STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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July 28, 2018

Guardian
[redacted]

Judi Lewis, Director of Special Education and
State/Federal Programs
[redacted] School District
[redacted]

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In re: [redacted] School District
OSPI Cause No. 2018-SE-0036
OAH Docket No. 03-2018-OSPI-00498

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,

Johnette Sullivan

Johnette Sullivan
Administrative Law Judge

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

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

IN THE MATTER OF:	OSPI CAUSE NO. 2018-SE-0036
	OAH DOCKET NO. 03-2018-OSPI-00498
[redacted] SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Johnette Sullivan in [redacted] Washington, on June 27, 28, and 29, 2018. The Guardian of the Student whose education is at issue[1] appeared and was represented by Kerri W. Feeney, attorney at law attorney at law. The [redacted] School District (District) was represented by Donald F. Austin attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Guardian filed a due process hearing request (Complaint) on March 29, 2018. Prehearing conferences were held by Administrative Law Judge Anne Senter on April 30, 2018, May 16, 2018, and June 7, 2018. ALJ Senter issued Prehearing Orders prior to the due process hearing on May 2, 2018, and June 19, 2018. To ensure an available ALJ for hearing, the matter was reassigned to ALJ Johnette Sullivan. *See* Notice of Reassignment of Administrative law Judge dated June 19, 2018.

The due date for the written decision was continued to thirty (30) days after the close of the hearing, pursuant to a request for continuance made by the Guardian. *See* First Prehearing Order of May 2, 2018. ALJ Sullivan completed the hearing on June 29, 2018. The Guardian proposed oral closing statements and objected to further extension of the due date. The District sought one week to file a written post-hearing brief. Both parties were allowed one week to file written briefs by Friday, July 6, 2018, without no impact on the due date. The due date for the written decision remained July 28, 2018 (since the 30th day fell on a Sunday).

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Guardian Exhibits: P1 through P21, P23 and P24, P26, P28, P29 page 1 only, P30 through P38

District Exhibits: D17, D33, D35, D39 pages 1-4 only, D42 through D44, and D48.

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

[1] In the interest of preserving family privacy, the names of all family members of the Student are omitted from this decision. Instead, they are identified as, e.g., "Guardian," "Mother," "Uncle," "Student," or "Sibling."

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Scott Fisher, Former District Director of Special Education
Student's Uncle
Patrick Walsh, District School Psychologist
Sharon Tormala Baltimore, LSWAA, Behavioral Assessment Team, Children's Village
Minerva Morales, District Superintendent
Judi Lewis, District Director of Special Education
Adrianna DiGregorio, District Vice Principal, Artz-Fox Elementary School
Kathryn Lanthorn, CFMHE, Ed.D., LMHC
Lionel Enns, Ph.D., BCBA-D, Under One Roof Psychological Services
Anne Nealen, M.D., Sunnyside Pediatric Clinic
Erica Garcia, District General Education Teacher
Student's Guardian.

ISSUES

The District agreed to the Guardian's request for an independent functional behavioral assessment by Dr. Lionel Enns. That is no longer an issue. The remaining issues are:

a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2016-2017 and 2017-2018 school years by:

i. Failing to conduct an initial evaluation within statutory timelines;

ii. Failing to develop an individualized education program (IEP) that would allow the Student to make progress commensurate with his abilities or to allow him to increase the amount of time he attended class;

iii. Failing to provide reporting on the Student's progress toward his IEP behavior goals;

iv. Failing to conduct a functional behavioral assessment (FBA) prior to restricting the Student's school day;

v. Failing to amend the IEP to accurately reflect that the Student had been placed on a limited school day, preventing the Guardian from participating in the decision;

vi. Failing to provide instructional or therapeutic supports that would allow the Student to be educated in his least restrictive environment rather than removing him from the classroom or excluding him from school;

b. And, whether the Guardian is entitled to her requested remedies:

i. Declaratory relief that the District has denied the Student a FAPE;

ii. An independent FBA at District expense;

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iii. Consultation by an occupational therapist to determine the Student's needs for sensory tools (e.g. Dino Disc and the need for heavy work) in the educational setting;

iv. An updated IEP;

v. An updated behavior support plan with positive supports targeting de-escalation that is based on the data collected through the independently conducted FBA;

vi. Training for staff in implementation of the behavior support plan

vii. Provision of social skills training to help the Student with conflict resolution;

viii. Provision of a dedicated paraeducator to address his behaviors through positive supports geared to enable the Student to remain in the classroom;

ix. Compensatory services:

A. The District to contract with a credentialed teacher to deliver 40 hours of academic instruction to the Student on a one-to-one basis;

B. The District to contract with a board certified behavior analyst (BCBA) to deliver 30 hours of educational and therapeutic services to assist the Student and to provide support and instruction to the Guardian. The goal is to coordinate implementation of the school-based behavior support plan with strategies used in the home and to provide as much consistency as possible for the Student. The 30 service hours will be delivered within 12 months from the date the District contracts with the provider. The service delivery schedule will be arranged between the Guardian and the provider;

C. If for any reason, the provider originally contracted cannot complete the entire 30-hour contract, the District will contract with a qualified replacement BCBA within 20 days;

D. Compensatory services will not interfere with or take the place of IEP services.

x. Updating the Student's disciplinary and attendance records for both the 2016-2017 and 2017-2018 school years to accurately reflect the total number of times he was excluded from the classroom and the reasons for each exclusion;

xi. And/or other equitable remedies, as appropriate.

See Second Prehearing Order of June 19, 2018.

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

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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.

Student

1. The Student was age 5 when the Guardian filed the complaint prior to spring break 2018. The Student lives with his maternal grandmother and grandfather, and siblings. The Student has been in the care of his grandmother since about nine months of age. All references to the Guardian or the Legal Guardian are to the Student's grandmother.

2. The Student's mother likely abused illegal substances when pregnant with the Student. Testimony of Guardian; Exhibit P34, p 1; Exhibit P16, p. 3.

3. The Student was hospitalized before 2 months of age with acute respiratory distress with pertussis. He was transferred to Seattle Children's Hospital where he was in care for about 3 weeks. The Student has a history of insomnia. Testimony of Guardian, Dr. Nealen, Dr. Lanthorn; Exhibit p16, p. 3.

4. The Guardian has consistently sought help for the Student since he has been in her care before his first birthday. The Guardian arranged for the Student to receive care and treatment from many providers, including: pediatrician Dr. Anne Nealen, M. D.; counselors at Yakima Valley Farm Workers Clinic (including its Behavioral Assessment Team located at Children's Village); staff at Inspire Developmental Center; and, specialists at Seattle Children's Hospital. Declaration of Guardian, Exhibit P34, p 1; Exhibit P5, p. 5. The Student had an individual service plan at Children's Village, under an early intervention service program for children age 0 – 3 years, as early as October 2013. Exhibit P4, p. 9.

5. The Guardian enrolled the Student in an early intervention program at Sunnyside School District (Sunnyside). At age 2 years, 10 months, the Student was referred for evaluation as part of the transition from early intervention services to Part B services at age 3 year. Exhibit P5, p. 5. A Sunnyside Individualized Educational Program (IEP) team, which included the Guardian, determined he was eligible under the category for Developmental Delays. The IEP team developed an IEP in May 2015 that focused on social skill goals. Exhibit P5, p. 16-24.

6. In spring 2016, Sunnyside re-evaluated the Student. The Sunnyside IEP team determined the Student no longer needed specially designed instruction. Exhibit P5, p. 30. The Sunnyside IEP team agreed to exit the Student from special education services in May 2016. The Student was 3 years, 10 months of age. Exhibit P5, p. 34.

7. The Guardian relocated the family's residence before the start of the 2016-2017 school year. The Student's new residence was within the District's boundaries. Testimony of Guardian.

2016-2017 School Year

Registration

8. The Guardian registered the Student for the District's half-day pre-K program on September 1, 2016. She informed the District the Student previously attended school in Sunnyside and that

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he received Special Ed and had an IEP in Sunnyside. The Guardian informed the District the Student was recently diagnosed with ADHD but was not on medication. In addition, the Guardian reported the Student's health conditions included a behavioral concern. However, she indicated "no" to the Student having "Special Needs:IEP". Exhibit P2, pp. 1-2.

9. When registration information shows an incoming student has received special education or has health conditions, the District expects office staff to forward the registration form to the Director of Special Education. Mr. Fisher, the Former Director, has no recollection of receiving the Student's September 2016 registration form. It is unknown if office staff did not follow training and failed to forward the form to him, or if he received the form but failed to follow through on the information. Testimony of Mr. Fisher.

10. Mr. Fisher explained that a registration form showing prior special education services should have triggered a District request for the Student's educational records from Sunnyside. The evidence includes 35 pages of educational records from Sunnyside. One page, a March 2016 Notice of Intent to Reevaluate – Consent bears two facsimile marks:

a. 09/07/2016 WED 11:42 FAX 5099929535 010/012
b. 2016/09/07 11:10:09 1 /14

Mr. Fisher did not recognize the facsimile number in (a). Mr. Fisher could not confirm that the District requested or received any Sunnyside records in September 2016. Mr. Fisher could not recall seeing the Student's Sunnyside educational records during the 2016-2017 school year. If Mr. Fisher saw the September 1, 2016 registration forms, or if he saw the Sunnyside Notice of Intent to Reevaluate, he took no action. Mr. Fisher left the District at the end of the 2016-2017 school year. Testimony of Mr. Fisher; Exhibit P5, p. 25.

Pre-K programs

11. The District offered general education and developmental pre-kindergarten (pre-K) programs. Mr. Fisher described the general education program as more generalized and not IEP driven.

12. The District placed the Student in its general education pre-K afternoon program. Mr. Fisher could not explain the District's process for deciding to place the Student in its general education pre-K instead of its developmental pre-K. Testimony of Mr. Fisher.

13. The Guardian placed the Student at Inspire Developmental Center in the mornings, for the hours he was not in District's afternoon pre-K program.

Receipt of medical records

14. In the 2016-2017 school year, the District failed to document the date it received medical records from the Student's pediatrician. The District failed to keep the pediatrician's records or a description of the medical records it received. The evidence includes 11 pages of chart notes by the Student's pediatrician. The notes were printed on November 2, 2016, and provide details about the Student's health condition during office visits on August 2, 2016, and October 31, 2016. Exhibit 6; Testimony of Dr. Nealen.

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15. In January 2017, Mr. Fisher authored a series of documents related to proposals to develop and implement a Section 504 Plan. Exhibits P8 and P9. He did not initially recall what he meant by an "evaluation date" of October 31, 2016. He did not recall if he based an "assessment summary" on a conversation with or a written report from the pediatrician. After an opportunity to review the pediatrician's October 31, 2016, notes, Mr. Fisher acknowledged the description he wrote in the Section 504 Plan documents of the Student's medical condition matched Dr. Nealen's notes. Exhibit P6, p. 9; Testimony of Mr. Fisher.

Guidance Team referral

16. Mr. Fisher documented a Guidance Team (G.T.) meeting held January 20, 2017. The G.T. requested the Student be referred for initial evaluation for a Section 504 plan. Mr. Fisher documented the G.T. reasoned that the Student's "performance at school may be affected by a medical condition that requires accommodations at school." Exhibit P8, p. 2; Testimony of Mr. Fisher.

17. The members of the G.T. are not known. A form to record the minutes of the G.T.'s January 20, 2017, meeting is blank. Exhibit P8, pp. 2, 6.

18. It is not clear if G.T. members included members of the Resource Management Team (hereafter RMT). Mr. Fisher and Ms. DiGregorio, the Vice Principal, described a monthly meeting of the building principal and other key team members. The RMT discussed resource needs and student needs. The RMT discussed the Student's school behavior during the 2016-2017 school year. The date is not known when the RMT first discussed the Student's behavior. Mr. Fisher believed the RMT maintained meeting notes but he was unsure where they were kept. The District did not provide the Guardian information about the RMT meeting discussions or include RMT notes in the Student's educational records. Testimony of Mr. Fisher. The evidence is unclear the G.T.'s decision to refer was connected to discussions by the RMT.

19. On January 23, 2017, three days after the G.T. meeting, Mr. Fisher created several documents related to development of a Section 504 Plan. The documents, all unsigned, include Medicaid Consent; Notice of Meeting scheduled for January 30, 2017, at 8:30 am; Prior Written Notice (PWN) proposing a 504 Plan; and, Notification Consent form for the Student to be evaluated. Mr. Fisher identified invitees by title, not by name: Teacher, Vice Principal, 504 coordinator, and Parent. He did not invite the school psychologist, Mr. Walsh. The Notification Consent form instructed the Guardian to return the form to the pre-K teacher. Testimony of Mr. Fisher; Exhibit P8, pp. 3-10.

20. The PWN dated January 23, 2017, stated the Student's medical condition was ADHD, that the Student was progressing academically and socially but his condition may require accommodations to help him "cope with the classroom environment." The Student may need a plan "to help staff understand his condition better and help him acquire the skills needed for kindergarten." Exhibit P8, p. 4. The PWN informed the Guardian that the G.T. had considered and rejected other options, specifically to not provide a 504 plan. Exhibit P8, p. 4; Testimony of Mr. Fisher.

21. On the date of the eligibility meeting, January 30, 2017, Mr. Fisher created another group of documents. Those documents are also unsigned. They include: Eligibility Determination form documenting an impairment that "Substantially" impacted the Student; Notice of Meeting

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scheduled for February 3, 2017, at 8 am; a PWN to initiate a 504 plan; a PWN to initiate a 504 plan and a 504 plan evaluation; and Notice of Action/Consent for initial placement of the Student for a 504 plan. Testimony of Mr. Fisher; Exhibit P8, pp. 11-16.

22. The PWNs dated January 30, 2017, state the District considered evaluating the Student for special education eligibility. Both state the District considered medical documents, conversations with the Guardian, and teacher input. A PWN states the Student attends day care at Inspire, and that special education eligibility was rejected because he is "on-track and on-par with his non-disabled peers." Exhibit P8, p. 13. The other PWN states the Student is a preschool student, and special education eligibility was rejected because he "is reported to be on-par with his peers in developing pre-academic, communication and social skills." Exhibit P8, p. 14.

23. The District did not keep notes of the Eligibility Committee meeting on January 30, 2017. The evidence does not identify all persons who attended the January 30, 2017, meeting. The District has no data or other objective information to support the determination the Student is on-track or on-par with his non-disabled peers. Testimony of Mr. Fisher, Ms. DiGregorio.

24. The Notice of Meeting for a second meeting scheduled on February 3, 2017, informed the Guardian as follows:

> On 01/30/2017, the Eligibility Committee met to discuss school related information on [the Student]. After reviewing all relevant information, it was determined that your child was eligible for accommodation and programming through Section 504.
>
> Before our school division can provide these special services for your child, we must have your written consent. We request your involvement in the writing of a 504 plan. A meeting has been scheduled as follows:
>
> Date: 02/03/2017 Time: 8:00 AM
> Location: Artz-Fox Elementary
>
> Participants:
> 504 Coordinator
> Guardian
> Paraeducator
> Teacher
> Vice Principal

Exhibit P8, p. 16.

25. The District did not keep notes of a meeting held on February 3, 2017.

26. Mr. Fisher could not explain reasons why the District did not have signed 504 Plan documents. He could not state whether the Guardian responded to the January 30, 2017, request for consent to the 504 Plan.

27. Mr. Fisher could not state whether the District implemented the Section 504 Plan.

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28. Ms. DiGregorio took part in RMT meetings. She recalled an invitation to attend a Section 504 meeting. She recalled attending a meeting upstairs in her office with Mr. Fisher and the Guardian. The evidence is unclear which meeting she attended, January 30 or February 3, 2017, or if the meeting she recalled with Mr. Fisher and the Guardian occurred on another date. Testimony of Ms. DiGregorio.

29. Ms. DiGregorio recalled a meeting where she was confused by the fact the Student had been on an IEP in Sunnyside. She recalled her impression at the meeting was that the Guardian did not want the pre-K teacher to know the Student had an ADHD diagnosis and did not want the Student labeled. Ms. DiGregorio did not specify what label the Guardian said she did not want given to the Student. Ms. DiGregorio's testimony clearly inferred that the Guardian did not want the Student to have a special education label. Ms. DiGregorio's recollection is inconsistent with the Guardian's disclosure of the ADHD diagnosis at registration, with Mr. Fisher's multiple references to ADHD in the meeting documents, and with the fact the pre-K teacher was invited to be part of the Eligibility Committee to discuss the referral.

30. The inference or understanding by Ms. DiGregorio that the Guardian was resistant to a special education label for the Student is inconsistent with the overall evidence of record. The Guardian likely was resistant to the Student being labeled as bad or as a disciplinary problem, but that does not equate to resistance to receiving special education services. Ms. DiGregorio may have misunderstood the Guardian's expression of concern and simply assumed the Guardian meant a special education label. However, the objective evidence is overwhelming that starting before the Student's first birthday the Guardian consistently and repeatedly sought treatment and special services for him. In addition to the services and programs already described above, the Guardian sought legal advice regarding the Student's eligibility for federal disability benefits. I find by a preponderance of credible evidence that the Guardian did not reject consideration of special education for the Student in January or February 2017.

31. It is not clear the Guardian actually attended the meetings scheduled for January 30, 2017 or February 3, 2017. She has no specific memory of a 504 Plan meeting. Neither Mr. Fisher nor Ms. DiGregorio provided documentation of the date they actually met with the Guardian.

Student's school behavior

32. The Guardian recalled receiving calls from the school about the Student's behavior. The Guardian's recollection is consistent with Ms. DiGregorio's habit of calling the Guardian each day the pre-K teacher sent the Student to the Ms.'s office. Ms. DiGregorio called parents and guardians to report praise as well as to address challenges. Testimony of Ms. DiGregorio, and the Guardian.

33. The District did not provide the Guardian with documentation of the dates the Student's behavior prompted the pre-K teacher to send him to the office of the Vice Principal, or if she was unavailable to the office of the Principal. Testimony of Mr. Fisher, Ms. DiGregorio, and the Guardian.

34. Ms. DiGregorio did not document the days or number of times that the pre-K teacher sent the Student to her office due to his behavior. Ms. DiGregorio recalled a call from the pre-K teacher during 1st semester, which prompted her to meet with the Student and practice how the Student

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should listen to the teacher. Ms. DiGregorio recalls one meeting with the Guardian and Student during 1st semester. Testimony of Ms. DiGregorio.

35. Ms. DiGregorio did not recall the total number of times the pre-K teacher sent the Student to her office. During the 2nd semester, Ms. DiGregorio saw him enough times for the Student to be 'on her radar screen. Testimony of Ms. DiGregorio.

36. Ms. Ms. DiGregorio did not document the number of calls she placed to the Guardian regarding the Student's behavioral challenges during the 2016-2017 school year.

Pre-K teacher reports

37. The Student Cumulative Record for Pre-K documents the Student "met standard" for reading, communication, math, and behavior; however, in 1st semester the pre-K teacher, Ms. Boswell, rated him below standard for behavior. Teacher Boswell recommended promotion to Kindergarten. Exhibit P2, p. 6.

38. Teacher Boswell commented in the grade report that the Student made good progress but needed to listen to directions "a little better." The Student was reported to be 'very smart" and the teacher thought he "should be very successful in Kindergarten." The Guardian signed the reports. Exhibit P2, p. 8.

39. Teacher Boswell made no reports regarding special services, accommodations, or about implementing a Section 504 plan. Exhibit P2, p. 6.

Registration for kindergarten

40. The Guardian completed a Student Registration Form and related documents for kindergarten for the 2017-2018 school year. She dated them May 15, 2017. Exhibit P2, pp. 9-14. The District did not document the date of receipt. The Guardian declared she delivered them to the District office on May 15, 2017. Exhibit P34, p. 4.

41. The Guardian reported that the Student had been in Special Education and had Behavioral concerns. However, she again indicated "no" to the Student having "Special Needs: IEP". Exhibit P2, p. 10.

42. After delivering the registration forms to the District office, the Guardian may have seen Scott Fisher and been introduced to Judi Lewis. However, she may have seen them at the office packing boxes on a later date. Exhibit P34, p. 4.

End-of-school-year conversations

43. Mr. Fisher does not recall meeting the Guardian in May or June 2017.

44. The District hired Judi Lewis as Director of Special Education starting with the 2017-2018 school year. Ms. Lewis was present from time to time in spring 2017 at the main office and in the school board's conference room before the official start date of her contract. Testimony of Mr. Fisher and Ms. Lewis.

45. Ms. Lewis does not recall meeting the Guardian in May or June 2017.

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46. The Guardian has consistently described a day before school was out in May or June 2017, when she saw Scott Fisher at the District office. Scott Fisher was putting things into a box, and a woman also handling boxes. The Guardian has consistently described how Scott Fisher explained he was leaving the District, and that he introduced the woman as Judi Lewis, the new Director of Special Education. Testimony of the Guardian; Exhibit P34. It is undisputed that Ms. Lewis was sometimes on site in the main office or the boardroom before her official contract start date, at times that Mr. Fisher was working in his office adjacent to the boardroom. Testimony of Mr. Fisher, Ms. Lewis. For these reasons, the Guardian's recollection of her introduction to Judi Lewis by Scott Fisher as both were packing of boxes is found credible.

47. The Guardian did not finish 10th grade. She signed a declaration under penalty of perjury on June 19, 2018. She admits she worked on the declaration with her attorney "for a while." She explained she does not understand some terms and her attorney helped her as to the form and to provide information up to date. Her attorney helped her to understand the meaning of the terms or words used in the declaration. Exhibit P34. Pertinent to the subject matter of the conversation, the Guardian declared:

> 16. I sought out Special Education Director Scott Fisher to ask whether [the Student] could be evaluated so an Individualized Education Plan (IEP) could be in place by the beginning of the 2017-2018 school year. . . .
>
> 17. I spoke to both Ms. Lewis and Mr. Fisher about my concerns that [the Student] had challenging behaviors, needed help in school, and that I wanted to be sure a plan was prepared for him before kindergarten started. Ms. Lewis gave me a packet of papers with her name on a post it and she promised to phone me to discuss whether [the Student] needed to be evaluated. She never called.
>
> 18. Before the 2017-2018 school year began, I approached Ms. Lewis and asked about the evaluation. Ms. Lewis insisted she did not have any file for [the Student] and no documentation of my prior evaluation request.

Exhibit P34, p. 4.

48. Eleven days earlier, on June 8, 2018, the District had deposed the Guardian. In testimony at hearing, she acknowledged that her Declaration of June 19, 2018, contained factual details about the conversation that she did not disclose in her deposition. She admits that she frequently responded at deposition that she "did not recall" to questions about the conversation, what was discussed, or the length of the conversation. She explained that she could not recall details on June 8, 2018, but that later as she thought about all the meetings she began to recall. Regarding the Declaration's Paragraph 17 quoted above, the Guardian admitted it was fair to say her deposition statements were wrong. She had not yet signed the deposition at the time she signed the Declaration.

49. Ms. Lewis's first recollection of meeting the Guardian is in August 2017. She did not document the encounter. She does not recall the Guardian requested an evaluation or talked about the Student needing an IEP. She admits, however, she wrote the post it note presented in evidence by the Guardian. Testimony of Ms. Lewis; Exhibit 9, p. 1.

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50. The Guardian had in her possession a post it note with the name, title, and telephone number of Judi Lewis that Ms. Lewis handwrote and gave to the Guardian. The Guardian presented the post it note attached to a copy of the Notice of Meeting dated January 30, 2017, for the Section 504 Plan meeting Mr. Fisher had scheduled on February 3, 2017. Exhibit 9, p. 1. The Guardian's deposition statements differ from her Declaration on this point. She declared:

> 18. Before the 2017-2018 school year began, I approached Ms. Lewis and asked about the evaluation. Ms. Lewis insisted she did not have any file for [the Student] and no documentation of my prior evaluation request.

Exhibit P34, p. 4. In testimony at hearing, she acknowledged that when deposed she did not recall having another conversation with Ms. Lewis until after school began. Her recollection of a conversation after school began is consistent with documents dated in October 2017 and described in findings below, authorizing exchange of confidential information and consent to evaluate. Exhibit P10.

51. The Guardian did not address the reasons she checked "no" regarding the Student not having a health condition needing Special Services: IEP on the May 15, 2017, kindergarten registration. She has not proven by a preponderance of evidence that as Scott Fisher was packing boxes that she told him she wanted the Student to have an IEP in place before kindergarten started.

52. The Guardian proved that Ms. Lewis handwrote her name, title, and contact number on a post it. She has not proven the date she received the post it from Ms. Lewis. The fact that Ms. Lewis gave the Guardian a post it note proves only that the Director provided contact information. It does not prove or disprove the subject of further conversation between them.

53. The Guardian described a medical wrap she observed worn by Ms. Lewis when Mr. Fisher introduced them. Ms. Lewis wore a wrap on her arm during the hearing. The Guardian described how she had worn a similar wrap following surgery. The fact that she mentioned her surgery to the Student's pediatrician on August 2, 2016 (Exhibit P6, p. 1-2), does not prove the content of conversation with Ms. Lewis in 2017.

54. The Guardian has not proven that in May or June 2017, Ms. Lewis gave her unsigned copies of the January 30, 2017, Section 504 Plan documents. The preponderance of evidence supports a finding that Mr. Fisher and Ms. Lewis were focused on their own individual tasks relating to packing up or delivering boxes of materials. The Guardian has not proven that Mr. Fisher halted packing boxes in order to retrieve the Student's educational records, and that he selected only the January 30, 2017 Section 504 documents, and that he handed them without significant discussion to Ms. Lewis, and that Ms. Lewis gave them to the Guardian. The fact Judi Lewis was willing to deliver boxes of materials in anticipation of a new job does not mean she was willing to start working by having a meaningful, substantive conversation with any parent wanting to make a special education referral for evaluation.

55. The Guardian probably did intend to request help for the Student, but she likely did not articulate a request for special education evaluation. To the extent the Guardian wanted to plan for the Student to have a successful experience in kindergarten, she has not proven by a preponderance that she communicated to Scott Fisher or Judi Lewis that she was asking to plan to evaluate and develop an IEP.

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56. More probably than not, the Guardian and Ms. Lewis had a conversation in August 2017. The Guardian likely did speak about the Student and likely did want the District to help the Student. However, schools help students in many ways. The Guardian may not have known all the specialized terms used in special education, but she knew about the process of giving written consent to evaluate. She had given written consent to Sunnyside.

57. For the above reasons, I find the Guardian has not proven by a preponderance of evidence that she communicated a request to Ms. Lewis that the District begin an evaluation of the Student special education.

2017-2018 school year

58. Kindergarten began well for the Student. He liked the teacher. However, the teacher left the District in the first month. The Student had difficulty with the change, including substitute teachers. Testimony of the Guardian, Ms. DiGregorio. At the school board's September 25, 2017 meeting, it approved hiring a new kindergarten teacher. Exhibit P29, p. 1.

59. The Guardian was not initially aware the kindergarten teacher had left. She reports the Student did not like the new teacher. Testimony of the Guardian.

60. The new kindergarten teacher was Ms. Garcia. The 2017-2018 school year was Ms. Garcia's first year teaching. Teacher Garcia's first official day was Wednesday, October 4, 2017. Her kindergarten class had 16 students, including the Student. Teacher Garcia explained that her kindergarten class began when the bell rang at 8:25 a.m., and was dismissed at the 3:00 p.m. bell. Teacher Garcia explained Students had 10 minutes for recess times morning and afternoon, 50 minutes for lunch, and a snack period. Testimony of Teacher Garcia.

61. Teacher Garcia had two paraeducators for support during morning reading intervention. A paraeducator returned to help monitor students mid-morning. Teacher Garcia explained that initially she did not have paraeducator or other adult support in the afternoons. Testimony of Teacher Garcia.

62. Teacher Garcia recalled the Student did not have problems with reading or math. She described how he finished assignments quickly.

Referral

63. The Guardian and Ms. DiGregorio discussed the Student's classroom behavior in September and October 2017. Neither could state specific dates of the conversations or the dates the Student's behavior caused him to be sent to the Ms. DiGregorio's office. Testimony of the Guardian, Ms. DiGregorio.

64. There is no evidence Ms. DiGregorio or other District employee made a special education referral of the Student in September or October 2017 of his kindergarten year.

65. The Guardian completed in her own handwriting on October 9, 2017, authorization forms for release and exchange of information between the District and Sunnyside, and the District and Children's Village. She handwrote Sunnyside's name, address, and the purpose of the

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disclosure: To help with services in the [redacted] School District. The Guardian described the records as:

> IEP plan for preschool
> Special Education Records

She handwrote the name of Children's Village and the District's name and address, but did not complete the sections for specific information to be released or the purpose. On both release forms, she handwrote the name of School Psychologist Walsh. Exhibit P10, pp. 2-3.

66. The District's School Psychologist, Mr. Walsh, wrote in a PWN dated October 11, 2017, in which he stated the District had received the Guardian's referral on October 9, 2017. Exhibit P11, p. 4. The District has no other objective record of the date it received a referral.

67. In closing briefs, the Guardian argues that "presumably" a referral was made before October 6, 2017. She bases her argument on a records release form she signed for Sunnyside Pediatrics/ Dr. Nealen. The form is identical in format to the records releases for Sunnyside School District, described above. However, the form directed to the pediatrician contains no handwriting. The information in the blanks on the pediatrician's release form are typewritten. For example, in the space to describe the records:

> Any records or information regarding a diagnosis or consideration of ADHD, and any other health, or historical, information that may suggest a cause for any condition that would be expected to have an adverse impact on school performance.

Exhibit P10, p. 1. More probably than not, the Guardian did not choose the words quoted above to describe the records. The release form has a typewritten date at the top of November 3, 2017. The Guardian signed the release form for the pediatrician and dated it October 6, 2017

68. The Guardian did not satisfactorily explain the anomaly of the dates. She did not prove by a preponderance of evidence that she went to the District on October 6, 2017, to file the document in evidence as Exhibit P10, p. 1.

69. The District has no objective evidence to show the date it received any of the three authorization/release forms. However, on November 8, 2017, Mr. Walsh wrote to Sunnyside Pediatrics/Dr. Nealen about the evaluation process for special education. The letter referred to an enclosed Authorization for Release/Exchange of Confidential Information.

70. The Guardian has failed to prove by a preponderance of evidence that a referral for special education was made on or before October 6, 2017. I find a referral was made on October 9, 2017, as acknowledged by Mr. Walsh in the PWN.

Consent to evaluate

71. On October 11, 2017, Mr. Walsh prepared the PWN mentioned above. The PWN said the District was proposing to initiate an initial evaluation for special education. Exhibit P11, p. 4.

72. In addition, Mr. Walsh documented attempts to contact the Guardian by phone and by letter, on October 11, 2017. Exhibit P11, p. 1; Testimony of Mr. Walsh. He prepared a Consent for Initial

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Evaluation form on October 11, 2017, highlighting the areas for the Guardian to check to give consent and to make her signature. Exhibit P11, p. 2.

73. The Guardian received the Consent for Initial Evaluation form, marked an "X" next to the highlighted box to show she consented, and wrote her signature on the highlighted line. On the date line, she wrote 10/17/10. Testimony of the Guardian; Exhibit P11, p. 3.

74. The Guardian asserts in closing argument that the Consent for Initial Evaluation obviously was not in the year 2010. She asserts the date should be interpreted as October 10, 2017. She does not offer a satisfactory explanation for that interpretation, given that Mr. Walsh did not prepare the form until October 11, 2017.

75. The Guardian asserts she could not have delivered the Consent form on October 17, 2017, because she took the Student to see the pediatrician that day. The notes for the Well Child Check show vital sign and other information, and refer to Carri Rasmusson MA-C, October 17, 2017, at 10:32 AM. They were electronically signed by Dr. Nealen on October 19, 2017, at 5:14 PM. Exhibit P16, pp. 1, 8. More probably than not, the Well Child Check was scheduled for the morning of October 17, 2017. The Guardian has failed to prove that a morning doctor's appointment in Sunnyside precluded her from being able to deliver the Consent form to the District in the afternoon.

76. The Guardian further argues that during the October 17, 2017, medical appointment, she reported that she had received notification from the District on October 11, 2017, that the District agreed to pursue a special education evaluation. Exhibit P16, pp. 3, 5. The Well Child Check notes do not prove the date the Guardian responded to the District's PWN dated October 11, 2017, or prove the date the Guardian signed the Consent.

77. The Guardian has failed to prove she signed the Consent on October 10, 2017.

78. The District asserts in closing argument that it received the Consent for Initial Evaluation on October 17, 2017. The District admits it did not add a receipt mark or otherwise independently document the date it received Consent from the Guardian. Mr. Walsh admits he did not document the date he received the Guardian's signed Consent. He admits he did not notice or question her handwritten date. Mr. Walsh acknowledged a post it note he affixed to the signed Consent form, noting "Due Dec 8." Exhibit P11, p. 3. He described making a rough calculation of the due date to complete the evaluation. Testimony of Mr. Walsh.

79. The District had a Teacher Inservice Day on Friday, October 13, 2017. The District had Student Led Conferences on October 25-27, 2017. The "No School" days were November 10, and November 22-24, 2017, and December 18 to 29, 2017. Exhibit P1, p. 2.

Initial Evaluation

80. Mr. Walsh conducted cognitive and academic assessments in late October 2017. He administered a few sections of the outdated Woodcock Johnson Tests of Achievement III (WJ-III). His purpose was to assess academic achievement, as he believes evaluating academic skills in inappropriate at the Student's age. Testimony of Mr. Walsh; Exhibit P14, pp. 20-31. The Student was at grade level, but the Mr. Walsh did not include in the evaluation summary that the Student failed every item on the calculation assessment. Exhibit P14, p. 27. He did not report that the Student writes some letters backwards, including letters in his own name. Exhibit P14,

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p. 28. He admits he did not document his observations of the Student's behavior during the testing, which is a required component of test administration. Exhibit P14, p. 20.

81. Mr. Walsh administered the Differential Ability Scales (DAS) to assess the Student's intellectual ability. He found no extreme variations between scores, but he did not administer the assessments for processing speech and working memory. The Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition (DSM-V) recognizes these areas are associated with ADHD. Exhibit P14, p. 48; Ex. P15, p. 4.

82. Mr. Walsh failed to include in the evaluation summary the results of a Beery-Buktenica Developmental Test of visual-Motor Integration, Sixth Edition (Beery VMI). He administered the Beery on October 26, 2017. The evidence does not establish whether the results (standard score 110, 75th percentile) were remarkable. Exhibit P14, pp. 32-34, Exhibit P17.

83. Mr. Walsh completed a Vanderbilt ADHD Diagnostic Teacher Rating Scale, but he admits he was not the Student's teacher and he observed the Student for only 40 on November 6, 2017. More probably than not, of the 35 ratings he focused primarily on the initial 9 that related to inattention, and 10 through 18 that related to hyperactivity. He did not answer questions 25, and 27 to 35, that might have indicated motivations other than ADHD for the Student's behaviors. Testimony of Mr. Walsh; Exhibit P 14, p. 3-4.

84. Mr. Walsh asked Teacher Garcia to complete a National Initiative for Children's Healthcare Quality (NICHQ) Vanderbilt Assessment Follow-up – Teacher Informant form. The directions state the rating "should reflect that child's behavior since the last assessment scale was filled out." Exhibit P14, pp. 3-6; Testimony of Mr. Walsh. He did not have an explanation for his decision to choose to use a follow-up assessment tool rather than do an initial assessment. He knew Ms. Garcia had taught the Student for barely one month and had not done an initial assessment. Testimony of Mr. Walsh.

85. Mr. Walsh felt the Guardian had already reported the Student's behaviors to the school. He decided it was not necessary to the Guardian to complete an initial assessment, or ask other adults familiar with the Student to be informants and provide rating information. Testimony of Mr. Walsh.

86. Mr. Walsh reviewed a June 30, 2017 report from Behavior Health Services. He reviewed Sunnyside School District educational records. He did not contact staff or review records from Inspire Developmental Center or other persons who provided day care or services to the Student. Testimony of Mr. Walsh.

87. A school psychologist may administer tests that identify symptoms of hyperactivity and inattention, but may not make a diagnosis of ADHD. Mr. Walsh was unable to locate the pediatric records that Mr. Fisher had reviewed in January 2017. Testimony of Mr. Walsh.

88. The Guardian asserts in closing argument that the deficiencies and oversights described above were because Mr. Walsh's sole objective was to establish symptoms of ADHD in a school setting.

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89. As stated above, Mr. Walsh wrote to the Student's pediatrician on November 8, 2017. He shared some of the assessment information. His purpose was to ask for the pediatrician's "endorsement" of his opinion that the Student met the DSM-V diagnostic criterion of Attention-Deficit/Hyperactivity Disorder, Combined Presentation. Testimony of Mr. Walsh; Exhibit P12.

90. On November 30, 2017, Mr. Walsh prepared a PWN and Notice of Meeting to conclude the Special Education evaluation. He scheduled the meeting or December 6, 2017, at 3:15 p.m. Exhibit P17, pp. 1, 2. He made a note on November 28, 2017, that he spoke to the Guardian about waiting for the "diagnostic statement', a reference to a response from Dr. Nealen. Exhibit P17, p. 15.

91. Dr. Nealen replied by letter dated December 4, 2018. She confirmed the Student did meet the criteria for ADHD. She opined that the school's Vanderbilt scores were important in documenting the diagnosis objectively, as Dr. Nealen had not yet received the Student's records from Behavior Health. She included her most recent chart notes dated October 17, 2017. She explained she thought the Student would benefit from a medication trial but the Guardian declined. Therefore, Dr. Nealen thought they "**should optimize the behavioral modification interventions**" to assist the Student. (Emphasis added.) Dr. Nealen wrote it would be helpful to receive periodic reports from the school regarding process with behavioral modification interventions. However, she did not receive periodic reports or communication from the District. Testimony of Dr. Nealen; Exhibit P16.

92. An Evaluation Team met on December 6, 2017, including the Guardian, the general education kindergarten teacher, Ms. Garcia, a special education teacher, Ms. Marquez, Ms. DiGregorio, Ms. Lewis, and Mr. Walsh. Exhibit P17, p. 6. Each signed the Evaluation Summary that determined the Student met eligibility criteria for Other Health Impaired.

> [The Student] presents significant hyperactivity and difficulty sustaining attention to school assignments. This has prevented him from being able to adequately participate in his general education kindergarten class. **He needs specially designed instruction to teach him to stay on task and participate for a full day in school.** (Emphasis added.)

In addition, the summary stated:

> [The Student] meets the diagnostic criterion of Attention-Deficit/Hyperactivity Disorder, Combined Presentation, according to criteria in the DSM-V. The ADHD symptoms have limited full participation in kindergarten. **[The Student] has had to be removed from class almost daily because of disruptive behavior.** (Emphasis added.)

Exhibit P17, pp. 3-4; Testimony of Mr. Walsh. Mr. Walsh determined the Student's hyperactivity and inattention symptoms were not a manifestation of oppositional or defiant behavior or a failure to understand instructions. Exhibit P17, p. 9; Testimony of Mr. Walsh.

Development of an IEP

93. The process to develop an IEP began with a PWN dated January 5, 2018. The team met as scheduled on January 11, 2018. The persons identified above for the Evaluation Team were the same persons who participated in development of the IEP. Exhibit P18, pp. 1-5.

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94. The IEP team developed two measureable annual goals. Both relate to behavior:

> By 01/10/2019, when given an academic task [the Student] will work independently improving his time on task from 1 minute to 10 minutes on 5 of 5 consecutive trials as measured by regularly collected teacher data
>
> By 1/10/2019, when given an assigned area for an activity [the Student] will independently remain in that area for the expected duration of that activity improving his duration of behavioral compliance from 0 given activities a day to at least 5 given activities a day as measured by regularly collected teacher data

The plan was for the Guardian to receive a quarterly written report of the Student's progress toward the goals. Exhibit P18, p. 10.

95. The IEP team approved discipline policy accommodations in a special education behavior plan. Exhibit P18, p. 11. The approved behavior services were to be provided by special education staff and monitored by a special education teacher. The frequency was 90 minutes/ 5 times weekly in the general education setting, and 15 minutes / 5 times weekly in a special education setting. The IEP planned for 75 minutes per week of a total 1715 minutes per week in a special education setting, which amounted to 95.63% of the time in a general education setting. Exhibit P18, p. 13.

96. The Guardian argues the District failed to describe any supports or one-on-one supervision, and faults that the only accommodation related to the discipline policy.

97. The Behavioral Intervention Plan (BIP) was developed as an accommodation to the District's discipline policy. The BIP identified environments of concern as the playground, waiting and walking in line, and in the classroom. The Positive Behavioral Interventions and Supports were:

1. *Sustain attention to school assigned tasks.*
   Desired behavior:
   To give adequate time to assignments so they are completed with expected quality.

2. *Hyperactive Behavior.*
   Desired Behavior:
   [The Student] will remain in his assigned place for the expected time.
   [The Student] will be respectful to other students (not striking them or making inappropriate remarks.).

Exhibit P18, p. 22.

98. The BIP identified Reinforcers of Desired Behaviors as follows:

> [The Student] will receive a note each day that documents success on his behavior goals. The note will be sent home with him at the end of each school day. He may be given the opportunity to earn specific rewards, such as stickers or toys, with documented progress towards his goals.

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If [the Student] commits behavior which requires specific action according to School Discipline Policy, and is determined to be related to ADHD, he will receive correction through Special Education, including:

1. Acknowledge of the behavior.
2. Instruction and practice of appropriate behavior.
3. Apologies and restitution, when possible.
4. Positive affirmations.

Exhibit P18, p. 23.

99. The Guardian argues the District failed to determine the antecedents for the Student's undesirable behavior, such as triggers on the playground, in line, or in the classroom. Further, the Guardian asserts the District did not base the BIP on objective data of the type gathered during a functional behavior assessment (FBA). The District did not have baseline data on the Student's level of performance at the time of the IEP meeting (his present levels). The Guardian argues that the Vanderbilt scores were inadequate to base the Student's present levels of behavioral performance.

100. The BIP had a section for Methods to Ensure Consistency of Implementation. It stated that data would be collected daily to assess the status of the Student's efforts to meet his behavioral goals. Exhibit P18, p. 23.

101. The Guardian argues the District failed to consult with an occupational therapist about gross motor or large motor activities, including use of wiggle seat or fidgets might held the Student. The Guardian argues the IEP goals tracked the behavior plan, rather than providing for skilled instruction in behavior strategies.

Reporting Student progress toward IEP behavior goals

102. The District did not assign specific staff with the task of collecting data to measure progress.

103. The District did not collect daily data regarding whether the Student stayed on academic tasks and remained in the assigned area.

104. The District did not clearly differentiate or document what occurred during the 90 minutes of daily specially designed instruction for behavior services that were to be provided to the Student in the general education kindergarten classroom, from what was being provided to the class as a whole.

105. The District did not document how the Student received the 15 minutes of behavioral services in a special education setting.

106. Ms. Garcia's lack of experience was evident when she did not know the meaning of the term "specialized instruction."

107. Further, when the District provided a progress report the day following the filing of the complaint, it was not prepared by any of the Student's teachers, paraeducators or service providers. Ms. Lewis, the Special Education Director, created and prepared the report on March 30, 2018. Ms. Lewis intended to report the Student made sufficient progress, whatever that

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meant, by writing "SP" on both behavioral goals. Ms. Garcia did not know what a report of "SP" meant. Testimony of Ms. Garcia, Ms. Lewis.

108. Ms. Lewis was not able to explain the data or information on which she relied to report the Student had made satisfactory progress. She did not have information about the number of consecutive trials or instances of behavioral compliance stated in the IEP. Further, a report of satisfactory behavioral progress was contrary to other evidence known to Ms. Lewis. For example, the Ms. DiGregorio continued to call the Guardian, the Student' disruptive behaviors persisted and escalated, and on February 6, 2018, he began to attend kindergarten only half-day in mornings. Testimony of the Guardian; Ms. DiGregorio, and Ms. Lewis.

Failure to amend IEP

109. On Monday, February 5, 2018, Ms. Lewis sent an email to the Student's kindergarten teacher, Ms. Garcia, the school's special education teacher, Ms. Marquez, and two other service providers (Ms. Tellez and Ms. Gorman). The subject was "Half day", and the purpose was

> . . . to let you all know [the Student] will be going home at 12:20 for the rest of this week and next. During this time we will be planning for his phased return to a full day, perhaps starting as early as the 20th.

110. Ms. Lewis and the Principal, Angie Ozuna, met the Guardian at the office on Tuesday, February 6, 2018. The Guardian's son (Uncle of the Student) happened to be visiting from out of town. He accompanied the Guardian to the meeting. The District invited to the meeting a behavior therapist from Educational Service District (ESD) 105, Ms. Maxwell. Ms. Maxwell introduced a person who accompanied her. The Guardian and Uncle reasonably understood that both Ms. Maxwell and the person who accompanied her were with the ESD. Ms. Lewis, on the other hand, reasonably knew that medical school students, interns and others sometimes accompanied Ms. Maxwell. Ms. Lewis did not know the full relationship between the ESD and those persons. Ms. Lewis regrets that she ignored her initial instinct to raise concerns about privacy and confidentiality violations, and obtain the Guardian's consent to the observer's presence.

111. Ms. Lewis had little explanation for the purpose of what she referred to as the "first meeting." She could not describe the full discussions or purpose of the meeting with Ms. Maxwell, except she insists the first meeting had nothing whatsoever to do with reducing the Student's school day.

112. Ms. Lewis testified the first meeting ended, and the Principal, Ms. Maxwell and the observer left. Ms. Lewis testified that in the main reception area, before the Guardian and Uncle left, the Uncle raised the possibility that the Student might come home in the afternoons. Ms. Lewis, purportedly to protect the Student's privacy, contends a "second meeting" occurred after she brought the Guardian and Uncle into an office, where the Principal later joined them. The District contends the idea of half-day came from the Uncle.

113. The Uncle testified that he accompanied the Guardian to a meeting at the District. He understood the Student had been in trouble at school, and was too much to handle. He recalled the two ladies from Yakima with the state maybe, arrived last. He shared information about a program in his town, an outreach to kids with special needs. He was interested in seeing the program brought to the lower Yakima Valley. He recalled the District brought up right away the

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idea of half-day. There were discussions about the Student having sleep problems and was sometimes hungry. The Uncle brought up a program called Nexus, that offered 1:1 counseling, videotaping, puzzles, play dough, learning how to interact with kids; but he understood there were no programs like that available. The two ladies from the Yakima talked about trying to bring programs to the area. He did not recall consideration of any other options other than a shortened half-day. Testimony of the Uncle.

114. The Guardian's Declaration is consistent with the Uncle's testimony, but as previously described in findings above, she did not recall or relate those same details during her deposition. Exhibit P34, pp. 6-7.

115. I give considerable weight to the existence of the February 5 email announcement of half-day, and to the District's need to invite a behavior specialist from the ESD, in assessing the credible weight of the evidence. The notion that planned discussions ended and attendees were leaving without any mention of a half-day schedule is highly doubtful, given the email announcement the day before from Ms. Lewis. To find otherwise would necessary require a finding the District planned to reduce the Student to half-day without any discussion whatsoever with the Guardian. In addition, I give weight to the evidence not offered by the District. The District chose to not present testimony of from Principal Ozuna or ESD's Ms. Maxwell in support of Ms. Lewis's recollection.

116. I find the testimony of the Uncle to be more credible and find the District initiated the change to the Student's school day by reducing it to mornings, half-day.

Individual Service Plan

117. The Student has been served through individual service plans developed by the Yakima Valley Farmworkers Clinic (YVFWC) Behavioral Health Services team, located at Children's Village in Yakima. Sharon Tormala, a licensed social worker associate advanced (LSWAA) is a behavioral therapist who has worked with the Student since June 2017. His appointments fluctuated between sessions at home, at school, and at Children's Village, depending on scheduling availability. He received eight individual session, two classroom observations, and two sessions with his Guardian. In an academic setting, she opined the Student would benefit from smaller classroom settings, clear expectations, heavy work opportunities in the classroom, activities such as puzzles, mazes, word searches and the like to choose from when completing assignments before his peers, and one-on-one support as needed to reinforce expectations. Testimony of Ms. Tormala; Exhibit P36.

Functional Behavioral Assessment prior to restricting Student's school day

118. The District did not conduct a Functional Behavioral Assessment (FBA) prior to restricting the Student's school day to half-day mornings.

119. In closing, the District admits the change in school schedule was not based on evaluative information. It did not have data from some other process or method of observing the Student over time, paying attention to antecedents of the behaviors, the types of behaviors, and the consequences to the Student following the behaviors or the outcomes.

Amendment of IEP to reflect the half-day program

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120. In closing, the District admits it did not memorialize the events of the February 6, 2018, discussions.

121. The District did not schedule a meeting of the IEP to discuss the half-day proposal.

122. The District did not amend the IEP to reflect the change in service minutes, or plan for how it would deliver specially designed instruction to the Student only in the mornings. The IEP team did not convene to consider whether to change or add to the annual behavior goals, or to determine whether to consider additional evaluation. The Guardian and other members of the IEP team did not have the opportunity to consider other options for the Student.

Instructional or therapeutic supports

123. The Guardian and other members of the IEP team did not have the opportunity to consider whether the Student would benefit from instructional or therapeutic supports. Absent a convening of the IEP team, the team and the Guardian, particularly, did not consider less restrictive options than removing him from the classroom or excluding him from school.

124. The Guardian argues that the process used by the District to restrict the Student to half-days deprived her of the opportunity to discuss and consider positive supports and the Student's need for skill development rather than discipline.

125. The District had an arrangement with the ESD to receive training and support, particularly from Ms. Maxwell, regarding behavioral plans. Testimony of Ms. Lewis. However, the District had no specific plan that it shared with the Guardian about how it planned for Ms. Maxwell to deliver behavioral services to the Student. Alternatively, the District did not share with the Guardian a plan for how staff, trained and/or monitored by Ms. Maxwell, would deliver behavioral services to the Student.

126. The District argues that immediately after the filing of the complaint, it tried to remedy any potential procedural violations. It asserts its efforts include its statements in its response to the complaint that outlined what it was not refusing to do and was willing to discuss or do. *See* District's Response to Due Process Hearing Request, April 9, 2018. In addition, the District argues that agreements made at the April 12, 2018, early resolution meeting cure any potential problems. Those included agreement for an independent FBA by Dr. Enns, a one-to-one paraeducator to work with the Student on behavior issues, an OT consultation, and holding a meeting with Dr. Enns and the Guardian to update the BIP and IEP.

127. In addition, the District believes the re-set opportunities offered by Ms. DeGregorio constituted instructional or therapeutic supports. It must be noted that the times the Student was unable to find the Vice Principal and instead went to the Principal's office are not considered. But, when Ms. DeGregorio met with the Student in her office, she used an "app" on her phone she referred to as "Andy" that allowed the Student to calm, play on the "app" and re-set. Ms. DeGregorio's description of the immediate calming effect when the Student had her one-on-one attention and could use the phone "app" was credible. However, her experience working with a board certified behavioral analyst or other behavioral specialists is limited and she is not a behavioral analyst. Based on the Findings regarding the observations and recommendations of Ms. Tormala, Dr. Enns, and Dr. Lanthorn, I find that Ms. DeGregorio lacked the skills to provide more than immediate environmental change that calmed the Student. The efforts had some

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instructive benefit after-the-fact, but not in a skills-based way of teaching the Student how to avoid the undesirable behavior in the first place.

Independent Functional Behavioral Analysis: Dr. Enns

128. The independent FBA was conducted by Lionel Enns, a licensed child psychologist. His doctorate includes certification as a board certified behavior analyst (BCBA-D). Exhibit P37. He evaluated the Student on May 3, 2018, in the classroom and the resource room and prepared an 18-page report regarding his observations, interview of Ms. Garcia the kindergarten teacher, impressions, and descriptions of three types of Student behaviors. He charted setting and antecedent events for each of the three behavior types: attention seeking; work/task avoidance; and, oppositionality. Exhibit P24, pp. 2-19; Testimony of Dr. Enns.

129. The District did not challenge Dr. Enns report.

130. Prior to testifying, Dr. Enns was provided with some exhibits and asked to comment. One was a two page unsigned document from ESD 105 Behavioral Health Support. He understood it was observation by Ms. Maxwell. A handwritten note at top refers to the date (1-24-2018) and the Student. Dr. Enns found the observations accurate with his, noting he suggested to Ms. Garcia a fun box and the document suggested a special art box. He recalled Ms. Garcia seemed surprised by his suggestions. She had ideas but in his opinion, no practical experience and was glad to hear his suggestions. He did not observe any interventions in his classroom observations, which he opined was unusual. He believed or inferred the teacher and paraeducator did not know what to do or have enough supports.

131. During his classroom observation, the teacher or paraeducator removed the Student several times. The staff reported the events as typical. The Student would receive resource room instruction, or be sent to the office. Some documents he reviewed referred to restraining the Student (Guardian's declaration, Exhibit P34; 5/114/2018 Restraint Report, Exhibit P28). In his opinion, the Student had no positive behavioral supports: no pre-teaching, no clear demarcation of what to do and how to mark or reward. For example, paraeducator Ms. Ramos explained she did not stand too close to the Student because she thought it was bad and would move away when he misbehaved. Dr. Enns would have recommended the exact opposite.

132. Dr. Enns strongly disagreed with a manifestation team's interpretation of his FBA report. The Student had been suspended, and the District determined his behavior was not related to his disability. The District cited one sentence from the FBA: Attempts to gain attention could be rooted in social deficits and diminished processing speed, memory, and attention issues related to in vitro drug exposure." Dr. Enns believed the DSM-V only uses "condition for further study" for children with in utero damage. He opined the District's conclusion was incorrect.

133. Dr. Enns opined this is not "merely a case of ADHD" and bluntly noted the need to consider the neurological insult and trauma the Student experienced in utero. He was not tasked with formally evaluating the Student, but he was stuck by the omission of lack of information about potential wide-ranging challenges, from learning disabilities and social challenges to extreme impulsivity. In his opinion, the Student is struggling with a markedly severe disability, and the Guardian, interventionists and educators can frequently feel overwhelmed and helpless. He opined it was time for the District to acknowledge its challenges and inadequate supports, because "there is no way to alter his current, negative trajectory without open, calm

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communications" where the Guardian and educators feel safe in expressing concerns. Exhibit P24, p. 18; Testimony of Dr. Enns.

134. Dr. Enns opined the Student's teacher and aide were not adequately trained to work effectively with him. Teacher training should be a focus of the BIP, to include in-class support, which would provide modeling and multiple opportunities for corrective feedback. Attending a training course would not sufficiently generalize to the classroom. "Only partly learning techniques could have long-term, negative effects in that educators then feel that behavioral techniques are ineffective, which would be a highly negative outcome. Dr. Enns had discussed with Ms. Lewis providing training by Season Ahmason, BCBA, who provides behavioral support for the ESD. Dr. Enns believed Ms. Ahmason would be an excellent resource for providing ongoing guidance. Exhibit P24, p. 18; Testimony of Dr. Enns.

135. Dr. Enns opined that skill building for the Student was essential. There must be emphasis on antecedent strategies in order to set the Student up for successful interactions (as opposed to reacting to maladaptive behaviors as they occur). The Student has had an entire year of learned behavior that increases his likelihood to engage in negative behaviors. Of particular concern to Dr. Enns was the Student's exposure in kindergarten to random reinforcement that made his behaviors more entrenched. He had a high level of concern the Student might harm someone, intentionally or inadvertently, due to the uncontrolled nature of the behaviors observed. Exhibit P24, pp. 18-19; Testimony of Dr. Enns.

136. Dr. Enns first recommendation was placement outside of the school, with staff who are already well trained and can begin effective intervention with the Student. His second recommendation was placement in the District. He had spoken to Ms. Lewis and understood his task was to make educational recommendations based on the current availability of services within the District. He expressed some frustration during testimony that Ms. Lewis had not mentioned the ESD's Newbridge to him. If he had known about Newbridge as a placement option, he would have learned more and suggested it in his report. He was not aware of the ESD's Newbridge Academy, and had not visited it. He had heard from an administrator in Prosser School District that Newbridge had a good reputation. It appeared to offer tiered intervention and staff that seemed very appropriate for the level of support the Student needed.

137. Dr. Enns did not opine about the Student's ability to sustain the rigors of a daily commute involving transportation to and from Yakima, the site of Newbridge.

138. Dr. Enns could not honestly predict how to make up or compensate for the fact the Student did not receive skills training and appropriate interventions in kindergarten.

Dr. Lanthorn: Diagnosis of PTSD and RAD

139. Kathryn J. Lanthorn is a certified forensic mental health evaluator, licensed mental health counselor, with a doctorate in Education, and a master in Applied Behavioral Sciences. She had been a Washington certified teacher, and twenty years teaching at the middle school, high school, and college level. Dr. Lanthorn had reviewed information in the Student's pediatric and educational records, including Dr. Enns' report. She found his report to be thorough and agreed with his recommendations for moving forward, particularly noting that ADHD does not fully capture the Student's disabilities. Dr. Lanthorn opined the Student does not have ADHD. She believes he was misdiagnosed. Testimony of Dr. Lanthorn; Exhibit P30.

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140. She met on June 18, 2018, with the Guardian alone, observed structured play activity between the Guardian and Student, and interviewed the Student. The Student was six years of age. The session was short of three hours, which she considered normal face-to-face time. She learned information not previously considered by other providers, specifically that as an infant the Student had been left alone with a two-year old sibling for an unknown number of days. Dr. Lanthorn had rarely sat with a six-year old child like the Student who did not want to please her. His affect was very unusual. The level of neglect cannot be known about the Student's experience in the first seven months of life before he was placed with his Guardian, but the effects were evident to a skilled, trained observer. Dr. Lanthorn observed a power struggle with herself, and with the Guardian, that is rare to observe in a six-year old child. Testimony of Dr. Lanthorn.

141. Dr. Lanthorn rejected the ADHD diagnosis based on the criteria in the DSM-V. She diagnosed Reactive Attachment Disorder (RAD) and Post-Traumatic Stress Disorder (PTSD). She considered the Student avoids attachments. He does not seek comfort from others, lacks emotional expression and affect. In a RAD cycle, the Student's only reaction at his age is physical. He is not available for instruction. She opined the student had "15 seconds of distress tolerance" because he is unable to regulate his emptions on his own. Without effective interventions, he will become a pariah in the classroom and have social impairments. PTSD if very difficult to diagnose in a child because they have not developed abstract thinking. They can only use concrete thought and are not able to talk about feelings and memories. For example, an adult with PTSD can express that being in a store makes the adult feel unsafe and want to leave the store. A child in that situation will throw things, push or demand to go, but be unable to abstractly reason and describe, as an adult would do. The Student, in her opinion, has a very strong behavior indicator for PTSD in that his impulsivity, distractibility, unreliability, and acting out are behaviors in response to PTSD. Testimony of Dr. Lanthorn.

142. Dr. Lanthorn noted that self-comfort techniques usually involve sucking a thumb or holding a blankie, while in case of abuse head-banging may be strangely self-soothing. The Student has a history of head-banging. Verbal threats are ineffective, as the Student will win every time. He will "one-up" the adult every time, as he did with her. In Dr. Lanthorn's opinion, the use of restraint is because the adults lacked skills and ran out of ideas. Dr. Lanthorn disagreed with the practice of sending the child from the classroom or sending him home at the end of the morning session. She opined that for the Student, going home rewarded his negative behavior, getting him one-on-one adult attention and avoiding school tasks. Dr. Lanthorn's opinion was that a school cannot help the Student by themselves, as there is too much to correct and efforts require collaboration with the Guardian and outside therapists. It is difficult for adults to learn not to take things personally, and learn skills so as not to be reactive. Testimony of Dr. Lanthorn.

143. Dr. Lanthorn described the educational setting in which the Student would thrive. The smaller the class size the better. The more individual adult attention the better. The more structure and consistent with the same adults the better. Less change was better. She was not focused on quantifying time in general education or a resource room. Her focus was on an educational setting that provided the Student with clear expectations and clear rewards. For example, she believed the Student could be a helper, which could address his physical need to move and help him learn social and other positive skills. Testimony of Dr. Lanthorn.

Remedies

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144. In closing, the District rejected the need for declaratory relief but agreed the Guardian should be awarded the following relief requested in the complaint:

a. An independent FBA at District expense;
b. Consultation by an occupational therapist;
c. An updated IEP;
d. An updated behavior support plan with positive supports targeting de-escalation that is based on the data collected through the independently conducted FBA;
e. Training for staff in implementation of the behavior support plan;
f. Provision of social skills training;
g. Provision of a dedicated paraeducator to address his behaviors through positive supports geared to enable the Student to remain in the classroom; and
h. Provision of staff training in reviewing and implementing early special education service plans for students who transfer to the District with existing service plans.

145. Regarding item (h) above, the District in closing would also provide training for existing students (not just those who transfer in to the District).

146. The District urges no relief for the request to update the Student's disciplinary and attendance records.

147. The District agrees relief should include an award of compensatory education. It differs with the Guardian regarding the scope and type of award. It argues no compensatory education is due prior to the December 6, 2017, evaluation meeting which it considered timely. It argues no compensatory education is due for time the Student spent in the Vice Principal's office because he received positive instruction that enabled him to "reset" and return to the classroom. The District urges reliance on Ms. Lewis's estimate that the Student missed 38 hours of schooling after he began half-days starting in February 2018.

148. The District, in closing, urges that it would not be useful to provide compensatory education that extends his school day nor takes away his Saturdays. The District proposes two summers of sessions 19 school days each, 3.5 hours per school day, for 66.5 compensatory hours per summer, or 133 hours of compensatory education over two summers. The Student would be in a general education classroom selected by his IEP team in April or May of 2019 and 2020. The District would provide the Student with a dedicated 1-1 paraeducator. The paraeducator would have been trained by a BCBA certified individual per Dr. Enns' recommendation, in working with the Student's behaviors, using positive reinforcement. The District distinguishes this from extended school year (ESY) because the Student is presently solid academically and his primary behavior needs is to function in a general education classroom. Primarily, the District urges flexibility because the Student's particular needs at the end of the 2018-2019 school year cannot be accurately predicted. The District postures that the Student may be at the place he would have been had the District provided appropriate special education in the past. It urges that the IEP team determine what compensatory education the Student needs prior to the end of the next school year.

149. The Guardian, in closing, argues the District's lack of contemporaneous data makes it impossible to calculate exactly how much classroom instruction the Student missed during the 180 days of the 2017-2018 school year. The Guardian estimates the Student missed about 110-112 total hours during the 2017-2018 kindergarten year. The Guardian's estimate considered

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District records, though incomplete, of disciplinary removals, shortened school days, and suspensions. She requests 70 hours of compensatory education, which she deems modest. She requests the District provide the compensatory education within twelve (12) months after contracting with a provider. The schedule would be arranged between the Guardian and the provider.

150. The Guardian requests the Dr. Enns recommended service delivery be adopted. She requests the District contract with a BCBA to delivery seventy (70) hours of educational and therapeutic services to the Student on a one-to-one basis. She requests the BCBA consult with Ms. Tormala, of the YVFWC Behavioral Assessment Team located at Children's Village. The purpose of the consultation would be to provide consistency in behavior management strategies used at home, in school, and in the setting of the compensatory education services.

ESD's Newbridge Academy

151. On June 21, 2018, Ms. Lewis contacted Newbridge for the purpose of reserving one spot in the program. Ms. Lewis has heard the ESD may relocate Newbridge to Zillah. Mr. Fisher, now a school psychologist in Zillah, knew of one student of that District who was transported daily to attend Newbridge. There is very little objective evidence of Newbridge and the administrative law judge declines to speculate about the ESD's plans for moving Newbridge.

152. In closing, the Guardian asks for an award of prospective placement for the 2018-2019 school year at Newbridge, with transportation services to access the program at its location in the Zillah School District.

153. The Guardian has not proven that the ESD has moved Newbridge from Yakima to Zillah.

154. After considering the totality of credible evidence, I find the Guardian has not proven the Student would be able to access his education if to do so he was required to commute daily to and from Yakima, where Newbridge operates.

CONCLUSIONS OF LAW

Jurisdiction

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for OSPI 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. There is no jurisdiction to address the Guardian's allegations that the District also violated Washington state law unrelated to the IDEA, the Americans with Disabilities Act or Section 504 of the Rehabilitation Act or to award attorney fees. *See* Second Prehearing Order of June 19, 2018.

Burden of Proof

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

The IDEA

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

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

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

5. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

> [A] 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' [FAPE] as defined by the Act.

Rowley, supra, 458 U.S. at 188-189.

6. 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.

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

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

Endrew F. v. Douglas County Sch. Dist. RE-1, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017).

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8. The Ninth Circuit has explained the *Endrew F.* standard as follows:

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

M.C. v. Antelope Valley Union High Sch. Dist., ___ F.3d ___, 2017 U.S. App. LEXIS 9359, at 22 (9th Cir. 2017).

Procedural Compliance with the IDEA

9. Procedural safeguards are essential under the IDEA:

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

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

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

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

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

Substantive Compliance with the IDEA

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

> "[S]pecial education and related services" need only be provided "*in conformity with*" the IEP. [20 USC §1401(9)] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.
> . . .
> We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

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

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Evaluation timelines

12. An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or if a state establishes a timeframe within which the evaluation must be conducted, within that timeframe. 34 C.F.R. ' 300.301(c).

> In Washington State, once a child is referred to a district for an initial evaluation, a district has 25 school days from receipt of the referral to provide the parents with notice of the referral and its intent to investigate, review the referral, gather available information regarding the child's disability, and make a determination whether the student is a candidate for evaluation. WAC 392-172A-03005(2).

13. If the student is a candidate for evaluation, the district must fully evaluate the student within 35 school days after the date written consent for an evaluation has been provided by the parents. WAC 392-172A-03005(3)(a). The 35 school-day period may be extended if agreed to by the parents and reasons for the extension are documented by the district. WAC 392-172A-03005(3)(c).

14. 2016-2017 school year. Based on the Findings above, I conclude the District did not violate the 25-day and 35-school-day requirements in WAC 392-172A-03005. The Guardian failed to prove she made a request for referral and evaluation in May or June 2017, or in August 2017.

15. 2017-2018 school year. Based on the Findings above, I conclude the District did not violate the 35-school-day requirement for completion of the evaluation. For argument's sake, if there has been a procedural violation it was *de minimus* because the regulatory scheme allows a total of 60 school days. The District did not use the full 25 school days from receipt of the referral to investigate and determine whether the Student was a candidate for evaluation. The evidence does not establish that the District used a total of more than 60 school days after receipt of referral to complete the evaluation. For that to be the case, based on the December 6, 2017, evaluation meeting, the District would have had to receive the referral shortly after the Labor Day holiday in early September. Exhibit P1, p. 2. There is no evidence to support such a finding.

16. For the above reasons, I conclude the Guardian failed to prove a violation of the IDEA or a denial of FAPE regarding the timelines in which the District completed the initial evaluation.

Failure to develop an IEP that would the Student to make progress commensurate with his abilities or to allow him to increase the amount of time he attended class.

17. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (1999, 9th Cir.). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

18. In developing the Student's IEP, WAC 392-172A-03110(1) requires the IEP team to consider:

> (a) The strengths of the student;
> (b) The concerns of the parents for enhancing the education of their student;
> (c) The results of the initial or most recent evaluation of the student; and

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(d) The academic, developmental, and functional needs of the student.

Subsection (2)(a) of the rule requires the IEP team to consider special factors unique to the Student:

> (i) Consider the use of positive behavioral interventions and supports, to address behavior, in the case of a student whose behavior impedes the student's learning or that of others; and
>
> . . .
>
> (v) Consider whether the student needs assistive technology devices and services.

19. Assistive technology devices would include any items used to increase, maintain, or improve the functional capabilities of a student eligible for special education. The term would include wiggle chairs, puzzles, fidgets and other items used as positive behavioral supports or rewards. WAC 392-172A-01025.

20. 2016-2017 school year. The Guardian has failed to prove a violation of the IDEA or a denial of FAPE to the Student related to an IEP claim regarding the 2016-2017 school year.

21. 2017-2018 school year. The Guardian as proven this claim for the 2017-2018 school year. The District failed to develop an IEP that addressed the Student's behavioral needs. The IEP was developed without a baseline of the Student's present behavioral performance. With a focus on confirming an ADHD diagnosis and a qualifying category, the District failed to obtain evaluative data when it developed the BIP, and failed to develop strategies and goals consistent with those of his behavioral therapist at YVFWC and his individual service plan. The District failed to develop an IEP that identified trained staff capable of delivering behavioral services, and failed to identify in the IEP any accommodations and supports (beyond accommodations to its discipline policy). The IEP overall was more focused on disciplinary matters than on skill building. The District failed to appropriately address the Student's developmental and functional needs in a way that would allow him to stay, or increase the times he could stay, in the general education classroom.

22. For the above reasons, I conclude the District did not develop an IEP in January 2018 that allowed the Student to make social and behavioral progress commensurate with his abilities. In reaching this conclusion, weight was given to the fact the Student was capable of making progress toward the goals in his individual service plan with the support of the behavioral therapist.

23. For the above reasons, I conclude the Guardian proved a violation of the IDEA and denial of FAPE to the Student by the District's failure to develop an IEP in January 2018 that allowed the Student to increase the amount of time he attended class.

Failing to provide progress reporting

24. A district's obligation under the IDEA is to measure annual progress toward IEP goals in the areas of reading, math, written language, and social emotional behavioral. WAC 392-172A-03090(1)(c)(ii); 34 CFR § 300.320(a)(3). The regulation does not use the term "report card" although the 1997 IDEA reauthorization included congressional committee reports where the term "IEP report card" was used S. Rep. No. 105-17, 105th Cong., 1st Sess. 22 (1997); H.R. Rep. No. 105-95, 105th Cong., 1st Sess. 102 (1997). The regulations do not specify the exact content of the reports, or the remedy for failure to issue periodic reports of progress toward IEP goals.

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25. A district's failure to provide progress reporting data can be a procedural violation that results in a denial of FAPE. *M.M. v. Lafayette School Dist.*, 767 F.ed 842, 855-856 (9th Cir. 2014).

26. The District concedes the lack of evaluative data regarding behaviors, and the lack of any daily data toward the IEP goals. Ms. Lewis's attempt to cure was not successful. Ms. Lewis's efforts resulted in form over substance, as she did lacked data and her report of "SP" was meaningless. Even if Ms. Lewis had spelled out "Satisfactory Progress" the report was meaningless because the Student, in fact, was demonstrating increased undesirable behaviors to the extent that at the time she wrote the report on March 30, 2018, he had been reduced from a full-day kindergarten experience to a half-day experience.

27. For the above reasons, I conclude the Guardian proved a violation of the IDEA or denial of FAPE to the Student by failing to provide the Guardian with progress reports for the 2017-2018 school year.

Failing to conduct a functional behavior assessment prior to restricting the Student's school day

28. On February 6, 2018, the District proposed reducing the Student's participation in the classroom to half-day. The District admits it acted without evaluative information.

29. For the reasons discussed below regarding failure to amend the IEP, I conclude the reduction without a clear plan to provide the minutes of specially designed instruction during the mornings only constituted a substantial or material change in educational program and services provided to the Student.

30. State and federal law do not define the term "functional behavioral assessment" or FBA. The District had an obligation to base educational decisions on more than anecdote, but not necessarily an FBA. Methods other than an FBA could have met the District's obligation. For example, had the District implemented the IEP and actually collected daily data as it had agreed, it could have used the data to make informed recommendations and decisions about the Student's educational needs.

31. For the above reasons, I conclude the Guardian proved a violation of the IDEA and denial of FAPE to the Student when it restricted the Student's school day without an FBA or other evaluative method.

Failing to amend the IEP to reflect the Student's limited school day, preventing the Guardian from participating in the decision

32. The IDEA requires that parents be given the opportunity to actively participate in their child's education, both in the formulation and review of the student's IEP. WAC 392-172A-03040, -03050, -03095, -03100, and -03115. The appendix to the Federal Regulations gives further definition to the parents= role in the process:

> The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2)

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> participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

Fed. Reg. 64:48, page 12473 (1999).

33. The importance of parental participation in the special education process was discussed at length by the Ninth Circuit Court of Appeals in *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). The Court of Appeals stated:

> Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. In *Target Range*, for example we held that the Target Range School District "failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act. 960 F.2d at 1485. Because Target Range had developed the IEP without the involvement of the child's parents, his teacher, or the school in violation of 20 U.S.C. '1401(a)(19), its decision to place the child in its special education class did not take into consideration the recommendations from those who best knew the child. *Id.* at 1484. We therefore held that Target Range's refusal to include the child's parents in the IEP process denied the child a FAPE and that his parents were entitled to reimbursement for the cost of providing an appropriate education *Id.* at 1485-86.

Id. at 892. In *Amanda J.*, the Court of Appeals ultimately determined that the school district's failure to provide the parents with information of the student's previously unknown diagnosis of autism resulted in a denial of FAPE because it infringed upon the parents' ability to meaningfully participate in the IEP process. *Id.* at 892-894.

34. The District admits it restricted the Student's school day without amending the IEP as required by WAC 392-172A-03110(2)(c) and (d). The discussion with the Guardian and her agreement to the restriction does not lessen the violation. The process deprived the Guardian of notice, an opportunity to invite participation by Ms. Tormala or others with knowledge of the Student, and an opportunity to address the lack of evaluative information.

35. For the above reasons, I conclude the Guardian proved a violation of the IDEA and denial of FAPE to the Student when the District failed to amend the IEP to reflect the restricted school day, depriving her of the right to participate in the decision.

Failing to provide instructional or therapeutic supports that would allow the Student to be educated in his least restrictive environment rather than removing him from the classroom or excluding him from school

36. The Guardian argues that in failing to provide any instructional or therapeutic supports, the District actually provided the Student with an individual discipline plan rather than a behavioral intervention plan. 34. CFR 300.324(a)(2)(i).

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37. The evidence overwhelming shows that Ms. Garcia and paraeducators lacked training, experience, and resources to provide instructional or therapeutic supports. Ms. DiGregorio meant well, and her account of how the Student liked the "Andy" application on her phone and was able to re-set and return to the classroom is accepted on its face. However, after considering and weighing the recommendations of Ms. Tormala, Dr. Enns, and Dr. Lanthorn, more probably than not what she perceived as a re-set did little to build the Student's skills or intervene before undesirable behavior occurred. Her efforts were entirely re-active, only after the Student had been sent to her office (which was more likely than not served as a reward to him). I conclude that her efforts for re-set did not constitute instructional or therapeutic supports.

38. For the above reasons, I conclude the Guardian proved a violation of the IDEA and denial of FAPE to the Student when the District failed to provide instructional or therapeutic supports that would allow him to be educated in his least restrictive environment rather than removing him from the classroom or excluding him from school.

Remedies

39. As noted in the Findings, the District agreed the Guardian is entitled to be awarded the following relief requested in the complaint:

a. An independent FBA at District expense;
b. Consultation by an occupational therapist;
c. An updated IEP;
d. An updated behavior support plan with positive supports targeting de-escalation that is based on the data collected through the independently conducted FBA;
e. Training for staff in implementation of the behavior support plan;
f. Provision of social skills training;
g. Provision of a dedicated paraeducator to address his behaviors through positive supports geared to enable the Student to remain in the classroom; and
h. Provision of staff training in reviewing and implementing early special education service plans for students who transfer to the District with existing service plans.

The District has already provided the independent FBA and OT consultation in items (a) and (b). Those remedies are moot. The other items (c) through (h) are awarded.

40. The Guardian has failed to prove she is entitled in this forum to an order that the District update the Student's disciplinary and attendance records for the two school years at issue. She offered no evidence to support this remedy under WAC 392-172A-05080, -05215, and -05216.

Compensatory Education

41. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005), *cited with approval in R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v.*

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Puyallup Sch. Dist., 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra,* 401 F.3d at 523-524.

42. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra,* 401 F.3d at 524.

43. The difficulty in crafting a compensatory remedy was recognized by Dr. Enns and Dr. Lanthorn, both of whom rely on detailed observations and data analysis to make recommendations. In crafting a compensatory award, significant weight is given to Dr. Enns description of a Student with markedly severe impairments. In addition, significant weight is given to Dr. Lanthorn's descriptions of a Student with neurological trauma and the unusual, rare behavior of not seeking to please. Given his age, and the entrenched undesirable behaviors that have worsened over the past year on account of the District's procedural and substantive violations of IDEA and denial of FAPE, I reject the District's proposal to delay providing compensatory services to summer 2019. I further reject the District's assertion that because needs are difficult to predict, an IEP team should be directed to determine in spring 2019 whether the Student still needs compensatory services and if so, the amount and type. The Student is six years old and more probably than not based on the Findings above, requires services without further delay.

44. The Guardian requests 70 hours of compensatory education, based on estimates the Student missed nearly 112 hours of instruction. The request that the District contract with a BCBA to delivery educational and therapeutic services to the Student on a one-to-one basis is reasonable and supported by the recommendations of Ms. Tormala, Dr. Enns, and Dr. Lanthorn. There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed. In this case, the Guardian's estimate of 112 hours would result in an award of 56 hours of one-to-one compensatory services.

45. I conclude that the Guardian is entitled to have the District provide the Student with fifty-six (56) hours of compensatory education services by contracting with an individual who is a board certified behavioral analyst (BCBA). The educational and therapeutic services shall be delivered to the Student on a one-to-one basis within twelve (12) months from the date the District contracts with a BCBA. The services shall be delivered at a location arranged by the Guardian and the BCBA. In selecting the BCBA, the District shall make all reasonable efforts to ensure the individual is available and willing to contract for the full twelve (12) month period. Further, the individual selected to contract must be willing to consult with the Student's behavioral therapist at YVFWC/Children's Village to provide consistency in behavior management strategies used at home, in school, and in setting(s) for the compensatory education services.

46. In the event the BCBA contracted becomes unavailable to complete the contract, the District shall immediately inform the Guardian, and immediately make reasonable efforts to contract with another BCBA. The 12-month term shall be extended by the amount of time the Student is not receiving services.

47. The Guardian has failed to prove that she is entitled to an order directing the District to place the Student at ESD 105's Newbridge Academy for the 2018-2019 school year. The evidence does not support a conclusion that the Student would be able to withstand a daily commute to

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Yakima. There simply is not enough evidence of record regarding a change in Newbridge's location of operations. If the IEP team convenes and determines that Newbridge's location has changed and it is a suitable placement for the Student, nothing in this order shall be interpreted as preventing the IEP team from placing the Student at Newbridge based on information known to the IEP team.

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

ORDER

1. The District violated the IDEA and denied the Student a FAPE in the 2017-2018 school year by failing to:
   a. Develop an individualized education program (IEP) that would allow the Student to make progress commensurate with his abilities or to allow him to increase the amount of time he attended class;
   b. Provide reporting on the Student's progress toward his IEP behavior goals;
   c. Conduct a functional behavioral assessment (FBA) prior to restricting the Student's school day;
   d. Amend the IEP to accurately reflect that the Student had been placed on a limited school day, preventing the Guardian from participating in the decision;
   e. Provide instructional or therapeutic supports that would allow the Student to be educated in his least restrictive environment rather than removing him from the classroom or excluding him from school;

2. The Guardian is awarded the remedies at Conclusions of Law 39, and 44-46.

Signed at Yakima, Washington on July 28, 2018.

Johnette Sullivan
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

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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.

Guardian
[redacted]

Judi Lewis, Director of Special Education and
State/Federal Programs
[redacted] School District
[redacted]

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

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