SBCT ABA program provided to the Student in her family home. When Ms. Kakach started working with the Student in her home ABA program, the focus and goals of the ABA therapy were dictated by the Parents, not by any evaluation of the Student's needs. It was communicated to Ms. Kakach that the Parents wanted a program that focused on academic skills, not functional academics or life-skills.

Kakach, T262-T263. Eventually, SBCT began to move towards providing ABA services focused on functional rather than academic reading. Kakach, T270. However, Ms. Kakach cannot determine if the Student had simply *memorized* stories and questions that had been presented to her over and over again, or if the Student had actually increased her reading *comprehension*. Kakach, T292-T294. Ms. Kakach could not determine whether the Student is able to generalize what she may have learned during her in-home ABA program to any school setting. Kakach, T282. Ms. Kakach would like to see more of a focus on developing job skills for the Student rather than a focus on academic skills. Kakach, T256. Moreover, Ms. Kakach did not coordinate the in-home ABA program with the services the Student was receiving at the Yellow Wood School, or later the Dolan Learning Center. Kakach, T262-T263, T266.

27. After careful review of the evidence of record, it is found as fact that, based upon the testimony of Ms. Kakach, the Parents have not proven by a preponderance of the evidence that the PLOPs in the Student's April 2016 IEP Amendment or the Student's November 2016 IEP are not accurate or do not support the appropriateness of the goals in either of those IEPs. The comparison of the PLOPs and goals in the IEPs to the levels of performance or progress in the Student's in-home ABA program through Ms. Kakach's opinion testimony is not convincing, and often provided no meaningful information. This attempted comparison is perhaps best characterized as an attempt to compare apples to oranges. See District's Post-Hearing Brief, p. 21, fn. 15.

28. Danielle Funk earned her BCBA in December 2017 and is a Licensed Behavior Analyst. Funk, T302, T338. She earned a Master of Arts degree in psychology with a specialization in ABA through Capella University in 2016. P67. She is presently employed with Maxim Behavioral Health Care as a BCBA. Funk, T303. Ms. Funk is not a certificated teacher. Funk, T340. She has never observed the Student in a school setting. Funk, T344. In her employment with Maxim Behavioral Health Care, Ms. Funk has "a case" with the Seattle School District, apparently referring to working with one student in the Seattle School District. Funk, T361.

29. In 2014, Ms. Funk was employed as an RBT with SBCT. She briefly provided direct, in-home ABA services to the Student during 2014, and later provided the same services to the Student from sometime in 2016 until April 2018. Funk, T303, T339. Ms. Funk supervised Ms. Kakach during at least some of the time she provided services to the Student. Funk, T303.

30. Based on her experience providing ABA services to the Student, Ms. Funk opined that it is difficult to know if the Student was actually learning the material Ms. Funk was presenting, or if the Student was simply repeating back what Ms. Funk was saying to her. Funk, T354. Ms. Funk was "not sure" if the Student could generalize the progress she made or the skills she acquired through the in-home ABA program to other environments, as she has never observed the Student out in the community or at school. Funk, T351.

31. As with Ms. Kakach, the Parents attempted to establish through the testimony of Ms. Funk that the PLOPs and/or goals in the Students April 2016 IEP Amendment, November 2016 IEP, and/or December 2017 IEP were not accurate or correct. However, Ms. Funk's testimony suffers from the same flaws as Ms. Kakach's testimony regarding those matters, if not to an even greater degree. These flaws include attempting to compare an IEP goal to a social-emotional "skill" Ms. Funk worked on with the Student (Funk, T311), attempting to determine the Student's level of reading comprehension based upon different instructional materials which Ms. Funk could not identify as being comparable (Funk, T315), and asserting the Student could write five full or

complete sentences about a picture (Funk, T316-T317) when the Parents' own independent educational evaluation ("IEE") assessed the Student's sentence writing fluency at a kindergarten level (J17p19; Sentence Writing Fluency <K.2). Moreover, to a greater degree than Ms. Kakach, the majority of Ms. Funk's opinions going to the Student's present levels of performance were not based on reference to SBCT data, but rather appeared to be off-the-cuff estimates in response to questions posed by the Parents' counsel. Funk, T312-313 (Student could understand "a lot" of stories); T315 (Estimates the Student got 50% of questions correct); T321 (Opines Student could identify math quantity concepts); T322 (Opines Student did "pretty well" using task lists); T332 (Opines the Student "knows her numbers"); T333 (Opines the Student's mean utterance length is 3 to 5 words).

32. After careful review of the evidence of record, it is found as fact that based upon the testimony of Ms. Funk, the Parents have not proven by a preponderance of the evidence that the PLOPs and/or goals in the Student's April 2016 IEP Amendment, November 2016 IEP, and/or December 2017 IEP are not accurate or do not support the appropriateness of the goals in those IEPs. The comparison of the PLOPs and goals in the IEPs to the levels of performance or progress in the Student's in-home ABA program through Ms. Funk's testimony is not convincing, and often provided no meaningful information.

33. On June 8, 2016, the Student began an overnight video electroencephalogram ("EEG"). P30pp17-19. The results of the EEG reflected "an increased risk for focal and generalized seizures." *Id.* p.18.

34. The Student's pediatric neurologist, Brien Vicek, M.D., conducted a comprehensive pediatric neurologic evaluation of the Student on June 9, 2016. In his evaluation, Dr. Vicek states:

She recently had overnight EEG study in sleep, continued to reveal fairly frequent epileptiform discharges. With that likelihood of nocturnal seizures off [C]lobazam, likelihood of further EEG deterioration in sleep that could result in greater difficulties cognitively and behaviorally, Dr. Sotero recommended continuation of her [C]lobazam and Stiripentol combination.

D6p1, P31p6.

35. Dr. Vicek's evaluation noted that the Student had progressed in her abilities to attend, concentrate, and focus, with a better ability to shift attention, and attributed this to the Student being on a better "mix" of seizure medications, as well as an improvement in her EEG with less epileptiform discharges during sleep. D6p2, P31p7.

36. Dr. Vicek noted in his evaluation that the Parents intended to enroll the Student at Yellow Wood School during the summer, and opined that the Yellow Wood School program would "fit" the Student well. *Id.* However, as best can be determined from the evidence of record, any information Dr. Vicek had about Yellow Wood School and its program for the Student would have come from the report(s) of the Parent(s).

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37. On August 3, 2016, the Parents requested that the District place the Student at Yellow Wood School and that the District fund an IEE at the District's expense.⁸ P5pp1-2.

38. The Parents requested that the District place the Student at Yellow Wood School because Ms. Riccio used reverse isolation with the Student in December 2014, because the Student had started her in-home ABA program with SBCT, which the Parents believed had improved her behavior, and because the Mother believed the Student was still too fragile and unstable to attend MIHS with a schedule like she had at IMS. Mother, T31, T33-T34, T1174-1175.

39. The District acknowledged the Parents' request for a placement at Yellow Wood School the same day in a letter to the Mother from Lindsay Myatich, Ph.D., the District's director of special education. In her letter to the Mother, Dr. Myatich also explained that the District would need to conduct a reevaluation of the Student to determine if a more restrictive private school placement was required. D7p1.

40. On August 4, 2016, the Parents signed a written consent for the District to conduct a reevaluation of the Student. J7p2.

41. The District informed the Parents that it was refusing to initiate an IEE at the District's expense in an August 24, 2016 Prior Written Notice ("PWN"). J8.

42. After receiving the PWN, the Mother informed the District that the Parents were initiating an IEE at their own expense with Anne Uherek, Psy.D.⁹ The IEE with Dr. Uherek began in September 2016. P6p1.

The 2016-2017 School Year

43. The Student entered ninth grade at MIHS for the 2016-2017 school year. The Student's special education teacher in the PLP classroom was Christine Kenyon. Ms. Kenyon was also the Student's case manager regarding her special education. Kenyon, T1284.

44. During September 2016, the Parents unilaterally placed the Student at Yellow Wood School for three hours per day in the afternoons, while the Student continued her in-home ABA program with SBCT during mornings. The Parents allowed the Student to attend MIHS for only three hours per week on Fridays from 9:00 a.m. to 12:00 p.m., so the District could conduct its reevaluation of the Student. Mother, T40; P9, D10.

45. Dr. Vlcek conducted another comprehensive pediatric neurologic evaluation of the Student on September 6, 2016. In his evaluation, Dr. Vlcek opined that the Student appeared to have made some very slow progress in some of her cognitive skills with the intensive therapies

⁸ Dr. Vlcek's reference to Yellow Wood Academy and the Parents' request for a placement at Yellow Wood School involve the same entity, which will be identified as Yellow Wood School. Yellow Wood School is a private day school. D7p1.

⁹ Dr. Uherek's curriculum vitae appears in the record as P26.

and interventions she was receiving. He also remarked that Parents and some of Student's therapists were "quite disappointed" with the Student's program at MIHS. D12p2, P31p10.

46. Dr. Vleck stated in his evaluation that in addition to the Student's attendance at Yellow Wood School, there "will be continuation of and clearly needed home ABA therapy 20 hours a week". *Id.*

47. As can best be determined from the evidence of record, as of September 2016, any information or knowledge that Dr. Vleck had about the Student's IEP at MIHS, and the opinions of any of her other therapists, would have come by and through the Parents' reports to him.

48. Dr. Vleck also noted there would be no school nurse on staff at the Yellow Wood School, and that in the past the Student needed a nurse present at school in order to administer Diastat, the Student's prescribed medication to treat any seizure the Student might have while attending school. However, as of September 2016, it was Dr. Vleck's opinion that it was no longer medically necessary to have a nurse on staff at Yellow Wood School, or at a public school. *Id.*

49. In a letter To Whom It May Concern dated September 8, 2016, Dr. Vleck set out his emergency medical plan in the event the Student had a seizure while at school. In part, the plan provided that if a nurse was available, the nurse could administer rectal diazepam.¹⁰ If no nurse were available, a medic responding to a 911-call could administer the medication. P31p17. The District received Dr. Vleck's emergency medical plan for the Student. D11.

50. In a September 20, 2016 PWN, the District confirmed that it had received notice from the Parents that they were revoking consent for the Student to receive special education services in the District. In response, the District acknowledged it would no longer provide those services for the Student. P11pp1-2.

The October 2016 Reevaluation

51. A meeting was held on October 18, 2016 to consider the results of the District's reevaluation of the Student. The Parents attended as part of the reevaluation team.

52. The Mother provided input for the reevaluation, including her summary of data and the Student's progress with her in-home ABA therapy through SBCT. Mother, T121; J10p9. However, while the reevaluation report references her input, the Mother does not believe her input was considered because it did not change the reevaluation report. Mother, T1188.

53. The reevaluation report also included information from five staff members at Yellow Wood School. J10pp10-12.

54. The Parents would ultimately reject the reevaluation report (see P13p1) because, although the Parents had been receiving IEP goal progress reports for the Student (J12), the Mother believed she did not have the underlying "backup data" from the District documenting any progress the Student may have made when the Student did attend school. Lacking such backup

¹⁰ Diastat is a form of diazepam.

data, the Mother believed she could not meaningfully participate in the reevaluation meeting. The Parents also cited their ongoing IEE with Dr. Uherek as a reason to reject the reevaluation report. P13.

55. After the reevaluation meeting, the report was revised.¹¹ The revisions were made through e-mail and telephone contacts between the Mother and Michael Neff, the District School Psychologist in charge of the Student's reevaluation. The revisions included the Mother's report of the Student's progress in her ABA program, additional medical information for the Student, updates to the adaptive and transition sections of the report, and a geography teacher's report from Yellow Wood School. J11.

56. Via email on November 10, 2016, the Parents informed the District that they disagreed with the District's reevaluation of the Student, and that they were requesting an IEE at the District's expense. P12.

The November 2016 IEP

57. An IEP team meeting was scheduled for November 15, 2016, to discuss transition services and annual goal progress; review the Student's current IEP, instructional needs and behavioral intervention plan; and determine the Student's placement. J13p1.

58. On November 7, 2016, the Mother had a pre-IEP meeting with Ms. Kenyon, the Student's special education teacher. P13p1, J13p33. Ms. Kenyon sent the Mother her draft of an IEP for the Student before the meeting. Kenyon, T1292.

59. Ms. Kenyon developed the goals in the draft IEP based in part upon information she was able to gather during the very limited, three hours per week each Friday when the Student attended her PLP class at MIHS. Kenyon, T1296-T1297. Ms. Kenyon also based the draft IEP goals on information provided by staff at Yellow Wood School. J13pp9-11.

60. Ms. Kenyon also prepared an agenda for the November 15, 2016 IEP meeting, as was her standard practice. *Id.* T1294.

61. The IEP meeting was held on November 15, 2016. The Parents were present as team members. At the Parents' request, Jed Miley, the dean of Yellow Wood School, was present. Mother, T1184. Ms. Kenyon, Noreen Bucknum, a District speech-language pathologist (SLP), and Dr. Myatich also attended the meeting. J13p5.

62. The Parents told the other team members that they disagreed with the PLOPs and goals in the draft IEP. The Mother provided her input during the meeting. Mother, T1179.

63. The team discussed Ms. Kenyon's agenda and the PLOPs and goals in the IEP. Myatich, T1325.

¹¹ It does not appear that the draft of the reevaluation report is present in the record. J10 appears to be the reevaluation report after the post-meeting revisions were made.

64. At the meeting, the Parents gave the District team members a written statement of their disagreement with the October 2016 reevaluation of the Student. P13.

65. The Parents' intent in bringing the Student to the District was to have her educated, which they consider to be provision of academic instruction, not to work on job skills. *Id.*

66. The District notified the Parents at the meeting that it was approving their request for an IEE at the District's expense. J14p1.

67. In a PWN dated November 16, 2016, the District informed the Parents that it was proposing to initiate the IEP, and that the District was rejecting the Parents' proposed placement of the Student at Yellow Wood School in part because it could provide an appropriate placement for the Student in a PLP classroom MIHS. J13p33.

68. In a second PWN dated November 16, 2016, the District informed the Parents that it was granting their November 10, 2016 request for an IEE at the District's expense.¹² J14.

69. In an email on November 17, 2016, the Mother informed Ms. Kenyon that the Parents did not agree with the goals in the IEP that were based on the District's reevaluation of the Student, which they also rejected. P14.

70. On December 8, 2016, counsel for the Parents sent a letter to the District. Parents' counsel informed the District that the Parents rejected the IEP, and that the Parents believed an individualized one-on-one program at Yellow Wood School would "more appropriately suit her needs." The letter went on to inform the District that until the Parents could reach an agreement with the District on the Student's IEP, the Student would no longer attend MIHS. D15.

71. The Student last attended school in the District on December 15, 2016. D27, D19p2.

72. Dr. Vicek conducted another comprehensive pediatric neurologic evaluation of the Student on January 3, 2017. Dr. Vicek stated in his evaluation that:

Parents feels (sic) that...she had made significant more progress [at Yellow Wood] than in what is able to be offered or done in public school in a special education...It would appear that the school district is not able to provide the program she needs in terms of ABA therapy and what is able to be provided at Yellow Wood School.

P31p23. As before, it appears that whatever information Dr. Vicek had regarding the District's proposed placement, the Student's in-home ABA therapy, and the Student's program at Yellow Wood School would all have come from the Parents' reports.¹³

¹² While the PWN identifies the Parents' IEE request as occurring on November 9, 2016, the email in which the Parents made the request was dated November 10, 2016. P12.

¹³ Dr. Vicek's evaluation also noted the Student attended MIHS for a half-day on Fridays. This cannot be true, given the Student last attended MIHS on December 15, 2016. This error continues in another comprehensive pediatric neurologic evaluation dated March 23, 2017. See D18p1, P31p29. The same

Dr. Uherek's IEE

73. On March 9, 2017, Dr. Uherek sent the Parents a draft of her IEE report for the Student. Dr. Uherek suggested the Parents meet with her to discuss the report. D16.

74. Dr. Vleck conducted another comprehensive pediatric neurologic evaluation of the Student on March 23, 2017. He noted that that EEGs obtained in June 2016 reflect the Student "clearly still having a significant ease or tendency to have seizures." D18p1, P31p29. Dr. Vleck noted that the Parents provided him with a copy of Dr. Uherek's IEE report for his review. Dr. Vleck opined that:

[F]rom a neurologic perspective and the health impaired status, I would concur and agree with all of the recommendations made by Dr. Uherek (sic)...[The Student] needs a relatively specialized program implementing all the recommendations from Dr. Uherek (sic)... I feel very unlikely that public school is going to be able to provide such a program for her.

D18p2, P31p30. Dr. Vleck noted in his evaluation that he believed if the Student was in a noisy environment that required a lot of change and transitions where there were many distractions, she could easily get overstimulated and overwhelmed and it would impact her executive functioning. The Student would also be at greater risk for having a seizure. *Id.*

75. On March 25, 2017, Dr. Uherek sent the Parents her "updated" IEE report. D17.

76. Dr. Uherek conducted her IEE of the Student beginning in October 2016. J17. The Student was almost 15½ years old. Dr. Uherek interviewed the Parents and conducted multiple standardized assessments and observations of the Student. Dr. Uherek ultimately diagnosed the Student with an Organic Mental Disorder, which was associated with her epilepsy, a mild-to-moderate intellectual disability, Autism Spectrum Disorder, an auditory processing disorder, a language-based learning disability, and a Developmental Coordination Disorder. *Id.* at pp. 10-12.

77. Dr. Uherek then made recommendations for the Student including: a highly individualized and self-paced instructional program; reteaching; a quiet environment for direct instruction; intensive behavior intervention using a data-driven ABA program; intensive speech and language services; visual supports in the classroom; avoiding timed tests; use of assistive technology to write/communicate; specific coaching in social skills with peers and adults; and a focus on functional reading and math. *Id.* at pp13-16. Dr. Uherek made no recommendation about limiting the number of transitions the Student would have during a school day.

78. The Parents asked Dr. Uherek to recommend placing the Student at either Yellow Wood School or the Dolan Learning Center, but Dr. Uherek declined to do so. Mother, T1192-T1193.

79. Although the exact date is not clear from the record, sometime between the April 2017 and August 2017, the Parents transitioned the Student from Yellow Wood School and enrolled

error appears in an SBCT Treatment Plan dated March 20, 2017. See P61p1 (The Student attends Mercer Island High School one morning a week and is educated in a self-contained classroom).

her at the Dolan Learning Center. See Mother, T142, T1198. The Dolan Learning Center is a state-approved Non-Public Agency ("NPA").

80. The Parents removed the Student from Yellow Wood School because it did not present the Parents with data to show the Student's progress, and it did not have staff trained to collect the data required for precision teaching.¹⁴ The Parents placed the Student at the Dolan Learning Center because it uses a hybrid of precision teaching and ABA, and because SBCT wanted to begin to focus more on adaptive and life-skills rather than continuing to focus on academics. Mother, T1198-T1199, T149.

81. The District first received a copy of Dr. Uherek's IEE report by email on April 17, 2017. Myatich, T1381.

82. In May 2017, the Mother had a meeting at the District with Dr. Myatich to review Dr. Uherek's IEE report. Dr. Uherek was also present at the meeting. Ultimately, Dr. Myatich proposed conducting further evaluations of the Student because some of Dr. Uherek's recommendations at the meeting were presented more strongly than they appeared in her report, including that the Student required a setting like the Dolan Learning Center with ABA and precision teaching. Myatich, T1330-T1332.

83. On or about May 16, 2017, the District sent a Reevaluation Notification/Consent document to the Parents. This informed the Parents that the District was seeking to conduct a reevaluation of the Student in the following areas: review of existing records, audiology, social/emotional, behavior, academic, fine motor, observation, medical-physical, adaptive, cognitive, communication, gross motor, vocational, and age appropriate transition assessment. J15p1.

84. One of the Parents signed the document on May 16, 2017. Although the box next to the statement, "I give consent for my child to be evaluated" was checked, the Parent(s) included the following restrictions on their consent to reevaluate the Student:

Permission given to exchange of reports and information. Observations with academy to be pre arranged (sic) with school and family. SLP/OT/PT evaluations are approved. Any other direct evaluations with [the Student] need additional approval.

J15p2.

85. The Parents' consent to reevaluate the Student is manifestly inconsistent with what the District was proposing. By their own language, the Parents were refusing consent to reevaluate the Student in multiple areas the District identified as part of the scope of its intended reevaluation.

86. In a PWN dated May 18, 2017, the District stated, "The parents provided the District with consent to reevaluate on 5/16/17 and requested an assessment plan prior to bringing [the Student] to the District for an evaluation by District staff." J16.¹⁵

¹⁴ Although identified as precision "teaching," precision teaching is not an educational methodology. It is a "measuring tool" to track progress on a given task. Dolan, T1419

¹⁵ In its Post-Hearing Brief, the District argued the Parents did not prove that they provided the District with their consent on the same day one of the Parents signed the Reevaluation Notification/Consent document.

87. There were 19 District school days between May 16, 2017, and the end of the 2016-2017 school year. D34p2.

88. The District first proposed to meet on August 29, 2017 and hold a reevaluation meeting, but Dr. Uherek, whom the Parents wanted to attend the meeting, was unavailable. Dr. Uherek's first availability was September 12th or 13th. D20. This was followed by further delays caused by Dr. Uherek. D21.

2017-2018 School Year

89. From the start of the 2017-2018 school year to October 11, 2017, there were 29 District school days. D34p3.

90. On September 30, 2017, the Student had a generalized tonic clonic seizure. The seizure was terminated with three doses of Diastat. D23p3. The Student had 12 more similar seizures over the next 24 hours. Prior to this, the Student's last cluster of seizures occurred in May 2014. D23p2.

Dr. Breiger's Neuropsychological Evaluation

91. As part of the further evaluation of the Student, the District contracted with David Breiger, Ph.D.¹⁶ Dr. Breiger relied, in part, upon some of the standardized assessments Dr. Uherek had administered to the Student as part of her IEE, as well as conducting additional assessments, clinical interviews, and a records review. The goal of the evaluation was to provide recommendations regarding the Student's academic planning and to help develop educational recommendations. J18p2.

92. With respect to her reading comprehension, Dr. Breiger determined the Student could not correctly identify answers with reading material that was at the Primer Level.¹⁷ Dr. Breiger concluded that the Student was not currently performing at the same level she did with repetitive practice of the same material. J18p5. He also concluded that it was "erroneous to believe that a particular approach to learning or teaching will increase performance if only applied with enough trials." *Id.* This means that simply repeating something enough times, similar to an ABA methodology, will not lead to the Student acquiring more complex or abstract concepts. Breiger, T905-906.

93. Dr. Breiger's recommendations noted that:

[The Student] will likely require a learning space that has reduced distractions and activity level when compared to same-age peers...Academic goals should be developed in order

See District's Post-Hearing Brief, p. 29. Given the PWN and its contents, which could only have come from the District, that argument is meritless.

¹⁶ Dr. Breiger's curriculum vitae appears in the record as D32.

¹⁷ The Primer Level is below a first-grade level. Breiger, T903. This result was consistent with Dr. Uherek's assessment of the Student's reading comprehension. *Id.* at p. 904.

to help [the Student] become more independent across several settings...Data should be kept on a frequent basis in order to track progress and in order to make adjustments... Technology should be explored...As Dr. Uherek and Dr. Vcek have both pointed out, intervention to help with the development of social, functional communication and adaptive behavior is important...Educational interventions of all kinds should incorporate the concept of generalization into the planning and implementation."

Id. at p6.

94. Dr. Breiger's recommendation for a learning space that has reduced distractions and activity level when compared to same-age peers does not mean that such an environment cannot be provided in a public-school setting. Breiger, T908. Such a learning space could be an office or a study carrel. *Id.* at T907. Dr. Breiger has observed the District's PLP program at MIHS. Myatich, T1332; Breiger, T916.

95. The District received Dr. Breiger's evaluation report on October 10, 2017. Myatich, T1338.

96. The severity of the Student's intellectual disabilities indicates she will have significant and likely profound difficulties in all aspects of functioning, including cognitive functioning, learning, memory, attention and the ability to solve novel problems. Breiger, T905. Focusing on academics or a particular academic level will not be as helpful to the Student as focusing on what she will need to do to function as independently as possible when she finishes school. *Id.* at T909.

97. Generalization refers to an individual taking what s/he has learned in one setting and being able to use it in a different setting. Generalization is one of the most difficult concepts for individuals on the autism spectrum and for individuals with intellectual disabilities to demonstrate. One criticism of ABA in the literature is that generalization does not occur easily across environments. This may account for the different reports of how well, for instance, the Student is able to comprehend what she reads in her in-home ABA program and the assessment of her reading comprehension by Dr. Uherek and Dr. Breiger. *Id.* at T911-T912.

Dr. Prosch-Jensen's Educational Recommendations

98. The District contracted with Dr. Kathleen Prosch-Jensen to provide recommendations for the Student's educational program as part of the District's reevaluation of the Student.¹⁸ Among her other professional credentials, Dr. Prosch-Jensen holds doctorate-level certification in ABA. D33. Dr. Prosch-Jensen provides instruction in Precision Teaching to her students as part of her graduate-level curriculum at the University of Washington. Prosch-Jensen, T1030, T1034. There is no substantial research to confirm that the use of Precision Teaching is effective for individuals on the autism spectrum. Precision Teaching was designed for adult literacy instruction, and then later modified for use with individuals with dyslexia, dysgraphia, dyscalculia and other types of academic problems. *Id.* at T1035-T1036, T1078.

99. Dr. Prosch-Jensen was familiar with the Student from meeting her when she was attending the District's Islander Elementary School and later IMS, and providing consultation and training for the Student's classroom staff. Prosch-Jensen, T996-T997; P20p1.

¹⁸ Dr. Prosch-Jensen's curriculum vitae appears in the record as D33.

100. As part of developing her recommendations for the Student's placement, Dr. Prosch-Jensen conducted observations beginning in late May and early June at Yellow Wood School, the Dolan Learning Center, and in the Student's home ABA therapy with SBCT. D22p2. Dr. Prosch-Jensen also conducted a records review and interviewed the Parents, Dr. Myatich, a teacher at the Dolan Learning Center, and Dr. Breiger. *Id.* at p1.

101. The Mother requested to meet with Dr. Prosch-Jensen to review the results of her observations, analysis of progress data, and educational recommendations for the Student. The meeting was held on October 3, 2017. P19pp1-2.

102. In preparation for the meeting, Dr. Prosch-Jensen compiled her analysis to date and provided it to the Mother. D22.

103. Dr. Prosch-Jensen's final analysis of her data and program recommendations for the Student was produced in a 21-page report dated November 9, 2017. J20. It included a review of Dr. Uherek's IEE report, Dr. Vleck's clinic notes, and multiple records from Yellow Wood School, SBCT, and the Dolan Learning Center. J20p1.

104. The report considered the Student's strengths and interests, needs and concerns, neurodevelopmental disorders, behavior, daily life, cognitive, academic and adaptive skills, language, and school program at MIHS. The report systematically examined all of the tasks and activities Dr. Prosch-Jensen observed across all the different environments and then provided an analysis of her observational and progress data. Based on her analysis of all that information, Dr. Prosch-Jensen finally made detailed program recommendations for the Student's program and personnel, daily schedule and activities, instructional strategies, accommodations, modifications and supports, and placement. J20.

105. Dr. Prosch-Jensen's report is comprehensive and thorough. Her analysis of all the data she compiled is logical and compelling. More than any of the many expert witnesses who gave testimony, Dr. Prosch-Jensen's explanation of her report and program recommendations at the hearing was particularly nuanced, and reflected a deep understanding of the impacts of the Student's disabilities on her education. Her education, training, and experience, particularly her doctorate-level certification in ABA, in combination with her long history of familiarity with the Student, provided Dr. Prosch-Jensen with the most applicable and compelling professional framework from which to make recommendations for the Student's educational program. Dr. Prosch-Jensen's opinions regarding program recommendations for the Student are given great weight.

The October 2017 Reevaluation

106. A reevaluation team meeting was held on October 11, 2017, to consider the results of the Student's reevaluation. J19. The Parents were sent a draft of the reevaluation report and draft IEP before the meeting. Myatich, T1337. Dr. Breiger appeared by telephone. Prosch-Jensen, T1001; Myatich, T1337. Dr. Uherek was present at the meeting, as were the Parents. Mother, T163-T164; Myatich, T1336. Dr. Prosch-Jensen "walked through" her draft report. Prosch-Jensen, T1001. Other members of the team reviewed highlights of their assessments, including Dr. Breiger. Myatich, T1339. Dr. Uherek agreed with the recommendations for the Student's education in Dr. Breiger's and Dr. Prosch-Jensen's reports. Uherek, T486-T491. The team

determined that the Student remained eligible for special education. The meeting lasted approximately 3 hours. Myatich, T1342.

107. On November 9, 2017, Dr. Prosch-Jensen produced her final analysis of her data and program recommendations for the Student. J20. Her final analysis and program recommendations included information the Mother provided both at and after the reevaluation meeting. Prosch-Jensen, T1001.

108. The Mother agrees with all of Dr. Prosch-Jensen's recommendations for the Student's education, except that the Mother believes those recommendations should be implemented in a smaller, less stressful environment with fewer transitions than MIHS, like the Dolan Learning Center. Mother, T1119-T1123.

The November 2017 IEP

109. An IEP team meeting was held November 15, 2017. D25p2, P22p1. The Parents attended along with their attorney, Jeannette Cohen. Mother, T1206.

110. In an email on November 21, 2017, the Parents informed the District that they disagreed with the District's reevaluation of the Student, and that Ms. Cohen would be filing the Parents' "dissenting notice."¹⁹ P22p1. In that same email, the Parents requested clarification and additional explanation regarding portions of Dr. Prosch-Jensen's Final Program Recommendations for the Student. *Id.* at pp1-5.

111. A second IEP team meeting was held on November 29, 2017. J22p1, p3. The Parents again attended with their attorney. Mother, T1206. Janet Dolan, founder of the Dolan Learning Academy, attended the meeting along with Dr. Myatich, Dr. Prosch-Jensen and others. J22p3.

112. The goals in the draft IEP were discussed at length. Prosch-Jensen, T1022. The PLOPs in the draft IEP were discussed and some were updated. *Id.* at T1023. There were no disagreements regarding the PLOPs or goals raised at the meeting. Myatich, T1346. The team proposed to implement the Student's IEP at MIHS, and the Parents agreed to an observation at MIHS to see if it would meet the Student's needs. *Id.* at T1025. The team also determined that a school nurse was the appropriate responsible adult to accompany the Student on her school bus. Myatich, T1347-T1348.

113. Via e-mail on November 21, 2017, the Parents informed the District of their multiple concerns regarding the Student's IEP. P22.

114. On November 30, 2017, Dr. Myatich provided the Parents with a copy of the final IEP via e-mail. D25.

¹⁹ The Parents' dissenting notice to the October 2017 reevaluation was finally received from Ms. Cohen by the District's counsel on April 9, 2018, nearly six months after the reevaluation meeting. See J19pp45-72; D31p1.

115. On December 1, 2017, the Parents informed the District via e-mail that they disagreed with the IEP, they would send their dissenting opinion the following week, and they planned to file for a due process hearing by the end of the year. D25pp1-2.

116. After the Parents expressed some concern at the IEP meetings about what the Student's daily schedule would look like were she to return to MIHS, Dr. Prosch-Jensen created a "Proposed Schedule with Activity Matrix." Myatich, T1350; Prosch-Jensen, T1025; J23. The schedule was intended to provide an example of the activities in which the Student could participate, and when her IEP goals would be addressed within that schedule. The schedule was not intended as a final schedule, but only as an example. Some of the activities could change based on parent input, or teacher, therapist and building schedules. The schedule included a description of activities for the Student, the IEP goals that would be addressed during and across those activities to promote generalization of learning, and the proportion of minutes of specially designed instruction. The schedule also noted that the Student would have access to quiet learning spaces at any time, for focused work or rest, depending on her needs. *Id.* at p.1.

117. As with Dr. Prosch-Jensen's earlier work, which produced her final Program Recommendations for the Student (J20), the proposed schedule at MIHS reflects a carefully considered and compelling explanation from a very well qualified and experienced professional who is knowledgeable about the impacts of the Student's disabilities on her education, and the District's programs and facility at MIHS. Dr. Prosch-Jensen's proposed schedule showing how the Student's IEP could be implemented at MIHS is given great weight.

118. On December 12, 2017, Dr. Prosch-Jensen responded to the Parents' request for clarification and additional explanation regarding portions of her Final Program Recommendations for the Student. P22pp1-5. Dr. Prosch-Jensen produced what she identified as her "Appendix A to Report 12-17-17." J21. In her appendix, Dr. Prosch-Jensen responded to each of the questions raised by the Parents.

119. In a PWN dated January 26, 2018, the District proposed to contact Dr. Kathleen Kinney to discuss Dr. Kinney's evaluation of the Student's vision, which was conducted on November 30, 2017, and provided to the District on January 21, 2018. J24, P27pp19-21; Myatich, T1340. Despite Dr. Myatich's attempts to contact Dr. Kinney, she never received any response. *Id.* at T1341.

120. On February 27, 2018, the Parents filed their Due Process Hearing Request.

The Student's Seizure Emergency Care Plans (ECPs)

121. For many years while the Student attended school in the District, she required the presence of one of the Parents or a school nurse on the bus to and from school in case she had a seizure on the bus.

122. For the 2016-2017 school year, Dr. Viocek cleared the Student to ride the school bus with a non-nurse paraeducator as a "second set of eyes" to alert the driver if the Student had a seizure on the bus. J27p1 (ECP dated and signed May 2016 and August 2016). The requirement for a second set of eyes on the bus was continued to a second ECP. J28p1 (ECP dated September 2016 but unsigned).

123. To date, it remains Dr. Vlcek's medical opinion that in addition to the bus driver, the Student requires only the presence of a responsible adult on the bus in order to alert the driver in the event the Student has a seizure on the bus. Vlcek, T70. If the Student has a seizure on the bus, the responsible adult would call 911, and upon arrival, a paramedic could administer the Student's Diastat. *Id.* at T70-T71.

124. Another ECP, also dated September 2016 but unsigned, had no language regarding any conditions about the Student riding the bus. J29.

125. In an ECP signed and dated by a District school nurse on December 12, 2017, and signed and dated by one of the Student's treating neurologists on January 2, 2018, there is no language at all regarding any conditions when the Student rides the school bus. *See* J30 (signed by nurse) and P34 (signed by neurologist).

126. In an unsigned ECP dated January 16, 2018, language reappears which requires a nurse or trained parent-designated adult (PDA) to be available at all times, including riding the bus to and from school and during off campus field trips. J31, P32. This ECP includes as part of the Seizure Plan that, in the event of a seizure, a nurse or PDA would "Administer Diastat or Nasal Midazolam per MD orders." *Id.* at pp.1. Dr. Vlcek has never approved the use of Nasal Midazolam with the Student. The Parents received this ECP during February 2018.

127. The Parents were concerned about the changes to the Student's ECPs and contacted Dr. Myatich. Dr. Myatich offered to schedule a conference call to address the Parents' concerns. D28. On March 8, 2018, the Mother participated in a telephone conference call with Dr. Vlcek, District Nurse Shelley Sage, and District SLP Noreen Bucknum. D30, P35, P36p1. The Mother believed her concerns regarding the Student's ECP were addressed during the call. Mother, T1219.

128. Although the District determined it would retain the requirement in the Student's ECP that a nurse be present on the bus with the Student, apart from that Dr. Vlcek agreed with the ECP developed after the conference call. Vlcek, T70; P36pp3-5, J32, J25pp3-4.

129. In a letter To Whom It May Concern dated March 15, 2018, Dr. Vlcek confirmed his opinion that the Student required a "responsible adult" on her school bus in order to alert the driver if the Student had a seizure. P31p39.

130. Finally, an unsigned ECP dated March 2018 requires a nurse to be present on the Student's bus. There is no mention of any PDA and no mention of using Nasal Midazolam. J32, J25pp3-4.

131. In a PWN dated April 16, 2018, the District informed the Parents, in part, that it disagreed with Dr. Vlcek, and assigned a nurse, not another responsible adult, to ride the Student's bus. D31.

132. Of note, Dr. Vlcek is concerned that the District included the requirement for a nurse to be present on the bus with the Student in order to create a reason why the Student could not be placed at a private school, specifically the Dolan Learning Center. Vlcek, T68. How Dr. Vlcek came to this opinion is not clear from the record, but it reflects poorly on Dr. Vlcek's credibility. Why Dr. Vlcek would have any belief or concern that the District was purposely trying to prevent

the Student from attending the Dolan Learning Center by fabricating unjustifiable medical restrictions would appear to be the product of some unknown animus for the District. Whatever the source of such animus, it greatly detracts from Dr. Vlcek's objectivity, and negatively affects his other testimony regarding his beliefs or opinions concerning the District and the District's provision of an education for the Student.

Examination of Expert Testimony

133. Dr. Prosch-Jensen is very familiar with MIHS and knows many of the staff very well based upon her 18 years of providing consultation and training for District staff. She had been in MIHS several times over the year leading up to the due process hearing. She is very familiar with Ms. Riccio, the BCBA at MIHS. Dr. Prosch-Jensen in fact supervised Ms. Riccio during her internship for her BCBA. *Id.* at T1073. It is Dr. Prosch-Jensen's opinion that her recommendations for the Student's educational program can be implemented at MIHS. *Id.* at T1072-T1076; *See also* J20, J23.

134. Dr. Breiger is a neuropsychologist. Medical doctors, including neurologists, are not trained to administer or interpret psychological or neuropsychological assessments. Educational recommendations for students fall within the professional expertise and the scope of practice of neuropsychologists. Breiger, T896-898. The District retained Dr. Breiger in part to assist the District in developing recommendations for the Student's educational program. Breiger, T899. Dr. Breiger does not believe the Student requires a non-public-school placement in order to have a learning space that has few distractions. *Id.* at T908.

135. Dr. Uherek agrees with the recommendations for the Student's education in Dr. Breiger's and Dr. Prosch-Jensen's reports (Uherek, T486-T491), even characterizing Dr. Prosch-Jensen's report as a "great job of recommending interventions" for the Student. *Id.* at T489. However, it is Dr. Uherek's opinion that a smaller environment with fewer transitions than MIHS, like the Dolan Learning Center, is her recommended placement for the Student. Dr. Uherek has never observed the District's proposed placement for the Student at MIHS, nor has she observed the Student at the Dolan Learning Center, although she is familiar with the physical layout of the Dolan Learning Center. *Id.* at T535-T536, T492.

136. Dr. Vlcek's records and testimony touch only tangentially upon the issue of the Student's educational program and placement. Aside from a copy of Dr. Uherek's IEE (see reference to Uherek's IEE at P31p30) and a copy of the MIHS schedule provided to him by the Parents, it appears that substantially all of Dr. Vlcek's information has come through the Parents. This includes any information regarding the services the Student has received and any progress she had made at home through SBCT, at Yellow Wood School, and at the Dolan Learning Academy, as well as any information about the District's proposed placement at MIHS. *See, e.g.*, P31p10 (apparently some of the Student's therapists and Parents are "quite disappointed" with her program in the public school and feel that it does not meet her needs effectively). This results in Dr. Vlcek basing his opinions upon essentially second-hand information. There is no evidence to conclude Dr. Vlcek has ever made observations at MIHS. Myatich, T1383.

137. Dr. Vlcek's testimony at hearing regarding his recommendations for the Student's education was quite summary. He recommended ABA therapy for the Student based upon his determination that the Student demonstrated more progress developmentally given her reduced seizures and more ABA therapy. Vlcek, T51. However, there is no evidence of record to find that

Dr. Vlcek is particularly familiar with the substance or practice of ABA therapy. Rather, Dr. Vlcek's testimony on this point appears much more general, more of simply a recommendation to continue providing what has apparently worked for the Student, rather than a careful analysis of why one particular methodology, like ABA, is substantively better or more appropriate than another methodology for the Student. See e.g. P31p10 (There will be continuation of and 'clearly needed' home ABA therapy 20 hours a week.). While Dr. Vlcek is clearly qualified to offer his expert *medical* opinion regarding how the symptoms of the Student's disabilities are expressed, there is nothing in the record to support Dr. Vlcek's qualifications to offer recommendations for the Student's *education*. For example, it is clearly within Dr. Vlcek's scope of medical expertise to offer his opinion that due to her disabilities the Student cannot be expected to focus on a given task for more than 15 minutes at a time. However, it is then up to other individuals qualified by their education, training, and experience as professional educators to take that limitation and design the special instruction necessary to allow the Student to still obtain an educational benefit by, for instance, specially designing the Student's educational program so that no one instructional task exceeds 15 minutes. After consideration of all the evidence of record, it is found that Dr. Vlcek's opinions regarding the Student's *education* in the District do not warrant substantial weight.

138. After careful review and consideration of the expert witnesses, their respective education, training, and experience, their source(s) of information and knowledge, as well as the persuasiveness and logical consistency of their testimony, the recommendations for the Student's educational program in Dr. Prosch-Jensen's final report (See J20) are adopted as findings of fact herein. It is also found as fact that the Student's IEP can be implemented at MIHS. See J23.

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 Parents. *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

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

Rowley, 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 . . .

Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ____, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Andrew F.* standard as follows:

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

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. ____, 138 S. Ct. 556 (2017).

5. 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).

The April 2016 IEP Amendment

6. The Parents first argue that the April 2016 IEP Amendment did not accurately determine the Student's PLOPs based upon data or goal-progress reports the Parents were finally given in October 2017. However, it is concluded that there was no meaningful examination of any evidence produced at hearing by the Parents to establish the PLOPs in the April 2016 amendment were not accurate *based upon* the data and goal progress reports they finally received in 2017. Rather, the Parents spent very considerable time at hearing taking the testimony of Ms. Kakach and Ms. Funk in an attempt to establish the PLOPs in the April 2016 amendment were not accurate based upon evidence *other than* the data and goal-progress reports the Parents received in October 2017. It is therefore concluded that the Parents have not proven by a preponderance of credible evidence that the PLOPs in the April 2016 IEP Amendment were any

way inaccurate based upon the data or goal-progress reports they finally received in October 2017.

7. The Parents next argue that the April 2016 IEP Amendment did not include appropriate goals based on the Student's academic needs and PLOPs. This is a legally distinct issue from the issue discussed above because it expands the possible use of evidence *beyond* just the data and goal progress reports the Parents received in October 2017. With respect to this issue, the Parents attempted to prove, principally through the testimony of Ms. Kakach and Ms. Funk, that the PLOPs and goals in the April 2016 amendment were not accurate or appropriate by a comparison of those PLOPs and goals to the PLOPs and goals they were working on with the Student through her in-home ABA program with SBCT. However, as determined in the Findings of Fact, this attempted comparison falls woefully short. The PLOPs and goals in the April 2016 IEP Amendment and in the SBCT program were not similar enough for meaningful comparison. Through no fault of their own, Ms. Kakach and Ms. Funk were confronted with an attempt to compare PLOPs and goals that, while at times may have shared some characteristics or qualities, were too dissimilar for compelling factual comparison. Much of the remainders of their testimony were off-the-cuff estimates based upon their recollections. This was particularly discomfoting given the Parents' oft-expressed desire for the "raw data" they asserted the District was required to produce to justify any of its decisions or actions. It is concluded that the Parents have not established by a preponderance of credible evidence that the PLOPs and goals in the April 2016 IEP Amendment were not appropriate for the Student.

8. Although not expressly identified as an issue, the Parents also argued in their closing brief that the PLPOs and goals were not appropriate because the IEP team did not seek or receive input from the Student's in-home ABA program through SBCT. Citing *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992) and *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003), the Parents argue that the District violated the IDEA and denied the Student FAPE because the IEP team did not ensure participation from individuals from the SBCT ABA program who were knowledgeable about the Student when it amended the Student's IEP. The undersigned respectfully disagrees with the Parents' reliance on these cases. Fundamentally, SBCT is not a *private school* in which the Student was *enrolled*. SBCT provided specific therapy services to the Student at her home. There were no peers, general education or special education, at the Student's home. There is no evidence to find SBCT could ever have awarded the Student a *diploma* or *graduated* the Student. The therapy providers were not certificated teachers. SBCT is much more accurately described as a service provider than a private school. Accepting the Parents' argument that the IEP team violated the IDEA by not inviting the SBCT provider(s) or supervisor to the IEP meeting would logically lead to the conclusion that every outside service provider of any student eligible for special education must be consulted or invited to an IEP meeting. The cases cited by the Parents do not establish such a duty for IEP teams.

9. The Parents next argue that the April 2016 IEP Amendment denied the Student FAPE because it reduced her time in general education classes, thereby denying the Student meaningful inclusion. This argument must also fail. The April 2016 amendment applied to periods of time at both IMS and MIHS.

10. With respect to the remainder of the 2015-2016 school year, the amendment did not change the amount of time the Student spent in general education. Before and after the amendment, the Student spent 550 minutes per week in general education. With respect to that

part of the following 2016-2107 school year covered by the amendment when the Student would move up to MIHS for ninth grade, the April 2016 IEP Amendment actually *increased* the Student's time in general education by 77.5 minutes per week, as well as increasing the percentage of time the Student would spend in general education from 32.64% at IMS to 33.47% at MIHS. It is concluded the Parents have not proven that the April 2016 IEP Amendment violated the IDEA or denied the Student FAPE.

The November 2016 IEP

11. The Parents first argue that the November 2016 IEP did not accurately determine the Student's PLOPs based on the Student's October 2016 reevaluation. It is very difficult to determine in what manner the Parents believe the October 2016 reevaluation is inappropriate or does not provide accurate information upon which to base the PLOPs in the November 2016 IEP. The Parents' Closing Brief cites to the 2016 reevaluation only once. Parents' Closing Brief, p. 21. Absent a more express argument or clearer explanation from the Parents, it would not be proper, and the undersigned will not *sua sponte* attempt to speculate, in what manner the Parents believe the 2016 reevaluation led to inaccurate PLOPs in the November 2016 IEP.

12. The Parents next argue that the goals in the November 2016 IEP are not appropriate based on the Student's academic needs and accurate PLOPs. This argument is more expansive than the Parents' first argument regarding the November 2016 IEP. To any extent the Parents rely upon the testimony of Ms. Kakach or Ms. Funk to prove the goals are not appropriate, that argument has already been considered and rejected. Ms. Kenyon developed the goals in part based upon her very limited opportunity to interact with, instruct, and observe the Student for only 3 hours per week on Fridays. However, any inaccuracy caused by Ms. Kenyon's limited contact with the Student is properly attributable to the Parents' unilateral decision to hold the Student out of school. Even if the Parents could establish a violation based upon Ms. Kenyon's goals, which they have not, no equitable remedy would be awarded for a violation caused overwhelmingly by their own actions. Ms. Kenyon also based her goals on input from staff at Yellow Wood School. No one from Yellow Wood School appeared as a witness at the due process hearing. Without testimony from someone with personal knowledge, the limited documentation from Yellow Wood School (P38) does not sufficiently "speak for itself" to make a finding of fact. The Parents also argue that Dr. Vlcek's opinion supports a finding that the Student's IEP should have included 20 hours per week of ABA services in order to provide the Student FAPE, referencing the September 6, 2016 statement in his notes that there will be continuation of clearly needed home ABA therapy 20 hours per week. Dr. Vlcek's opinion testimony has already been considered at length. His statement or opinion regarding the Student's need for and quantity of ABA services is not compelling. ABA is an educational methodology or instructional tool. While Dr. Vlcek is undoubtedly qualified to offer a medical opinion, there is nothing of record upon which to conclude he has any significant education, training or experience as a professional educator. There is an old adage in special education: physicians do not prescribe special education.

13. The Parents next argue that the November 2016 IEP did not offer the Student an appropriate educational placement. However, this argument is not clearly articulated in the Parents' Closing Brief. The Brief identifies what the Parents believe are procedural errors in the formation of the IEP, which have already been addressed as necessary above. After careful review of all the evidence regarding the November 2016 IEP, it is concluded that the Parents have not proven by a preponderance of credible evidence that the IEP denied the Student FAPE, and did not deny the Student an appropriate educational placement.

The October 2017 Reevaluation

14. The October 2017 reevaluation of the Student was perhaps the most highly litigated element of the due process hearing. The Parents finally articulated their disagreements with the reevaluation in a 28-page dissenting opinion authored by their counsel nearly six months after the reevaluation meeting. The common theme underlying most of the dissenting opinion is that the reevaluation must include *verbatim* entire evaluation reports, such as Dr. Uherek's IEE report, in order for the evaluation to be legally appropriate under the IDEA. See Parents' Closing Brief, p. 32, citing to J19p45 (Parents believe the District's Evaluation Report...must include Dr. Uherek's complete evaluation). There is simply no such requirement under the IDEA. An evaluation report must be sufficient in scope to develop an IEP, and at a minimum, must include a statement of whether the student has a disability that meets the eligibility criteria, a discussion of the assessments and review of data that supports the conclusion regarding eligibility, how the student's disability affects the student's involvement and progress in the general education curriculum, the recommended special education and related services needed by the student, and other information determined through the evaluation process and parental input needed to develop an IEP. WAC 392-172A-03035. Nothing more is required under the law. The Parents' belief to the contrary is not persuasive.

15. The Parents argue broadly that the reevaluation team ignored all the data, conclusions, and recommendations of Dr. Uherek, Dr. Vlcek, and the Student's teachers with SBCT, Yellow Wood School, and Dolan Learning Center. Parents' Closing Brief, p36. This argument does not hold up under scrutiny. Both the exhibits of record and the testimony of multiple witnesses manifestly refute this argument. It is the quite apparent perspective of the Parents that unless the reevaluation team changed the reevaluation report to reflect what the Parents wanted it to say, the team had not considered the data, conclusions, or opinions of the Parents and their experts. The Mother stated as much during her testimony. Although they are mandatory members of a reevaluation team, parents do not have veto power over the contents of the reevaluation report, or the eligibility determination.

16. The reports from and opinions of the Parents, Dr. Uherek, Dr. Vlcek, Ms. Kakach, Ms. Funk, Dr. Breiger, Dr. Prosch-Jensen, Dr. Myatich, and Ms. Kenyon²⁰ have all been reviewed and considered at length by the undersigned and are reflected in the above Findings of Fact. The credibility and weight of the evidence from all these sources has been carefully discussed. With two exceptions discussed below, it is concluded that the Parents have not proved by a preponderance of credible evidence that the October 2017 Reevaluation was not appropriate or denied the Student FAPE.

17. The Parents raise two arguments regarding the evaluation that merit further consideration. First, the Parents argue that District violated the applicable regulation for completion of an evaluation. In Washington State, once a school district receives parental consent, it must complete a reevaluation within 35 school days. WAC 392-172A-03015(3)(a). The District

²⁰ This list does not include every individual who testified at the due process hearing. However, these are the individuals who are the most relevant and material of the witnesses who appeared with respect to the evidence that is necessary to resolve the issues that must be addressed.

received the consent form signed by one of the Parents on May 16, 2017. The reevaluation meeting was not held until October 11, 2017, or a total of 48 school days later. Therefore, the reevaluation was completed 13 school days late. This is a procedural violation of the IDEA. However, not every procedural violation warrants a remedy.

18. Procedural violations of the IDEA amount to a denial of FAPE, and therefore warrant a remedy, 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.

WAC 392-172A-05105(2). See also 34 CFR §300.513; 20 USC §1415(f)(3)(E)(ii).

19. The Parents have not presented evidence to support their assertion this delay denied them their right to meaningfully participate in the Student's reevaluation. The Parents were present and participated in the meeting along with Dr. Uherek. This is not a situation where the Parents did not attend the reevaluation meeting. They had the opportunity to provide input. However, they perceived the team as not considering what they had to say because, ultimately, the team did not agree with the Parents. Consideration of parental input does not require *acquiescence* to parental input. It is concluded that the Parents have not proven the District's procedural violation in holding the IEP meeting 13 school days late significantly impeded their right to participate in making decisions regarding the November 2017 reevaluation of the Student. In addition, having found there is not sufficient evidence to conclude the reevaluation substantively denied the Student FAPE or denied the Student an educational benefit, it is concluded that no remedy will be awarded to the Parents for this procedural violation.

20. The Parents also argue that the reevaluation team failed to consider the results and recommendations from Dr. Uherek's IEE and the Student's teachers from the Dolan Learning Center, Yellow Wood School, and providers at SBCT. To any extent these claims have not already been addressed above, it is concluded that the Parents have not proven them by a preponderance of credible evidence. The record is extraordinarily clear that the reevaluation team considered all sources of information it was required to consider. The fact that the team ultimately disagreed with the Parents is not proof these sources of information were not considered by the team.

21. The Parents also argue they were denied meaningful participation in the decision-making process because they did not receive IEP goal progress reports for the April 2016 IEP Amendment or the November 2016 IEP until October 2017. This is incorrect. The Mother admitted at hearing the Parents timely received these IEP goal progress reports. It was not the IEP goal progress reports that the Parents wanted but did not timely receive. It was what they characterized as the underlying raw data supporting the goal progress reports that they wanted. However, other than summarily asserting that their lack of this raw data prevented them from enjoying meaningful participation, the Parents have not specifically articulated how the lack of any such raw data hindered them. The Parents have not established through evidence of record that they have any particular education, training, or experience that would provide them any special insight, skill, or ability to somehow cull meaningful information from any such raw data. The

Parents were timely provided with IEP goal progress reports, and have not proven in any substantive manner that their lack of any raw data denied them the opportunity to meaningfully participate in the decision-making process for the Student.

The 2017 IEP

22. The Parents' fundamental argument to attempt to prove the Student's 2017 IEP is not appropriate is that the Student had not attended school in the District since 2016, and therefore the District staff who drafted the IEP did not have information about the Student's PLOPs or progress at the Dolan Learning Center since she last attended school in the District. This argument cannot stand scrutiny in light of the conclusion that the Parents have failed to prove the October 2017 reevaluation is not appropriate. That reevaluation, completed all of one month before the November 2017 IEP, considered a tremendous amount of timely data provided through the evaluations and reports of particularly Dr. Uherek, Dr. Breiger, and Dr. Prosch-Jensen. The information regarding the Student and the impact of her disabilities on her ability to receive an educational benefit, and the recommendations for her educational program and placement from these evaluations and reports, did not suddenly all become stale overnight. Tellingly, Dr. Uherek, Dr. Breiger, and Dr. Prosch-Jensen's recommendations for the elements of the Student's educational program, which is reflected in a student's IEP, are quite uniformly consistent with one exception - where those elements of the Student's educational program will be implemented: MIHS or the Dolan Learning Center.

23. Having concluded that the October 2017 reevaluation has not been proven inaccurate or inappropriate, the argument that the Student's PLOPs developed one month later for the IEP and based upon the reevaluation report were not accurate is without merit. An express purpose of an evaluation or reevaluation is to recommend the special education and related services needed by a student. WAC 392-172A-03035(1)(d). That is precisely what the October 2017 reevaluation report provided for the November 2017 IEP. The Parents' reliance on the testimony of the witnesses who were working with the Student at the Dolan Learning Center, Adrienne Litman and Kassi Picchi, is very misplaced. The testimony of those witnesses does not appear in the Findings of Fact because their testimony was not found to be reliable, compelling, or persuasive. It was intentionally disregarded in favor of the essentially contemporaneous evaluations and reports of the same professionals identified above who contributed to the October 2017 reevaluation.

24. It is concluded that the Parents have not proven by a preponderance of credible evidence that the Student's November 2017 IEP did not accurately determine the Student's PLOPs and did not provide appropriately ambitious goals in light of the Student's circumstances. It is concluded that the November 2017 IEP offered the Student FAPE.

25. The final and critical issue remaining for the Student is where her November 2017 IEP should be implemented. That determination had largely been made based upon the Findings of Fact. Dr. Uherek opined the appropriate placement for the Student is at Dolan Learning Center. While Dr. Vicek concurs with Dr. Uherek's opinion for the Student's placement, his opinion is given less weight for all the reasons already addressed above. Dr. Breiger, Dr. Myatich and most especially Dr. Prosch-Jensen have all opined the Student's November 2017 IEP can be successfully implemented at MIHS. Of all these well-trained and very experienced professionals, the unique combination of qualifications and experience possessed by Dr. Prosch-Jensen is particularly compelling. Dr. Prosch-Jensen has years of experience with the Student dating back to elementary school in the District. She had the opportunity to observe the Student across more

environments – at the District, Yellow Wood School, Dolan Learning Center, and at home in the SBCT therapy – than any of the other expert witnesses. Her doctorate-level ABA certification provides her with a far superior frame of reference to opine on the appropriate use of ABA with the Student. The reports she prepared and her testimony at hearing were extraordinarily compelling and persuasive. It is concluded that the opinion of Dr. Prosch-Jensen, supported by the expert opinions of Dr. Breiger and Dr. Myatich, that the Student's IEP can be successfully implemented at MIHS carries more weight than the opposing opinions. Accordingly, it is concluded that the Student's November 2017 IEP and placement at MIHS are appropriate and provide the Student with FAPE.

26. In concluding that the District has offered the Student FAPE through the IEPs the teams have developed along with placement at MIHS, there is no legal reason to consider the appropriateness of either the services provided by the Parents through SBCT, or at Yellow Wood School and the Dolan Learning Center, or the appropriateness of their requested prospective placement of the Student at the Dolan Learning Center.

The Student's Seizure Emergency Care Plans (ECPs)

27. The Parents were concerned over the contents of the ECP they received in February 2018 for two reasons. First, it required a nurse or trained PDA to ride the bus with the Student. Second, it referenced use of Diastat or Nasal Midazolam in the event the Student had a seizure. Dr. Vlcek has never authorized the use of Nasal Midazolam to treat the Student's seizures. The Mother contacted Ms. Myatich, who arranged a conference call with Dr. Vlcek and District staff on March 8, 2018. After the call, final revisions were made to the ECP, eliminating any reference to use of Nasal Midazolam, but retaining the requirement that a nurse be present on the Student's bus. Apart from the requirement for a nurse, Dr. Vlcek was satisfied with the final ECP.

28. The remaining issue then is the District requirement that a nurse be present on the bus with the Student. In Dr. Vlcek's opinion, all that is necessary is to have a responsible adult on the bus with the Student. Under the IDEA, selection of staff is a decision generally left to a school district. Unless only one particular individual is capable of providing the services a student requires to receive FAPE, school districts retain the right to select staff to provide instruction and services to a student eligible for special education. For example, so long as a classroom teacher is properly qualified, the IDEA does not provide any authority for parents to request one teacher over another teacher. *Yuba City Unified School District*, 114 LRP 17835 (SEA CA 2014), *aff'd*, *Swanson v. Yuba City School District*, 68 IDELR 215 (E.D. Cal. 2016) (Addressing issue of parent's preference for one nurse over another nurse where there were no unique circumstances to support parent's preference).

29. After review of the record, it is concluded that the District's decision to require a school nurse on the Student's bus falls within a school district's discretion vis-à-vis staff selection and assignment. Clearly, there is no question that a school nurse would be a responsible adult, which is consistent with Dr. Vlcek's medical opinion. That a school nurse would be more qualified than a non-nurse responsible adult does not alter this conclusion. It is also concluded that Dr. Vlcek's expressed concern that the District included the requirement for a nurse on the Student's bus in order to create a reason why the Student could not be placed at the Dolan Learning Center is without any support in the record.

Parents' Requests for Reimbursement and Prospective Placement

30. The Parents have requested reimbursement for educational expenses they have incurred for services they provided the Student at Yellow Wood School, the Dolan Learning Center, and through SBCT. The requested remedies must be denied. Having concluded that the District did not violate the IDEA in any manner to warrant the award of a remedy and that the District offered the Student FAPE through the IEPs the teams have developed with placement at MIHS, there is no legal basis for reimbursement.

31. 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 Mercer Island School District has not violated the Individuals with Disabilities Education Act, or such violations do not warrant any remedy. The Mercer Island School District has not denied the Student a free appropriate public education. The Parents' requested remedies are denied.

Signed at Seattle, Washington on January 16, 2019.



MATTHEW D. WACKER
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 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. *MGW*

Parents



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